UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

V.R. ENTERTAINMENT, VICKASH MANGRAY, JEFF MANGRAY, and MONNIE MANGRAY

Plaintiffs,

v.

CITY OF ANN ARBOR, CITY OF ANN ARBOR POLICE DEPARMENT, CITY OF ANN ARBOR CHIEF OF POLICE, BARNETT JONES, ANN ARBOR CITY ADMINISTRATOR STEVE POWERS, and ROGER FRASER PREVIOUS CITY ADMINISTRATOR, JOINTLY AND SEVERALLY AND IN THEIR INDIVIDUAL CAPACITY

Defendants,

Case No. 12-cv-10203

Honorable Paul D. Borman

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PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

ORAL ARGUMENT REQUESTED

NOW COMES, Plaintiffs V.R. Entertainment, Vickash Mangray, Jeff Mangray, and Monnie, Mangray, by and through their counsel, Roger Farinha, and state as follows in support of their Response to Defendants' Motion to Dismiss:

1. Defendants have filed a Motion to Dismiss the above captioned action pursuant to several subsection of Fed. R. of Civ. P. 12, seeking to silence a group of individuals, who are designated as a protected class, from having the opportunity to air or seek redress for the deplorable treatment they have suffered at the hands of city government in Ann Arbor, Michigan for catering to African American and Latino students and customers.

2. More egregiously, however, the Motion contradicts itself by consistently arguing that Plaintiffs have failed to state a claim upon which relief can be granted because Plaintiffs' Complaints lacks sufficient facts to support such claims, then argues that the facts included in Plaintiffs' Complaint are incorrect, thereby creating questions of fact where none may have existed prior to Defendant's paper being filed.

3. Accordingly, Plaintiffs request this Court deny Defendants' Motion in its entirety so that this matter may proceed to the discovery stage and even more facts may present themselves for this Court's review.

WHEREFORE, Plaintiffs request this Court enter an Order denying Defendants' instant motion, or in the alternative, grant Plaintiffs leave to file an amended pleading that may satisfy the Court.

Respectfully submitted,

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BRIEF IN SUPPORT OF PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

STATEMENT OF ISSUES PRESENTED

1. Have Plaintiffs sufficiently pleaded their case pursuant to Fed. R. Civ. P. 8 to allow this litigation to go forward.

Plaintiffs would say: YES.
Defendants would say: NO.

2. Have Plaintiffs sufficiently set forth facts to support its 4th, 8th, 14th, and Due Process claims?

Plaintiffs would say: YES
Defendants would say: NO

3. Did Defendants act so far outside the scope of conduct that qualified immunity no longer applies to them in regard to misconduct toward Defendants?

Plaintiffs would say: YES
Defendant would say: NO.

4. Does this Court have subject matter to hear this matter and/or or personal jurisdiction over the Defendants?

Plaintiffs would say: YES
Defendant would say: NO.

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In support of its Response to Defendants' Motion to Dismiss, Plaintiffs state the following:

Introduction

Defendants seek dismissal of Plaintiffs' Complaint for Plaintiffs' purported failure to specifically point out Defendants' racist conduct *in toto* in Plaintiffs' Complaint, a requirement not imposed by any of the case law presented by Defendants or any statute or court rule cited in Defendants' papers. [1]

Defendants' paper misstates facts, clearly contorts the law in a fashion designed to serve Defendants' purpose instead of the law's intended purpose i.e. to protect the Plaintiffs and their customers, and argues in such self-serving circles about the purported deficiencies of Plaintiffs' papers that Defendants' blatant racist conduct, designed to strip Plaintiffs' of their liberty and their ability to conduct business, almost gets lost.

Accordingly, Plaintiffs request this Court examine the conduct described in Plaintiffs' Complaint in a light most favorable to the Plaintiffs i.e. that the Defendants have essentially terrorized Plaintiffs to the point where they are now involved in law suits with the city at the administrative, state and federal level, and look at the dissimilar treatment visited upon other night clubs, owned by White people and serving White people less than a mile away, that have had exactly the same issues, but are viewed as valuable citizens rather than pariahs.

[1] Interestingly, Defendants do not mention race almost at all in its papers, but hammer home that Plaintiff's claims of racism are conclusory, without any reference to what ultimately makes the claims conclusory rather than factual .

