

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHAEL ELBERY,)
Plaintiff,)
)
v.)
) C.A. No. 97-11743-MLW
DANIEL SKLUT, et al.,)
Defendants,)

MEMORANDUM AND ORDER

WOLF, D.J.

September 26, 2001

I. SUMMARY

Plaintiff Michael Elbery, pro se, has moved for summary judgment on some, but not all, of his claims in this case. The defendants are seven police officers of the Town of Shrewsbury, Massachusetts, who are sued in their individual and official capacities, and the Town of Shrewsbury. Defendants have not moved for summary judgment.

More specifically, Elbery has moved for summary judgment on Count I (false arrest, false imprisonment, and violation of the Fourth and Fourteenth Amendment of the Constitution), Count II (malicious prosecution and violation of the Fourth and Fourteenth Amendment of the Constitution), Count V (conspiracy to commit perjury and procure perjury to conspire to cover-up malicious prosecution and illegal search and seizure in violation of the Fourth and Fourteenth Amendment of the Constitution), Count VIII (supervisory liability), and Count IX (municipal liability of the

218

Town of Shrewsbury). Elbery has not moved for summary judgment on Count III (intentional infliction of emotional distress), Count IV (conversion and violation of the Fourteenth Amendment without due process based on the alleged illegal seizure and failure to return 21 magazines to him), Count VI (malicious abuse of process), Count VII (conspiracy to violate plaintiff's constitutional rights), and Count X (continuing violation of plaintiff's constitutional rights).

For the reasons stated in this Memorandum, Elbery is not entitled to summary judgment on any of his claims. Therefore, his motion for partial summary judgment is being denied.

II. SUMMARY JUDGMENT STANDARD

Elbery is a lay person representing himself. Therefore, his pleadings must be liberally construed. See Haines v. Kerner, 404 U.S. 519, 520 (1972). Nevertheless, established legal standards apply to claims made by pro se litigants as well as to claims made by parties represented by counsel. See Francis v. Angelo, No. 00-80-BK, 2001 WL 194926, at *4 n.8 (D. Me. Feb. 23, 2001) ("[D]eference to the plight of the pro se pleader must be counterbalanced against the policy concerns that animate the rigorous pleading requirements of Federal Rule of Civil Procedure 56 and our complimentary local rules.").

The court's discretion to grant summary judgment is governed by Federal Rule of Civil Procedure 56. Rule 56 provides, in pertinent part, that the court may grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). In making this assessment, "the court must look at the record in the light most favorable to the party opposing the motion and must indulge all inferences favorable to that party." Stepanischen v. Merchants Despatch Transp. Corp., 722 F.2d 922, 928 (1st Cir.1983); Attallah v. United States, 955 F.2d 776, 779 (1st Cir.1992); Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir.1990).

In determining the merits of a motion for summary judgment, the court is compelled to undertake two inquiries: (1) whether the factual disputes are genuine, and (2) whether any fact genuinely in dispute is material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law properly preclude the entry of summary judgment." Id. To determine if the dispute about a material fact is "genuine," the court must

decide whether "the evidence is such that a reasonable [factfinder] could return a verdict for the non-moving party." Id.; see also Medina-Munoz, 896 F.2d at 8; Oliver v. Digital Equip. Corp., 846 F.2d 103, 105 (1st Cir. 1988).

III. FACTS

Unless otherwise indicated, the following facts are undisputed. Until early 1990, Elbery had a license to carry firearms issued by the City of Worcester, Massachusetts. Elbery Ex. I-4. Worcester revoked his license to carry after his 1990 arrest for assault and battery with a dangerous weapon, a handgun. Id. Elbery appealed the revocation. Id. However, the Worcester District Court affirmed the revocation at a January 16, 1991 hearing. Id. Elbery asserts that he appealed the court's ruling, but does not describe the result of his appeal.

