IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No: 23-cv-01951-CNS-MDB

JACQUELINE ARMENDARIZ and CHINOOK CENTER,

Plaintiffs,

v.

CITY OF COLORADO SPRINGS;
DANIEL SUMMEY, a detective with the Colorado Springs Police Department, in his individual capacity;
B.K. STECKLER, a detective with the Colorado Springs Police Department, in his individual capacity;
JASON S. OTERO, a sergeant with the Colorado Springs Police Department, in his individual capacity;
ROY A. DITZLER, a police officer with the Colorado Springs Police Department, in his individual capacity; and
FEDERAL BUREAU OF INVESTIGATION,

Defendants.

CITY OF COLORADO SPRINGS' MOTION TO DISMISS

Defendant City of Colorado Springs ("City") moves to dismiss all of Plaintiffs' claims against it pursuant to Fed. R. Civ. P. 12(b)(6).

Certification of Conferral Pursuant to Civ. Practice Standard 7.1B(b): Undersigned counsel certifies that she conferred with Plaintiffs' counsel, Sara Neel, concerning this motion. Plaintiffs oppose the motion.

Introduction

In this case, Plaintiffs complain of search warrants that neutral judges concluded were amply supported by probable cause and sufficiently particular and, thus, constitutional. Plaintiffs' claims against the City should be dismissed with prejudice.

Argument

I. Section 1983 Claims

In Claims 1 and 2 of the Amended Complaint, Plaintiffs assert their Fourth Amendment unlawful search and First Amendment retaliation claims against the City under 42 U.S.C. § 1983. (Doc. 12 at 39-44) In addition to showing that a municipal employee committed an underlying constitutional violation, to state a Section 1983 claim against a municipality, a plaintiff must show the existence of an official policy or custom; a direct causal link between the policy or custom and the injury alleged; and "at least for claims of inadequate hiring, training, or other supervisory practices," deliberate indifference on the part of the municipality. *Waller v. City & Cty. of Denver*, 932 F.3d 1277, 1283-84 (10th Cir. 2020).

A. Municipal Unlawful Search

1. No Unlawful Search By An Employee

Plaintiffs' failure to allege a plausible Fourth Amendment unlawful search claim by the Officers (*see* Doc. 50 at 3-6 and Doc. 51 at 2-7), also dooms their Fourth Amendment unlawful search claim against the City. For this reason alone, the Fourth Amendment claims against the City must be dismissed. *See Ellis ex rel. Est. of Ellis v. Ogden City*, 589 F.3d 1099, 1104 (10th Cir. 2009); *Hernandez v. Correct Care Sols., LLC*, No. 18-CV-02522-DDD-GPG, 2019 WL 4200929, at *3 (D. Colo. Sept. 5, 2019).

2. No Customs of Unlawful Search Warrant Applications

Plaintiffs allege that the City has a "custom, policy, and practice" of seeking "broad-reaching warrants to search digital devices and social media accounts" of participants, associates of participants, and organizers of protests during which participants engage in criminal conduct. (Doc. 12 ¶ 131)

Plaintiffs fail to allege facts plausibly demonstrating the existence of such customs. "A 'custom' has come to mean an act that, although not formally approved by an appropriate decision maker, has such widespread practice as to have the force of law." *Carney v. City & Cty. of Denver*, 534 F.3d 1269, 1274 (10th Cir. 2008). "In order to establish a custom, the actions of the municipal employees must be 'continuing, persistent and widespread.'" *Id.* (citation omitted). Indeed, Plaintiffs must show that "similarly situated individuals were mistreated by the municipality in a similar way." *Carney*, 534 F.3d at 1274.

