

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8284
(Summary Calendar)

ARTELIA M. SCOTT,

Plaintiff-Appellant,

versus

GEORGE E. MOORE, Individually
and as an Employee of Killeen
Police Department, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Western District of Texas
(W-92-CA-06)

(March 3, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

The Plaintiff-Appellant Artelia M. Scott appeals from the district court's summary judgment dismissing all claims contained

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

in her 42 U.S.C. § 1983 civil rights case implicating a sexual assault she allegedly suffered while in jail. Finding that the defendants' motion for summary judgment and the court's judgment based on that motion failed to address Scott's claim grounded in the failure to staff the jail adequately, we vacate and remand the judgment to the extent it purported to dismiss that claim, and affirm the judgment in all other respects.

I

FACTS AND PROCEEDINGS

Scott filed a civil rights complaint against George Moore, the Killeen Police Department, and the City of Killeen, pursuant to 28 U.S.C. § 1983, alleging that while she was in the Killeen Police Department holding facility she was sexually assaulted by Moore, a jailer. She then amended her complaint, dropping the Killeen Police Department as a defendant, adding the Killeen Chief of Police, Francis L. Giacomozzi as a defendant, and adding a state law tort claim. Moore was dismissed from this action after being discharged in bankruptcy.

After completion of discovery, which included interrogatories as well as Scott's deposition, the defendants filed a motion for summary judgment which failed to address Scott's allegation of inadequate jail staffing. Scott did not respond to the defendants' motion.

The district court granted summary judgment in favor of the defendants and dismissed the case. In doing so, it too failed to address Scott's allegation of inadequate jail staffing.

II

ANALYSIS

On appeal, Scott contends that the district court erroneously granted summary judgment in favor of the defendants on all claims. She is mistaken regarding her claims that the City and Giacomozzi permitted and tolerated a policy and practice of sexual assaults, both by defendant Moore and by other unnamed jail employees or city officials, and she is mistaken as to her state law tort claim. She is correct, however, as to her claim of inadequate jail staffing. We therefore affirm the district court's rulings as to all claims except the inadequate staffing claim. As to that one claim, which was not covered by defendants' summary judgment motion or the court's judgment, we have no choice but to vacate that judgment and remand for further consideration.

A. Standard of Review

[This Court] applies the same standards as those that govern the district court's determination. Summary judgment must be granted if the court determines that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." To determine whether there are any genuine issues of material fact, the court must first consult the applicable substantive law to ascertain what factual issues are material. The court must then review the evidence bearing on those issues, viewing the facts and inferences in the light most favorable to the nonmoving party.

King v. Chide, 974 F.2d 653, 655-56 (5th Cir. 1992) (citations omitted).

B. Municipal Liability

Scott's § 1983 claims primarily focus on municipal liability. There are "two different issues when a § 1983 claim is asserted

against a municipality: (1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation." Collins v. City of Harker Heights, Tex., _____ U.S. _____, 112 S.Ct. 1061, 1066, 117 L.Ed.2d 261 (1992). Generally, the second issue is determined first by assuming that the initial issue has been satisfied. See id. at 1067.

"In a § 1983 action, a municipality may not be held strictly liable for the acts of its non-policy-making employees under a respondeat superior theory." Benavides v. County of Wilson, 955 F.2d 968, 972 (5th Cir.), cert. denied, 113 S.Ct. 79 (1992). A local governing body "may be liable under § 1983, however, where the alleged unconstitutional activity is inflicted pursuant to official policy." Johnson v. Moore, 958 F.2d 92, 93 (5th Cir. 1992). "Official policy" is defined as:

1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or
2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy.

Id. at 94. "A § 1983 plaintiff must plead specific facts with sufficient particularity to meet all the elements of recovery. This heightened pleading requirement applies to allegations of municipal custom or policy." Fraire v. City of Arlington, 957 F.2d

1268, 1278 (5th Cir.) (footnotes omitted), cert. denied, 113 S.Ct. 462 (1992).

Scott has alleged a policy of permitting sexual assaults on individuals detained in the city jail. That allegation can be separated into two distinct components, which are 1) knowledge of sexual assaults by Moore and by other jail employees, and 2) failure adequately to staff the jail.

1. Knowledge of Moore's and Other Jail Employees' Alleged Assaults.

Scott argues that the City and Giacomozzi knew or should have known of prior assaults, both by Moore and by other jail employees. She contends that this activity amounted to a persistent, widespread practice which was so common as to constitute a custom representing municipal policy. See Johnson, 958 F.2d at 94. She has failed to satisfy the heightened pleading requirement, however, and has not responded to defendants' Motion for Summary Judgment with any factual assertions that would preclude its being granted. See Fraire, 957 F.2d at 1278; see Cleckner v. Republican Van & Storage Co., 556 F.2d. 766, 771 (5th Cir. 1977).

Defendants do not dispute that Giacomozzi was the official with the authority to make or approve official policy. There is no record evidence, however, that Giacomozzi or any other policy-making official of the City was aware of any sexual assaults committed either by Moore or by other jail employees.

In his affidavit attached as an exhibit to the defendants' motion for summary judgment, Giacomozzi averred that he

first became aware in February, 1989, of the complaint of Artelia M. Scott concerning her treatment during the time she was being held in the city facility . . . following her arrest on December 31, 1988. I immediately assigned the complaint to the Internal Affairs Division . . . [and then] to the Criminal Investigation Division. At 3 p.m. on April 20, 1989, I met with [defendant] Moore to advise him that he had been placed on administrative leave pending the investigation. . . . Moore [subsequently] submitted his resignation

Prior to receiving the complaint of Artelia Scott, I had never been made aware of any complaints concerning treatment of prisoners by jailers involving sexual advances to or sexual assaults on prisoners. No complaints had been filed with the department prior to that of Ms. Scott by anyone held in the city's facility relating to sexual advances or assaults or the preferential treatment of prisoners in return for sexual favors. No complaints have been received since Ms. Scott's . . . [and] no complaints of this nature against any other jailer or officer other than George Moore have ever been filed.

