

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Wiley Y. Daniel

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

JAN 23 2001

JAMES R. MANSPEAKER
CLERK

Civil Action No. 00 - D - 1285

JESSICA GONZALES, individually and as next best friend of her deceased minor children REBECCA GONZALES, KATHERYN GONZALES and LESLIE GONZALES,

Plaintiff,

v.

CITY OF CASTLE ROCK, and AARON AHLFINGER, R.S. BRING, and MARC RUISI,
Officers of the City of Castle Rock Police Department,

Defendants.

ORDER

THIS MATTER is before the Court on Defendants' Motion to Dismiss filed August 7, 2000. The Motion urges that the causes of action contained in the Complaint fail to state claims upon which relief can be granted. I held a hearing on this Motion on Thursday, January 4, 2001 and took the matter under advisement.

FACTUAL BACKGROUND

Plaintiff Jessica Gonzales is the mother of deceased minor children Rebecca, Katheryn and Leslie Gonzales. In May 1999 Plaintiff obtained a temporary restraining order ("TRO") against her estranged husband, Simon Gonzales, which prevented him from molesting or disturbing the peace of Plaintiff or her three children. The TRO was served on Simon and, by stipulation, was made permanent as of June 4, 1999. The permanent order provided Simon with certain "parenting time" with the children, which included a pre-arranged, advance notice mid-week dinner visit.

On Tuesday, June 22, 1999 Simon Gonzales abducted the three children from Plaintiff's home. No advance notice or arrangements were made for Simon to have "parenting time" with the children that evening. Plaintiff called the Castle Rock Police Department for assistance at approximately 7:30 p.m. Two police officers, Defendants Brink and Ruisi were dispatched to Plaintiff's home. She showed them the TRO, told them Simon had taken the children, and requested that the TRO be enforced. Brink and Ruisi told Plaintiff there was nothing that they could do, and suggested that Plaintiff contact the Police Department if the children were not home by 10:00 p.m.

At approximately 8:30 p.m., Plaintiff confirmed that Simon Gonzales had the children by contacting him on his cellular telephone. Simon told Plaintiff that he and the children were at Elitch Gardens amusement park in Denver. Plaintiff called the Police Department and requested that Brink have someone check for Simon or his vehicle at Elitch Gardens. Brink told the Plaintiff to wait until 10:00 p.m. At 10:10 p.m. Plaintiff again called the Police Department to report that her children had not been returned. She then went to Simon's apartment and called the Police Department. She was told to wait there for an officer, but none came. At approximately 12:50 a.m. Plaintiff went to the Police Station and filled out an incident report.

Over an eight hour period, Plaintiff repeatedly asked Defendants to enforce the TRO and retrieve the children. Defendants repeatedly told Plaintiff to wait and did nothing to enforce the TRO or locate the children. At approximately 3:20 a.m. on June 23, 1999, Simon drove to the Castle Rock police station and opened fire on the station

with a semi-automatic handgun. Police shot and killed Simon. The three girls were found murdered in the cab of Simon's truck.

SUMMARY OF COMPLAINT ALLEGATIONS

Plaintiff's Complaint alleges due process and 42 U.S.C. §1983 violations stemming from the alleged failure of Defendants City of Castle Rock and police officers in the Castle Rock Police Department to enforce the TRO against Simon. Plaintiff argues that the TRO created a property right under the Fourteenth Amendment, and in turn created a constitutional duty on behalf of Defendants to enforce the TRO. Plaintiff further argues that section 18-6-803.5(3) of the Colorado Revised Code required the Defendants to use "every reasonable means to enforce" the TRO and "arrest" or "seek a warrant for the arrest of" Simon Gonzales for his violations of the TRO. COLO. REV. STAT. § 18-6-803.5(3) (1999). Plaintiff alleges that Defendants failure to enforce the TRO constituted a denial of both her substantive and procedural due process rights pursuant to 42 U.S.C. §1983.

STANDARD OF REVIEW

In deciding a Motion to Dismiss, the court "must accept all the well-pleaded allegations as true and must construe them in the light most favorable to the plaintiff." David v. City and County of Denver, 101 F.3d 1344, 1352 (10th Cir. 1996), cert. denied, 118 S.Ct. 157 (1997) (quoting Gagan v. Norton, 35 F.3d 1473, 1474 n. 1 (10th Cir. 1994)). "A complaint may be dismissed pursuant to Fed.R.Civ.P. 12(b)(6) only 'if the plaintiff can prove no set of facts to support a claim for relief.'" Id. (quoting Jojoia v. Chavez, 54 F.3d 488, 490 (10th Cir. 1995)).

Defendants seek dismissal of the Complaint for failure to state a claim for relief pursuant to Rule 12(b)(6). The individual Defendants also seek dismissal arguing that they are entitled to qualified immunity; Castle Rock seeks dismissal arguing that Plaintiff has failed to allege facts sufficient to support a municipal liability claim.

DUE PROCESS CLAIMS

To sustain an action under 42 U.S.C. § 1983 a plaintiff must show (1) that the conduct complained of was committed by a person acting under color of state law and (2) that the conduct deprived the plaintiff of a constitutional right. See Blum v. Yaretsky, 457 U.S. 991, 1002 (1982). The parties do not dispute that Defendants were acting under color of state law. The issue is whether their conduct deprived Plaintiff of a constitutional right.

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. Plaintiff contends that § 14-10-108 of the Colorado Revised Statutes is the basis for a property interest which is protected by due process. Under § 14-10-108, a party to proceedings for dissolution of marriage may obtain a temporary order "[e]njoining a party from molesting or disturbing the peace of the other party or of any child." Plaintiff sought and obtained such an order in this case (the TRO). The TRO was made permanent and served on Simon Gonzales on June 4, 1999.

The means to enforce a TRO issued pursuant to § 14-10-108 is established by § 18-6-803.5(3) of the Colorado Revised Statutes which provides that

(a) Whenever a restraining order is issued, the protected person shall be provided with a copy of such order. A peace officer shall use every

reasonable means to enforce a restraining order. (b) A peace officer shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person when the peace officer has information amounting to probable cause that:

(I) The restrained person has violated or attempted to violate any provision of a restraining order; and (II) The restrained person has been properly served with a copy of the restraining order or the restrained person has received actual notice of the existence and substance of such order.

COLO. REV. STAT. § 18-6-803.5(3) (1999).

Even when there is a protectable property interest, the Due Process Clause does not generally confer an "affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." DeShaney v. Winnebago, 489 U.S. 189, 196 (1989)

Substantive Due Process

Substantive Due Process protects people from arbitrary and unreasonable action that deprives them of life, liberty or property. Plaintiff contends that the State,¹ by its inaction, arbitrarily deprived her of a property interest created by the TRO. The starting point for analyzing the validity of Plaintiff's substantive due process claim is DeShaney v. Winnebago, where the Supreme Court held that the Constitution only

imposes upon the State affirmative duties of care and protection with respect to particular individuals when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs.

Id. at 198 & 200. Even if the State knows of an individual's predicament or expresses intent to help an individual, its failure to protect does not violate substantive due

¹As used here, the term "State" refers generically to state and local governmental entities and their agents.