IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:23-cv-00219-BO-RJ

MONICA FAITH USSERY,

Plaintiff,

v.

HONORABLE ROY COOPER, in his official capacity as Governor of the State of North Carolina, HONORABLE ERIK A. HOOKS, in his individual and official capacity as Secretary of the North Carolina Department of Public Safety, LORRIN FREEMAN, in her individual and official capacity as Wake County District Attorney, CASSANDRA DECK-BROWN, in her individual and official capacity as Chief of Raleigh Police Department, DEDRIC BOND, in his individual and official capacity as City of Raleigh Police Department Captain, ROGER "CHIP" HAWYLEY, in his individual and official capacity as Chief of North Carolina State Capitol Police, MARTIN BROCK, in his individual and official capacity as Chief of the North Carolina General Assembly Police Department, DERICK PROCTOR, in his individual and official capacity as an officer of North Carolina State Capitol Police, TITO FINK, in his individual and official capacity as an officer of the North Carolina State Capitol Police, and The City of Raleigh,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS BY THE CITY OF RALEIGH

NOW COMES defendant, the City of Raleigh (hereinafter, the "City"),by and through undersigned counsel, and offers this Memorandum of Law in Support of its Motion to Dismiss.

NATURE OF THE CASE

Plaintiff commenced this action by filing a Complaint on April 21, 2023 [D.E. 1], and filed an Amended Complaint on May 1, 2023 [D.E. 11]. The Amended Complaint names as defendants

the City, City of Raleigh Police Chief, Cassandra Deck-Brown (retired) (hereinafter, "Chief Deck-Brown); City of Raleigh Police Captain, Dedrick Bond (retired) (hereinafter, "Captain Bond"); Governor, Roy Cooper; Wake County District Attorney, Lorrin Freeman; the Secretary of the North Carolina Department of Public Safety; and several officers of the North Carolina State Capitol Police and North Carolina General Assembly Police Department. The Amended Complaint contains purported claims pursuant to 42 U.S.C. § 1983 for alleged violations of Plaintiff's constitutional rights under the First and Fourteenth Amendments; and a claim that Defendants conspired to deprive her of her rights in violation of the North Carolina Constitution.

The Amended Complaint was served on the City on May 4, 2023. On May 24, 2023, the City filed its First Motion for Extension of Time seeking a thirty (30) day extension of time within which to answer or otherwise respond to the Amended Complaint. [D.E. 21.] The City's motion was granted by Text Order dated June 9, 2023. On June 11, 2023, undersigned counsel for the City's mother passed away. With the consent of Plaintiff's counsel, the City filed a Second Motion for Extension of Time seeking an additional seven (7) days within which to answer or otherwise respond to the Amended Complaint. [D.E. 27.]

For the reasons set forth herein, the City has filed a Motion to Dismiss Plaintiff's claims against the City. The City's Motion to Dismiss is ripe for adjudication and, as explained below, should be granted.

STATEMENT OF FACTS

The present action arises from Plaintiff's arrest on April 14, 2020. [Amnd. Compl., D.E. 11.] On that date, Plaintiff was participating in a public demonstration to protest various Executive Orders issued by North Carolina Governor, Roy Cooper, in response to the COVID-19 pandemic. [Id. ¶ 28.]

On March 27, 2020, Governor Cooper issued Executive Order No. 121 which ordered "all individuals currently in the State of North Carolina" to "stay at home" except for limited purposes provided in the order, and limited "mass gatherings" to groups of ten or fewer individuals when gathered in a "confined indoor or outdoor space." [Id. ¶ 28.] According to the Amended Complaint, sometime after noon, Captain Bond advised the crowd of demonstrators that they were in violation of the Governor's Executive Order and asked them to disburse. [Id. ¶ 34.] After issuing three (3) warnings, law enforcement officers began walking through the parking lot to disperse the crowd. [Id. ¶ 35.] Plaintiff was arrested by officers of the Raleigh Police Department (hereinafter, the "RPD"). [Id. ¶ 39.] Plaintiff was patted down by a female officer with the Wake County Sheriff's office before being transported to the Wake County Detention Facility by Defendant Derick Proctor and Defendant Tito Fink. [Id. ¶ 40.]

