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TJG/dlo - Our File Number:

Attorney for Defendants, Penns Grove Police Officers Carmen Hernandez and Jason Spera

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY - TRENTON**

MARIA ARGUETA; WALTER CHAVEZ; ANA
GALINDO; W.C. by and through his parents Walter
Chavez and Ana Galindo; ARTURO FLORES;
BYBYANA ARIAS; JUAN ONTANEDA; VERONICA
COVIAS; and YESICA GUZMAN,

Plaintiffs,

vs.

UNITED STATES IMMIGRATION AND CUSTOMS
ENFORCEMENT ("ICE"); JOHN MORTON, Assistant
Secretary for Immigration and Customs
Enforcement; JULIE L. MYERS, Former Assistant
Secretary for Immigration and Customs
Enforcement; ALONZO R. PENNA, Deputy Assistant
Director for Operations, Immigration and Customs
Enforcement; JOHN P TORRES, Former Deputy
Assistant Director for Operations, Immigration and
Customs Enforcement; SCOTT WEBER, Director,
Office of Detention and Removal Operations, Newark
Field Office; BARTOLOME RODRIGUEZ, Former
Director, Office of Detention and Removal
Operations, Newark Field Office; AGENT 1, AGENT
2, AGENT 3, AGENT 4, AGENT 5, AGENT 6, AGENT
7, AGENT 8, AGENT 9, AGENT 10, AGENT 11,
AGENT 12, AGENT 13, AGENT 14, AGENT 15,
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AGENT 24, AGENT 25, AGENT 26, AGENT 27,
AGENT 28, AGENT 29, AGENT 30, AGENT 31;
JOHN DOE ICE AGENTS 1-18; JOHN SOE ICE
SUPERVISORS 1-15; Penns Grove Police Officers
Carmen Hernandez, Jason Spera, and Joseph
DiCarolis (sued in their Individual Capacities),

Defendants

Civil Action

Number 08-cv- 1652 (PGS/ ES)

**NOTICE OF MOTION TO DISMISS
PURSUANT TO F.R.C.P. 12(b)(6)**

TO: Baher Azmy, Esquire
Seton Hall School of Law
Center for Social Justice
833 McCarter Highway
Newark, New Jersey 07102

~ and~

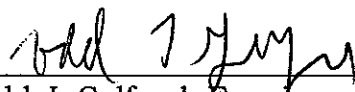
R. Scott Thompson, Esquire
Lowenstein Sandler PC
65 Livingston Avenue
Roseland, New Jersey 07068
Attorney for Plaintiff

PLEASE TAKE NOTICE that the undersigned, on behalf of the Defendants, Penns Grove Police Officers Carmen Hernandez and Jason Spera, shall move before the United States District Court, Trenton, New Jersey, on a date and time to be set by the Court, for an Order dismissing the Complaint in its entirety pursuant to F.R.C.P. 12(b)(6).

PLEASE TAKE NOTICE that the undersigned offers the attached Brief in support of the Motion.

Respectfully Submitted,

BARKER, SCOTT & GELFAND
A PROFESSIONAL CORPORATION

By: 
Todd J. Gelfand, Esquire

Dated: 6/23/2010

**IN THE UNITED STATES DISTRICT COURT
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MARIA ARGUETA; WALTER CHAVEZ; ANA GALINDO;
W.C. by and through his parents Walter Chavez and
Ana Galindo; ARTURO FLORES; BYBYANA ARIAS;
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Removal Operations, Newark Field Office;
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DOE ICE AGENTS 1-18; JOHN SOE ICE
SUPERVISORS 1-15; Penns Grove Police Officers
Carmen Hernandez, Jason Spera, and Joseph
DiCarolus (sued in their Individual Capacities),
Defendants

**BRIEF IN SUPPORT OF
MOTION TO DISMISS**

On Behalf of Defendants Patrolman Carmen Hernandez
and Patrolman Jason Spera

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I. Introduction

Plaintiffs have amended the Complaint to include three (3) municipal police officers from the Borough of Penns Grove in this litigation which is primarily against the United States Government. The gravamen of the litigation has nothing to do with these Penns Grove officers. For the Penns Grove officers, the allegations are simply conclusory allegations that the officers participated in the use of excessive force and in an illegal search of Plaintiff Yesica Guzman's residence. The Defendant Penns Grove officers are not alleged to have had any physical contact whatsoever with Yesica Guzman. There are no specific factual allegations of any search or seizure by any of the Penns Grove officers. The Third Amended Complaint simply gives none of these defendants any notice of what he or she allegedly did wrong.