For starters, Plaintiffs' allegations concerning a warrant for "a zippered notebook" (Doc. 12 ¶¶ 145-146) fails to demonstrate a custom of seeking "broad-reaching warrants to search digital devices and social media accounts" because a "zippered notebook" is neither a digital device nor a social media account. The allegations concerning the notebook thus are inapposite to Plaintiffs' Fourth Amendment claim against the City.

a. Digital Device Search Warrants

Plaintiffs utterly fail to allege that the City has a custom of seeking overbroad warrants to search the digital devices of protest participants. They generally allege that after the August 3, 2020 protest in front of a CSPD officer's home, the City "arrested two persons for alleged 'riot' and 'menacing'" and then "obtained warrants … to search cell phones and other digital devices." (Doc. 12 ¶ 139) But Plaintiffs fail to allege whose digital devices the City sought to search, the

type of material sought from those devices, the date range of the materials sought, or any search terms supplied for the search, etc. Absent such factual allegations, Plaintiffs fail to allege that the purported warrants were overbroad in any way.

Plaintiffs' allegations concerning a warrant for a cell phone belonging to E.B.—the alleged partner of an armed protester at the August 3, 2020 demonstration—are inapposite. (Doc. 12 ¶¶ 140-141) Here, neither Plaintiff is a "partner" of a protest participant; they admittedly were themselves a participant (Ms. Armendariz) in and organizer (Chinook) of the July 31, 2021 housing march. (Doc. 12 ¶ 3) Thus, because E.B. was not "similarly situated" to Plaintiffs, the allegations concerning the search warrant for E.B.'s cell phone fail to demonstrate the existence of an unconstitutional custom. *Carney*, 534 F.3d at 1274. Even if the search warrant for E.B.'s phone does count, it is just one other instance of seeking a search warrant for a digital device, which is insufficient to demonstrate the existence of a "'continuing, persistent and widespread'" custom. *See Sexton v. City of Colorado Springs*, 530 F. Supp. 3d 1044, 1071 (D. Colo. 2021); *Waller*, 932 F.3d at 1290. In sum, Plaintiffs fail to allege the existence of a City custom of seeking search warrants for digital devices.

b. Social Media Account Search Warrants

Plaintiffs also fail to allege that the City has a custom of seeking overbroad warrants to search the social media accounts of protest organizers. Plaintiffs generally allege that City police officers "obtained warrants … to search private information on social media accounts." (Doc. 12 ¶ 139) But, again, Plaintiffs fail to allege whose social media accounts the City sought to search, the type of material sought from those accounts, the date range of the materials sought, or any search terms supplied for the search, etc. Absent such factual allegations, Plaintiffs fail to allege that the purported warrants were overbroad in any way.

Plaintiffs allege that the City obtained a warrant for Armendariz's Facebook account, "including Ms. Armendariz's private listing of Facebook friends and their Facebook IDs." (Doc. 12 ¶ 147) But Armendariz is not "similarly situated" to Chinook. *Carney*, 534 F.3d at 1274. Chinook challenges the warrant for its Facebook Messenger chats based on its contention that organizing (through Facebook) a protest in which the 60 marchers engaged in illegal conduct fails to supply sufficient probable cause to search its Facebook Messenger chats for the week surrounding the march. (Doc. 12 ¶ 48) Armendariz, by contrast, is not a protest organizer; the probable cause for the warrant for Armendariz's Facebook account would be different. Thus, the warrant for Armendariz's Facebook account is not evidence of a custom of seeking overbroad warrants to search the social media accounts of organizers of protests in which the participants engage in illegal conduct.

Plaintiffs also allege that the City sought and obtained a warrant for the Empowerment Solidarity Network's ("ESN") "Facebook records," because ESN was "an organizer of the August 3 demonstration" in which the participants engaged in illegal conduct. (Doc. 12 ¶¶ 136-139, 142-144) The Facebook messages would help with "better understanding the event planning process, specifically to determine if the armed subjects were directed to use intimidation and force towards uninvolved citizens travelling through the area, and to help identify the unknown actors." (*Id.* ¶ 144) This one other instance of allegedly seeking an overbroad warrant for an illegal protest organizer's Facebook account records is "insufficient to show a practice so permanent and well settled that it constitutes a custom or usage with the force of law." *Sexton*, 530 F. Supp.3d at 1071. *See also Waller*, 932 F.3d at 1290 ("[D]escribing only one similar incident of excessive force prior to his own injuries—fall[s] far short of plausibly alleging a 'widespread practice' of excessive force, much less a practice 'so permanent and well settled as to constitute a custom or usage with

the force of law.'"). In sum, Plaintiffs fail to allege the existence of a "'continuing, persistent and widespread'" custom of seeking "broad-reaching warrants to search digital devices and social media accounts" of participants and organizers of protests during which participants engage in criminal conduct. *Carney*, 534 F.3d at 1274 (citation omitted).