Elbery applied for a Firearm Identification Card ("F.I.D.") while he lived in Shrewsbury, Massachusetts. Elbery Ex. A-5. The date on the application appears to be sometime in the 1980s. Id. Elbery's signature on the application represents that, "I have read s.129B of c.140 and I state affirmatively I am not disqualified for any of the reasons from possessing such a firearm identification card." Id.

According to the Shrewsbury Police Department Master Card

Detail Listing, Elbery was first involved with the Shrewsbury Police in June 1983, relating to a "ruckus that resulted in assaults & batteries." Elbery Ex. C-2. He was next involved with the Shrewsbury Police in August 1985, as a result of a disturbance at a neighborhood gas station. Id. He was cited for speeding in March and September 1989, and again in 1990. Id. Elbery was arrested in February 1990 for assault and battery with a dangerous weapon. Id. In 1990, Elbery was placed in protective custody. Id. In 1992, he was cited twice for speeding and was suspected of intimidating a witness. Id.

On July 2, 1993, Elbery was convicted in Worcester Superior Court of assault with intent to maim, assault and battery, and disorderly conduct stemming from an incident with an off-duty Westboro, Massachusetts police officer (the "assault charge"). Elbery Memorandum at 1. He was sentenced to ten years in prison. Id. After being sentenced, Elbery was granted a stay of sentence pending appeal. Id. at 2. The events that generated this case occurred during this stay. Id.

On July 25, 1993, Elbery rented a garage-style storage unit, number C-341, at the E-Z Mini Storage Facility ("the E-Z") in Shrewsbury, in which he stored various items including a car and guns. Elbery Memorandum at 2-3; id. Ex. F (lease agreement for storage unit). Elbery's lease stated that, "[t]he parties

acknowledge and agree that, except in circumstances of Lessee's default, Lessee has in no way delivered or relinquished exclusive possession of the property stored or used in the Premises by entering into this Lease, and that Lessee's control and dominion over such property is dependent in no degree upon the cooperation of Lessor." Id. ¶ 4. The lease further stated that:

Upon the reasonable request of Lessor, Lessee shall provide access to [Lessor] to enter the Premises for the purposes of inspection, repair, alteration, improvement or to supply necessary or agreed services. In case of emergency, Lessor or its agents may enter the Premises, without liability therefor and without affecting Lessee's obligations under this Lease, for any of [the above] stated purposes without notice to or consent from Lessee. The term 'emergency' shall mean any sudden, unexpected occurrence or circumstance which demands immediate action.

Id. ¶ 7. The lease prohibits use of the facility for any unlawful purpose, and prohibits storage of flammable, hazardous or toxic materials or fluids, or explosives. Id. ¶ 5. The lease also prohibits the lessee from residing in the storage facility, stating that, "The premises shall not be used for residential purposes." Id.

On August 4, 1994, there was a fire at the E-Z that caused an estimated \$2,000,000 in property damage to be suffered by 54 individuals who rented storage space there. Elbery Memorandum at 2. The fire occurred at about 10:00 p.m. Defendants' Ex. 6: Johnson Dep. at 10. "While fighting the fire, firefighters were

required to open a number of storage bins, including bin #C-341, to check for extension of fire and for fire extinguishment." Elbery Ex. M ¶ 2 (Affidavit of Chester Johnson). Elbery's unit escaped heat and fire damage. Id.

On the morning of August 5, 1994, Elbery received a telephone call "requesting him to claim his possessions, as there had been a fire at [the] E-Z." Elbery Memorandum at 3. Elbery went to the E-Z later that morning. Id.

On August 5, 1994, Sergeant James Hurley of the Shrewsbury Police Department was assigned to collect evidence at the E-Z and photograph storage bins. Defendants' Statement at 1. When he arrived at the E-Z, Hurley saw "many people doing many other functions consistent with an ongoing arson investigation." Elbery Ex. W: Hurley Dep. at 62-63. Along with Lieutenant A. Wayne Sampson, Hurley photographed the bins and collected evidence. Defendants' Statement at 1 (citing Hurly Dep. at 17-18, 47). Sampson did not take any videos or participate in the investigation of the fire, except as a supervising officer. Defendants' Statement at 1 n.1 (citing Sampson Dep. at 13-14).