Counter-Statement of Facts

Plaintiffs are the owners of Dream Nightclub ("Nightclub")in Ann Arbor, Michigan, a college town where the residents and the student body are overwhelmingly White.

On various nights of the week, the Nightclub caters to specific ethnic groups, including nights where Latino and African American young people, some of whom do not live in Ann Arbor, come to Ann Arbor, to listen to "Urban Music" and associate with one another at a club owned by Asian proprietors i.e. Plaintiffs.

On some of those nights, the African American bouncers and the Indian owners have called the police to help with unruly customers.[2]

On others, individuals have left the Nightclub, gone to other locations[3], and gotten into fights with one another.

Because the Nightclub caters to minority students and is owned by minority owners, the Nightclub has been sued by the City of Ann Arbor ("City") for nuisance claims three (3) times in a roughly two (2) year period and to date **the City and has voluntarily dismissed all but the matter currently pending before the Court before any substantial litigation even commenced!** [4]

[2] Defendants claim that 200 calls were made to the police is spurious and simply untrue. Calls attributed to events occurring at the Nightclub were as unrelated as bad acts occurring in a nearby parking garage by people who were never patrons of the Nightclub.

[3] On one such occasion in May of 2011, two people left the Nightclub and entered into the parking lot of the United States Post Office, which by law was required to be padlocked, and there was a shooting. That shooting somehow caused the City of Ann Arbor to shut down the Nightclub, despite the only nexus of the violence being that the Nightclub was open for business on a Saturday night.

[4] Defendants gleefully attach all three Complaints to their instant motion, but gloss over the fact that the Complaints were so baseless that the City voluntarily dismissed them without any action being taken against the Nightclub by any Court.

The Nightclub has further been tormented by the City with City Counsel meetings where the Nightclub has been the subject of discussion, but the Nightclub is provided with no Notice that the meeting is to occur.

The Nightclub has had multiple police officers and police vehicles stationed outside its doors, but only on nights where minorities are frequenting the Nightclub.

The Nightclub has been closed down on account of minority patrons of the Nightclub getting into fights after leaving the Nightclub in areas where the Nightclub cannot geographically have any connection to same.

Accordingly, Plaintiffs request this Court deny Defendants' instant Motion and allow this matter to proceed to discovery.

Standard of Review

Under Rule 12(b)(6) a complaint may be dismissed "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed.2d 59 (1984) (citing *Conley v. Gibson*, 355 U.S. 41,45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957)); See also *Davis H. Elliot Co. v. Caribbean Utilities Co.*, 513 F.2d 1176, 1182 (6th Cir.1975).

The complaint must be construed in the light most favorable to plaintiff, and its well-pleaded facts must be accepted as true. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683,11686, 40 L.Ed.2d 90 (1974); see also *Westlake v. Lucas*, 537 F.2d 857,858 (6th Cir.11976). There is no requirement to accept as true legal conclusions or unwarranted factual inferences. See *Westlake*, 537 F.2d at 858; Davis H. Elliott, 513 F.2d at 1182; *Blackburn v. Fisk University*, 443 F.2d 121, 124 (6th Cir. 1971).

Morgan v. Church's Fried Chicken, 829 F.2d 10, 12 (6th Cir. 1987).

In Conley v. Gibson, the Supreme Court states that the 12(b)(6) motion must not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Yoichiro Hamabe*, Functions of Rule 12(b)(6) in the Federal Rules of civil Procedure: A categorization Approach 15 Campbell L. Rev. 119, 130 (1993)

The court should not use dismissal *sua sponte* without allowing a plaintiff an opportunity to be heard. In *Tingler v. Marshall*, the Sixth Circuit ruled that before a complaint may be dismissed sua sponte, the court must require: (1) service of the complaint on defendants, (2) notice of the court's intent to dismiss the complaint, (3) an opportunity for plaintiff to amend his complaint or respond to the reasons state by the district court in its notice of intended sua sponte dismissal, (4) an opportunity for defendant to respond or file an answer or motions, and (5) a statement of the reasons for dismissal.