Officer Carmen Hernandez is accused of entering Yesica Guzman's residence and apparently accused of doing so with her service weapon drawn, following the lead of a team of officers from the Immigration and Customs Enforcement ("ICE") bureau of the United States Department of Homeland Security ("DHS"). Once Penns Grove Officer Hernandez recognized Plaintiff Guzman, Officer Hernandez allegedly holstered her weapon. That is the totality of the allegations against Officer Hernandez. As for defendant officers Spera and DiCarolus, from the Complaint, the entirety of the factual allegations in the Complaint relating to them yields the accusation that they may have stood "outside around the perimeter of the home" while something allegedly

happened inside. Such factual allegations are insufficient to plead any civil rights cause of action against any of these three Penns Grove officers.

Moreover, these Penns Grove officers have now been sued on April 16, 2010 based upon something that happened on August 1, 2006. The claims against the Penns Grove officers are subject to dismissal under the applicable statute of limitations.

II. Facts

The following is a summary of **all** relevant facts set forth in the Third Amended Complaint relating to the Penns Grove officers. There is no material factual allegation in the Complaint which is omitted from this summary.

On August 1, 2006, Penns Grove officers Carmen Hernandez, Jason Spera and Joseph DiCarolus allegedly “participated” in an ICE raid on the home of Plaintiff Yesica Guzman. (Complaint, ¶¶ 65-68). The facts relating to this raid are alleged at paragraphs 168 through 180 of the Third Amended Complaint. The causes of action against the Penns Grove defendant officers are contained at paragraphs 244 through 289 of the Third Amended Complaint.

The target of the ICE raid of the Guzman home was determined by ICE to be a “fugitive” as defined by ICE to mean an individual with either an outstanding deportation order or who failed to report to the office of Detention and Removal Operations of ICE after receiving notice to do so. (Complaint ¶

69). Penns Grove officers are identified in the Complaint as “officers” who participated in the ICE raid along with the ICE law enforcement personnel, identified in the Complaint as “agents.”

Starting with paragraph 169 of the Complaint, which begins the allegations of wrongdoing specific to the Guzman raid, the Complaint does not identify whether the ICE agents or Penns Grove officers are accused of yelling for Plaintiff Guzman to “open the front door.” Paragraph 170 implies that an unidentified Penns Grove officer or officers were, like the ICE agents, “wearing bullet proof vests and carrying guns.” Plaintiff Guzman “recognized” Defendant Penns Grove Officer Carmen Hernandez and an unidentified black male Penns Grove officer whom Plaintiffs **do not** allege was Defendant Penns Grove Officer Spera or DiCarolis. (Complaint, ¶ 171).

The ICE agents are then accused of pushing their way into the home and shoving Plaintiff and her husband. The ICE agents all kept their guns drawn, but Defendant Penns Grove Officer Carmen Hernandez allegedly holstered her gun once she saw and recognized Plaintiff Guzman. Several ICE agents and Penns Grove officers remained outside around the perimeter. (Complaint ¶ 172, 174). The Complaint does not allege that Defendant Penns Grove Officer Spera or DiCarolis entered the Guzman home.

The Complaint alleges that “upon information and belief, a minimal search of DHS records would have revealed that the [target] had already been deported,” (Complain ¶ 173), but the Complaint does not allege that the Penns

Grove officers had any access to DHS records. The Complaint then alleges that the ICE agents, not any Penns Grove police officer, lacked a warrant, probable cause or exigent circumstances and that the ICE agents, but not any Penns Grove police officer, detained Plaintiff Guzman at gunpoint and questioned her about drugs, weapons and any other occupants of the home. (Complaint ¶ 175). The ICE agents, but not any Penns Grove Police officer, then searched the Guzman residence including the children's bedrooms over Plaintiff Guzman's specific objection, pointing a gun at a sleeping relative. (Complaint ¶¶ 176-179). The ICE agents, but not any Penns Grove officer, confiscated Plaintiff Guzman's passport and threatened to take her children and make it his "personal mission" to ensure her husband went to jail. (Complaint ¶¶ 179-180).

Thus distilling the allegations against Defendants Spera and DiCarolis from these facts, the only allegation is that these two Penn Grove officers were among some combination of ICE agents or perhaps other Penns Grove officers who went to the Guzman home address and remained outside the home around the perimeter. Defendant Penns Grove Officer Hernandez only followed the lead of the ICE agents into the home with her gun drawn, allegedly, but holstered it once she recognized Plaintiff Guzman.

