IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-40059

JOYCE ANN SMITH,

Plaintiff - Appellant

v.

CITY OF PRINCETON, TEXAS; ANNE ANGELL, doing business as First Choice Towing,

Defendants - Appellees

Appeal from the United States District Court for the Eastern District of Texas

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CLERK'S OFFICE:

Under 5TH CIR. R. 42.3, the appeal is dismissed as of June 18, 2018, for want of prosecution. The appellant failed to timely file record excerpts.

The brief also remains insufficient as noted in this court's letter dated June 18, 2018. If appellant moves to reopen the appeal, both record excerpts and a sufficient brief must accompany any motion to reopen this appeal.

Certified as a true copy and issued as the mandate on Jun 18, 2018

Attest: Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

LYLE W. CAYCE
Clerk of the United States Court of Appeals for the Fifth Circuit

Dawn Shulin
By: _____
Dawn M. Shulin, Deputy Clerk

ENTERED AT THE DIRECTION OF THE COURT

United States District Court

EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

JOYCE ANN SMITH	§	
	§	Civil Action No. 4:17-CV-85
v.	§	(Judge Mazzant/Judge Nowak)
	§	
CITY OF PRINCETON, TEXAS,	§	
ANNE ANGELL	§	

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Came on for consideration the report of the United States Magistrate Judge in this action, this matter having been heretofore referred to the Magistrate Judge pursuant to 28 U.S.C. § 636. On October 31, 2017, the report of the Magistrate Judge (Dkt. #67) was entered containing proposed findings of fact and recommendations that Defendant City of Princeton, Texas's Motion to Dismiss (Dkt. #48) and Motions to Strike Plaintiff's Third Amended Complaint (Dkts. #54, #57) each be granted, and Plaintiff Joyce Ann Smith's ("Smith") "Motion Judgment for A Matter of Law" (Dkt. #43) be denied. Further, the Magistrate Judge recommended that Smith's claims against Anne Angell and the City of Princeton Code Enforcement Department be dismissed pursuant to 28 U.S.C. § 1915. Having received the report and recommendation of the Magistrate Judge, having considered Smith's timely filed objections (Dkt. #68) and the City of Princeton's response thereto (Dkt. #69), and having conducted a de novo review, the Court is of the opinion that the Magistrate Judge's report (Dkt. #67) should be adopted.

BACKGROUND

The underlying facts are set out in further detail by the Magistrate Judge and need not be repeated here in their entirety. Accordingly, the Court sets forth only those facts pertinent to Smith's objections. Plaintiff Joyce Ann Smith lives in Princeton, Texas, in a neighborhood

Appendix A

governed by the Villa of Monte Carlo Homeowners Association ("HOA"). Smith asserts that in violation of the City of Princeton's ordinances and the Villa Monte Carlo's HOA regulations, the City of Princeton improperly labeled her vehicle as abandoned and instructed First Choice Towing, owned by Anne Angell, to tow it from her residence on August 24, 2016 (Dkt. #46 at pp. 2–3). Smith filed this lawsuit on February 3, 2017 (Dkt. #1). On February 9, 2017, the Court granted Smith leave to proceed *in forma pauperis* (Dkt. #3). Broadly construed, Smith claims that the actions of the City of Princeton and Anne Angell constitute violations of 42 U.S.C. § 1983, 18 U.S.C. § 1956, 18 U.S.C. § 242, Texas Penal Code § 31.03(a), and "Texas Vehicle Code 226581(1)(a) section 683.011 [and] section 683.012" (Dkt. #46 at pp. 2–3).