Hurley had known Elbery for several years. Defendants' Statement at 3, n.2. When Hurley saw Elbery standing near the fence outside of the E-Z, Hurley said to him, "There appear to be some guns in your storage bin, Michael." Id. at 3. Hurley states

that Elbery told him that he was a convicted felon and that he could not "do anything anymore." Id.

Hurley then "checked [] his department's computer system," which indicated that the Shrewsbury Police Department had not issued a F.I.D. to Elbery. Id. (citing Hurley Dep. at 163). However, as of August 4, 1994, Elbery did have a valid F.I.D. issued by the Town of Shrewsbury. Elbery Ex. A (letter from Shrewsbury Chief of Police dated 3/20/95 to Assistant District Attorney confirming that Elbery had valid F.I.D. as of 8/4/94, but revoking the F.I.D. card effective immediately); id. Ex. A-1 (letter from Shrewsbury Chief of Police dated 3/20/95 to Elbery revoking F.I.D. based on "the fact that you have been convicted of a felony charge"); id. Ex. A-5 (Elbery's application for F.I.D. to Town of Shrewsbury).

At approximately 12:00 noon on August 5, 1994, Shrewsbury Police Officer Chester Johnson was "called [] in to investigate the fire." Defendants' Ex. 6: Johnson Dep. at 11. After speaking with Fire Department officials, Johnson began investigating the cause and origin of the fire. Defendants' Statement at 2.

"During the course of that investigation, [he] inspected bin #C-341, which was open as a result of the efforts to extinguish the fire." Elbery Ex. M: Johnson Aff. ¶ 3. He observed a 1990 red Chevrolet Corvette, and "[i]n the passenger compartment of the

vehicle was a partially-wrapped item, in plain view, that appeared to be an Uzi machine gun." Id.; see also Defendants' Statement at 2 ("At some point during the investigation, Sgt. Johnson became aware that a car contained guns. He saw the shape of a rifle box in a grayish, clear plastic bag. Sgt. Johnson could make out, 'Uzi.'" (citing Johnson Dep. at 14-15)). "Based on this information, the Shrewsbury Police Department applied for an received a search warrant to search storage bin #C-341." Elbery Ex. M: Johnson Aff. ¶ 4.

Carl Hanson, another Shrewsbury Police Officer, also had a conversation with Elbery outside of the fence that surrounded the E-Z. Defendants' Statement at 2. Defendants assert that Elbery expressed concern to Hanson about the car that he had in storage and asked Hanson to check on the car to see if it had been damaged in the fire. Id. at 2. After Hanson told Elbery that there was no damage to the outside of the car except for soot and water from the fire, defendants claim that Elbery asked Hanson to check the inside of the car. Id. Elbery denies that he asked anyone to "go into my E-Z unit." Elbery Aff. ¶ 21. Rather, Elbery contends that he never consented to a search of his E-Z unit. Id. Hanson checked the inside of the car and told Elbery that there was no visible damage. Defendants' Statement at 2. Hanson saw a box inside of the car labeled "Uzi." Id.

Defendants assert that Elbery "also asked Sergeant Stephen Faucher to check his car[] very closely for damages." Defendants' Statement at 2 (citing Faucher Dep. at 8). Once again Elbery denies this. Elbery Affidavit ¶ 21. Faucher looked at Elbery's car and "saw what he thought was a gun and a box marked 'u-z-i,' both wrapped in plastic, like trash bags." Defendants' Statement at 2-3 (citing Faucher Dep. at 11-12).

In the early afternoon of August 5, 1994, Sampson received a telephone call from one of the officers who was investigating the fire. Defendants' Statement at 3. He did not remember which officer called. Sampson Dep. at 6. The officer told him that he believed that there were guns inside of a car in one of the storage units. Defendants' Statement at 4 (citing Sampson Dep. at 6-7). "One of the officers told Lt. Sampson that [Elbery] had specifically asked him to go in and check on the motor vehicle." Defendants' Statement at 4. The officer also told Sampson that Elbery had said that he was a convicted felon. Id.

