

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

LEONARD JOHNSON

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v.

CASE NO. 4:23-cv-650

THE TOWN OF PROSPER, TEXAS, et. al.

TOWN OF PROSPER’S REPLY TO PLAINTIFF’S RESPONSE TO MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW **TOWN OF PROSPER, TEXAS**, one of three Defendants, and files its REPLY TO PLAINTIFF’S RESPONSE TO ITS MOTION TO DISMISS as follows:

I.

Plaintiff’s RESPONSE fails to any demonstrate viable claims against Town of Prosper

The Plaintiff’s sole claim against the Town of Prosper is purportedly founded on *Monell*, and more specifically, on the flawed premise that the Town Council directed Chief Kowalski to begin an investigation into the Plaintiff’s identity. The PLAINTIFF’S CONSOLIDATED RESPONSE IN OPPOSITION TO DEFENDANTS’ MOTIONS TO DISMISS (hereinafter “PLAINTIFF’S RESPONSE”)[Dkt. 16] ignores the clear fact that the Town Council did nothing to initiate or direct any investigation of the Plaintiff - it was reasonably requested by the victim [Town Councilmember Jeff Hodges]¹ of the fake email mimicking a Prosper public official. But not allowing facts to get in the way of pursuing his implausible *Monell* theory, Plaintiff tries to conjure up a claim where none exists by essentially contorting *Monell* into a strict liability theory. Plaintiff remains wrong about liability under *Monell* and dismissal of the Town of Prosper should follow.

¹See, Defendants Lt. Boothe and Chief Kowalski’s MOTION TO DISMISS [Dkt. 8], Ex. 5, p. 3 (describing Councilmember Hodges concerns)

II. Continued incorrect contentions about role of the Town

The Plaintiff's sole "factual" allegation [couched upon the nebulous "on information and belief"] against the Town of Prosper is as follows:

On information and belief, around this same time, the full Prosper Town Council met to discuss the issue of the identity of the person behind the "prospercitycouncil@gmail.com" email and concurred as a full body to direct PPD to initiate an investigation into the matter. Accordingly, the Prosper Town Council, acting as the final policymaker for the Town of Prosper, officially directed PPD Chief Kowalski to begin an investigation into Plaintiff's identity.²

Indisputably, Councilmember Jeff Hodges is the person who requested that the Police Department investigate this matter, not the Prosper Town Council as Plaintiff continues to incorrectly aver. Lt. Boothe clearly explained in his COMPLAINT setting out probable cause for the arrest of the Plaintiff that:

Further, Town of Prosper Councilman Hodges became concerned that someone could be using his identity to conduct nefarious acts that may include scams or misrepresentations that could potentially harm his reputation and/or the Town. At this time, **Town of Prosper Councilman Hodges requested that the Prosper Police Department conduct a full investigation** and expressed the desire to identify and prosecute the person representing himself as Town of Prosper Councilman Jeff Hodges to induce agents of the Town of Prosper and the Prosper Police Department to submit to the pretended authority of the requestor and cause the release of the requested information.³

Besides paragraph 38, there are no other "Factual Allegations" about or against the Town.⁴ Plaintiff's legal theories [not factual allegations] are set out in COUNT V "Municipal Liability U.S. Const. Amends. I, IV, XIV, and 42 U.S.C. §1983 (Town of Prosper)."⁵

²Plaintiff's COMPLAINT [Dkt. 1], paragraph IV(C)(38), p. 8 (emphasis added)

³See, Defendants Lt. Boothe and Chief Kowalski's MOTION TO DISMISS [Dkt. 8], Ex. 5, p. 3 (emphasis added)

⁴See, generally, Plaintiff's COMPLAINT [Dkt. 1], paragraph IV(A)-(D), p. 3-20

⁵Plaintiff's COMPLAINT [Dkt. 1] paragraphs V(137)-(145), p. 27-29

III.

No violation of any constitutional rights

As detailed LT. BOOTHE AND CHIEF KOWALSKI'S MOTION TO DISMISS [Dkt. 8], Plaintiff's constitutional rights were not violated. Thus, there is no liability on the Town of Prosper's part. Like the Plaintiff in *Luera v. Kleberg County, Tex*, 460 Fed. Appx. 447 (5th Cir 2012), Plaintiff herein cannot prevail against the Town of Prosper because probable cause existed for the Plaintiff's arrest for violation of Texas Penal Code §37.11, i.e. there was no constitutional deprivations of any kind, and thus there is no Section 1983 nor *Monell* liability.

