

JEFFERSON COUNTY DISTRICT COURT 100 Jefferson County Parkway Golden, Colorado 80401 <hr/> In re the Lower North Fork Fire litigation	DATE FILED: February 18, 2014 2:56 PM CASE NUMBER: 2012CV2550 Case No.: 12 CV 2550 Div.: 5 Courtroom: 4e
ORDER re: sec. 1983 claims - Rule 12(b)(5) motions	

The present Order addresses claims that the conduct which resulted in the Lower North Fork wildfire constitutes a violation of 42 U.S.C. sec. 1983. The defending parties ask the court to dismiss these claims pursuant to Rule 12(b)(5), C.R.C.P.

1. Procedural posture as of September, 2013

The events which resulted in the Lower North Fork wildfire have been reviewed by the parties on many occasions. The court sees no need to review these events again.

(a) parties

In its present posture, the parties to this litigation may generally be grouped into homeowners and insurance companies, on one side of the case, and various governmental agencies and their agents or employees, on the other.

Because of the manner in which the present litigation is postured, the formal names of the parties are somewhat confusing.¹ To simplify the present Order, and without prejudice to any party, the court refers to the homeowner and insurance company parties as simply “homeowners” or “claiming parties.” The court usually refers to the governmental entities or employees who are opposing the homeowners as “defending parties.”

(b) special master process

Many of the homeowners’ claims are presently being addressed in what the parties have termed the “special master” process. This process involves adjudication of factual matters by arbiters from the Judicial Arbiters’ Group (who are acting as special masters pursuant to Rule 53, C.R.C.P.) and then submission of the adjudicated claims to the legislature.

The special master process will not address all of the claims advanced by the homeowners, and none of the claims advanced by the insurance companies. In previous Orders, the court has referred to the claims which will not be addressed by the JAG arbiters as the “non-JAG” claims. A number of the non-JAG claims allege violation of 42 U.S.C. sec. 1983.

¹ Most of the homeowners, for example, are technically Respondents in Interpleader.

Because of the large number of parties involved in the present litigation, and the volume of pleadings filed by these parties, the court finds that directing the present Order to particular arguments advanced by particular parties is neither necessary nor desirable. The court accordingly addresses the present Order to all of the claiming parties who have advanced non-JAG claims based upon 42 U.S.C. sec. 1983, and to all of the defending parties who have challenged the sufficiency of these claims pursuant to Rule 12(b)(5) C.R.C.P.

2. Applicable law - Rule 12(b)(5)

Rule 12(b)(5) motions challenge the facial sufficiency of a claim.

(a) scope of court's review

In ruling upon Rule 12(b)(5) motions, the court is to consider only the factual allegations set forth in the claiming parties' complaint. Denver Post Corp. v. Ritter, 255 P.3d 1083, 1088 (Colo. 2011). The court must accept these factual allegations as true, and must view them in the light most favorable to the non-moving party. Denver Post Corp. v. Ritter, *supra*, 255 P.3d at 1088. The court is not to accept as true legal conclusions which the complaint miscasts as factual allegations. Denver Post, *supra* at 1088; Western Innovations, Inc. v. Sonitrol Corp., 187 P.3d 1155, 1158 (Colo. App. 2008).

(b) standard

The court determines the sufficiency of the homeowners' sec. 1983 claims by applying the standard adopted in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 556 U.S. 662 (2009).

In Iqbal, *supra*, the Supreme Court held that the sufficiency of a complaint should be determined as follows:

Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As the Court held in Twombly, the pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement."

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Iqbal, *supra*, 556 U.S. at 676 (citations omitted; emphasis added).

The court is to apply the above-cited "facial plausibility" standard by considering separately each of the particular elements which together establish a claim for relief under

sec. 1983. Those elements were set forth by our Supreme Court in International Society For Krishna Consciousness, Inc. v. Colorado, 673 P.2d 368 (Colo. 1983), where the Court wrote:

To state a claim for relief under section 1983, a complainant need allege only (1) that some person deprived complainant of a right, privilege or immunity secured by the federal constitution; and (2) that such person acted under color of state law. Furthermore, it is well-settled that complaints filed under the Civil Rights Act are to be construed liberally.

673 P.2d at 373 (citations omitted); see also Beaver Creek Property Owners Association, Inc. v. Bachelor Gulch, 271 P.3d 578, 585 (Colo. App. 2011) (citing International Society, *supra* with approval).

In the matter now before the court, there is no dispute that the governmental actors responsible for the complained-of conduct were acting “under color of state law.” The Rule 12(b)(5) issues before the court, accordingly, concern only the first of the two above-quoted elements and, in particular, the term “deprive.”