After receiving this call, Sampson checked the vehicle identification number ("VIN") that the officer provided him, which showed that the owner had a Worcester address. Elbery Ex. E: Sampson Affidavit. However, Elbery asserts that the car "was not registered or insured" and that it "was never registered or insured in Worcester, always in Shrewsbury." Elbery Affidavit ¶¶ 6, 17.

Elbery's registration for his Corvette for 1992 and 1994 contains a Shrewsbury address. Elbery Reply Memorandum, Ex. A. The record does not indicate whether the address associated with the VIN would necessarily be the same as the registration or insurance address.

Sampson contacted the Worcester Police Department to determine whether Elbery had a valid F.I.D. Defendants' Statement at 4-5. The Worcester Police Department informed him that although Elbery did not have an F.I.D., he previously had a license to carry weapons that was revoked because he was a convicted felon. Id. at 4.

Sampson applied for a warrant to search Elbery's storage area for "an illegally possessed firearm (to wit: long barrel rifle located in Chevrolet Corvette), illegally possessed ammunition for said rifle and any additional illegally possessed firearms and ammunition." Defendants' Statement at 5 (referring to Elbery Ex. E). In the affidavit attached to the application, Sampson stated that he had checked with the Worcester Police Department and that Elbery's F.I.D. had been revoked as of January 28, 1991. Id. at 5 (referring to Elbery Ex. E). A search warrant was issued for Elbery's storage unit. Elbery Ex. E-1.

The items found in the search included a Remington shotgun, AK-47 rifle, Uzi, and .22 caliber Beretta semi-automatic weapon. Elbery Ex. E.

Elbery was arrested at about 5:00 p.m., on August 5, 1994, for illegal possession of a firearm. Elbery Memorandum at 3. All of the guns which Elbery was charged with possessing were found in the storage locker. Elbery Memorandum at 3.

The record is not clear as to which officer(s) arrested Elbery. Hurley applied for the complaint. Elbery Exs. C-3 & C-5. Sampson and Hurley wrote a Shrewsbury Police Department incident report. Id. Ex. C. On the arrest-custody report, Sampson is listed as the arresting officer and Hurley as the assisting officer. Id. Ex. C-1.

Sampson does not recall whether he arrested Elbery, "although he remembers bringing the search warrant to the premises, informing [Elbery] that he had a search warrant, that [Elbery] was there and that [Elbery] was arrested." Defendants' Statement at 8.

Hurley's "primary function in the arrest of Elbery[] was that he 'tagged in' the firearms that were located in the Elbery's storage bin." Defendants' Statement at 8 (citing Hurley Dep. at 33, 46). Hurley asserts that he was involved in the arrest "[a]s far as taking property as evidence" Id. at 8 (citing Hurley Dep. at 33, 46). Hurley saw the plaintiff being arrested, and heard Sampson say to Elbery, "'You're being placed under arrest for illegal possession of firearms.'" Id. at 9 (citing Hurley Dep. at 33-34).

Johnson was not directly involved in the arrest. Defendants' Statement at 8 (citing Johnson Dep. at 13). When Elbery was arrested, Johnson was fifty or sixty feet away, putting his dog back in his cruiser. Id. at 9.

Police officer James Coates of the Shrewsbury Police Department did not arrest Elbery and is not a defendant. Defendants' Statement at 9. However, his name appeared as the "arresting officer" on the written Miranda rights form, which is presented to individuals "only in the booking room, not at the scene of the arrest." Id. (citing Coates Dep. at 29-30). Hurley testified that he thought that Coates may have transported Elbery to the police station. Id. (citing Hurley Dep. at 56).