After processing Plaintiff at the Wake County Detention Center, Defendant Derick Proctor presented probable cause to a Wake County Magistrate, who found that probable cause existed to believe that Plaintiff had violated Executive Order 121 in violation of N.C.G.S. § 14-288.20(2). [Id. ¶ 41.] Plaintiff was detained for approximately one hour and ordered to appear in Wake County District Court on June 25, 2020. [Id. ¶ 42.] When Plaintiff was tried in Wake County District Court, she was found guilty of violating Executive Order 121 and of criminal trespass for remaining on the premise of 100 East Jones Street, Raleigh, North Carolina after being notified not to be there by RPD Captain Barnes. [Id. ¶ 60.] As a result, Plaintiff was fined $300 plus court costs. Id.

ARGUMENT

When considering a Rule 12(b)(6) motion to dismiss, the court must accept as true the facts alleged in the complaint and view them in a light most favorable to the plaintiff. Ostrzenski v.

Seigel, 177 F.3d 245, 1251 (4th Cir. 1999). However, the court "need not accept the legal conclusions drawn from the facts [nor] accept as true unwarranted inferences, unreasonable conclusions or arguments." Giarratano v. Johnson, 521 F.3d 298, 302 (4th Cir.2008) (quotations omitted). Further, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). Although "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations," a pleading that merely offers "labels and conclusions," or "a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555. Likewise, "a complaint [will not] suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancements.'" Iqbal, 556 U.S. at 678 (*quoting Twombly,* 550 U.S. at 557). Because the Amended Complaint offers no more than these in support of Plaintiff's claims against the City, these claims should be dismissed.

I. THE AMENDED COMPLAINT FAILS TO RAISE A PLAUSIBLE *MONELL* CLAIM AGAINST THE CITY.

The Amended Complaint argues that the City should be held liable to the Plaintiff pursuant to 42 U.S.C. § 1983 for violating Plaintiff's free speech and free assembly rights secured by the First Amendment, as well as Plaintiff's guarantees of due process and equal protection secured by the Fourteenth Amendment. [Amnd. Compl., D.E. 11 ¶¶ 107-166.] However, the Amended Complaint lacks sufficient factual material to support a plausible *Monell* claim against the City.

"[U]nder *Monell*, a municipality is liable only for its own illegal acts." Owens v. Baltimore City State's Attorney's Office, 767 F.3d 379, 402 (4th Cir. 2014), cert. denied, 575 U.S. 983 (2015) (citing *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978)). Liability is limited to those instances in which the municipal policy or custom itself causes a deprivation of constitutional rights. Holloman v. Markowski, 661 F. App'x 797, 800 (4th Cir. 2016) (*unpublished – copy*

attached), cert. denied, _ U.S. _, 137 S. Ct. 1342, 197 L. Ed. 2d 531 (2017) (citing *Monell*, 436 U.S. at 690-91). "[A] municipality cannot be held liable solely because it employs a tortfeasor – or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." Monell, 436 U.S. at 691. Instead, the Supreme Court has admonished "that a municipality can be liable under § 1983 only where its policies are the moving force [behind] the constitutional violation." City of Canton, Ohio v. Harris, 489 U.S. 378, 389 (1989).

For a municipality to be liable under § 1983, a plaintiff must establish that local officials violated the plaintiff's constitutional rights by following an official policy or custom which caused the violation. Lytle v. Doyle, 326 F.3d 463, 471 (4th Cir. 2003). The Fourth Circuit has explained that a "policy or custom" manifests in four ways:

> (1) through an express policy, such as a written ordinance or regulation; (2) through the decisions of a person with final policymaking authority; (3) through an omission, such as a failure to properly train officers, that "manifest[s] deliberate indifference to the rights of citizens"; or (4) through a practice that is so "persistent and widespread" as to constitute a "custom or usage with the force of law."

Id. (quoting *Carter v. Morris*, 164 F.3d 215, 218 (4th Cir. 1999)).

