

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

JUAN BARRERA, JOSE CABRERA,	:	
DANIEL CHAVEZ, JOSE DUMA,	:	
JOSE LLIBISUPA, ISAAC	:	
MALDONADO, EDGAR REDROVAN,	:	
NICHOLAS SEGUNDO SANCHEZ,	:	
JUAN CARLOS SIMBANA, and	:	CIVIL ACTION NO. 3:07cv01436(RNC)
DANILO BRITO VARGAS	:	
	:	
Plaintiffs,	:	
	:	
V.	:	FEBRUARY 1, 2008
	:	
MARK BOUGHTON, ALAN BAKER,	:	
JOSE AGOSTO, RICHARD DEJESUS,	:	
JAMES FISHER, JAMES LALLI,	:	
CRAIG MARTIN, JOSEPH NORKUS,	:	
JOHN DOES, CITY OF DANBURY,	:	
RONALD PREBLE, RICHARD	:	
McCAFFREY, JAMES BROWN, JOHN	:	
DOES and USA	:	
	:	
Defendants.	:	

DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO DISMISS

The undersigned Defendants, Mark Boughton (Mayor of the City of Danbury), Alan Baker (Chief of Police of the Danbury Police Department), Jose Agosto, Richard DeJesus, James A. Fisher, James Lalli, Craig Martin, Joseph Norkus (current or former Danbury police personnel) and John Does 1-8 (Danbury police officers who have not been identified),

(hereinafter referred to as the “Defendants”), hereby file this Memorandum of Law in Support of their Motion to Dismiss the state law claims alleged in Claims for Relief Number 3-5 and 19, as well as Claim for Relief number 16 as it relates to these Defendants, of the plaintiffs’ Amended Complaint dated November 26, 2007, pursuant to Fed. R. Civ. P. 12 (b)(6), for failure to state a claim upon which relief may be granted because the plaintiffs have not stated a valid cause of action as to these Claims for Relief. In support of this motion, the Defendants state as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND

According to the Amended Complaint, eleven day-laborers were arrested on September 19, 2006 in connection with an undercover immigration sting operation at Kennedy Park in Danbury. (Amended Complaint at ¶ 61). Nine of the eleven arrestees have become the plaintiffs in the present case. (*Id.*) The plaintiffs allege that they were arrested by officers of Danbury’s Police Department (the “DPD officers”) and then transferred to the custody of Immigration and Customs Enforcement (“ICE”). (*Id.* at ¶ 112). They further allege that ICE agents then transported the plaintiffs to various detention centers located in Massachusetts and Texas. (*Id.* at ¶ 116, 134-36).

In their twenty-four (24) Claims for Relief, the plaintiffs allege that they were unlawfully arrested and illegally detained in violation of their constitutional rights under the First, Fourth and Fourteenth Amendments of the U.S. Constitution, as well as §§ 4, 7-9, 14 and 20 of Article First of the Connecticut Constitution. In connection with the September 19, 2006 arrests, the

plaintiffs filed their initial complaint on September 26, 2007, and an Amended Complaint on November 26, 2007.

The Amended Complaint is replete with references to defendant Mayor Boughton's alleged implementation of discriminatory immigration policies, and, with the help of the defendant DPD officers, the enforcement of those policies, which targeted day-laborers on the basis of their race, ethnicity and perceived national origin, in an effort to encourage Ecuadorian immigrants to leave the City of Danbury. (See, e.g., Amended Compl. at ¶¶ 33-34, 37, 48-49, 110). On January 3, 2008, the court (Chatigny, J.), granted the Defendants permission to file this Motion to Dismiss, without the need for a pre-filing conference on the issue.

The plaintiffs' state law claims in the THIRD and NINETEENTH Claims for Relief allege that they were racially discriminated against as a result of having been made targets of an illegal immigration sting operation, in violation of § 20 of Article First of the Connecticut Constitution, and consequently were deprived of equal protection of the law. (Amended Compl. at ¶¶ 184, 186, 290-92). The state law claims in the FOURTH Claim for Relief allege that the defendant DPD officers violated the plaintiffs' rights to freedom of speech and to peaceably assemble in violation of §§ 4 and 14 of Article First of the Connecticut Constitution. (*Id.* at 189-90). The state law claims in the FIFTH Claim for Relief allege that the plaintiffs' arrests constituted a deprivation of liberty that was without due process of law, in violation of § 8 of Article First of the Connecticut Constitution. Finally, the SIXTEENTH Claim for Relief seeks to

bring an action under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), based on the alleged conspiracy between the federal agents of the Hartford Fugitive Operations Team (the “HARFOT officers”) and the DPD officers to violate the plaintiffs’ constitutional rights.