Hanson first learned that Elbery was being arrested when he saw him being handcuffed and placed in the police car. Id. at 9 (citing Hanson Dep. at 18). Carlin had no involvement with the investigation or Elbery's arrest. Id. at 9 (citing Carlin Dep. at 7). Faucher did not see Elbery's arrest. Id. at 10 (citing Faucher Dep. at 13). Sklut was not involved in the investigation or Elbery's arrest, and did not see Elbery being arrested. Id. at 10 (citing Sklut Dep. at 21).

After he was arrested, Elbery called Robert Sheketoff and hired him as his lawyer. Elbery Memorandum at 3. Elbery remained in the Shrewsbury jail until August 8, 1994, three days after the

arrest, when he was arraigned on six gun possession charges at the Westboro District Court by Judge McCann. Id. More specifically, Elbery was charged with violating Mass. Gen. L. ch. 269, §§ 10(a) and (h), which respectively prohibit a person from possessing a firearm outside his home or business without a license to carry and from possessing a firearm without an F.I.D. Bail was set at \$50,000 at the time of Elbery's arrest, but was reduced to \$5,000 at his arraignment. Id. Elbery did not make bail and remained at the Worcester County House of Correction. Id.

On August 10, 1994, Elbery appeared before Superior Court Judge Toomey for a hearing on the Commonwealth's motion to vacate the stay of sentence pending appeal in the assault charge case. Elbery Memorandum at 3; see also id. Ex. R: Hearing transcript. The Assistant District Attorney represented to the court that Elbery's "license" had been revoked in August 1993. Id. Ex. R: Hearing transcript at 5-6. Elbery's attorney argued that Elbery's F.I.D. was valid because a felony conviction does not automatically revoke an F.I.D. and Elbery's F.I.D. had not been revoked in writing.¹ Id. at 7-11. However, Judge Toomey revoked the stay of

¹Elbery asserts that his F.I.D. was not presented at any of the hearings and that no one mentioned the existence of his F.I.D. to any of the judges who presided over the hearings relating to the gun charges. Elbery Memorandum at 3. In particular, he asserts that none of the judges were informed that Elbery had a valid F.I.D. as of the date of his arrest. Id.

sentence on the assault charge as a result of the new weapons charges. Id. Elbery began to serve the ten-year prison sentence. Elbery Memorandum at 3.

On October 21, 1994, there was a hearing on Elbery's motion to suppress based on the allegedly illegal search of his E-Z storage unit. The motion was denied. Elbery Memorandum at 3.

When the Worcester County District Attorney's office learned that Elbery had a valid F.I.D. at the time of his arrest, prosecutors offered to drop the weapons charges. Elbery Memorandum at 4. Elbery declined, went to trial, and was found not guilty of all six gun charges. Id. at 4 and Ex. B (docket entries indicating findings of not guilty). No representative from the District Attorney's office or any police officers appeared for the trial. Id. at 4. The entire trial consisted of the presentation to the court of Elbery's F.I.D. Id.

IV. DISCUSSION

Elbery has not demonstrated that there are undisputed facts which entitle him to judgment as a matter of law concerning any of the state or federal claims on which he has moved for summary judgment.

Viewed in the light most favorable to defendants, the evidence is sufficient to prove that Elbery asked Hanson and Faucher to

inspect his E-Z storage area for fire damage and, therefore, consented to their search of it. No warrant is required to conduct a search based upon an individual's voluntary consent. See Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).

Alternatively, the evidence is sufficient to prove that Johnson was conducting an investigation of the causes and origins of the fire when he entered Elbery's E-Z storage area. As the Supreme Court has held:

[O]fficials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished.

Michigan v. Tyler, 436 U.S. 499, 510 (1978); see also United States v. Mitchell, 85 F.3d 800, 806 (1st Cir. 1996). Warrantless searches conducted the morning after a fire have been deemed reasonable in certain circumstances. See Tyler, 436 U.S. at 511; Mitchell, 85 F.3d at 806. Johnson was conducting his investigation at about 12:00 noon on the day following the fire. A factfinder could properly conclude that this was a reasonable time after the fire had been extinguished.

