

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60520
Summary Calendar

GERALD A. PADGETT, ET AL.,

Plaintiffs-Appellants,

versus

U. L. PALMER, SR., ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Mississippi
(92-CV-173)

(June 2, 1995)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:*

In this § 1983 case, the plaintiffs-appellants contend that the district court improperly granted summary judgment in favor of the defendants. Specifically, they maintain that they stated a viable constitutional claim against deputy sheriffs Hillman and Allen regarding the alleged deprivation of property, that Hillman and Allen were not entitled to qualified immunity, that Allen and

*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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Hillman's failure to act was tantamount to conversion and constituted wrongful interference with business, and that the claims against Palmer were sufficient to withstand summary judgment. The arguments fail.

The district court dismissed the claims brought against Allen and Hillman in their official capacities as being "totally without merit." The plaintiffs concede "that there [is] no allegation of wide spread policy and/or procedure of the Greene County Sheriff's Department of allowing wrongful deprivation of property." A governmental entity (the Sheriff's Department) can be held liable under § 1983 only if official policy or custom caused the deprivation of a constitutional right. Monell v. Dep't of Social Serv., 436 U.S. 658, 694 (1978). The plaintiffs' concession that no policy existed waives this issue.

The district court, erroneously analyzing the issue under Mississippi state law, determined that Allen and Hillman were qualifiedly immune from suit regarding the alleged deprivation of federal constitutional rights. We affirm on other grounds; Allen and Hillman are qualifiedly immune under the applicable federal standard. See Hanchey v. Energas Co., 925 F.2d 96, 96 (5th Cir. 1990).

The first inquiry in examining a defense of qualified immunity asserted in a motion for summary judgment is to determine whether the plaintiffs have alleged "the violation of a clearly established constitutional right." Siegert v. Gilley, 500 U.S. 226, 231

(1991). We apply "currently applicable constitutional standards to make this assessment." Rankin v. Klevenhagen, 5 F.3d 103, 106 (5th Cir. 1993). The second step is to "decide whether the defendant's conduct was objectively reasonable" in the light of the legal rules clearly established at the time of the incident. Spann v. Rainey, 987 F.2d 1110, 1114 (5th Cir. 1992).

The plaintiffs allege that the defendants violated their due process rights by depriving them of their property. The plaintiffs have not alleged that state postdeprivation remedies are inadequate. See Marshall v. Norwood, 741 F.2d 761, 763-64 (5th Cir. 1984) (neither negligent nor intentional deprivations of property by state officials rise to the level of due process violations when state law provides adequate postdeprivation remedies). Mississippi provides such a remedy. See Masonite Co. v. Williamson, 404 So.2d 565, 567 (Miss. 1981). The plaintiffs therefore have not satisfied the first prong of Siegert with respect to their due process claim.

The plaintiffs, however, have satisfied the first prong of the Siegert test with regard to their Fourth Amendment claim. They have alleged that Allen and Hillman, in their individual capacities, conspired with Palmer to seize the plaintiffs' property without a legal basis. See Soldal v. Cook County, Ill., 113 S.Ct. 538, 548 (1992). Nevertheless, the plaintiffs' Fourth Amendment claim fails the second Siegert prong. The plaintiffs have pointed to no clearly established legal rules that would mandate that the

deputies intervene and force Palmer to relinquish control over the plaintiffs' property. We have found no such authority.

The officers have carried their summary judgment burden; they did not seize the plaintiffs' property. Not only were the officers not requested to force Palmer to relinquish control, but there is no evidence that the defendants violated clearly established legal principles by not doing so on their own. These defendants are therefore entitled to claim qualified immunity regarding the seizure-of-property claim.

The plaintiffs do not brief the abuse of process claim asserted in the district court. Arguments must be briefed to be preserved. See Brinkmann v. Dallas County Deputy Sheriff, 813 F.2d 744, 748 (5th Cir. 1987). Thus, this issue is abandoned.

The plaintiffs argue that their claim of conversion against Allen and Hillman was erroneously dismissed. They offer no proof, however, that either Allen or Hillman exercised any dominion or control over the plaintiffs' property, and thus have not stated a claim for conversion. See Walker v. Brown, 501 So.2d 358, 361 (Miss. 1987). The plaintiffs' argument that the deputies had a duty to return their property lacks support of any authority.

The plaintiffs also contend that Allen and Hillman intentionally and/or negligently interfered with the plaintiffs' business. ACI Chemicals v. Metaplex, Inc., 615 So.2d 1192, 1200-1201 (Miss. 1993). There is no record evidence indicating that Allen and Hillman acted intentionally and willfully and in a manner

calculated to cause damage to the plaintiffs. The plaintiffs have not satisfied their summary judgment burden.

To the extent that the plaintiffs have briefed their allegation that a conspiracy existed between Palmer and the deputies to deprive them of their property, the record belies that contention. All of the defendants testified that they had never met each other prior to July 9, 1992. To prevail, the plaintiffs must show that the defendants "agreed to commit an illegal act." Dayse v. Schuldt, 894 F.2d 170, 173 (5th Cir. 1990). The plaintiffs have not shown such an agreement.

The plaintiffs further allege that the district court erred in granting summary judgment in favor of Palmer. Specifically, they contend that Palmer unconstitutionally deprived them of their property.

A private actor cannot be liable under § 1983 unless that person was acting under color of state law. Hernandez v. Maxwell, 905 F.2d 94, 95 (5th Cir. 1990). A private actor may be held liable under § 1983 if it is shown that the actor conspired with state officials who were acting under color of state law to deprive an individual of a federal constitutional right. See Daniel v. Ferguson, 839 F.2d 1124, 1131 (5th Cir. 1988). As previously discussed, the plaintiffs' allegations of any conspiracy are unsupported by any evidence. Summary judgment was proper.

It is true that Palmer did not specifically move for summary judgment, a district court is entitled to grant summary judgment in

favor of a non-moving defendant, provided that the plaintiffs had adequate notice and opportunity to present their evidence. Marriott Bros. v. Gage, 911 F.2d 1105, 1107-08 (5th Cir. 1990). Defendants Allen and Hill moved for summary judgment. Palmer moved for an extension of time in which to file for summary judgment, clearly notifying the plaintiffs that he was contemplating same. The plaintiffs responded, arguing that the deadline for filing such a motion had lapsed pursuant to the Scheduling Order. The district court granted Palmer's motion and extended the filing deadline.

The plaintiffs' response to Allen and Hillman's motion for summary judgment was approximately 180 pages long. The plaintiffs' claims against all defendants were identical. Therefore, the plaintiffs are hard-pressed to argue that they did not have both notice and an opportunity to present their summary judgment evidence. Further, they do not specifically argue that they were denied an opportunity adequately to present evidence or did not have notice that Palmer intended to file for summary judgment.

The district court dismissed the remaining state law claims against Palmer, without prejudice, because it had dismissed the federal claim against Palmer. The plaintiffs do not contest this dismissal.

For the reasons stated herein, the judgment of the district court is

A F F I R M E D.