3. Definition of “deprive” in sec. 1983 litigation

Authorities construing the term “deprive” in sec. 1983 litigation have held that the term must be understood to include what might loosely be termed a “culpable mental state.” The seminal case in this area is Daniels v. Williams, 474 U.S. 327 (1986), the pertinent language of which is:

We conclude that the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property.

474 U.S. 328. Applying Daniels, authorities have uniformly held that an act performed negligently cannot constitute a “deprivation” for purposes of sec. 1983.

(a) claimants’ allegations of deprivation

Recognizing the Daniels “negligence is not enough” principle, the homeowners analyze the governmental conduct of which they complain by applying a template based loosely upon the mental states recognized by the Criminal Code. These mental states are (in order of decreasing culpability) “intentionally or with intent”; “knowingly or willfully”; “recklessly,” and “with criminal negligence.” See sec. 18-1-501, C.R.S. (definitions of quoted terms). The homeowners thus state that their complaints “painstakingly allege many facts that support the conclusion that this wildfire was the result of willful, reckless and/or grossly negligent conduct....” *Response to Defendants’ Motions to Dismiss by Kuehster Groups A and B (filed August 14, 2013)*, p. 4 of 30).

Several Colorado appellate decisions have applied a similar template in their analysis of the sort of conduct which could establish liability under sec. 1983. In Sebastian v. Douglas County, Colorado, --- P.3d ---, 2013 WL 4874140 (Colo. App., 2013), for example, the Court of Appeals referred to each of the culpable mental states recognized by the Criminal Code:

In the analogous, fourteenth amendment context, the United States Supreme Court has agreed that the word “‘deprive’ ... connote[s] more than a negligent act.” Consistent with this, courts have recognized that, to be successful, a section 1983 claimant “must establish that the defendant acted knowingly or intentionally to violate his or her constitutional rights, such that mere negligence or recklessness is insufficient.”

--- P.3d ---, 2013 WL 4874140 at hd. 4 (emphasis added); see *a/so* Uberoi v. University of Colorado, 713 P.2d 894, 903 (Colo. 1986) (referring to “gross negligence, recklessness, or intentional conduct...”); Jones v. Board of Education, etc., 854 P.2d 1386, 1388 (Colo. App. 1983) (referring to mental states of “intentional conduct or deliberate indifference, recklessness, or gross negligence.”).

(b) standard adopted by federal authorities

Notwithstanding the language of cases such as Sebastian, the court believes that the intentional-willful-reckless-negligent template of the Colorado Criminal Code does not accurately reflect the law to be applied when determining whether particular governmental conduct constitutes a “deprivation” for purposes of sec. 1983.

It seems to the court that, as a matter of common sense, conduct which arguably works to deprive a person of a constitutional right must fall somewhere on a continuum in which intentional conduct is on one end, and negligent conduct is on the other. It seems clear enough that intentional conduct will almost certainly constitute a “deprivation” for purposes of sec. 1983; negligent conduct will certainly not constitute a cognizable deprivation.

As many courts have recognized, the difficulty lies in identifying the point on the continuum at which a violation of substantive due process (and, consequently, a cognizable violation of sec. 1983) occurs. As developed in federal case law, that point has been identified as the point at which governmental conduct “shocks the conscience.” County of Sacramento v. Lewis, 523 U.S. 833, 847, n.8 (1998) (“Thus, in a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.”); see *a/so* Graves v. Thomas, 450 F.3d 1215, 1220 (C.A.10 2006) (“The ‘ultimate standard for determining whether there has been a substantive due process violation is whether the challenged government action shocks the conscience of federal judges.”).

Authorities have held that the point of conscience-shock is identified as follows:

(a) If the complained-of governmental conduct occurred in circumstances in which governmental actors had no opportunity to consider possible harmful consequences of their actions, the threshold of sec. 1983 liability is that of “intent to harm.” See, e.g., Neal v. St. Louis County Bd. Of Police Commissioners, etc., 217 F.3d 955, 958 (8th Cir. 2000) (“...the intent-to-harm standard most clearly applies in rapidly evolving, fluid, and dangerous situations which preclude the luxury of calm and reflective deliberation...”).

(b) If the complained-of governmental conduct occurred in circumstances in which governmental actors had time to deliberate upon their course of action, the threshold is one of “deliberate indifference.” The leading decision discussing the mean-

ing of this term is Farmer v. Brennan, 511 U.S. 825 (1994); a typical decision in this area is Sylvia Landfield Trust v. City of Los Angeles, 720 F.3d 1189 (C.A. 9 2013) (“Where ... circumstances afford reasonable time for deliberation before acting, we consider conduct to be conscience-shocking if it was taken with deliberate indifference toward a plaintiff’s constitutional rights.”).