The City of Princeton filed its Motion to Dismiss Smith's original complaint on March 14, 2017 (Dkts. #10, #11). On March 23, 2017, "[t]o ensure clarity in the record and allow Plaintiff an adequate opportunity to plead her claims," the Court denied the City of Princeton's Motion to Dismiss as moot, and ordered Smith to file an amended complaint that "set forth each cause of action alleged by Plaintiff, specifically identify which causes of action are asserted against which Defendant, and specifically identify the factual basis for each claim" (Dkt. #14). Smith filed her First Amended Complaint on April 27, 2017 (Dkt. #24). Defendants City of Princeton and Angell filed Motions to Dismiss Smith's First Amended Complaint on May 15, 2017 (Dkt. #28) and May 18, 2017 (Dkt. #29), respectively. On June 8, 2017, the Magistrate Judge, for a second time, recommended the Court deny the Defendants' Motions to Dismiss and order Smith to file a second amended complaint. The Magistrate Judge's Report provided Smith with a clear, detailed roadmap to correct her pleading deficiencies (Dkt. #33). The Court fully adopted the Magistrate Judge's recommendation (Dkt. #44). On July 7, 2017, Smith filed her Motion for Judgment (Dkt. #43); to which the City of Princeton responded on July 24, 2017 (Dkt. #45). On July 31, 2017, Smith filed

her Second Amended Complaint (Dkt. #46), and on August 2, 2017, Smith filed additional attachments to such complaint (Dkt. #47). On August 10, 2017, the City of Princeton filed a Motion to Dismiss Smith's Second Amended Complaint, its third motion to dismiss (Dkt. #48). Smith subsequently filed a Third Amended Complaint, constituting her fourth attempt at pleading her best case (Dkt. #49), without moving for leave and outside of the deadlines delineated in the Scheduling Order (Dkt. #35) (the Parties' deadline to add parties was July 17, 2017, and Smith's deadline to file amended pleadings was July 28, 2017). On September 7, 2017, the City of Princeton filed a Motion to Strike Smith's Third Amended Complaint (Dkts. #54, #57). Smith filed her Response to the City of Princeton's Motion to Dismiss her Second Amended Complaint on September 21, 2017 (Dkt. #59).

On October 31, 2017, the Magistrate Judge entered a report and recommendation (Dkt. #67), recommending that the City of Princeton's Motion to Dismiss (Dkt. #48) and Motion to Strike Plaintiff's Third Amended Complaint (Dkts. #54, #57) each be granted,[1] and Smith's "Motion Judgment for A Matter of Law" (Dkt. #43) be denied. Further, the Magistrate Judge recommended that Smith's claims against Defendant Angell and the City of Princeton's Code Enforcement Department, to the extent asserted, be dismissed pursuant to § 1915. Smith filed objections to the report on November 14, 2017 (Dkt. #68). On November 28, 2017, the City of Princeton filed a response to Smith's objections (Dkt. #69).

OBJECTIONS

A party who files timely written objections to a magistrate judge's report and recommendation is entitled to a de novo review of those findings or recommendations to which the party specifically objects. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b)(2)-(3).

[1] Docket Numbers 54 and 57 appear to be identical.

Broadly construing her objections, Smith objects to each of the Magistrate Judge's ultimate recommendations (Dkt. #68). Specifically, Smith states that the City of Princeton's Motion to Strike should not be granted because: (1) "there is no motion to strike pleadings in the State of Texas" (Dkt. #68 at p. 2) (emphasis omitted); (2) the "motion to strike is untimely because it was made after answering the complaint" (Dkt. #68 at p. 2); and (3) the "City of Princeton Texas went into **default** because they failed to serve a[n] answer to this complaint on March 19, 2017" (Dkt. #68 at p. 2) (emphasis in original). Smith objects that her complaint should not be dismissed because: (1) "the statute of limitations should, in equity, be deemed tolled because Plaintiff could not have discovered the facts supporting this claim" (Dkt. #68 at p. 2); and (2) the "City of Princeton, Texas has a clear motive to engineer a cover-up because of being a conspirator in illegal towing from First Choice Towing that has NO TEXAS License to Tow, the Plaintiff[']s Vehicle in HOA" (Dkt. #68 at p. 3) (emphasis in original). Finally, Smith objects that her Motion for Judgment should not be denied because:

> The City of Princeton, Texas ha[s] no sufficient evidence to Support it[s] case. They have laws, municipal codes and ordinances, but they choose not to abide by them. First Choice Towing ha[s] no sufficient evidence to Support its case. The [S]tate of Texas ha[s] rules and regulations[,] but First Choice Towing [chose] not to abide by them. Never had a license to operate as a tower.