Hanson, Faucher, and Johnson each asserts that he saw a rifle in plain view in Elbery's automobile, and Faucher also states that he saw a gun. The evidence indicates that at least one of them told Hurley that there were guns in Elbery's vehicle. According to Hurley, he spoke to Elbery, who stated that he was a convicted

felon.

Hurley checked the Shrewsbury computer system, which indicated that Elbery did not have an F.I.D. Sampson checked with Worcester. He was told that Elbery had no F.I.D. and that his license to possess a firearm had been revoked.

At this point, the Shrewsbury Police had probable cause to obtain a warrant to search Elbery's vehicle.

The existence of probable cause is to be evaluated on the basis of the collective information of the law enforcement officers engaged in a particular investigation.

United States v. Diallo, 29 F.3d 23, 25-26 (1st Cir. 1996) (internal citations and quotation marks omitted). The Supreme Court has defined probable cause to search as "a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983).

In this case, the Shrewsbury Police had probable cause to believe that Elbery was violating Massachusetts General Laws, ch. 269, §§ 10 (a) and (h), which prohibit possession of a firearm without an F.I.D. and possession of a firearm outside of an individual's residence or business without a license to carry. Generally, possession includes constructive, as well as actual, possession. See Commonwealth v. Sadberry, 692 N.E.2d 103, 105 (Mass. App. Ct. 1998). A person who is not in direct physical

control of something, but has the ability and intention to exercise control of it, is in constructive possession of it. Id. Thus, the evidence is sufficient to support the conclusion that it was reasonable for the defendants to believe that Elbery possessed the weapons that were in his automobile and, because of the information received from the inquiries made in Shrewsbury and Worcester, it was illegal for him to possess them.

After the search of Elbery's vehicle resulted in the seizure of the weapons, it could properly be found that it was permissible under both federal and state law for one or more of the defendants to arrest Elbery without a warrant. Under Massachusetts law, where, as a reasonable factfinder could conclude in this case, "the police had sufficient information to constitute probable cause to believe, and did believe, that a person had committed a felony . . . they had a right to arrest him without a warrant." Julian v. Randazzo, 403 N.E.2d 931, 934 (Mass. 1980). In addition, where the police officers had probable cause to make an arrest, the state law tort of false imprisonment has not been committed. See Rose v. Town of Concord, 971 F. Supp. 47, 50 (D. Mass. 1997). Similarly, to prove that a warrantless arrest violated his federal Fourth Amendment rights, a "plaintiff must show at a minimum that the arresting officers acted without probable cause." Mann v. Cannon, 731 F.2d 54, 62 (1st Cir. 1984); see also United States v. Watson,

423 U.S. 411, 421 (1976).

Moreover, the evidence does not permit the granting of Elbery's motion for summary judgment on his claim that his arrest and imprisonment violated his federal Fourteenth Amendment right to Due Process. The Fourth Amendment "governs the legitimacy of his arrest and its incidents." Brady v. Dill, 187 F.3d 104, 108 (1st Cir. 1999). The Fourteenth Amendment issue:

is whether [Elbery's] post arrest procedural guarantees were abridged. To prevail on such a battleground, [Elbery] must do more than show that the [police officers] made a mistake.

Id. In the instant case, there is no allegation, let alone evidence, that Elbery was not afforded "the full panoply of post-arrest rights that the Constitution demands." Id. at 109. Moreover, the existence of adequate state law remedies for any proven tort of false arrest or malicious prosecution means that Elbery may not recover under 42 U.S.C. § 1983 for an alleged violation of his right to procedural Due Process. See Reid v. New Hampshire, 56 F.3d 332, 341 (1st Cir. 1995). To the extent, if any, that Elbery alleges violations of his right to substantive Due Process, Albright v. Oliver, 114 S. Ct. 807 (1994), bars his claim. See Young v. Knox County Deputy, 68 F.3d 455, 1995 WL 610338 *1 (1st Cir. 1995) (unpublished decision).