In all five of these Claims for Relief, the plaintiffs allege they are entitled to damages as a result of the “violations of their Constitutional rights, loss of liberty, harms to their reputations and professional prospects, monetary damages, and emotional distress.” (Amended Complaint at ¶¶ 187, 191, 194, 258 and 293).

II. LAW AND ARGUMENT

A. Motion to Dismiss Standard

A Court may dismiss a complaint pursuant to Fed. R. Civ. P. 12 (b)(6) “only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” D’Alessio v. New York Stock Exchange, Inc., 258 F.3d 93, 99 (2d Cir. 2001) (internal citations and quotations omitted). “The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.” County of Suffolk v. First. Am. Real Estate Solutions, 261 F.3d 179, 187 (2d Cir. 2001) (internal citations and quotations omitted).

“When considering a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12 (b)(6), the Court must accept all allegations in the complaint as true and draw all inferences in

the non-moving party's favor." Wilson v. Midway Games, Inc. 198 F. Supp.2d 167, 170 (D. Conn. 2002) (citations omitted). "The case will not be dismissed unless the Court is satisfied that the complaint cannot state any set of facts that would entitle the plaintiff to relief. However, because bald assertions and conclusions of law will not suffice to state a claim, the Court need not accept averments which are legal conclusions unsupported by the facts alleged elsewhere in the complaint." Id. at 170-71 (internal citations and quotations omitted).

B. The plaintiffs' THIRD and NINETEENTH Claims for Relief fail to state a cause of action as Connecticut has not recognized a direct cause of action under Article First, § 20 of the Connecticut Constitution.

The state law claims in the plaintiffs' THIRD and NINETEENTH Claims for Relief allege that the defendant DPD officers violated their rights under § 20 of Article First of the Connecticut Constitution. Section 20 provides: "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his civil or political rights because of religion, race, color, ancestry or national origin." Conn. Const. art. 1, § 20. More specifically, in their THIRD Claim for Relief the plaintiffs allege that they were intentionally targeted on the basis of race for an immigration sting operation "out of a malicious and bad faith intent to drive [the plaintiffs] out of the City of Danbury." (Amended Compl. at ¶¶ 184, 186). The NINETEENTH Claim for Relief, which was brought only by plaintiff Danilo Vargas, alleges that the DPD officers (John Does 6-8), in a pretextual traffic-

stop, intentionally treated Vargas differently from other drivers similarly situated and without any rational basis, in violation of his right to equal protection of the law. (*Id.* at ¶¶ 290-92).

These claims must be dismissed, because Connecticut has not recognized a direct cause of action for a violation of Article First, § 20 of the Connecticut Constitution. The plaintiffs appear to rely on Binette v. Sabo, 244 Conn. 23 (1998), presumably in support of their cause of action for a violation of § 20 of Article First of the Connecticut Constitution. In that case, the court specifically recognized a private cause of action for money damages for violations of §§ 7 and 9 of Article First of the Connecticut Constitution,¹ based on an alleged unreasonable search and seizure and unlawful arrest by defendant municipal police officers. *Id.* at 49-50.

However, nowhere in Binette does the court extend a direct cause of action for a violation of any other sections of the Connecticut Constitution. Furthermore, no other case in Connecticut has extended Binette's holding to include a direct cause of action for a violation of Article First, § 20. The Binette court held that "[w]hether to recognize a cause of action for alleged violations of other state constitutional provisions in the future must be determined on a case-by-case basis." Binette v. Sabo, *supra*, 244 Conn. at 48. Our Connecticut Supreme Court

¹Section 7 provides: "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation." Conn. Const. art. 1, § 7. Section 9 provides: "No person shall be arrested, detained or punished, except in cases clearly warranted by law." Conn. Const. art. 1, § 9.

has not recognized a direct cause of action for a violation of Article First, § 20 of the Connecticut Constitution, as it has for §§ 7 and 9. Therefore, the plaintiffs' state law claims should be dismissed, because they have not stated a valid cause of action.

C. The plaintiffs' Fourth Claim for Relief fails to state a valid cause of action because Sections 4 and 14 of Article First of the Connecticut Constitution only applies to citizens.

In their FOURTH Claim for Relief, the plaintiffs allege that, without probable cause to believe that the plaintiffs were in violation of any immigration laws, the DPD officers, including John Does 1-5, "knowingly and intentionally stopped, detained, investigated, and arrested [them] in retaliation for their exercise of protected speech and association in a public forum." (Amended Compl. at ¶¶ 189-190). As part of their state law claims, the plaintiffs allege that such conduct occurred in violation of their constitutional rights under §§ 4 and 14 of Article First of the Connecticut Constitution. These claims should be dismissed, because the plaintiffs are not protected under these sections of the Connecticut Constitution, and have therefore failed to state a valid cause of action.