Like any other claim, to survive a motion to dismiss, a complaint asserting a *Monell* claim must provide "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678. While the Amended Complaint includes the City among the defendants whom Plaintiff seeks to hold liable for her alleged unlawful arrest and prosecution, it contains no mention whatsoever of any official City policy which could have plausibly caused the alleged

constitutional violations.[1] Boilerplate allegations and generalized claims without "details about [the] policies and practices and how they are inadequate, inaccurate, or ineffective" are insufficient as a matter of law to establish a custom or practice claim under *Monell*. I.P. by Newsome v. Pierce, 5:19-CV-228-M, 2020 WL 1231809, at *6 (E.D.N.C. Mar. 9, 2020) (*unpublished – copy attached*); Lyles v. Prawdzik, No. PWG-15-1056, 2016 WL 3418847, at *5 (D. Md. June 22, 2016) (*unpublished – copy attached*); Barrett v. Board of Educ. of Johnston County, 13 F. Supp. 3d 502, 511 (E.D.N.C. April 9, 2014), affirmed, 590 F. App'x 208 (November 6, 2014) ("This is nothing more than a formulaic recitation of the legal standard for finding municipal liability under § 1983. The complaint offers no non-conclusory factual allegations . . .. Indeed, plaintiffs point to no particular policy at all.").

The Amended Complaint is likewise silent regarding the existence of "informal ad hoc policy choices or decisions of municipal officials authorized to make and implement municipal policy." Edwards v. City of Goldsboro, 178 F.3d 231, 244-45 (4th Cir. 1999) (quoting *Spell v. McDaniel*, 824 F.2d 1380, 1385 (4th Cir.1987)). Even if the Amended Complaint contained factual allegations sufficient to infer the existence of such informal policy choices or decisions, any such practices would not rise to the level of official policy or custom unless they were "so persistent and widespread as to practically have the force of law." Connick v. Thompson, 563 U.S. 51, 61 (2011). A claimant must point to a persistent and widespread practice by municipal officials with sufficient duration and frequency to establish the required elements—for both knowledge and failure to act. Holloman, 661 F. App'x at 797. "Proof of a single incident of unconstitutional

[1] The Amended Complaint also fails to identify any City official or employee who acted as a policy-maker. There is no mention of the City's Mayor, the City Council, or City Manager. In fact, the sole reference to Chief Deck-Brown is as the commanding officer of Captain Bond and all other RPD officers present at the protest on April 14, 2020. [Amnd. Compl., D.E. 11 ¶ 15.]

activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." City of Oklahoma City v. Tuttle, 471 U.S. 808, 823-24 (1985). By contrast, "where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident 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." Id. at 824. The Amended Complaint fails to allege any other instance in which any RPD officer violated the constitutional rights of any other individual.

"Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." Carter, 164 F.3d at 218. Further, "[a] close fit is required between the identified policy and the constitutional violation, and liability arises only if the policy or custom suffers such specific deficiency or deficiencies that make the specific violation almost bound to happen, sooner or later, rather than merely likely to happen in the long run." Id. The Amended Complaint's only support for City liability under *Monell* is Plaintiff's narrative of the acts of Captain Bond and other unidentified RPD officers on a single day.[2] [Amnd. Compl., D.E. 11 ¶¶ 33-36, 45, 81, 82, 85, 88-

[2] While the Amended Complaint contains allegations of unlawfully withheld video recordings, the allegations themselves reveal that the City was not responsible for any alleged failure to disclose body-camera footage or other *Brady* evidence to Plaintiff or her counsel. [Amnd. Compl., D.E. 11 ¶¶ 55, 59, 62-67.] The Amended Complaint asserts that the Wake County District Attorney, counsel for the opposing party in Plaintiff's criminal proceedings, had possession of the RPD's body- camera footage. [Id. ¶ 59.] Moreover, the Amended Complaint reveals that North Carolina law limits the City's authority to release its police body camera recordings unless ordered to do so by a Wake County Superior Court judge; and that the RPD released its recordings to Plaintiff's counsel when such an order was issued. [Id. ¶ 65-67.]

93.] In addition to lacking any allegation concerning the existence of a deficient City policy, the Amended Complaint also contains no facts showing that any such policy caused any deprivation of Plaintiff's rights. "Without such heft, the plaintiff's claims cannot establish a valid entitlement to relief, as facts that are merely consistent with a defendant's liability, fail to nudge claims across the line from conceivable to plausible." Nemet Chevrolet, Ltd., 591 F.3d at 256 (citations and punctuation omitted).