Faced with these facts, Plaintiff engages in a circular and self-serving argument. Basically, Plaintiff believes that it is somehow unconstitutional on its face to investigate someone who has used a fake name to submit a Public Information Act request.⁶ Thus, according to Plaintiff, the mere initiation of an investigation⁷ in this instance is somehow sufficient to invoke *Monell* liability. Plaintiff remains wrong. There is no constitutionally impermissible policy of the Town of Prosper. Rote regurgitation of his allegations [which are now known to be wrong] will not thwart dismissal.

IV.

Plaintiff has not adequately plead nor could he establish under these facts any Section 1983 and *Monell* liability

It is beyond cavil that a governmental entity such as the Town of Prosper can be sued and subjected to monetary damages and injunctive relief under 42 U.S.C. §1983 only if its official policy or custom causes a person to be deprived of a federally protected right. *Monell v. New York City Department of Social Services*, 436 U.S. 658, 694 (1978). An isolated incident cannot be the basis for holding a City/Town liable.

⁶See, Plaintiff's RESPONSE [Dkt. 16], p. 43

⁷By making this argument the Town does not concede that its Council initiated the investigation. To the contrary, it denies same.

Despite this clearly established law, the Plaintiff believes he can prevail. But he cannot.

Plaintiff footnotes:

Plaintiff does not allege that the Town has a persistent widespread practice that rises to the level of an “official custom”. Town Mot. At 10-11. His municipal liability claim is predicated on the Town’s direct involvement with Plaintiff’s investigation and prosecution.⁸

In other words, Plaintiff points solely to his investigation and arrest and still flawed assertion that it was the product of Town Council action. Such does not suffice.

The existence of a constitutionally deficient policy cannot be inferred from a single wrongful act. *O’Quinn v. Manuel*, 773 F. 2d 605, 610 (5th Cir. 1985) (citing *City of Oklahoma v. Tuttle*, 471 U.S. 808, 105 S. Ct. 2427, 85 L.Ed. 2d 791 (1985); see also, *Tuttle*, 105 S. Ct. at 2436 (plurality opinion) “[W]here the policy relied upon is not itself unconstitutional, considerably more proof than the single incident [of unconstitutional conduct forming the basis of the section 1983 action] will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the ‘policy’ and the constitutional deprivation.” The existence of a constitutionally deficient policy cannot be inferred from a single wrongful act. *O’Quinn v. Manuel*, 773 F. 2d 605, 610 (5th Cir. 1985) (citing *City of Oklahoma v. Tuttle*, 471 U.S. 808, 105 S. Ct. 2427, 85 L.Ed. 2d 791 (1985); see also, *Tuttle*, 105 S. Ct. at 2436 (plurality opinion) “[W]here the policy relied upon is not itself unconstitutional, considerably more proof than the single incident [of unconstitutional conduct forming the basis of the section 1983 action] will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the ‘policy’ and the constitutional deprivation.”

Plaintiff was required to come forward with more than mere allegations establishing that his purported constitutional deprivations were caused by the application of an official policy, custom

⁸See, Plaintiff’s RESPONSE [Dkt. 16], p. 42, fn. 18

or practice of the Town of Prosper. Plaintiff's COMPLAINT fails woefully in this regard and does not even allege more than an isolated violation of his own constitutional rights,⁹ assuming arguendo that they were even violated¹⁰; this is insufficient to establish a custom or policy of the Town of Prosper. Accordingly, because the Plaintiff fails to sufficiently allege that Town of Prosper maintained an unconstitutional policy, custom, or practice necessary to establish *Monell* liability, he has failed to properly state a claim which is capable of surviving Rule 12(b)(6) dismissal.