The circumstances which resulted in the Lower North Fork fire do not present the sort of “rapidly evolving, fluid, and dangerous situation” which would permit application of the “intent to harm” standard. The question before the court, therefore, is whether the homeowners’ sec. 1983 claims have alleged facts which, if true, would permit the court to reasonably infer that the governmental actors acted with conscience-shocking deliberate indifference.

4. Deliberate indifference

In determining whether the sec. 1983 claims before the court set forth factual allegations from which conscience-shocking deliberate indifference could be inferred, the court notes the general proposition that deliberate indifference “is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.” Connick v. Thompson, 131 S.Ct. 1350 (2011). A cogent explication of this principle is found in Uhlrig v. Harder, 64 F.3d 567 (C.A. 10 1995), where the Tenth Circuit wrote:

Collins’ [i.e., Collins v. City of Harker Heights, Texas, 503 U.S. 115 (1992)] focus on deliberateness coheres with our previous recognition that a sec. 1983 violation must be predicated on a state action manifesting one of two traditional forms of wrongful intent—that is, either: (1) an intent to harm; or (2) an intent to place a person unreasonably at risk of harm. While “an intent to harm” follows the traditional tort law concept of intentionality, we have defined “an intent to place a person unreasonably at risk” (or reckless conduct) as when a state actor “was aware of a known or obvious risk that was so great that it was highly probable that serious harm would follow and he or she proceeded in conscious and unreasonable disregard of the consequences.”

64 F.3d at 573 (citation and footnotes omitted); see also Green v. Post, 574 F.3d 1294, 1304 (C.A. 10 2009) (holding that conscience-shocking deliberate indifference must “demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking.”).

In the court’s view, the factual (*i.e.*, non-conclusory) allegations now before the court, if true, would not support an inference that governmental actors knew that their actions would cause injury to the lives and property of the homeowners, or that these actors were “aware of a known or obvious risk that was so great that it was highly probable that serious harm would follow...”. To the contrary, it seems to the court that the allegations of the sec. 1983 claims, if true, would establish only that the actions of Mssrs. Michalak, Gallamore, and Will were the proximate cause of the claimants’ losses.

In seeing proximate cause, and not deliberate indifference, the court notes that claimants’ allegations include claims such as

(i) that the governmental actors considered, but did not properly evaluate, weather forecasts suggesting that conditions would not be optimal for the controlled burn (e.g. Kuehster counterclaims, par. 21, ff);

(ii) that, when plumes of smoke were observed by residents on March 24, governmental actors directed firefighters to “stand down” because the sources of the plumes were in the area of the controlled burn (*id.*, par 32);

(iii) that the governmental actors did not monitor the area of the prescribed burn on Sunday, March 25. It is noteworthy, however, that the wildfire did not escape from the property of Denver Water until Monday afternoon, March 26, when the actors were present at the scene of the controlled burn;

(iv) that the governmental actors removed firefighting equipment from the scene on March 26, a few hours before the fire escaped (*id.*, par 37);

(v) that one or more of the three named individuals was physically present at the fire scene on Monday afternoon, March 26, and was actively involved in summoning aid (*id.*, par. 40).

The court finds that, as a matter of law, allegations such as these do not describe the sort of conscience-shocking deliberate indifference which is required for sec. 1983 liability.

5. Employer or supervisor responsibility for sec. 1983 violations

In general, liability for sec. 1983 violations is placed upon the particular governmental actor responsible for the allegedly wrongful conduct. See, e.g., Backes v. Village of Peoria Heights, 662 F.3d 866, 669 (7th Cir. 2011) (“...a defendant must have been personally responsible for the deprivation of the right at the root of a sec. 1983 claim for that claim to succeed.”). Doctrines such as *respondeat superior*, therefore, cannot form the basis of sec. 1983 liability.

(a) exception to general rule

Notwithstanding the above-referenced general rule, there are circumstances in which governmental agencies have been held to be responsible for sec. 1983 violations committed by their agents or employees. The seminal case in this area is Monell v. Department of Social Services of City of New York, 436 U.S. 658 (1978), the pertinent language from which is:

Local governing bodies, therefore, can be sued directly under sec. 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the sec. 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other sec. 1983 “person,” by

the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental “custom” even though such a custom has not received formal approval through the body’s official decision-making channels.