Argument

I. THIS COURT HAS BOTH SUBJECT MATTER AND PERSONAL JURISDICTION TO HEAR THIS MATTER.

Despite failing to argue same anywhere in their brief, Defendants seek dismissal pursuant to both Fed. R. Civ. P. 12(b)(1) and (2), which request should be denied as Defendants' unexplained basis for same is incorrect.

In order to provide jurisdiction to this Court, all that must be alleged in a 1983 claim is that the City is acting under the color of law to deprive Plaintiffs of certain rights, which is essentially the basis for Plaintiff's entire Complaint. *Brzowski v. Brzowski*, 2007 U.S. Dist. LEXIS 55025 (N.D. Ill. July 26, 2007)

Accordingly, Plaintiffs request this Court deny Defendants' Motion on the basis of Fed. R. Civ. P. 12(b)(1) and (2) and impose costs on Defendants for alleging same in its instant motion, and at least according to its "Controlling Authorities" page, only referencing same in its prayer for relief on page 20 of its paper.

II. PLAINTIFFS' COMPLAINT COMPLIES WITH FED. R. CIV. P. 8.

Defendants allege in its papers that Plaintiffs' pleading is deficient due to lack of specificity in its allegations, but also complains that that allegations are conclusory, and sometimes complains that the allegations made are simply not true.

As to Defendants' first complaint about specificity, it simply is not required to the depth and level that Defendants allege in their papers. As to its complaint that the allegations are not true, that alone creates issues of fact which require this Court to deny Defendants' instant motion.

“This case presents the antecedent question of what a plaintiff must plead in order to state a SEC.1 claim. Federal Rule of Civil Procedure 8(a)(2) required only “a short and plain statement of the claim showing that the pleader is entitled to relief,” in order to “give the defendant fair notice of what the claim is and the grounds upon which it rests,” *Conley v. Gibson*, 355 U.S. 41,47,78 S.Ct. 99, 2 L.Ed.2d 80.

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations a plaintiffs obligation to provide the “grounds” of his “entitle[ment] to relief” requires more that labels and conclusions, and a formulaic recitation of a cause of action’s elements will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the

complaint's allegations are true. Applying these general standards to a Sec.1 claim, stating a claim requires a complaint with enough factual matter to suggest an agreement.

Asking for plausible grounds does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal discrimatory actions by the Ann Arbor police department.

The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects Rule 8(a)(2)'s threshold requirement that the "plain statement" possess enough heft to "sho[w] that the pleader is entitled to relief."

"*In Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1974,k 1965, 167 L.Ed.2d 929 (2007), the Supreme Court said that, when viewing the complaint under the above standards, to survive a motion to dismiss a complaint must contain(1) "enough facts to state a claim to relief that is plausible," (2) more than "a formulaic recitation of a cause of action's elements," and (3) allegations that suggest a "right to relief above a speculative level."

Just weeks after the *Twombly* decision, however, the Supreme Court cited *Twombly* to reaffirm the liberal pleading standard in Rule 8(a)(2);" Rule 8(a)(2) required only a 'short and plain statement of the claim showing that the pleader is entitled to relief.' Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the claim is and the grounds upon which it rests.' *Erickson v Pardus*, 551 U.S. 89, 127 S.Ct. 2197, 220, 167 L.ED.2d 1081 (2007) (quoting *Twombly*, 127 S.Ct. at 1964).

On several occasions, the Sixth Circuit has identified "uncertainty regarding thw scope of *Twombly*," and noted that *Twombly* may be "limited to expensive, complicated litigation." *Gunasekera*, 551 F.3d at 466. In reviewing a motion to dismiss," [w]e read *Twombly* and *Erickson* in conjunction with one another." *Sensations, Inc*. v. *City of Grand Rapids,* 526 F.3d 291, 295-96 (6th Cir.2008)."

Plaintiffs have set forth more than the required amount of facts and specificity to pass muster pursuant to Court Rule and Case Law.

Accordingly, because Plaintiffs' 1983 claims, its Fourth and Fourteenth Amendment claims, and its Substantive Due Process claims are properly pleaded, Plaintiff's request this Court deny Defendants' instant motion, or in the alternative, should the Court require more specificity, grant Plaintiffs leave to file an amended complaint.