(Dkt. #68 at p. 7).

1. Motions to Strike

To begin, Smith objects that "there is no motion to strike pleadings in the State of Texas" (Dkt. #68 at p. 2). Smith is proceeding in federal court. Federal Rule of Civil Procedure 1 states "[t]hese [Federal Rules of Civil Procedure] govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81." Because Rule 81 is inapplicable to Smith's case, the instant lawsuit is not subject to Texas state procedure law, but

instead is governed by the Federal Rules of Civil Procedure. Accordingly, whether Smith may file her Third Amended Complaint or whether it should be stricken is governed by Federal Rules of Civil Procedure. The appropriate means by which the City of Princeton may object to the unauthorized filing of Smith's Third Amended Complaint is through filing a motion to strike. *See Klein v. Walker*, No. 1:14-CV-00509-RC-ZJH, 2016 WL 9245462, at *1 (E.D. Tex. Dec. 14, 2016), *aff'd,* No. 17-40052, 2017 WL 3879795 (5th Cir. Sept. 5, 2017) (Clark, J.); *see also United States v. Saul*, No. 5:09-CV-69, 2011 WL 13220641, at *1 (E.D. Tex. Dec. 2, 2011). As discussed in the Report and Recommendation, (pursuant to Federal Rules of Civil Procedure) Smith was not entitled to file her Third Amended Complaint without first obtaining the Court's leave or Defendants' consent; to date, Smith has failed to procure either. Therefore, this objection is overruled.

Smith objects that the "motion to strike is untimely because it was made after answering the complaint" (Dkt. #68 at p. 2). Smith offers no authority for this argument and the record does not support her contention. Smith filed her Third Amended Complaint on August 25, 2017 (Dkt. #49). Thirteen days later, on September 7, 2017, the City of Princeton moved to strike Smith's Third Amended Complaint (Dkt. #54). Even so, the Court is not constrained by any such deadlines because "the decision to grant or deny leave to amend a complaint lies within the sound discretion of the district court." *Little v. Liquid Air Corp.*, 952 F.2d 841, 846 (5th Cir. 1992), *on reh'g en banc,* 37 F.3d 1069 (5th Cir. 1994). Accordingly, this objection is also overruled.

Smith finally objects that the City of Princeton's Motions to Strike should not be granted because the "City of Princeton Texas went into **default** because they failed to serve an answer to this complaint on March 19, 2017" (Dkt. #68 at p. 2) (emphasis in original). Federal Rule of Civil Procedure 55 sets forth certain conditions under which default may be entered against a party, as

well as the procedure to seek the entry of default judgment. Under Rule 55, a default "occurs when a defendant has failed to plead or otherwise respond to the complaint within the time required by the Federal Rules." *N.Y. Life Ins. Co. v. Brown*, 84 F.3d 137, 141 (5th Cir. 1996); a*ccord* Fed. R. Civ. P. 55(a). The City of Princeton did not go "into default because they failed to serve an answer to this complaint on March 19, 2017" as Smith suggests. Smith initiated the lawsuit on February 3, 2017 (Dkt. #1). The City of Princeton filed a motion to dismiss Smith's complaint on March 14, 2017, prior to filing any answer (Dkt. #10). Accordingly, the City of Princeton has appeared by virtue of filing its Motion to Dismiss. It is well established that "[t]he filing of a motion to dismiss is normally considered to constitute an appearance." *Sun Bank of Ocala v. Pelican Homestead & Sav. Ass'n*, 874 F.2d 274, 277 (5th Cir. 1989); *see also Washington v. M. Hanna Const. Inc.*, 299 F. App'x 399, 400 (5th Cir. 2008). Because the City of Princeton has appeared in this case by filing its Motion to Dismiss (which such appearance was on file prior to Smith's instant mention of default), and has been actively defending the claims against it since the inception of this case, no default has occurred. *Spence v. Argent Mortg. Co., LLC*, No. 4:13CV512, 2014 WL 11486242, at *1 (E.D. Tex. May 27, 2014), *report and recommendation adopted,* No. 4:13CV512, 2014 WL 11486244 (E.D. Tex. Sept. 29, 2014); *see also Washington*, 299 F. App'x at 400. This objection is overruled.