3. No Causation

Plaintiffs must also allege "'a direct causal link between the municipal action and the deprivation of federal rights.'" *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 770 (10th Cir. 2013) (citation omitted). This means that "'the challenged policy or practice must be 'closely related to the violation of the plaintiff's federally protected right.'" *Id.* (citation omitted). On a municipal liability claim, "'rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee.'" *Id.* (citation omitted).

In this case, Plaintiffs allege municipal causation only in a conclusory fashion. (*See* Doc. 12 ¶ 165) No facts are alleged that plausibly suggest a direct causal link between any action of the City and any constitutional violation. *See Weitzman v. City & Cty. of Denver*, No. 17-cv-02703-KLM, 2019 WL 1438072, at *15 (D. Colo. Mar. 31, 2019) (allegation that municipality's "policies, customs, or practices in failing to properly train and supervise their employees were the moving forces and proximate cause of the violation of [plaintiff's] constitutional rights" failed to satisfy causation element of municipal liability claim). Nor does Plaintiff "explain how the incident described in the … complaint could have been avoided with different or better training or supervision." *Rehberg v. City of Pueblo*, No. 10-CV-00261-LTB-KLM, 2012 WL 1326575, at *5 (D. Colo. Apr. 17, 2012). Plaintiffs fail to allege facts plausibly showing that a City custom caused the violation of their constitutional rights.

B. Municipal First Amendment Retaliation

1. No First Amendment Retaliation By An Employee

Plaintiff's failure to allege a plausible First Amendment retaliation claim by the Officers (*see* Doc. 50 at 7-8, Doc. 51 at 8-10), also dooms their First Amendment retaliation claim against the City. For this reason alone, the First Amendment claim against the City must be dismissed. *See Ellis*, 589 F.3d at 1104; *Hernandez*, 2019 WL 4200929, at *3.

2. No Policy or Custom

Plaintiffs allege that the City has a custom of retaliating against political activists by seeking search warrants lacking probable cause. (Doc. 12 ¶¶ 2, 7) But to state a First Amendment retaliation claim, the "adverse action" (here, seeking the search warrants) must have been "substantially motivated as a response to the plaintiff's exercise of constitutionally protected conduct." *Shero v. City of Grove, Okla.*, 510 F.3d 1196, 1203 (10th Cir. 2007).

According to Plaintiffs' own allegations, however, each of the search warrants sought information relating to individuals who already had engaged in criminal conduct. Plaintiffs admit that the August 3, 2020 demonstration at a CSPD officer's home involved 100 participants "marching in the street" and "standing in the street," which is a violation of Colorado state law and City Code (Doc. 12 ¶ 137) (*See* Colo. Rev. Stat. 18-9-107(1)(b); Doc. 51-2, Colorado Springs City Code § 9.2.104) Armed individuals blocked passage of non-participating citizens. (Doc. 12 ¶ 137) Understandably, CSPD "asserted that the protest had become a 'riot' pursuant to C.R.S. § 18-9-101" and sought warrants that would enable them to identify and prosecute the offenders. (*Id.* ¶ 138)

Each of the search warrants served this purpose. E.B. was the partner of a protest participant who "blocked vehicles, while armed with a gun." (*Id.* ¶ 140) ESN organized the demonstration at

which the participants obstructed passage and intimidated members of the public with weapons. (*Id.* ¶¶ 143-144) The "zippered notebook" containing " 'organizational information' and 'rosters, contact information, and personal identification' of members of two groups" was found at an arrestee's home and would help "identify suspects 'who have yet to be identified and charged from the riot that occurred in Colorado Springs, CO on 08/03/2020.' " (*Id.* ¶¶ 145-146) Armendariz's Facebook friends likewise would help the City identify the individuals who at the August 3, 2020 demonstration marched and stood in the street and intimidated the public with weapons. (*Id.* ¶ 147) The desire to identify and prosecute individuals who engaged in criminal conduct during the August 3, 2020 and July 31, 2021 protests substantially motivated City police officers to seek the warrants, not the mere exercise of First Amendment rights.

