UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

STEVEN AVERY,
Plaintiff,

v.

Case No. 12-C-193

MANITOWOC COUNTY, ET Al.,
Defendants.

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

Steven Avery #122987

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COMES NOW the plaintiff, Steven Avery, *pro se* and respectfully submits to this Honorable Court this brief in support of his motion for summary judgment.

STATEMENT OF THE CASE

1. In November of 2005 Teresa Halbach ("Halbach") was reported missing by her family. She had been reported to have done a photo shoot for Avery on October 31st, 2005. The investigation quickly centered on Avery.

2. On November 6th, 2005 a fourth entry into Avery's home occurred, incident to a search warrant. Local law enforcement collected evidence while searching all areas of the Avery's home over four days. In this search the Wisconsin State Crime Lab ("Lab") from Madison also engaged in the investigation, using collection methods beyond that of local law enforcement. See Plaintiff's Exhibit 1, pages 12-13. The Lab did not uncover any evidence of the presence of Halbach.

3. In November 2005 investigators questioned Brendan Dassey ("Dassey") Avery's nephew and a minor, concerning his knowledge of the murder and sexual assault of Halbach. He stated that he was unaware of any such murder or sexual assault.

4. On February 27th, 2006 investigators again questioned Dassey. See Plaintiff's Exhibit 2. This interrogation occurred at Dassey's school and without his mother present. This time, after some leading questions, Dassey made a statement that he was aware that Halbach was murdered by Avery. However, he made no statement that he had participated in a sexual assault of Halbach.

5. On March 1st, 2006 Brendan Dassey made another statement that was markedly different from the one made on February 27th.

6. Immediately after the questioning, defendant Baldwin presented an "AFFIDAVIT FOR SEARCH WARRANT" (Plaintiff's Exhibit 3) to defendant Kratz of the Calumet County District Attorney's office. Defendant Kratz notarized the document. Probable cause was based on a statement made by Dassey (identified as "B.R.D."). Information concerning the November, 2005 and February 27th, 2006 statement by Dassey was not presented within the four corners of the affidavit.

7. Defendant Baldwin then obtained a "SEARCH WARRANT" (Plaintiff's Exhibit 4) from Manitowoc County Circuit Court Judge Patrick Willis for numerous items from Avery's residence and garage. The warrant was then executed on 12932 Avery Road in the Town of Gibson, County of Manitowoc, Wisconsin.

8. The warrant was executed and several items were taken from Avery's property. Also, Avery's residence was damaged significantly, leaving Avery in debt to his landlord to repair or replace the damaged items.

9. On March 3rd, 2006 defendant Baldwin submitted a "RETURN OF SEARCH WARRANT" (Plaintiff's Exhibit 5) for forty-three items taken from Avery's residence and garage.

10. In 2012 Avery filed a law suit under 42 U.S.C. § 1983 asserting claims from the unconstitutional search of his home and curtilage, seizure of his property, invasion of his privacy, and violation of his due process and equal protection rights by those acting under color of state law. Avery seeks damages as to all claims and declaratory relief. In addition to the constitutional harm imposed by the violations of his rights Avery also asserts that the property was damaged and he is entitled to relief for such damages.

11. On October 25th, 2012 defendants Zigmunt and Manitowoc County moved for dismissal before this court. Avery's response follows.

ARGUMENT

I. AVERY INCORPORATES THE ARGUMENTS HE MADE IN RESPONSE TO THE CALUMET COUNTY AND STATE DEFENDANTS IN THIS CASE

12. The other defendants in this case have moved for dismissal in this action. Avery has already responded to these requests for dismissal and incorporate those arguments by reference in this response.

II. DEFENDANT ZIGMUNT IS NOT ENTITLED TO ABSOLUTE IMMUNITY

13. Judges are absolutely immune from damage awards in civil rights cases for acts taken in their judicial capacities. ***Stump v. Sparkman***, 435 U.S. 349 (1978). Only if they act in the "clear absence of all jurisdiction" can they be held liable. ***Stump***, 435 U.S. at 356-57; see also ***Bradley v. Fisher***, 80 U.S. (13 Wall.) 335, 352 (1871) (probate court judge who tried a criminal case would act in the absence of all jurisdiction and lose immunity).

14. Judges are entitled only to qualified immunity for the performance of non-judicial (i.e., executive or administrative) functions. ***Forrester v. White***, 448 U.S. 219, 229-30 (1988). Judges are not absolutely immune from injunctive relief. ***Pullman v. Allen***, 466 U.S. 522, 541-43

(1984). Judges and courts are not immune from declaratory relief. ***Court of Virginia v. Consumers***, 446 U.S. 719 (1980). Judicial immunity extends to officials and employees who act under the direct orders of judges. ***Whitesel v. Sengenberger***, 222 F.3d 861, 867 (CA10 2000).

15. In the present case the violations that defendant Zigmunt contributed to do not leave her immune from declaratory relief. ***Court of Virginia v. Consumers***, 446 U.S. 719. Further, because, as defendant Zigmunt argues, she was acting merely as an arm of the court [cite] she has supported Avery's point that defendant Zigmunt's absolute immunity argument must fail. As noted above, Judges, and the clerks by extension, are not absolutely immune from executive or administrative functions. ***Forrester***, 448 U.S. at 229-30. Defendant Zigmunt's argument should be accepted by the court as an admission that she was acting in an executive or administrative capacity. Therefore she is not entitled to absolute immunity.