2. Motion to Dismiss

Smith initially objects that her complaint should not be dismissed because: (1) "the statute of limitations should, in equity, be deemed tolled because Plaintiff could not have discovered the facts supporting this claim" (Dkt. #68 at p. 2). Nowhere in the Report and Recommendation does the Magistrate Judge recommend dismissing Smith's complaint as barred by the statute of

limitations (*See* Dkt. #67). The limitations period is irrelevant to the Magistrate Judge's recommendations. Accordingly, this objection is overruled.

Smith also objects that the "City of Princeton, Texas has a clear motive to engineer a cover-up because of being a conspirator in illegal towing from First Choice Towing that has NO TEXAS License to Tow, the Plaintiff[']s Vehicle in HOA" (Dkt. #68 at p. 3) (emphasis in original). Insofar as Smith intends by this statement to argue Angell is a state actor or conspired with state actors, her conclusory allegation fails. To state a claim under § 1983, Smith must allege that a person acting under color of state law deprived her of a right secured by the Constitution or the laws of the United States. *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49 (1999); *Augustine v. Doe*, 740 F.2d 322, 324-25 (5th Cir. 1984). Where a private citizen is alleged to have committed a § 1983 violation, such as Smith's allegations against Angell, Smith must offer proof that Angell is either a state actor or conspired with state actors. *Ferguson v. Dunn*, No. 1:16-CV-272, 2017 WL 3033338, at *3 (E.D. Tex. May 24, 2017), *report and recommendation adopted,* No. 1:16-CV-272, 2017 WL 3020931 (E.D. Tex. July 17, 2017) (citing *Priester v. Lowndes Cty.*, 354 F.3d 414, 420 (5th Cir. 2004)). Moreover, "[t]he Fifth Circuit has explained that specific facts must be pled when a conspiracy is alleged; mere conclusory allegations will not suffice." *Covarrubias v. Wallace*, 907 F. Supp. 2d 808, 819 (E.D. Tex. 2012) (citing *Hale v. Harney,* 786 F.2d 688, 690 (5th Cir. 1986)). "In pleading these specific facts, the Plaintiff must allege the operative facts of the alleged conspiracy." *Id.* (citing *Lynch v. Cannatella,* 810 F.2d 1363, 1369–70 (5th Cir. 1987)). "In addition, the Fifth Circuit has noted that 'charges as to such conspiracies must be based on substantial and affirmative allegations, and no mere gossamer web of conclusion or inference, as here, trifles light as air,' will suffice to sustain a claim of conspiracy." *Id.* (quoting *Crummer Company v. Du Pont,* 223 F.2d 238, 245 (5th Cir. 1955). Here, Smith fails to allege

Angell is a state actor or conspired with state actors and she fails to substantiate her claim of conspiracy beyond a conclusory allegation that one existed. Under Fifth Circuit precedent, this is insufficient and Smith's objection is without merit.

3. Motion for Judgment

Smith objects that the Magistrate Judge improperly recommended that her Motion for Judgment be denied because:

> The City of Princeton, Texas ha[s] no sufficient evidence to Support it[s] case. They have laws, municipal codes and ordinances, but they choose not to abide by them. First Choice Towing ha[s] no sufficient evidence to Support its case. The [S]tate of Texas ha[s] rules and regulations[,] but First Choice Towing [chose] not to abide by them. Never had a license to operate as a tower.

