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United States District Court, D. Massachusetts.

Karen BONITZ, et al.
v.
Michael V. FAIR, et al.

Civ. A. No. 82–0032–Z. | July 31, 1987.

Attorneys and Law Firms

Judith A. Stalus, Ann Lambert Greenblatt, Mass. Correctional Legal Services, Inc., John Reinstein, Civil Liberties Union of Mass., Boston, Mass., for plaintiffs.

Nancy Gertner, in pro. per.

Maryanne Conway, John W. Bishop, Jr., Dan Cox, Wm. Shaughnessy, Richard L. Zisson, Zisson & Veara, Roberta Thomas Brown, Boston, Mass., for defendants.

Opinion

MEMORANDUM OF DECISION AND ORDER

ZOBEL, District Judge.

***1** Defendant, William Shaughnessy ("Shaughnessy"), has moved for clarification of issues at trial or in the alternative to extend time within which to file a motion for summary judgment. The remaining defendants have filed renewed motions for summary judgment. On these motions now before me, I rule as follows:

Motion for Clarification

Plaintiffs have argued that based on the complaint, specifically claims numbered 12, 22, 23 and 39, the issues for trial should include the validity or invalidity of the warrant which authorized the search. Shaughnessy moves to limit the issues to the reasonableness or unreasonableness of the search as executed, arguing that plaintiffs have not given sufficient notice that the validity of the warrant was to be an issue in the case.

While the complaint did allege generally that the search was "undertaken without lawful cause," (complaint, # 22), nowhere does it specifically allege that the warrant itself was invalid. Nor did plaintiffs specifically articulate this claim at the numerous scheduling conferences at which counsel were asked to define the issues or in their opposition to defendants' first motion for summary judgment. Furthermore, both this Court, in ruling on defendants' first motion for summary judgment, and the First Circuit Court of Appeals, in its decision on defendants' interlocutory appeal, specifically found that the only issue raised by plaintiffs' allegations was the reasonableness or unreasonableness of the execution of the search. *See Bonitz v. Fair,* CA No. 82–32–Z, slip op. at 5 n. 2 (D.Mass. Aug. 12, 1985); *Bonitz v. Fair,* 804 F.2d 164, 173 n. 10 (1st Cir.1986). Under all of these circumstances, and given the imminence of trial, I decline to include the validity of the warrant as an issue for trial. I note also that, because it was an open question in 1982 whether a warrant, probable cause, or even reasonable suspicion was required for a prison search, defendant would most likely be entitled to qualified immunity on plaintiffs' claims under the warrant. *Bonitz v. Fair,* 804 F.2d 164, 173 n. 10 (1st Cir.1986).[1]

Motion for Summary Judgment

Defendants argue first that they are entitled to summary judgment as to plaintiffs' Fourth Amendment claim because they did not participate in the search itself and are not liable for the alleged sporadic instances of unreasonable conduct of those who did. Questions of fact remain, however, as to whether these defendants' plan and preparations for the search necessarily led to the execution thereof in an unreasonable manner, indeed, whether these defendants authorized the allegedly unreasonable conduct. Therefore, defendant's motion for summary judgment as to the Fourth Amendment claim is denied.

Defendants next argue that they are entitled to qualified immunity on the Fourth Amendment claim since their actions did not violate clearly established law. While defendants may ultimately prevail on this argument, there are issues of fact yet to be decided, such as the extent of defendants' involvement in planning and effecting the search and the reasonableness of the search as planned, which makes the granting of summary judgment inappropriate at this time.[2]

***2** Because I have already limited the triable issues, I need not rule on defendants' motion for summary judgment as to plaintiffs' claims that the warrant was invalid.

Defendants' motion for summary judgment as to plaintiffs' state law claims is denied. Since I have denied the motion for summary judgment as to the Fourth Amendment claim, the state law claims are properly before me on pendent jurisdiction and, given that their determination depends on a resolution of disputed facts, summary judgment is not appropriate.

Footnotes

1 Shaughnessy has also submitted a renewed motion for summary judgment arguing first, that his actions did not cause plaintiffs' alleged injuries, and second, that he is entitled to qualified immunity with respect to plaintiff's claim that he attempted to secure a warrant without probable cause. While the facts presented by plaintiff with respect to Shaughnessy's involvement in the search are far from overwhelming, there appear to be enough disputed facts to preclude summary judgment on the issue of causation, particularly given the imminence of trial. Having already limited the issues, I need not rule on Shaughnessy's motion with respect to the warrant.

2 I am aware of the recent Supreme Court ruling in *Anderson v. Creighton,* 55 U.S.L.W. 5902 (June 25, 1987), which allows a court to consider, in deciding whether to grant a motion for summary judgment based on qualified immunity, not only the state of the law at the time of the alleged official misconduct, but also the actual circumstances faced by the defendant. Because, however, there are disputes of fact as to the circumstances surrounding the defendants' actions, summary judgment is inappropriate even given the *Anderson* decision.