The Complaint was initially filed on April 3, 2008, naming "John Loe" Penns Grove officers alleged to have participated in the raid on the home of plaintiff "Carla Roe 3," identified only as a Salem County resident, on an

unidentified date in August, 2006. (Complaint, paragraph 29). The First Amended Complaint was filed on May 22, 2008, containing the same designations and lack of information regarding "Carla Roe 3" and the "John Loe" Penns Grove police officers.

Plaintiffs' counsel sent a "notice" to the Borough of Penns Grove indicating that Penns Grove police officers would be named as defendants. (See Plaintiffs' Certification of Counsel in support of Motion for Leave to file Third Amended Complaint, paragraph 3 and exhibit B). The notice advised the Penns Grove Solicitor only that Plaintiffs intended to serve the "John Loe" Penns Grove officers once the identities were determined. The letter allegedly forwarded a copy of the First Amended Complaint, in which the name of Plaintiff Yesica Guzman did not appear, but rather Plaintiff Guzman was still only identified as "Carla Roe 3." No other notice of any kind was sent to anybody associated with the Borough of Penns Grove until October 30, 2009, 14 months after the statute of limitations had expired.

Meanwhile, the Second Amended Complaint, filed on June 8, 2009, ten months after the statute of limitations expired, finally identified Plaintiff "Carla Roe 3" as Yesica Guzman, residing in Salem County, but still did not identify the "John Loe" Penns Grove police officers by name. On October 5, 2009, an initial scheduling conference was held among Plaintiffs' counsel and the United States Defendants' counsel (Plaintiffs' Brief in support of Motion for Leave to file Third Amended Complaint, page 5). Plaintiffs thereafter issued subpoenas

to Penns Grove in October and November, 2009 and then issued a Subpoena Duces Tecum for written questions to the Borough of Penns Grove on February 5, 2010. (Plaintiffs' Certification of Counsel in support of Motion for Leave to file Third Amended Complaint, paragraphs 4-6 and exhibits C, D and E).

Plaintiffs filed a motion for leave to amend the Complaint, to include the individual Penns Grove officers individually, on March 12, 2010 and filed the Third Amended Complaint on April 16, 2010.

III. Legal Argument

A. Standard of Review under FED. R. CIV. P. 12(b)(6)

The Defendant Penns Grove officers move for dismissal of the claims against them asserted in the Third Amended Complaint in accordance with Fed. R. Civ. P. 12(b)(6). A Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted should be granted unless the plaintiff's factual allegations are:

"enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true, (even if doubtful in fact)."

Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1965, (2007) (internal citations omitted). Furthermore:

"[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, ... a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."

Id. (internal citations omitted).

Recently, this pleading standard was further refined by the United States Supreme Court in its decision Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009). In granting petitioner's motion to dismiss the Ashcroft Court held:

"[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." The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions [or to t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements [i.e., by] legal conclusion[s] couched as a factual allegation.

Ashcroft, 129 S.Ct. at 1949-54.

Therefore, while a court must accept all "well-pleaded" factual allegations in the complaint as true, and draw all reasonable inferences in favor of the non-moving party, "the pleading standard . . . demands more than an unadorned "the-defendant-unlawfully-harmed-me" accusation..." Ashcroft, 129 S. Ct. at 1949-54; Twombly, 550 U.S. at 555; Phillips v. County of Allegheny, 515 F.3d 224, 233 (3d Cir. 2008). Instead, in deciding a motion to dismiss, a court should look to the face of the complaint and decide whether, taking all of the allegations of fact as true and construing them in a light most favorable to the plaintiff, has the plaintiff alleged "enough facts to state a claim for relief that is plausible on its face." Twombly, 127 S. Ct. at 1974.

Even under the most liberal application of the notice pleading standards

of FRCP 8(a), “a court is not required to assume that a Plaintiff can prove facts not alleged.” Evancho v. Fisher, 423 F.3d 347, 354 (3d Cir. 2005), citing, City of Pittsburgh v. West Penn Power Co., 147 F.3d 256, 263 n.13 (3d Cir. 1988).

