

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RESPONSE TO MOTION TO DISMISS

Defendants have asked the Court to dismiss the third amended complaint under Rule 12(b)(6) by arguing that plaintiff has failed to anticipate the affirmative defense of qualified immunity. (ECF No. 43 at 4.) This argument is not appropriate at the pleading stage because “a plaintiff is not required to plead facts in the complaint to anticipate and defeat affirmative defenses.” *Trust. Corp. v. Stewart Info. Services Corp.*, 665 F.3d 930, 935 (7th Cir. 2012). The Court should deny defendants’ motion for the reasons set out below.

I. The Facts

The facts, accepting plaintiff's allegations as true, *Circle Block Partners, LLC v. Fireman's Fund Ins. Co.*, 44 F.4th 1014, 1018 (7th Cir. 2022), are as follows:

A. The Constitutional Violations

On August 18, 2021, defendant Enos, acting under color of his authority as an animal control officer employed by defendant McHenry County, crossed the curtilage of plaintiff's dwelling and attempted to speak with plaintiff and enter and search plaintiff's dwelling. (Third Amended Complaint, ¶¶ 3, 5.) Plaintiff refused to allow Enos to enter his dwelling. (*Id.*, ¶ 6.)

Before leaving plaintiff's property, Enos accessed plaintiff's private mailbox that is not located on the curb and is not easily accessible to the public.¹ (Third Amended Complaint, ¶ 7.) Enos then looked through the mail and saw a piece of mail addressed to a person named Monica Cosby. (*Id.*, ¶ 8.) Enos used the information he had obtained from the search of plaintiff's mailbox to prepare a "Written Notice of Ordinance Violation" alleging that Cosby had failed to vaccinate an animal and had failed to provide the animal with a McHenry County Rabies Registration Tag.² (*Id.*, ¶¶ 9-10.)

¹ Plaintiff does not allege that Enos violated the Fourth Amendment by walking to plaintiff's front door and attempting to speak to plaintiff. *Kentucky v. King*, 563 U.S. 452, 469 (2011). Plaintiff's claim arises from the search of his mailbox. See *infra* at 6.

² Plaintiff does not assert that addressing the notice to Cosby violated plaintiff's constitutional rights. As plaintiff explains below, his claims are for the violation of his Fourth Amendment rights and for a separate ordinance violation prosecution against plaintiff. Plaintiff included references to Cosby to add to the plausibility of his state law malicious prosecution claim by showing that the separate ordinance

Plaintiff was outraged, upset, and distressed when he saw the notice of violation and learned about the unreasonable search of his mailbox; plaintiff suffered severe emotional distress as the direct and proximate result of that violation of his Fourth Amendment rights. (Third Amended Complaint, ¶ 14.)

Plaintiff subsequently complained to representatives of McHenry County about the unlawful search of his mailbox; plaintiff also demonstrated that there was no factual basis to accuse him of the ordinance violations alleged against Cosby. (Third Amended Complaint, ¶ 17.) In retaliation for plaintiff's exercise of his First Amendment right, an agent of the County initiated an ordinance prosecution against plaintiff. (*Id.*) Plaintiff contends that the municipality is liable under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978) for the violation of his First Amendment rights.

B. The State Law Malicious Prosecution Claim

On March 23, 2022, McHenry County initiated a prosecution in state court against plaintiff for an alleged ordinance violation. (Third Amended Complaint, ¶ 15.) The County initiated the prosecution because plaintiff had

violation prosecution against plaintiff was not based on a reasonable belief that plaintiff had violated the ordinance.

complained about the unlawful search of his mailbox and had demonstrated to agents of McHenry County that there was no factual basis to accuse him of having violated any animal control ordinance of the County. (*Id.*, ¶ 17.) The prosecution terminated in plaintiff's favor on June 16, 2022. (*Id.*, ¶ 18.) As the direct and proximate result of the prosecution, plaintiff was required to appear in court and was outraged, upset, and suffered severe emotional distress. (*Id.* ¶ 19.)

II. The Screening Orders

Plaintiff filed this case pro se (ECF No. 1) and sought leave to proceed *in forma pauperis*. (ECF No. 5.) The court screened the complaint pursuant to 28 U.S.C. § 1915(e)(2)(B) and concluded that plaintiff had stated a First Amendment claim but fell short on his proposed Fourth Amendment claim. (ECF No. 7.) Plaintiff thereafter submitted a pro se amended complaint (ECF No. 8) adding factual allegations to clarify "that his claim is based on a government agent (who is not a postal worker) accessing his private mailbox that is not located on the curb, or otherwise easily accessible by the public." (ECF No. 9.) The court allowed the Fourth Amendment claim to go forward. (*Id.*)

Plaintiff thereafter secured representation and counsel filed a second amended complaint (ECF No. 16), adding a state law malicious prosecution claim. (Second Amended Complaint, ¶¶ 15-20.) Plaintiff filed a third

amended complaint (ECF No. 39), replacing “Defendant Doe” with Jason Enos and correcting the inadvertent omission of the First Amendment from the second amended complaint. (Third Amended Complaint, ¶ 20.)

III. The Motion to Dismiss

Defendants do not challenge the sufficiency of plaintiff’s *Monell* claim for which qualified immunity does not apply. *Owen v. City of Independence*, 445 U.S. 622, 657 (1980); *Brokaw v. Mercer County*, 235 F.3d 1000, 1022 (7th Cir. 2000). Nor do defendants challenge plaintiff’s First Amendment, retaliatory prosecution claim.