(Dkt. #68 at p. 7).

The Magistrate Judge broadly construed Smith's Motion for Judgment as a motion for judgment on the pleadings (Dkt. #67 at p. 15). "A motion for judgment on the pleadings pursuant to Rule 12(c), Fed.R.Civ.P. is designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts." *Rosa v. Morvant*, No. CIV.A. 9:06-CV-252, 2007 WL 3132613, at *1 (E.D. Tex. Oct. 23, 2007) (citing *Hebert Abstract v. Touchstone Properties, Ltd.*, 914 F.2d 74, 76 (5th Cir. 1990)). Thus, judgment in favor of Smith is appropriate under Rule 12(c) "only if there is no issue of material fact and if the pleadings show [Smith] is entitled to judgment as a matter of law." *Frost v. Martin*, No. CIV.A. 1:08-CV-65, 2009 WL 3063386, at *2 (E.D. Tex. Sept. 22, 2009) (citing *Voest–Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 891 (5th Cir.), *cert. denied*, 525 U.S. 1041 (1998). Smith's objection wholly fails to address the Magistrate Judge's finding that she is not entitled to judgment as a matter of law on her claims; instead, Smith focuses her objection on whether the City of Princeton has sufficient evidence to

"[s]upport it[s] case." Here, Smith has failed to state a plausible claim for relief against the City of Princeton or Angell, much less show that no issue of material fact exists, and therefore, her Motion for Judgment should be denied. In addition, the City of Princeton does not have a burden to "[s]upport it[s] case" as Smith suggests; rather Smith bears the burden of proof on the causes of action she has raised in this case. *Sam's Style Shop v. Cosmos Broad. Corp.*, 694 F.2d 998, 1003 (5th Cir. 1982) ("As a general proposition, of course, the plaintiff has the burden of proving all of the affirmative elements of its case."). This objection is similarly overruled.

CONCLUSION

Having considered Plaintiff Joyce Ann Smith's timely filed objections (Dkt. #68), the City of Princeton's response thereto (Dkt. #69), and having conducted a de novo review, the Court adopts the Magistrate Judge's report (Dkt. #67) as the findings and conclusions of the Court.

Accordingly, it is **ORDERED** that Defendant City of Princeton, Texas's Motion to Dismiss (Dkt. #48) and Motions to Strike Plaintiff's Third Amended Complaint (Dkts. #54, #57) are **GRANTED**, and Plaintiff Joyce Ann Smith's "Motion Judgment for A Matter of Law" (Dkt. #43) is **DENIED**. Plaintiff Joyce Ann Smith's claims against the City of Princeton, Anne Angell, and the City of Princeton's Code Enforcement Department are hereby **DISMISSED** pursuant to Rule 12(b)(6) and § 1915 for failure to state a claim.

All relief not previously granted is **DENIED**.

The Clerk is directed to **CLOSE** this civil action.

IT IS SO ORDERED.
SIGNED this 8th day of January, 2018.

AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

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

JOYCE ANN SMITH,	§	
	§	
Plaintiff,	§	CIVIL ACTION NO. 4:17-CV-85-ALM-CAN
	§	
v.	§	
	§	
CITY OF PRINCETON, TEXAS, and ANNE ANGELL,	§	
	§	
	§	
Defendants.	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Pending before the Court are Defendant City of Princeton, Texas's Motion to Dismiss [Dkt. 48] and Motion to Strike Plaintiff's Third Amended Complaint [Dkts. 54, 57], and Plaintiff's "Motion Judgment for A Matter of Law" (hereinafter, "Motion for Judgment") [Dkt. 43]. Having considered Defendant City of Princeton's Motion to Dismiss and Motion to Strike, Plaintiff's Motion for Judgment [Dkt 43], and all other relevant pleadings, the Court recommends that Defendant's Motion to Dismiss and Motion to Strike each be granted, and that Plaintiff's Motion for Judgment be denied.