In her deposition, Scott testified that District Attorney Hughes told her that there were five other complaints of sexual impropriety lodged against Moore. But she also testified that Hughes did not state that any of the alleged incidents had been reported to Giacomozzi or any other city officials. When asked whether she had any knowledge from any source that any person involved in a supervisory or administrative capacity in the Killeen Police Department knew about these alleged incidences, she stated that "we're still looking off into it."

Scott specifically stated that Hughes did not tell her that any person had complained to Giacomozzi or to anyone in the City of Killeen Administration concerning incidences of alleged sexual assaults in the city jail. She also stated that she and her lawyer were attempting to locate individuals who had knowledge that this information had been conveyed to Giacomozzi or other city officials

but that she did not know of anyone as of the date of her deposition.

Diane Van Helden, the attorney representing the defendants, averred in her affidavit, attached to the defendants' motion for summary judgment, that Scott never supplemented the answers to the interrogatories or otherwise advised Van Helden that any of the information contained in Scott's deposition or answers had changed. Scott has failed to show that Giacomozzi or any other city officials knew of or tolerated any sexual assaults in the city jail. Furthermore, the Killeen Police Department's written policy prohibited the personal abuse of prisoners. She has failed to raise a material fact issue in this regard.

2. Failure to Staff the Jail Adequately

In her amended complaint, Scott alleged that the City and Giacomozzi failed to provide proper and adequate staffing of the city jail and that they knew or should have known that such inadequate and improper staffing created an unsafe situation. Defendants failed to address this matter in their motion for summary judgment; neither did the district court address it. As the parties seeking summary judgment, the defendants bore the burden of demonstrating that there was no dispute as to any material fact in the case. See Impossible Electronic Techniques, Inc. v. Wackenhut Protective Systems, Inc., 669 F.2d 1026, 1031 (5th Cir. 1982). They have not met their burden and therefore we must vacate and remand that aspect of the district court's grant of summary judgment.

C. State Tort Claim: Defective Jail Design

Scott also alleges that the district court erred in dismissing her state law tort claim. In her amended complaint, Scott alleged that the design and layout of the city jail were "such that there exists no adequate safeguards and protection for plaintiff when she was confined there." She further alleged that the defendants knew that the design and layout rendered the jail unsafe. And she alleged that the defendants failed to take any action to protect individuals confined in the jail from the opportunity for uncontrolled abuse resulting from its "structural defects," such as lack of visibility or monitoring cameras, and the existence of enclosed cells.

In the district court, Scott's pleadings set forth a claim for premises defect under the Texas Tort Claims Act. See Tex. Civ. Prac. Rem. Code §§ 101.001, et seq. A governmental unit's sovereign immunity is waived for claims of personal injury caused by the condition of real property. Tex. Civ. Prac. Rem. Code § 101.021(2). Yet claims based on the intentional torts of government employees, including assaults, are exempted from this waiver of sovereign immunity. Id. at § 101.057(2).

Defendants maintain that Scott's allegations arise from the intentional tort committed by Moore. Scott did not assert negligence as the basis for her cause of action. Her attempted reliance on City of Waco v. Hester, 805 S.W.2d 807 (Tex. Ct. App. 1990), is misplaced.

While Hester held that sovereign immunity was waived when an

inmate was raped by another inmate, it clearly predicated that decision on the fact that the person who raped Hester was not a government employee. Thus, the claim did not arise out of an intentional tort but from the City's antecedent negligence: The jailers had been warned prior to the assault that the rapist had been intimidating Hester, yet they ignored the warning. Hester, 805 S.W.2d at 813-14.

In the instant case a governmental employee, not a third party, was the actor who perpetrated the sexual assault. There is absolutely no evidence to suggest that Giacomozzi or any city officials knew, prior to the assault, that Moore had a propensity to be sexually violent.

On appeal, Scott recharacterizes her claim as one that "arose out of the antecedent negligence of the City of Killeen's and Employee's and not a premises defect." She also alleges that the defendants negligently implemented the policy regarding adequate jail security. It appears that she is alleging both negligence claims, as opposed to her claim for premises defect, for the first time on appeal. If so, the claims are not properly before us unless their preclusion would work a manifest miscarriage of justice, a circumstance she has not alleged. See Delesdernier v. Porterie, 666 F.2d 116, 124-25 (5th Cir.), cert. denied, 459 U.S. 839 (1982).

Assuming, arguendo, that Scott properly raised both negligence claims in the district court, they still fail. Scott did not respond to the defendants' motion for summary judgment. She has

shown no defect in the jail, and thus, has shown no antecedent negligence. She has also failed to make a showing regarding the negligent implementation of a jail security policy. Even if she had, she has not shown a causal connection between that negligence and the assault. Moore, the only jailer on duty at the time of the alleged assault, could have turned off or ignored the cameras. Scott has not shown how any of the alleged defects or policy implementation caused the assault. Her argument fails.

III

CONCLUSION

As the defendants failed to discharge their burden with respect to Scott's allegation of failure adequately to staff the jail, and as the district court did not address that issue, we vacate and remand solely as to that issue. In all other respects, the district court's judgment is affirmed.

AFFIRMED in part, VACATED and REMANDED in part.