Article First, Section 4 of our state constitution provides: "Every *citizen* may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty." Article First, Section 14 of our state constitution provides: "The *citizens* have a right, in a peaceable manner, to assemble for their common good, and to apply to those invested with the powers of government, for redress of grievances, or other proper purposes, by petition,

address or remonstrance.” Conn. Const., art. 1, §§ 4, 14 (emphasis added). Both of these sections *expressly* provide for the rights to be conferred upon *citizens* of the United States. No where in the Amended Complaint is it alleged that any of the plaintiffs are citizens of the United States or the State of Connecticut. Thus the constitutional protections offered in Article First, §§ 4 and 14 do not apply to these plaintiffs. See State v. Sinchuk, 96 Conn. 605, 610-615 (1921); Benjamin v. Bailey, 234 Conn. 455, 464 n.6 (1995). Therefore, the plaintiffs’ state law claims in their FOURTH Claim for Relief should be dismissed, as the plaintiffs have failed to state a valid cause of action.

D. The plaintiffs’ FIFTH Claim for Relief fails to state a cause of action as Connecticut does not recognize a cause of action for a violation of Article First, § 8 of the Connecticut Constitution.

In their FIFTH Claim for Relief, the plaintiffs’ state law claim is that the defendant DPD officers, including John Does 1-5, arrested them and “deprived them of their . . . liberty in a manner that was without due process of law and fundamentally unfair” in violation of § 8 of Article First of the Connecticut Constitution. (Amended Compl. at ¶ 193).

Article First, § 8, of the Connecticut constitution provides in relevant part: “No person shall be . . . deprived of life, liberty or property without due process of law” Our Supreme Court has expressly refused to recognize a private cause of action for damages pursuant to a violation of this particular constitutional provision. See ATC Partnership v. Town of Windham, 251 Conn. 597, 612-17 (1999), cert. denied, 530 U.S. 1214, 120 S. Ct. 2217, 147 L.Ed.2d 249

(2000); Kelley Property Development, Inc. v. Lebanon, 226 Conn. 314, 330-331 (1993).

Therefore, the plaintiffs' state law claim should be dismissed for failure to state a valid cause of action.

E. The plaintiffs' SIXTEENTH Claim for Relief fails to state a valid cause of action as Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics is inapplicable to the DPD officers.

In their SIXTEENTH Claim for Relief the plaintiffs allege a cause of action for conspiracy against the defendant HARFOT officers and the DPD officers under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, supra. In support of their claim, the plaintiffs allege that the "HARFOT Officers and DPD officers entered into an agreement, between and amongst themselves, to act in concert to inflict an unconstitutional injury on the Day-Laborer plaintiffs. . . . The conspiracy included . . . an agreement to arrest and detain Day-Laborer plaintiffs in violation of their various rights" (Amended Compl. at ¶ 255).

The Bivens court held that a violation of a person's Fourth Amendment rights by a federal agent, acting under color of his authority, would give rise to a cause of action for damages. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, supra, 403 U.S. at 397. "[A] Bivens action is the federal analog to suits brought against state officials under . . . 42 U.S.C. § 1983. . . . Section 1983 applies . . . to state and local officers, [and] the Supreme Court in Bivens . . . inferred a parallel damages action against federal officers." Hartman v. Moore, 547 U.S. 250, 255 n.2 (2006) (citations omitted; internal quotation marks

omitted). Because the undersigned Defendants of this Motion to Dismiss (the DPD officers) are state officials, the plaintiffs have not stated a valid cause of action under Bivens as to them.

Therefore, the portion of the plaintiffs' SIXTEENTH Claim for Relief that refers to the DPD officers should be dismissed.

III. CONCLUSION

For the above stated reasons, the Defendants, Mark Boughton, Alan Baker, Jose Agosto, Richard DeJesus, James A. Fisher, James Lalli, Craig Martin, Joseph Norkus and John Does 1-8 , respectfully request this court to grant their motion to dismiss.

THE DEFENDANTS,
MARK BOUGHTON, ALAN BAKER, JOSE
AGOSTO, RICHARD DEJESUS, JAMES
FISHER, JAMES LALLI, CRAIG MARTIN,
JOSEPH NORKUS, JOHN DOES

By: _____/s/
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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2008, a copy of the above was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

_____/s/_____
Charles A. Deluca, Esq.

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