Furthermore, it must be remembered that neutral judges independently assessed all the search warrants—not only those at issue in this case but also those on which Plaintiffs rely to show a City custom of seeking overbroad warrants—for probable cause and particularity and concluded that they met both constitutional requirements. (Doc. 12 ¶¶ 55-56. 118, 139, 140, 143, 146, 147) The judges' findings are entitled to "great deference." *Poolaw v. Marcantel*, 565 F.3d 721, 728 (10th Cir. 2009). Indeed, if Plaintiffs' contention that all of the referenced warrants are unconstitutionally overbroad and invalid, not only are the officers who drafted them " 'plainly incompetent,' " but their supervisors and the judges who issued them "were as well." *Messerschmidt v. Millender*, 565 U.S. 535, 554 (2012).

3. No Causation

As with Armendariz's claim against the City (*see supra* Part I.A.3), Chinook alleges municipal causation only in a conclusory fashion. (*See* Doc. 12 ¶ 182)

II. Stored Communications Act Claim

In Claim 3 of the Amended Complaint, Chinook asserts that the City violated provisions of the Stored Communications Act, 18 U.S.C. 2701 *et seq.* ("SCA"). (Doc. 12 at 45-46) The SCA "bars unauthorized access to stored electronic communications." *Davis v. Gracey*, 111 F.3d 1472, 1482 (10th Cir. 1997). The government may compel a provider of electronic communication services (such as Facebook) to disclose the contents of communications that it possesses and stores with "a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures …) by a court of competent jurisdiction." 18 U.S.C. § 2703(a), (b)(1)(A). In fact, "good faith reliance on a court warrant … is a complete defense to any civil or criminal action brought under this chapter or any other law." 18 U.S.C. § 2707(e)(1). Furthermore, to be liable under the SCA, "a person must know he or she is accessing … subscriber records or stored communications … without an appropriate form of legal process." § 9:26. Knowing or intentional state of mind required under Stored Communications Act, 1 Data Sec. & Privacy Law § 9:26 (2023-2024), citing *Long v. Insight Commc'ns of Cent. Ohio, LLC*, 804 F.3d 791, 797-98 (6th Cir. 2015) (finding that the plain language and legislative history of the SCA supported the interpretation that a "knowing or intentional state of mind" was required for liability under the SCA).

Here, Chinook alleges that the City accessed Chinook's Facebook Messenger chats with a warrant issued pursuant to Colorado state court warrant procedures. (Doc. 12 ¶¶ 45-56) Thus, Plaintiffs fail to allege a violation of the SCA. *See* 18 U.S.C. § 2703(a), (b)(1)(A) (the government can require the disclosure of the contents of an electronic communication with a warrant).

In addition, the City did so in good faith reliance on the warrant. The Affidavit in support of the warrant identified Chinook as the organizer of the housing march, the conduct of the

approximately 60 march participants that was illegal (namely, marching in the street despite repeated orders to move to the sidewalk), and the crime of "Obstructing Passage or Assembly" that the 60 march participants committed. (Doc. 51-1 at 3) Not only did the individual Officers (Steckler and Otero) believe it to be sufficient under the Fourth Amendment, so did the judge. Thus, the City is entitled to the good faith reliance defense to liability under the SCA. 18 U.S.C. § 2707(e)(1).

Finally, Chinook alleges only that Officers Steckler and Otero "acted with a knowing and intentional state of mind." (Doc. 12 ¶ 193) But the state of mind of two police officers hardly demonstrates the state of mind of the City. Chinook fails to allege that, for example, a final decisionmaker for the City knew or intended to access Chinook's Facebook Messenger chats without a valid warrant. For all of these reasons, Chinook fails to state a claim against the City for a violation of the SCA.

Conclusion

Plaintiffs' claims against the City of Colorado Springs should be dismissed with prejudice.

Respectfully submitted this 20th day of November, 2023.

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CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on the 20th day of November, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following email addresses:

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