BACKGROUND

Relevant Procedural History

Plaintiff initiated this lawsuit on February 3, 2017 [Dkt. 1]. The Court allowed Plaintiff to proceed *in forma pauperis* on February 9, 2017 [Dkt. 3]. On March 14, 2017, Defendant City of Princeton filed its Motion to Dismiss [Dkts. 10, 11]. On March 23, 2017, the Court ordered Plaintiff to file an amended complaint on or before April 28, 2017 [Dkt. 14]. Plaintiff filed her First Amended Complaint on April 27, 2017 [Dkt. 24]. Defendants City of Princeton and Anne

Angell filed Motions to Dismiss on May 15, 2017 [Dkt. 28] and May 18, 2017 [Dkt. 29], respectively. On July 18, 2017, per the Magistrate Judge's recommendation [Dkt. 33],[1] the Court denied the Defendants' Motions to Dismiss and ordered Plaintiff to file a second amended complaint on or before August 1, 2017 [Dkt. 44]. On July 7, 2017, Plaintiff filed her Motion for Judgment [Dkt. 43]; on July 24, 2017, the City of Princeton filed a response [Dkt. 45]. Plaintiff filed her Second Amended Complaint on July 31, 2017 [Dkt. 46], and filed additional attachments on August 2, 2017 [Dkt. 47]. On August 10, 2017, the City of Princeton filed a second motion to dismiss [Dkt. 48]. Without seeking leave and outside of the deadlines enumerated in the scheduling order [Dkt. 35],[2] Plaintiff subsequently filed a Third Amended Complaint [Dkt. 49]. On September 7, 2017, the City of Princeton filed its Motion to Strike Plaintiff's Third Amended Complaint [Dkts. 54, 57]. [3] On September 21, 2017, Plaintiff filed her Response to the Motion to Dismiss [Dkt. 59].

Relevant Factual History

Plaintiff lives in Princeton, Texas in a neighborhood governed by the Villa of Monte Carlo Homeowners Association. According to the allegations in Plaintiff's Second Amended Complaint, on August 24, 2016, First Choice Towing towed Plaintiff's car, a 1989 Chevrolet Cavalier, allegedly on orders from the City of Princeton, while the car was parked on the street in front of Plaintiff's home [Dkt. 46 at 2]. Broadly construing the allegations in her Response to the Motion to Dismiss,[4] Plaintiff asserts that in violation of municipal ordinances and the Villa Monte Carlo's HOA regulations, the City of Princeton improperly labeled her vehicle as

[1] The Report and Recommendation provided Plaintiff with a clear, detailed roadmap to correct her pleading deficiencies [Dkt. 33].
[2] The Parties' deadline to add parties was July 17, 2017, and Plaintiff's deadline to file amended pleadings was July 28, 2017. .
[3] It appears that Docket Numbers 54 and 57 are identical.
[4] These allegations found in Plaintiff's response to the Motion to Dismiss are not present in Plaintiff's Second Amended Complaint [Dkt. 46].

abandoned and instructed First Choice Towing to tow it from her residence, and that she was instructed to pay First Choice Towing in order to regain possession of her car [Dkt. 59]. Plaintiff asserts that the actions of the City of Princeton and Angell, as the owner of First Choice Towing, constitute violations of 42 U.S.C. § 1983, 18 U.S.C. § 1956,[5] 18 U.S.C. § 242;[6] Texas Penal Code §31.03(a);[7] and "Texas Vehicle Code 226581(1)(a) section 683.011 [and] section 683.012"[8] [Dkt. 46 at 2-3]. Plaintiff alleges that she is entitled to: (1) general damages in the amount of $1.5 million for her "Physical Stress Pain, Physical Suffering, Mental Anguish, Mental Cruelty and Mental Shock, Anxiety and Emotional Distress;" (2) $1.5 million in "Hedonic damages...that consist of the Loss of Enjoyment of Life in [her] Home and Neighborhood and 'City' of Princeton, Texas;" and (3) punitive damages in the amount of $7 million "that consist of misconduct and omitted liable of the City of Princeton, Texas" [Dkt. 46].