As outlined below, under these standards, Plaintiffs have not pleaded any facts suggesting that any individual Penns Grove officer used excessive force or engaged in a constitutionally unreasonable search or seizure. Moreover, Plaintiffs seek to ensnarl the Penns Grove officers in this litigation nearly 4 years after the raid at issue, in violation of the statute of limitations and without the ability to demonstrate such diligent efforts to join the Penns Grove officers earlier as would be necessary for Plaintiffs to avail themselves of the “relation back” rules. For each of these reasons, all claims against the Penns Grove officers in the Third Amended Complaint are subject to dismissal.

B. The Statute of Limitations Defense Requires Dismissal of the Penns Grove Officers; Plaintiffs Cannot Meet the Requirements of the Relation Back Doctrine

New Jersey’s two year statute of limitations for personal injury cases under N.J.S.A. 2A:14-2 is the relevant statute of limitations applicable to claims under 42 U.S.C. Section 1983. See e.g. Cito v. Bridgewater Township Police Department, 892 F.2d 23, 25 (3d Cir. 1989); Getchey v. County of Northumberland, 120 Fed. App. 895, 897-898 (3d Cir. 2005); Dole v. Local 427, International Union of Elec., etc., 894 F.2d 607, 619 (3d Cir. 1988). As the raid pursuant to which the Penns Grove Defendant Officers are sued

occurred on August 1, 2006 (Complaint, ¶¶ 65-68) and the Complaint against the Penns Grove defendants was not filed until April, 2010, the Complaint as to the Penn Grove defendant officers can only survive if the “relation back” requirements of Fed. R. Civ. P. 15(c) are met.

Under Fed. R. Civ. P. 15(c)(1), the claims may relate back to a previous filing if relation back is permitted by the law providing the statute of limitations applicable to the claim. Since New Jersey law provides the statute of limitations for the 42 U.S.C. Section 1983 claims here, the first question becomes whether New Jersey law would permit relation back and if not, whether relation back is permitted under Fed. R. Civ. P. 15(c)(3).

The New Jersey Court Rule regarding relation back is R. 4:9-3 and the more specific rule relating to fictitious party “John Doe” practice is R. 4:26-4. The requirements under R. 4:26-4 for relation back include that the exercise of due diligence prior to the expiration of the statute of limitations would not have revealed the identity of the defendant, DeRienzo v. Harvard Industries, Inc., 357 F.3d 348, 353 (3d. Cir. 2004), citing Farrell v. Votator Div. of Chemetron Corp., 62 N.J. 111, 115 (1973), and the defendant must not be prejudiced by the delay, DeRienzo, 357 F.3d at 353-354, citing Farrell, 62 N.J. at 122-23.

As to Defendant Carmen Hernandez, paragraphs 171 and 172 of the Complaint make clear that Plaintiff Guzman recognized Defendant Hernandez, the female Spanish-speaking officer, at the time of the arrest four years ago. Her husband also recognized the black male Penns Grove officer. While

Plaintiff's counsel will likely argue that the mere recognition of a black male officer and a Spanish-speaking female officer does not mean that Plaintiffs could sufficiently identify them to name them individually in the Complaint, the Certification of counsel supporting the motion by which Plaintiffs sought to add these officers does not allege that Plaintiff Guzman and her husband did not know these officers by name on sight. Nor is there any certification submitted from Plaintiff Guzman herself indicating whether or not she knew the officers' actual identities, or outlining any effort Plaintiff Guzman made during the nearly four years after the raid to identify the Penns Grove officers involved.

Moreover, the Certification of counsel belies the contention that there was diligent effort to ascertain the officers' identity and join them in a timely fashion. Particularly, the first alleged communication to anybody associated with Penns Grove is a June 18, 2008 letter from Plaintiffs' counsel to the Solicitor for the Borough of Penns Grove, allegedly "placing them on notice that Penns Grove officers would be named as defendants in this action." This "notice" was issued approximately six weeks prior to expiration of the statute of limitations. The "notice" itself did not provide much notice of anything, as Plaintiff Guzman had still only been identified as "Carla Roe 3," a resident of Salem County and the date of the raid was not identified except for the allegations that it occurred during August, 2006. The notice purported to give notice to Penns Grove but did not make any request for information as to the

identity of the officers. The “notice” was not any effort to ascertain the officers’ identity, much less diligent effort.