The Amended Complaint falls far short of the facts necessary to support the elements of any cognizable *Monell* claim against the City. While detailed factual allegations are not required, "the complaint must, however, plead sufficient facts to allow a court, drawing on judicial experience and common sense, to infer more than the mere possibility of misconduct." Nemet Chevrolet, Ltd., 591 F.3d at 256 (citations and punctuation omitted). Because the Amended Complaint lacks factual content giving rise to a plausible inference that the allegedly unconstitutional actions of any City employee were taken pursuant to official City custom or policy, Plaintiff's claims against the City must be dismissed. See Jackson v. Long, 102 F.3d 722, 731 (4th Cir. 1996) (affirming dismissal of claim against sheriff in his official capacity where complaint failed to allege "a Sheriff's Department regulation, policy, or practice that authorized any constitutionally proscribed action taken against [the plaintiff]"); Cochran v. Morris, 73 F.3d 1310, 1316 (4th Cir. 1996) (affirming dismissal upon frivolity review of claims based upon conclusory allegations against prison officials).

II. THE EXISTENCE OF ADEQUATE STATE LAW REMEDIES BARS PLAINTIFF'S DIRECT CLAIM UNDER THE STATE CONSTITUTION.

Count One of the Amended Complaint alleges that the Defendants engaged in a conspiracy that violated her rights under the North Carolina Constitution. [Amnd. Compl., D.E. 11 ¶¶ 72-106.] Direct claims for monetary relief under the North Carolina Constitution are commonly called

Corum claims. See Corum v. University of North Carolina, 330 N.C. 761, 413 S.E.2d 276, cert. denied sub nom. Durham v. Corum, 506 U.S. 985 (1992). While *Corum* recognized the possibility of direct action under the North Carolina Constitution against the state and its officials, it imposed important limits. "In *Corum,* our Supreme Court held that one whose state constitutional rights have been abridged has a direct claim under the appropriate constitutional provision. A claim is available, however, only in the absence of an adequate state remedy." Phillips v. Gray, 163 N.C. App. 52, 58, 592 S.E.2d 229, 233 (2004) (emphasis added), rev. denied, 358 N.C. 545, 599 S.E.2d 406 (2004). Although the *Corum* case involved claims against the State and its officials, its principles apply equally to claims against municipalities. Glenn-Robinson v. Acker, 140 N.C. App. 606, 631-632, 538 S.E.2d 601, 619 (2000), rev. denied, 353 N.C. 372, 547 S.E.2d 811 (2001). A plaintiff who has remedies available under State law cannot assert a *Corum* claim against a local government. Id.; Davis v. Town of Southern Pines, 116 N.C. App. 663, 675-676, 449 S.E.2d 240, 247-248 (1994), rev. denied, 339 N.C. 737, 454 S.E.2d 648 (1995) (summary judgment for town appropriate as State constitutional rights adequately protected by common law claim of false imprisonment). As in Wilkerson v. Duke Univ., "[b]ecause state law gives plaintiff the opportunity to present his claims and provides the possibility of relief under the circumstances, plaintiff's state constitutional claims must fail." Wilkerson v. Duke Univ., 229 N.C. App. 670, 676, 748 S.E.2d 154, 159 (2013).

Plaintiff herein alleges that the Defendants violated her North Carolina Constitutional rights by conspiring to arrest her [Amnd. Compl., D.E. 11 ¶ 95] before subjecting her to abuse of process and malicious prosecution [Id. ¶ 101]. Under North Carolina law, the claim of false imprisonment bars direct action under the State Constitution because the constitutional right to be free from restraint is the same interest protected by the common law tort. Rousselo v. Starling,

128 N.C. App. 439, 447, 495 S.E.2d 725, 731 (1998). The tort of malicious prosecution likewise provides an adequate remedy barring direct constitutional claims. Swick v. Wilde, 2012 WL 3780350, 31-32 (M.D.N.C. 2012) appeal dismissed and remanded, 2013 WL 3037515 (4th Cir. 2013)(malicious prosecution grants an adequate remedy barring a direct claim under the State Constitution) (*unpublished – copy attached*); DeBaun v. Kuszaj, 2013 WL 4007747, 7 (N.C. Ct. App. 2013) (claim of malicious prosecution bars direct cause of action under the State Constitution against either the [city] or [the city's officer] in his official capacity) (*unpublished – copy attached*).