APPLICABLE LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6)

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The complaint must include more than labels and conclusions. A formulaic recitation of the elements of a cause of action will not do. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Instead, the complaint must set forth enough facts to state a claim for relief that is plausible on its face. *Id.* at 570. A claim is facially plausible when the plaintiff pleads facts that allow the court to draw the reasonable inference that

[5] 18 U.S.C. § 1956 criminalizes money laundering.
[6] 18 U.S.C. § 242 criminalizes civil rights violations by state actors.
[7] Texas Penal Code § 31.03(a) criminalizes theft.
[8] Broadly construing Plaintiff's pleadings, the Court surmises that Plaintiff intends to cite to provisions of the Texas Transportation Code that detail notice and other requirements for law enforcement taking abandoned motor vehicles into custody. Tex. Transp. Code §§ 683.011-.012.

the defendant is liable for the misconduct alleged. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1940 (2009)).

When ruling on a motion to dismiss, a judge must assume all allegations in the complaint are true. A "well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that recovery is very remote and unlikely.'" *Twombly*, 550 U.S. at 555 & 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). "Two working principles underlie . . . *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 555). "Second, only a complaint that states a plausible claim for relief survives a motion to dismiss." Id. at 1950 (citing *Twombly*, 550 U.S. at 556). "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

Section 1915

Pursuant to 28 U.S.C. § 1915(e)(2)(B)(i), a court is empowered to dismiss an *in forma pauperis* case if it finds that the action is "frivolous or malicious." Under § 1915(e)(2)(B)(i), "[a] complaint is frivolous if it lacks an arguable basis in law or fact." *Rogers v. Boatright*, 709 F.3d 403, 407 (5th Cir. 2013) (citing *Berry v. Brady*, 192 F.3d 504, 507 (5th Cir. 1999)). "A complaint lacks an arguable basis in law if it is based in an indisputably meritless legal theory, such as if the complaint alleges the violation of a legal interest which clearly does not exist." *Id.* "A complaint lacks an arguable basis in fact if, after providing the plaintiff the opportunity to present additional facts when necessary, the facts alleged are clearly baseless." *Id.* In addition to

dismissal for frivolousness, a court may also dismiss the suit for failure to state a claim upon which relief may be granted. 28 U.S.C. § 1915(e)(2)(B)(ii). Tracking the same language as Rule 12(b)(6) of the Federal Rules of Civil Procedure and applying the same standards, § 1915(e)(2)(B)(ii) provides for dismissal if, accepting plaintiff's factual allegations as true, it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations. *Hale v. King*, 642 F.3d 492, 497-99 (5th Cir. 2011). Although a *pro se* plaintiff's pleadings must be read more liberally than those filed by an attorney, the complaint must nonetheless allege sufficient facts to demonstrate to the court that the plaintiff has at least a colorable claim. *See Bustos v. Martini Club, Inc.*, 599 F.3d 458, 465–66 (5th Cir. 2010).

ANALYSIS

Motion to Strike

In its Motion to Strike Plaintiff's Third Amended Complaint, the City of Princeton argues that Plaintiff's Third Amended Complaint should be stricken because: (1) "Plaintiff did not file a Motion for Leave to File her Third Amended Pleading in accordance with CV-7(k);" (2) "it was filed after the July 28, 2017 deadline to do so set forth in the Court's Scheduling Order has expired;" and (3) "she has attempted at this late date to add additional parties therein without obtaining leave of court to do so even though the deadline to add additional parties expired on July 17, 2017" [Dkt. 57 at 4].