After that “notice,” the next allegation of any attempted contact with the Borough of Penns Grove to ascertain the identity of the officers occurred in October, 2009, sixteen (16) months later, and at that point a year and two months past the statute of limitations cutoff. At that time, Plaintiffs issued a subpoena to Penns Grove. The subpoena only requested production of documents which might have revealed the identity of the Penns Grove officers involved. According to the Certification, it was not until February 5, 2010, that Plaintiffs, through counsel, served a document actually asking for identification of the involved officers. By that point the statute of limitations had expired 1 ½ years prior.

Assuming the Court considers the October, 2009 subpoena to be the first effort by Plaintiffs’ counsel to ascertain the identities of the Penns Grove officers involved in the August 1, 2006 raid at issue, the focus becomes the fact that this subpoena was issued a year and two months beyond the statute of limitations cutoff. Plaintiffs’ brief in support of their motion for leave to file the Third Amended Complaint suggests that this delay is justified by the fact that “[u]nder the Federal Rules of Civil Procedure, discovery could not commence until after a Rule 26(f) conference was held....” because of Rule 26(d)(1) (Plaintiffs’ Brief at page 5). The Rule 26(f) initial conference was held on October 5, 2009.

Plaintiffs ignore the qualifying language of Fed. R. Civ. P. 26(d)(1), however, as the rule provides that a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), "except when authorized under these rules or by order." Knowing that there were unidentified Penns Grove officers and the statute of limitations had expired, certainly Plaintiffs could have brought this to the Court's attention and requested an order permitting discovery for the purpose of diligently identifying the Penns Grove officers. Moreover, the language of Rule 26(f) only requires that the parties confer to discuss and develop a discovery plan. Once the parties have conferred in accordance with Rule 26(f), discovery can be conducted and is not prohibited by Rule 26(d). There is no explanation offered by Plaintiffs for why they did not confer with defense counsel for the United States defendants, explain the need to diligently and immediately pursue discovery to identify parties they wished to sue beyond the statute of limitations and then begin conducting that discovery on a timely or at least minimally diligent basis. In short, procedurally, nothing prevented Plaintiffs from diligently conducting discovery to ascertain the identity of the Penns Grove officers between the time the Complaint was filed and the October 5, 2009 initial scheduling conference.

A separate ground for denial of relation back relief from the statute of limitations here is the prejudice to the Penns Grove defendants. The New

Jersey courts hold that the mere passage of time in itself constitutes prejudice. Mears v. Sandoz Pharms. Inc., 300 N.J. Super. 622, 631 (App. Div. 1997).

The lack of diligence in naming the Penns Grove officers and prejudice to the officers which prevent application of relation back doctrine under New Jersey law also prevent relation back under the provisions of Fed. R. Civ. P. 15(c)(3). Moreover, under Fed. R. Civ. P. 15(c)(3), where an amendment names a new party, the party to be named must have had notice of the institution of the action within the period provided by Rule 4(m) for service of the summons and complaint, *i.e.*, 120 days. Plaintiffs' motion papers pursuant to which the Third Amended Complaint was allowed reflect that from the time the Complaint was filed initially on April 3, 2008, there was no notice of it to the Penns Grove officers in any form. While a notice had been sent to the Penns Grove Solicitor within 120 days, on June 18, 2008, no such notice was sent to the individual officers and, at that time, Yesica Guzman had only been identified in the Complaint as "Carla Roe 3." Penns Grove's ultimate response to this notice was that Penns Grove had no documents identifying the officers involved and Plaintiffs issued no notice to the officers themselves until after the Third Amended Complaint was filed.

In summary, Plaintiffs cannot meet the requirements for relation back under either New Jersey law or the Federal Rules of Civil Procedure. The Complaint, as to the Penns Grove officers, must therefore be dismissed because of the statute of limitations.

C. The Complaint Does Not Accuse the Penns Grove Officers of Any Fact-Specific Wrongdoing Which Would be Sufficient to Establish any Cause of Action Against any Penns Grove Officer

In order to set forth a claim under 42 U.S.C. §1983, a plaintiff must prove:

1. That the Defendants deprived him of his federal constitutional rights;
2. While acting under the color of state law.

Mark v. Borough of Hatboro, 51 F. 3d 1137, 1141 (3d Cir. 1995).