III. DEFENDANTS DO NOT UNDERSTAND THE LAW RELATED TO CONSPIRACY.

Defendants attacks on Plaintiffs 42 USC 1985 claim evidence a lack of research or a lack of understanding of Plaintiffs' pleadings.

> To prove a § 1985(3) claim: [A] complaint must allege that the defendants did (1) "conspire . . ." (2) "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." It must then assert that one or more of the conspirators (3) did, or caused to be done, "any act in furtherance of the object of [the] conspiracy," whereby another was (4a) "injured in his person or property" or (4b) "deprived of having and exercising any right or privilege of a citizen of the United States." *Griffin v. Breckenridge,* 403 U.S. 88, 102-03, 29 L. Ed. 2d 338, 91 S. Ct. 1790 (1971). The plaintiff must show that the conspiracy is fueled by some "class-based, invidiously discriminatory animus." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 268, 122 L. Ed. 2d 34, 113 S. Ct. 753 (1993)).

Bell v. Fowler, 99 F.3d 262, 270 (8th Cir. S.D. 1996).

Plaintiffs have sued current and former city officials, current and former police officials, individuals who have acted outside the scope of their duties in committing overtly racist acts against the Plaintiffs, and may actually add Defendants to this matter given that one or more of the Defendant were trying to engage one of Nightclub's former employees, Liam "Bootsy" McDuffy to spy on Defendants in exchange for City work.

In short, there are more than enough individuals and entities involved in this lawsuit to find the requisite parties necessary to preserve a conspiracy claim.

Accordingly, Plaintiffs request the Court deny Defendants' instant Motion or in the alternative, grant Plaintiffs leave to file an Amended Pleading.

IV. DEFENDANTS' CLAIM THAT RACIST ACTS FALL WITHIN THE SCOPE OF DEFENDANS POWERS' , FRASER' AND JONES' DUTIES SHOCKS THE CONSCIENCE.

Defendants' papers allege that the individual Defendants should be dismissed from this matter as they were acting within the scope of their employment when they committed racist acts against the Plaintiffs, and are therefore immune from suit.

Defendants are incorrect and even cite case law that proves them incorrect:

> Under federal law, government officials are entitled to qualified immunity from actions for damages as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.

See, Defendants' Motion, pg 16.

Plaintiffs are alleging that due to overt racism, the individual Defendants have deprived Plaintiffs of the fundamental rights to life, liberty and the pursuit of happiness.

Under Defendants' theory, the individual Defendants may receive immunity from Plaintiffs seeking to recover from same if they reasonably believed overt acts of racism

were part of the job description working for other Defendant entities in the City of Ann Arbor.

Assuming, *arguendo*, that Ann Arbor does not preach racism in the workplace, at the very least a question of fact remains as to whether the individual Defendants could reasonably have thought their racist conduct was in furtherance of the City as opposed to their individual belief systems.

Accordingly, Plaintiffs request the Court deny the instant Motion or in the alternative, grant Plaintiffs leave to file an amended pleading.

Conclusion

Plaintiffs have been running entertainment venues in the City of Ann Arbor for over a decade.

Since 2009, the City of Ann Arbor has made it a priority to disrupt Plaintiffs' business and to close same.

When the first two law suits in State Court were unsuccessful, and in fact were so weak the Defendants voluntarily dismissed them, Plaintiffs tried to "toe the line."

It has not worked. Even today, with this lawsuit pending, the City has now recommended to the State of Michigan Liquor Control Commission that the State not renew Plaintiffs' liquor license, essentially assuring yet another lawsuit between these parties.

Plaintiffs should have the right to fight back. Plaintiffs' only apparent crime is catering to what the City of Ann Arbor has deemed an undesirable crowd i.e. African American and Latino students and non-students who come to Ann Arbor to dance at Plaintiffs' Nightclub.

In order to preserve Plaintiffs' rights, Plaintiffs' request this Court deny the instant Motion, or in the alternative grant Plaintiffs leave to file an amended pleading more to the Court's liking.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Roger Farinha, hereby affirm that on March 19, 2012, I served a copy of Plaintiffs' Response to Defendants' Motion to Dismiss For Failure to State a Claim on all

parties participating in the electronic notification system employed by the United States District Court for the Eastern District of Michigan.

Respectfully submitted,

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