The existence of evidence sufficient to prove probable cause

also defeat's Elbery's state law malicious prosecution claim. Elbery was charged with possessing a firearm without an F.I.D. in violation of Massachusetts General Law ch. 269, § 10(h) and also with violating § 10(a) of that statute, which prohibits possessing outside his residence or place of business a firearm without a license to carry it. As described earlier, the evidence is sufficient to prove that when Elbery was charged it was reasonable, although evidently not right, for the defendants to believe Elbery did not have an F.I.D. Moreover, the evidence indicates that the E-Z storage was neither Elbery's business nor his residence. Generally, a "residence" is defined as "[a] personal presence at some place of abode with no present intention of definite and early removal" Black's Law Dictionary at 1176 (5th ed.). An "abode" is one's home. Id. at 7. In addition, the lease for the E-Z storage area prohibited Elbery from residing there. There is no evidence that he did so, or that he used the storage area as a place of business. Therefore, the evidence at this point is sufficient to prove that there was probable cause to support the prosecution of each of the charges against Elbery.

Similarly, Elbery is not entitled to summary judgment on his claim that his Fourth and Fourteenth Amendment rights were violated as a result of a malicious prosecution. Procedural Due Process does not provide a basis for a federal claim based on malicious

prosecution because, as indicated earlier, state law provides an adequate remedy for that tort. See Nieves v. McSweeney, 241 F.3d 46, 53 (1st Cir. 2001). "It is an open question whether the Constitution permits the assertion of a section 1983 claim for malicious prosecution on the basis of an alleged Fourth Amendment violation." Id. Even assuming such a cause of action exists, however, the Fourth Amendment protects against "unreasonable seizures." Seizures based upon probable cause are not unreasonable. See, e.g., Watson, supra; Mann, supra. Thus, the evidence in this case does not necessarily establish a case of malicious prosecution rises to the level of a Fourth and Fourteenth Amendment violation for which § 1983 provides a remedy.

Elbery is also not entitled to summary judgment on his claim that the defendants conspired to commit perjury and cover-up the alleged false arrest and malicious prosecution of him. As a matter of law:

[T]here is a viable claim to recover under 42 U.S.C. § 1983 for an intentional cover-up if the cover-up cause[s] [a] jury's inability to decide who is responsible for [] constitutional violations that are proven.

Gonsalves v. City of New Bedford, 939 F. Supp. 921, 925 (D. Mass. 1996). It is also legally possible for defendants to be liable for conspiring to engage in such a cover-up. Generally, conspiracies are actionable under § 1983 where there has been an agreement to

deprive a person of a constitutional right and an actual deprivation of that right. See Landrigan v. City of Warwick, 628 F.2d 736, 742 (1st Cir. 1980). However, the evidence in this case is sufficient to permit a reasonable factfinder to conclude that no conspiracy to cover-up a constitutional violation existed.

Elbery is not entitled to summary judgment on his claims of supervisory liability because he has not, at this point, established that any defendant directly violated his rights. See Nieves, 241 F.3d at 50. He is also not entitled to summary judgment on his claim of municipal liability on the part of the Town of Shrewsbury because he has not now established an underlying constitutional violation existed. Id.

V. ORDER

For the foregoing reasons, it is hereby ORDERED that:

1. Elbery's motion for partial summary judgment (Docket No. 196) is DENIED.
2. Elbery shall, by November 16, 2001, file a pretrial memorandum in the form required by the attached Procedural Order.
3. Defendants shall, by November 16, 2001, supplement their pretrial memorandum.
4. A pretrial conference will be held on November 29, 2001, at 3:00 p.m.
5. Trial will commence on December 10, 2001.

Charles P. Way
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHAEL ELBERY,

Plaintiff

CIVIL ACTION

V.

NO. 97-11743-MLW

DANIEL SKLUT, ET AL,

Defendant

DOCKETED

PROCEDURAL ORDER
RE: FINAL PRETRIAL CONFERENCE/TRIAL

WOLF, D. J.