With respect to claims against individuals, liability under §1983 “is personal in nature and can only follow personal involvement in the alleged wrongful conduct, shown through specific allegations of personal direction or of actual knowledge or acquiescence.” Rode v. Dellarciprete, 845 F. 2d 1195, 1207 (3d Cir. 1988); Evancho v. Fisher, 423 F.3d 347, 353 (3d Cir. 2005). . See also, Walsifer v. Borough of Belmar, 2008 U.S. App. LEXIS 1380 at *8-*9 (3d Cir. 2008) (upholding dismissal of claims against chief of police for lack of allegation of personal involvement); Rodriguez v. Town of West New York, 191 Fed. Appx. 166, 167-168 (3d. Cir. 2006) (upholding dismissal of claims against mayor and director of public safety for lack of personal involvement); Martsof v. Brown, 2008 U.S. Dist. LEXIS 1721 at *11-*12 (M.D. Pa. 2008) (dismissing claim against police captain on the pleadings for failing to allege sufficient personal involvement in alleged retaliation where the captain advised the

plaintiff that complaining may negatively affect plaintiff's career); Georges v. Ricci, 2007 U.S. Dist. LEXIS 89030 at *33-*34 (D.N.J. 2007); Banda v. Corzine, 2007 U.S. Dist. LEXIS 80932 at *22 (D.N.J. 2007).

Examining the personal involvement of Defendant Penns Grove officers Spera and DiCarolis, there is not a single factual allegation of any physical contact with any Plaintiff by the Penns Grove officer defendants. As to Defendants Spera and DiCarolis, the Complaint does not allege that they entered the home or even came in sight of Plaintiff Guzman. Nor does the Complaint allege any facts to suggest Spera or DiCarolis searched or seized any location or any person. Rather, as noted above, the only factual allegations against Defendants Spera and DiCarolis amount to the contention that these two defendant officers stood outside at the perimeter of the Guzman property during the ICE raid. Certainly there is no set of facts which might later be proven through discovery which could transform that allegation into a case for liability against Spera and DiCarolis.

Stated somewhat differently, if this Complaint is not dismissed, defendants Spera and DiCarolis will be defending an excessive force claim without having been accused by Plaintiffs of using any force at all. They would be forced to defend an unreasonable search and seizure claim with no idea of what Plaintiff alleges they searched or seized.

Defendant Penns Grove Officer Hernandez is accused of accompanying the raiding ICE agents and, like the agents leading the raid, entering the home

with her gun drawn. While all of the ICE agents are alleged to have continually displayed their firearms throughout the raid, Plaintiffs allege that defendant Hernandez immediately holstered her weapon once she saw and recognized Plaintiff Guzman. (Complaint, ¶ 172).

If there is any question as to whether the mere allegation of the brief display of a firearm is a sufficient allegation to subject a police officer to a civil rights lawsuit, then consideration of qualified immunity resolves the question. See, generally, Harlow v. Fitzgerald, 456 U.S. 800, 818 (1982); Siegert v. Gilley, 500 U.S. 226, 232-233 (1991). Qualified immunity, where applicable, is “an entitlement not to stand trial **or face the other burdens of litigation.**” Saucier v. Katz, 533 US 194, 200 (2001) (emphasis added). The Supreme Court emphasized that it is “an immunity from suit rather than a mere defense to liability.” Id. The Supreme Court has held that “the qualified immunity standard ‘gives ample room for a mistake in judgments’ by protecting ‘all but the plainly incompetent or those who knowingly violate the law.’” Hunter v. Bryant, 502 U.S. 224, 229, (1991).

Qualified immunity has similarly been defined as “entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law.” Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). Since qualified immunity bestows on individually named defendants immunity from suit, the Supreme Court “repeatedly ha[s] stressed

the importance of resolving immunity questions at the earliest possible stage in litigation." Hunter v. Bryant, 502 U.S. 224, 227 (1991). The Supreme Court has admonished that "[u]ntil this threshold immunity question is resolved, discovery should not be allowed." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Qualified immunity operates "to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." Bumgarner v. Hart, 2009 U.S. App. LEXIS 4650 (3d Cir. March 6, 2009); citing, Hope v. Pelzer, 536 U.S. 730, 739 (2002).

An aspect of qualified immunity particularly relevant here is that it is reasonable for local municipal police officers, not typically experienced or trained in enforcement of federal immigration laws and enforcement policy, to follow the lead of the federal agents when offering such agents assistance in enforcing those laws which are within the area of expertise of the federal agents. Liu v. Phillips, 234 F.3d 55, 27 (1st Cir. 2000), citing United States v. Hensley, 469 U.S. 221, 232-233 (1985). See also Shah v. Holloway, 2008 U.S. Dist. LEXIS 61688 (D. Mass July 28, 2008). This is a corollary of the related, perhaps more general principle that when a supervising or authorizing officer makes a mistake of fact or mistake of law which is not apparent to an assisting or subordinate officer, the assisting or subordinate officer is nonetheless entitled to qualified immunity. Id. at 57-58.