Monell, *supra* at 690 (footnotes omitted); see also Holliday v. Regional Transportation District, 43 P.3d 676, 687 (Colo. App. 2001) (“Governmental entities subject to suit under 42 U.S.C. sec. 1983 may be held liable where an unconstitutional action implements or executes the official policy of the entity. However, such governmental entities cannot be held vicariously responsible under a theory of *respondeat superior* for the unauthorized acts of employees.”). A similar rule applies to the responsibility of supervisors for the actions of their subordinates. Cullen v. Phillips, 30 P.3d 828 (Colo. App. 2001).

6. Above-quoted law, applied

To apply the above-referenced principles, the court turns to the facts alleged in the homeowners’ sec. 1983 claims.

(a) Kuehster (Scanlan)

In their Tenth Claim for Relief, these claimants allege that the City and County of Denver and the Denver Water Board are liable for the conduct of Mssrs. Michalak, Gallamore, and Will in the following language:

127. At all times the City and County of Denver and the Denver Water Board acted under color of statute, ordinance, rule, regulation, custom and practice relating to the Lower North Fork burn and fire. Further, the actions by the State of Colorado and its employees were under color of state law, rule, regulation, standard, custom and practice and are attributable to the Denver Water Board under the theory of concerted or joint action.

128. The Denver Water Board, through its highest administrators and governing board, authorized the CSFS to conduct the burns on its properties, which burns were conducted in an ultra-dangerous or ultra-hazardous fashion given the environmental factors and without appropriate safeguards being put into place by the Denver Water Board and its officials.

(b) Appel parties

These parties allege sec. 1983 claims against the City and County of Denver and the Denver Water Board in their Eleventh Claim for Relief. The pertinent language of their eleventh claim is identical to that of the Kuehster (Scanlan) tenth claim for relief.

(c) Ogg parties

These parties allege 1983 claims against the City and County of Denver and the Denver Water Board in their Tenth Claim for Relief. The pertinent language of their tenth claim is identical to that of the Kuehster (Scanlan) tenth claim for relief.

(d) Campbell parties

These parties allege sec. 1983 claims against the City and County of Denver and the Denver Water Board in their Tenth Claim for Relief. The pertinent language of their tenth claim is identical to that of the Kuehster (Scanlan) tenth claim for relief.

(e) Spoon parties

These parties allege sec. 1983 claims against the City and County of Denver and the Denver Water Board in their Tenth Claim for Relief. The pertinent language of their tenth claim is identical to that of the Kuehster (Scanlan) tenth claim for relief.

7. Analysis - liability of Denver and Denver Water under sec. 1983

The above-quoted allegations fall far short of satisfying the requirements of Monel.

It is obvious that neither Denver nor Denver Water had in place at the time of the fire any “statute, ordinance, rule, [or] regulation” which required their agents to destroy the lives or property of others through the creation of wildfires. It is also obvious that neither Denver nor Denver Water have engaged in any “custom and practice” which countenances such conduct. This language of the sec. 1983 claims, therefore, is pure hyperbole, and is of no significance in determining the sufficiency of the claims pursuant to Rule 12(b)(5).

In the court’s view, claimants’ allegation that Denver and the Denver Water Board “authorized the CSFS to conduct the burns on its properties, which burns were conducted in an ultra-dangerous or ultra-hazardous fashion...” is similarly insufficient.

It is only common sense that, but for the decision to conduct the controlled burn, the wildfire would never have occurred. The trigger for sec. 1983 liability, however, has never been held to be but-for causation. The requisite relationship between the complained-of conduct and the complained-of harm is instead as follows:

As our sec. 1983 municipal liability jurisprudence illustrates, however, it is not enough for a sec. 1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the “moving force” behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.

Board of County Commissioners, etc. v. Brown, 520 U.S. 397, 404 (1997) (emphasis added).

A governmental agency becomes a “moving force behind the injury alleged” when the agency has in place a policy, either formal or informal, which requires or tolerates the conduct which caused the complained-of injury. In the present matter, however, the only policy of Denver and Denver Water alleged in the claimants’ pleadings is the policy of reducing the danger of wildfire through the use of controlled burns.

The sec. 1983 claimants allege no facts which, if true, would establish that this policy requires that the controlled burns be conducted in an “ultra-dangerous or ultra-haz-

ardous fashion,” or that Denver or the Denver Water Board knowingly acquiesced in any such conduct.

8. Conclusion

Applying the standard of Twombly and Iqbal, the court finds that the homeowners have failed to allege facts which, if true, would allow the court to draw the reasonable inference that the actions of the defending parties deprived the homeowners of their constitutional rights.

The defending parties’ motions to dismiss the sec. 1983 claims against them pursuant to Rule 12(b)(5), C.R.C.P., are GRANTED.

Date: February 18, 2014



Judge