Moreover, while the Town certainly does not concede that Plaintiff has adequately plead the first two *Monell* prongs, it is the third prong where Plaintiff's claims are most obviously implausible. A meaningful discussion of the concept of "moving force" is completely absent from the Plaintiff's lawsuit¹¹ and the word "moving force" literally appears just once in Plaintiff's entire COMPLAINT, and even then, in the most conclusory of manner.¹² Plaintiff's RESPONSE counters that he only needs to show that an official policy or custom was a "cause in fact of the deprivation of rights inflicted" [citing cases].¹³ According to the Plaintiff, a single incident of unconstitutional conduct is enough. It is not.

**V.
Plaintiff's Ratification Theory fails**

Plaintiff writes "Here, Plaintiff alleged the Prosper Town Council met and ratified the decision to investigate 'Geoff Hodges' in order to identify and prosecute the person behind the

⁹Plaintiff's COMPLAINT [Dkt. 1] paragraphs V(137)-(145), p. 27-29

¹⁰The Town does not concede and has shown above and through Lt. Boothe and Chief Kowalski's MOTION TO DISMISS that Plaintiff's constitutional rights were not violated.

¹¹Plaintiff's COMPLAINT [Dkt. 1] paragraphs V(137)-(145), p. 27-29

¹²Plaintiff's COMPLAINT [Dkt. 1] paragraphs V(143), p. 28-29

¹³Plaintiff's COMPLAINT [Dkt. 1], p. 44

lawful records requests.”¹⁴ But Plaintiff’s ratification theory falls flat.

Fifth Circuit precedent has limited the theory of ratification to "extreme factual situations." See *Snyder v. Trepagnier*, 142 F.3d 791, 798 (5th Cir. 1998) (refusing to find ratification in case in which officer shot fleeing suspect in the back); *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985) (finding ratification in case in which officers "poured" gunfire onto a truck and killed innocent occupant). This Court addressed, then rejected, ratification as a theory to impute liability in *Lugo v. Collin Cty.*, No. 4:11-CV-00057, 2011 WL 4378093, 2011 U.S. Dist. LEXIS 106681 at *48-49 (E.D. Tex. Aug. 2, 2011), writing:

Defendants argue that Plaintiffs' claims against the Clerk Defendants for ratification should be dismissed for failure to state a claim under Fed. R. Civ. Pro. 12(b)(6). Plaintiffs argue that Kunkle, Crigger, and Robertson may be liable on a theory of ratification of their subordinates actions. "If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality." *Peterson v. City of Fort Worth*, 588 F.3d 838, 848 (5th Cir. 2009) (quoting *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988)). The Fifth Circuit has limited liability on the theory of ratification to "extreme factual situations." *Peterson*, 588 F.3d at 848. In addition, a policymaker who defends conduct that is later shown to be unlawful does not necessarily incur liability. *Id.*; *Coon v. Ledbetter*, 780 F.2d 1158, 1161-62 (5th Cir. 1986).

The Court finds that Plaintiffs have not asserted facts sufficient to constitute a claim for ratification under 42 U.S.C. § 1983. In any event, had Plaintiffs' Complaint contained any factual allegation sufficient to support a claim of ratification, the circumstances are not considered an "extreme factual situation," which the Plaintiffs do not argue, sufficient to impose liability on Kunkle, Crigger, or Robertson. Accordingly, the Court finds that Plaintiffs' claims for ratification should be dismissed.

Like the Plaintiffs in *Snyder*, *Grandstaff*, and *Lugo*, Plaintiff herein cannot survive dismissal by merely parroting the term “ratification” in hopes his *Monell* claims will pass muster. They do not. There are not plausible non-conclusory factual allegations that would convert this situation into the “extreme factual situation” for which ratification would apply.

¹⁴See, Plaintiff’s RESPONSE [Dkt. 16], p. 43

**VI.
PRAYER**

WHEREFORE, PREMISES CONSIDERED, Defendant the **TOWN OF PROSPER,** prays that the Court grant its MOTION TO DISMISS; that it dismiss the Plaintiff's claims and pleas for damages, and that the Town have such other relief, at law or in equity, to which it may show itself justly entitled.

Respectfully submitted,

By: /s/ Robert J. Davis

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2023, I electronically filed the foregoing document with the clerk of the Court for the Eastern District, using the electronic case filing system of the Court. The electronic case filing system sent a "Notice of Electronic Filing" to the following attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means: Thomas S. Leatherbury and Peter B. Steffensen.

/s/ Robert J. Davis

ROBERT J. DAVIS