Here, the allegations of the Complaint make clear that Penns Grove Defendant Officer Hernandez, the only Penns Grove officer accused of entering

the Guzman home, was allegedly assisting and following the lead of the ICE agents. Given that the ICE agents were allegedly “running the show,” it was entirely reasonable for Defendant Hernandez to follow the ICE agents’ lead. In fact, according to the Complaint, Officer Hernandez’s involvement was even less offensive than it would have been if she followed the ICE agents’ lead entirely, as Plaintiffs concede that Officer Hernandez holstered her weapon immediately upon recognizing Plaintiff Guzman, while the ICE agents allegedly continued the raid with guns drawn. Given the reasonableness of Defendant Hernandez’s actions under the factual circumstances alleged in the Complaint, Defendant Hernandez is entitled to dismissal of the Complaint against her because of qualified immunity.


In summary, Defendants Spera and DiCarolis are clearly entitled to dismissal of the Complaint on the pleadings, as they are accused of excessive force and unreasonable search and seizure, yet they are not accused of using any force at all and there are no facts alleged to suggest these two officers searched or seized anything or any person. As to Defendant Hernandez, she is entitled to dismissal because it was reasonable under the circumstances for her to allegedly assist and follow the lead of the ICE agents. If Plaintiff Guzman’s constitutional rights were violated under the alleged facts, they were violated because of the actions and decisions of the ICE agents, not the local municipal police officer who followed their lead given that they were dealing with a case within the ICE agents’ expertise.

IV. **Conclusion**

For the foregoing reasons, it is respectfully submitted that the claims in the Third Amended Complaint should be dismissed against the Defendant Penns Grove officers Spera, DiCarolus and Hernandez.

Respectfully Submitted:

BARKER, SCOTT & GELFAND
A PROFESSIONAL CORPORATION

By: 
Todd J. Gelfand, Esquire

Dated: 6/23/2010

Todd J. Gelfand, Esquire
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TJG/dlo - Our File Number: 46640-28
Attorney for Defendants, Penns Grove Police Officers Carmen Hernandez,
and Jason Spera

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY - TRENTON**

MARIA ARGUETA; WALTER CHAVEZ; ANA
GALINDO; W.C. by and through his parents
Walter Chavez and Ana Galindo; ARTURO
FLORES; BYBYANA ARIAS; JUAN ONTANEDA;
VERONICA COVIAS; and YESICA GUZMAN,
Plaintiffs,

vs.

UNITED STATES IMMIGRATION AND
CUSTOMS ENFORCEMENT ("ICE"); JOHN
MORTON, Assistant Secretary for Immigration
and Customs Enforcement; JULIE L. MYERS,
Former Assistant Secretary for Immigration and
Customs Enforcement; ALONZO R. PENNA,
Deputy Assistant Director for Operations,
Immigration and Customs Enforcement; JOHN
P TORRES, Former Deputy Assistant Director
for Operations, Immigration and Customs
Enforcement; SCOTT WEBER, Director, Office
of Detention and Removal Operations, Newark
Field Office; BARTOLOME RODRIGUEZ, Former
Director, Office of Detention and Removal
Operations, Newark Field Office; AGENT 1,
AGENT 2, AGENT 3, AGENT 4, AGENT 5,
AGENT 6, AGENT 7, AGENT 8, AGENT 9,
AGENT 10, AGENT 11, AGENT 12, AGENT 13,
AGENT 14, AGENT 15, AGENT 16, AGENT 17,
AGENT 18, AGENT 19, AGENT 20, AGENT 21,
AGENT 22, AGENT 23, AGENT 24, AGENT 25,

Civil Action
Number 08-cv- 1652 (PGS/ ES)

ORDER

AGENT 26, AGENT 27, AGENT 28, AGENT 29, AGENT 30, AGENT 31; JOHN DOE ICE AGENTS 1-18; JOHN SOE ICE SUPERVISORS 1-15; Penns Grove Police Officers Carmen Hernandez, Jason Spera, and Joseph DiCarolus (sued in their Individual Capacities), Defendants
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THIS MATTER having been brought before this Court on a Motion to Dismiss pursuant to F.R.C.P. 12(b)(6) on behalf of Defendants Penns Grove Police Officers Carmen Hernandez and Jason Spera, by Todd J. Gelfand, Esquire, attorney for the Defendants, Penns Grove Police Officers Carmen Hernandez and Jason Spera, with notice to counsel for Plaintiff, Baher Azmy, Esquire and R. Scott Thompson, Esquire and the Court having considered the moving papers, any opposition filed, and arguments made by counsel, and for good cause having been shown:

IT IS on this _____ day of _____, 2010, **ORDERED AND ADJUDGED** that all claims in this matter asserted against Defendants Penns Grove Police Officers Carmen Hernandez and Jason Spera are hereby **DISMISSED** with prejudice.