16. Defendant Zigmunt was responsible for the violation stated herein in that they was aware that the officers went outside the scope of the warrant and did nothing about it. Further, she should have noted that the return was dated seven days past the issuing date of the warrant, making the execution of the warrant illegal since the warrant had expired. Her awareness is evident in that she stamped the warrant and warrant's return.

17. The Defendants rely on Magistrate judge Goodstein's opinion in "*Avery v. Manitowoc, et al.* [sic] 12CV0052 (E.D. Wis.), Court's Docket, No. 42, p. 9" (Defendants' brief at p. 8), in arguing that a warrant is not a writ, and therefore not requiring a court seal. Avery has already filed notice that he will appeal the same ruling in ***Avery v. Kratz***, 2011CV1093. Particularly Avery is prepared to assert and will assert here that per Black's law dictionary a warrant most certainly is a writ. Black's defines warrant as: 1. A writ directing or authorizing someone to do an act, esp. one directing a law enforcer to make an arrest, a search, or a seizure." ***Id.*** at 1616.

Combined with the arguments already presented in response to the Calumet County defendants and incorporated herein supports that legal conclusion that a warrant is, as a matter of law, a writ.

III. DEFENDANT ZIGMUNT SHOULD NOT BE REMOVED FROM THIS SUIT

18. The failure to affix the seal on the warrant as required under Wis. Stat. § 753.30 (a) 1, which states in relevant part:

> ...the clerk or one of his or her deputies, shall issue all processes under the clerk's hand and the seal of the court and attest it in the name of the judge, signing it by the title of office, and shall tax costs...

As this portion of the statute shows it is the clerk or one of her deputies that was required to place a seal on the warrant at issue in the present case. The statute also notes that the clerk was required to sign the warrant, and Wis. Stat. § 753.04 also notes this, however Avery doesn't note this in his arguments.

19. Taking into account that defendant Zigmunt was required to do the administrative task of affixing the seal on the warrant she cannot be found to be free from culpability here. However, if affixing the seal is a ministerial act, thereby affording her the extension of defendant Willis' absolute immunity then Avery asserts that she is not immune from declaratory relief and should not be allowed to be removed from this suit.

IV. DEFENDANT MANITOWOC COUNTY SHOULD NOT BE REMOVED FROM THIS SUIT

20. It may be true that Manitowoc county has not been made aware of the requirement to train its personnel about the proper procedure in issuing a warrant by affixing a seal due to no earlier complaint. However, it is clear that the statutes require that all writs and processes be issued under hand and seal. Indeed, this court has expounded in great detail the importance of the use of seals. See ***Wolf v. Cook***, 40 F. 432 (E.D. Wis. 1889). Given that there has been either

a constitutional provision or statutory provision in this state since this Wisconsin became a state. Therefore, it is clear that Manitowoc County cannot claim that it didn't know that it had to train its personnel to affix seals nor can it claim that it wasn't responsible in part for the violations here by not checking the work of its clerk.

21. Plaintiffs who seek to impose liability on local governments under 42 U.S.C. § 1983 must prove that "action pursuant to official municipal policy" caused their injury. ***Monell v. Dep't of Soc. Servs.***, 436 U.S. 658, 691, 694 (1978). Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law. See ***ibid***; ***Pembaur v. City of Cincinnati***, 475 U.S. 469, 480-81 (1986); ***Adickes v. S. H. Kress & Co.***, 398 U.S. 144, 167-68 (1970). These are "action[s] for which the municipality is actually responsible." ***Pembaur***, 469 at 479-80.

22. An official policy may be demonstrated by even a single act, however, where the act represents "a particular course of action made by [a municipality's] authorized decisionmakers." ***Pembaur***, 475 U.S. 469. The complaint must set fourth specific facts and not mere conclusory allegations of such a policy or custom. ***Strauss v. City of Chicago***, 760 F.2d 765, 767-68 (CA7 1985).

23. Defendant the County of Calumet, through its policy maker/administrator, here the Clerk of Court defendant Zigmunt, was responsible for setting the policies and/or customs inside the municipality, oversight and training of its personnel, and is responsible for the violations herein as much as the County, through its agency and any other such related County agency.

24. A policy or custom must clearly be "the moving force of the constitutional violation." ***Polk County v. Dodson***, 454 U.S. 312, 326 (1981), and be "practices so persistent and widespread as to practically have the force of law."

25. An official policy may be demonstrated by even a single act, however, where the act represents "a particular course of action made by [a municipality's] authorized decisionmakers." ***Pembaur***, 475 U.S. 469. The complaint must set fourth specific facts and not mere conclusory allegations of such a policy or custom. ***Strauss v. City of Chicago***, 760 F.2d 765, 767-68 (CA7 1985).

26. Here the policy maker, defendant Zigmunt, openly argues that she had no requirement to place a seal of the court on the warrant. As a result the county's position is that it has a policy or custom that caused the plaintiff's rights to be violated. Therefore, they cannot be removed from this suit.

CONCLUSION

27. Wherefore, for the foregoing reasons, Avery requests that this Honorable Court deny the defendant's request to dismiss his claim.

Respectfully submitted this 8 day of November, 2012.

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CERTIFICATE OF SERVICE

I certify that on this day I served a copy of the within **PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS** on all defendants at the addresses listed below, by way of prepaid first class mail, pursuant to Rule 5(d), Federal Rules of Civil Procedure.

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Dated: 11-8-2012

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