The above-entitled action is scheduled for a final pretrial conference on NOVEMBER 29, 2001 AT 3:00 P.M. in Courtroom #10 on the 5th Floor. Counsel shall be prepared to commence trial of this action on or after DECEMBER 10, 2001. Each party shall be represented at the pretrial conference by trial counsel.

In order to secure the just, speedy and inexpensive determination of this action in accordance with the Civil Justice Reform Act of 1990 and Local Rule 16.5, the parties shall meet prior to this conference to accomplish the following:

- (1) to discuss and negotiate settlement of the action;
- (2) to draft and sign a stipulation as to all uncontested facts;
- (3) to narrow the issues to be tried;
- (4) to exhibit to all parties any and all photographs, documents, instruments and other objects any party intends to offer as exhibits at trial;
- (5) to give notice to all parties of the names and addresses of witnesses a party intends to call at trial, including the names and qualifications of any expert witnesses.

Counsel shall prepare and file, either jointly or separately, pretrial memoranda and/or trial documents which set forth the following:

- (1) a concise summary of the evidence that will be offered by the plaintiff, defendant and other parties with respect to both liability and damages (including special damages, if any);
- (2) a statement of facts established by the pleadings, by admissions or by stipulations. Counsel shall stipulate all facts not in genuine dispute;
- (3) contested issues of fact;
- (4) any jurisdictional questions;
- (5) any question raised by pending motions;
- (6) issues of law, including evidentiary questions, together with supporting authority;
- (7) any requested amendments to the pleadings;
- (8) any additional matters to aid in the disposition of the action;
- (9) the probable length of trial and whether jury or nonjury;
- (10) a list of the names and addresses of witnesses who will testify at trial and the purpose of the testimony, i.e., whether factual, medical, expert, etc.;

219

- (11) a list of the proposed exhibits (photographs, documents, instruments, and all other objects) in order of their introduction to the Court. Those exhibits to be introduced without objection shall be identified by a single sequence of numbers and those items to which a party reserves the right to object shall be identified by a single sequence of capital letters, regardless of which party is offering the exhibit.

This material shall be filed, in duplicate, no later than five (5) business days prior to the scheduled date for the final pretrial conference. A party who intends to object to any proposed exhibit or witness shall give written notice to all parties setting forth the basis for the objection and file said notice, in duplicate, with the clerk on or before NOVEMBER 22, 2001. A party who intends to file any motion in limine shall do so no later than NOVEMBER 8, 2001. Any responses to a motion in limine shall be filed no later than NOVEMBER 22, 2001.

Five (5) business days prior to the date assigned for trial each party shall file in duplicate:

- (A) In cases to be tried to a jury, a trial brief including:
- (1) any proposed questions for the voir dire examination of the jury;
 - (2) requests for instructions to the jury with citation to supporting authority;
 - (3) any proposed interrogatories or special verdict form.
- (B) In non-jury cases, a trial brief including:
- (1) any proposed findings of fact and requested rulings of law.

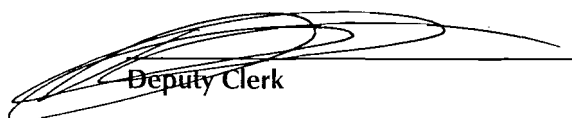
If the trial materials required by this Order have been previously filed with the Court, please advise the Court in writing of the filing date and supplement trial documents, as necessary. Immediately upon receipt of this Order, any counsel who realizes that one or more attorneys have not been notified shall forthwith notify the additional attorney(s) in writing as to the entry of this Order and file a copy of the writing with the clerk.

Compliance with this Order is not excused, absent the actual filing of closing papers or the entry of a Settlement Order of Dismissal in a form prescribed by the Court.

PLEASE NOTE: The Court requires twenty-four hour notice of settlement. Any settlement on the eve of trial may result in the imposition of costs, including the costs associated with bringing in jurors unnecessarily.

By the Court,

September 26, 2001
Date


Deputy Clerk

Copies To: Counsel