U.S.D.J.

[] OPPOSED

[] UNOPPOSED

Todd J. Gelfand, Esquire
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TJG/dlo - Our File Number: 46640-28

Attorney for Defendants, Penns Grove Police Officers Carmen Hernandez, and Jason Spera

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY - TRENTON**

MARIA ARGUETA; WALTER CHAVEZ; ANA
GALINDO; W.C. by and through his parents
Walter Chavez and Ana Galindo; ARTURO
FLORES; BYBYANA ARIAS; JUAN ONTANEDA;
VERONICA COVIAS; and YESICA GUZMAN,
Plaintiffs,

vs.

UNITED STATES IMMIGRATION AND CUSTOMS
ENFORCEMENT ("ICE"); JOHN MORTON,
Assistant Secretary for Immigration and Customs
Enforcement; JULIE L. MYERS, Former Assistant
Secretary for Immigration and Customs
Enforcement; ALONZO R. PENNA, Deputy
Assistant Director for Operations, Immigration
and Customs Enforcement; JOHN P TORRES,
Former Deputy Assistant Director for Operations,
Immigration and Customs Enforcement; SCOTT
WEBER, Director, Office of Detention and
Removal Operations, Newark Field Office;
BARTOLOME RODRIGUEZ, Former Director,
Office of Detention and Removal Operations,
Newark Field Office; AGENT 1, AGENT 2, AGENT
3, AGENT 4, AGENT 5, AGENT 6, AGENT 7,
AGENT 8, AGENT 9, AGENT 10, AGENT 11,
AGENT 12, AGENT 13, AGENT 14, AGENT 15,
AGENT 16, AGENT 17, AGENT 18, AGENT 19,
AGENT 20, AGENT 21, AGENT 22, AGENT 23,
AGENT 24, AGENT 25, AGENT 26, AGENT 27,
AGENT 28, AGENT 29, AGENT 30, AGENT 31;
JOHN DOE ICE AGENTS 1-18; JOHN SOE ICE
SUPERVISORS 1-15; Penns Grove Police Officers
Carmen Hernandez, Jason Spera, and Joseph
DiCarolis (sued in their Individual Capacities),
Defendants

Civil Action
Number 08-cv- 1652 (PGS/ ES)

CERTIFICATION OF SERVICE

as to
NOTICE OF MOTION TO DISMISS
PURSUANT TO F.R.C.P. 12(b)(6)

On behalf of Defendants

- Patrolman Carmen Hernandez
- Patrolman Jason Spera

Jointly, Severally or in the
Alternative

The original of the within Motion to Dismiss Plaintiff's Complaint on behalf of the Defendants, Patrolman Carmen Hernandez and Patrolman Jason Spera, Jointly, Severally, or in the Alternative, has been electronically filed with the United States District Court for the District of New Jersey/ Camden Vicinage.

On June 24, 2010 a true and correct copy of the Motion to Dismiss Plaintiff's Complaint on behalf of the Defendants, Patrolman Carmen Hernandez and Patrolman Jason Spera, Jointly, Severally, or in the Alternative was delivered via CM/ECF to:

Baher Azmy, Esquire
Mark Noferi, Esquire
L. Danielle Tully, Esquire
Seton Hall School of Law
Center for Social Justice
833 McCarter Highway
Newark, New Jersey 07102

~ and ~

R. Scott Thompson, Esquire
Scott L. Walker, Esquire
Natalie J. Kraner, Esquire
Heather C. Bishop, Esquire
Lowenstein Sandler PC
65 Livingston Avenue
Roseland, New Jersey 07068

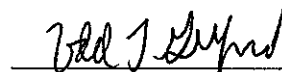
I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Respectfully Submitted:

BARKER, SCOTT & GELFAND
a Professional Corporation

Dated: 6/23/2010

By:



Todd J. Gelfand, Esquire