Defendants, in paragraphs 12 and 14 of their motion to dismiss (ECF No. 42), limit their Rule 12(b)(6) motion to dismiss to the following:

12. First, Enos is entitled to qualified immunity because the Plaintiff has failed to allege specific facts that establish that this Defendant violated Plaintiff’s constitutional rights nor that the right allegedly violated was established at the time of alleged violation.

[Defendants omit paragraph 13]

14. Lastly, Plaintiff claims have no relief which can be granted as Defendant Enos is entitled to qualified immunity, and the action of attending Court for an ordinance violation cannot possibly amount to an actionable claim under 42 U.S.C. § 1983.

Each ground for dismissal is wholly without merit.

IV. Plaintiff States a Claim Against Defendant Enos

The Supreme Court recognized in *Florida v. Jardines*, 569 U.S. 1 (2013) that government agents may not cross the curtilage to search a

mailbox. There, police “officers were gathering information in an area belonging to Jardines and immediately surrounding his house—in the curtilage of the house, which we have held enjoys protection as part of the home itself. And they gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner.” *Id.* at 5-6. In this case, defendant Enos crossed the curtilage to search plaintiff’s mailbox.

The Court held in *Jardines* that the use of a police dog to sniff the front porch was “an unlicensed physical intrusion.” *Id.* at 7. The Court held that this was an unlawful search because “the officers learned what they learned only by physically intruding on Jardines’ property to gather evidence.” *Id.* at 11.

The Supreme Court reaffirmed *Jardines* in *Collins v. Virginia*, 138 S. Ct. 1663 (2018). There, police officers had crossed the curtilage of a home to search a motorcycle. *Id.* at 1668. The Supreme Court held that the warrantless crossing of the curtilage was an unlawful search: “When a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred. *Id.* at

1670. The same result is required here, where defendant Enos crossed the curtilage to search plaintiff's mailbox.³

V. Enos's Qualified Immunity Argument Is Frivolous

Defendant Enos asserts that he is entitled to qualified immunity because plaintiff has not alleged "that the right allegedly violated was established at the time of alleged violation." (Motion to Dismiss, ¶ 13.) The Seventh Circuit rejected this pleading standard in *Independent Trust. Corp. v. Stewart Info. Services Corp.*, 665 F.3d 930, 935 (7th Cir. 2012), as this Court has repeatedly recognized.

"[A] plaintiff ordinarily need not anticipate and attempt to plead around affirmative defenses." *Castillo v. Dorothy*, 19 C 50251, 2022 WL 279553, at *7 n.5 (N.D. Ill. Jan. 31, 2022), quoting *Hyson USA, Inc. v. Hyson 2U, Ltd.*, 821 F.3d 935, 939 (7th Cir. 2016). This Court followed this rule in *Bell v. DeJoy*, 3:22-CV-50404, 2023 WL 3226202, at *2 (N.D. Ill. May 3, 2023), quoting *O'Gorman v. Chicago.*, 777 F.3d 885, 889 (7th Cir. 2015) for the rule that "[a]t the pleading stage, a plaintiff need not anticipate or overcome an affirmative defense, such as exhaustion." See also *Leach v. UAW Loc. 1268 Region 4*, 3:22-CV-50004, 2022 WL 17605327, at *2 (N.D. Ill. Dec. 13, 2022),

³ Plaintiff had a reasonable expectation of privacy in materials placed in his mailbox. 18 U.S.C. 1708.

where the Court quoted *Cancer Found., Inc. v. Cerberus Capital Mgmt., LP*, 559 F.3d 671, 674 (7th Cir. 2009) for the same rule.

Plaintiff demonstrated in Section IV that he had a reasonable expectation of privacy in the contents of his mailbox and that defendant Enos thereby violated the Fourth Amendment when he crossed the curtilage to inspect the contents of that mailbox.

The Court should therefore reject defendant Enos's qualified immunity defense.

VI. Plaintiff Does Not Bring a Section 1983 Malicious Prosecution Claim

Defendants misread the complaint as asserting a Section 1983 malicious prosecution claim. (ECF No. 43 at 5-6.) This is incorrect. Plaintiff brings his malicious prosecution claim under Illinois common law, as plainly set out in paragraph 20 of the Third Amended Complaint:

20. The above-described conduct of the employee of defendant McHenry County (a) constitutes the Illinois state law tort of malicious prosecution, for which defendant McHenry County is liable under the doctrine of *respondeat superior* and (b) cause plaintiff to be deprived of rights secured by the First Amendment to the Constitution of the United States.

Plaintiff alleges that an agent of McHenry County initiated a prosecution for an ordinance violation, that the ordinance violation prosecution was initiated without probable cause in retaliation for plaintiff's

complaint to the County about misconduct by one of its employees, and that the prosecution was resolved in plaintiff's favor. (Third Amended Complaint, ¶¶ 15-18.) These allegations plausibly allege malicious prosecution under Illinois law. *Lund v. City of Rockford*, 956 F.3d 938, 949 (7th Cir. 2020). The Court should deny defendants' motion to dismiss plaintiff's state law malicious prosecution claim.

VII. Conclusion

The Court should therefore deny the motion to dismiss.

Respectfully submitted,

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