Further, because these common law claims may also be brought against the individually named defendants in their individual capacities, Plaintiff has an additional source of adequate common law remedies. As the North Carolina Court of Appeals stated in *Rousselo*, "*Corum* did not hold that there had to be a remedy against the State of North Carolina in order to foreclose a direct constitutional claim. We agree . . . that the existence of an adequate alternate remedy is premised on whether there is a remedy available to plaintiff for the violation, not on whether there is a right to obtain that remedy from the State in a common law tort action." Rousselo, 128 N.C. App. at 448, 495 S.E.2d at 731 ; see also, Edwards v. City of Concord, 827 F.Supp.2d 517, 522-524 (M.D.N.C. 2011). In the present case, the Plaintiff had the option to assert common law claims against the individually named defendants. These claims, if meritorious, could have provided Plaintiff with an adequate state law remedy.

Plaintiff's potential claims against the individually named defendants in their individual capacities could have provided an adequate state law remedy even if Plaintiff would have been required to prove malice, corruption, or conduct outside the scope of employment in order to prevail. As the *Rousselo* court stated, "[w]e decline to hold that [plaintiff] has no adequate remedy

merely because the existing common law claim might require more of him." Rousselo, 128 N.C. App. at 448-449, 495 S.E.2d at 731-732; see also, Edwards v. City of Concord, 827 F.Supp.2d 517, 522-524 (M.D.N.C. 2011) ("plaintiff does not lack an adequate remedy merely because his burden of proof on his available claim may be different"); DeBaun, 2013 WL 4007747, 7 (N.C. Ct. App. 2013) ("The fact that plaintiff must overcome the affirmative defense of public officer immunity to succeed on his tort claims does not negate their adequacy as a channel through which plaintiff could seek relief").

Therefore, because there are common law claims that could have adequately protected Plaintiff's rights under the North Carolina Constitution, and companion claims against the individually named defendants in their individual capacities could have provided alternative sources of an adequate remedy, Plaintiff's direct claim under the North Carolina Constitution should be dismissed.

III. PLAINTIFF'S OFFICIAL CAPACITY CLAIMS ARE REDUNDANT AND SHOULD BE DISMISSED.

The purported claims against the City are also directed against Chief Deck-Brown and Captain Bond in their official capacities. An action against officers in their official capacities is simply another way of bringing suit against a municipal employer. Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989). Further, vicarious liability does not apply in actions brought under 42 U.S.C. § 1983. Monell v. Department of Social Services, 436 U.S. 658 (1978); Carter v. Morris, 164 F.3d 215, 218 (4th Cir. 1999). Thus, there is no difference between suing the individual defendants in their official capacities and suing the City itself. Will, 491 U.S. at 71. The Fourth Circuit has held that official capacity claims are essentially the same as claims against the entity, and should be dismissed as duplicative when the entity (such as the employing municipality) is also named as a defendant. See Love-Lane v. Martin, 355 F.3d 766, 783 (4th Cir. 2004). Judicial

economy and efficiency are best served by proceeding solely against the City. See Brissett v. Paul, 141 F.3d 1157, 1998 WL 195945 (4th Cir. 1998) (*unpublished – copy attached*); Newbrough v. Piedmont Regional Jail Authority, 822 F. Supp. 2d 558, 574 (E.D.N.C. 2011).

The same rule applies to Plaintiff's claim under the North Carolina Constitution. North Carolina state courts have held that when governmental employees are sued in their official capacities, "the claim is against the office the employee holds rather than the particular individual who occupies the office." May v. City of Durham, 136 N.C. App. 578, 584, 525 S.E.2d 223, 229 (2000) (citing *Kentucky v. Graham*, 473 U.S. 159 (1985)). "Therefore, in a suit where the plaintiff asserts a claim against a governmental entity, a suit against those individuals working in their official capacity for this governmental entity is redundant." Id. (citing *Moore v. City of Creedmoor*, 345 N.C. 356, 367, 481 S.E.2d 14, 21 (1997).

CONCLUSION

For the reasons set forth herein, the City respectfully requests that the Court grant its motion and dismiss Plaintiff's claims against the City in their entirety.

This the 5th day of July 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of July 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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And I hereby certify that I have mailed the document to the following non CM/ECF participants:

N/A

Respectfully submitted,

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