Federal Rule of Civil Procedure 15(a)(1) states that "[a] party may amend its pleading once as a matter of course within: (A) 21 days of serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." Rule 15(a)(2) provides that "[i]n all other cases, a party may amend its pleading only with the opposing party's written

consent or the court's leave." "The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). "Denial of leave to amend may be warranted for undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies, undue prejudice to the opposing party, or futility of a proposed amendment." *U.S. ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 270 (5th Cir. 2010). Plaintiff is not entitled to amend her pleading as a matter of course under Rule 15(a)(1)(A)-(B) and has not requested leave to amend her pleading as required by Rule 15(a)(2). "Plaintiff['s] *pro se* status does not excuse [her] from complying with federal statutes, rules of civil procedure, or local rules of court." *See Hassell v. United States,* 203 F.R.D. 241, 245 (N.D. Tex. 1999). *Perkins v. United States*, 314 F. Supp. 2d 664, 670 (E.D. Tex. 2004), *report and recommendation adopted,* No. 1:03-CV-1429, 2004 WL 1588082 (E.D. Tex. May 6, 2004). Plaintiff was specifically instructed to file a motion for leave to join additional parties (if needed) by July 17, 2017, and to file a motion for leave to amend her pleadings by July 28, 2017 [Dkt. 46]. Plaintiff failed to request leave and as is evidenced by the record, Plaintiff has been given numerous prior opportunities to plead her best case. On March 23, 2017, the Court ordered Plaintiff to file an amended complaint on or before April 28, 2017 and explicitly ordered Plaintiff to set forth in her amended pleadings "each cause of action alleged by Plaintiff, specifically identify which causes of action are asserted against which Defendant, and specifically identify the factual basis for each claim" [Dkt. 14]. On July 18, 2017, the Court again ordered Plaintiff to file another amended complaint. The Court specifically enumerated the deficiencies in Plaintiff's pleadings and permitted Plaintiff further opportunity to remedy each deficiency [Dkt. 44]. Plaintiff filed her Second Amended Complaint on July 31, 2017 [Dkt. 46], and filed additional attachments on August 2, 2017 [Dkt. 47]. Fifteen days following the filing of the instant Motion to Dismiss (the third filed by the City of

Princeton [Dkts. 11, 28, 48]) Plaintiff filed her Third Amended Complaint [Dkt. 49]. Plaintiff has not informed the Court of any compelling reason why she should be granted yet another opportunity to amend her pleadings. Furthermore, Plaintiff's Third Amended Complaint would be a futile amendment, as it still contains only "[t]hreadbare recitals of the elements of [] cause[s] of action, supported by mere conclusory statements," *Iqbal*, 129 S. Ct. at 1949, and still does not remedy the pleading deficiencies brought to Plaintiff's attention [Dkt. 49]. The City of Princeton's Motion to Strike Plaintiff's Third Amended Complaint should be granted [Dkts. 54, 57] and Plaintiff's Third Amended Complaint should be stricken [Dkt. 49].

Motion to Dismiss

Plaintiff alleges that Defendants Angell and the City of Princeton are liable under 42 U.S.C. § 1983; 18 U.S.C. § 1956; 18 U.S.C. § 242; Texas Penal Code § 31.03(a); and "Texas Vehicle Code 226581(1)(a) section 683.011 [and] section 683.012" [Dkt. 46 at 2-3]. Initially, the Court notes that Plaintiff is not entitled to relief under criminal statutes 18 U.S.C. § 1956, 18 U.S.C. § 242, or Texas Penal Code § 31.03(a). 18 U.S.C. § 1956 does not create a private cause of action, and therefore, Plaintiff is not entitled to relief against Defendants under this statute. *See de Pacheco v. Martinez*, 515 F. Supp. 2d 773, 787 (S.D. Tex. 2007) ("the Court notes that the federal courts have not recognized a private right of action for breach of § 1956, the money laundering statute). 18 U.S.C. § 242 does not create a private cause of action, and therefore, Plaintiff is not entitled to relief against Defendants under this statute. *See Gaynier v. Hudson*, No. 3:16-CV-2314-D-BK, 2017 WL 2348809, at *3 (N.D. Tex. Mar. 22, 2017), *report and recommendation adopted,* No. 3:16-CV-2314-D, 2017 WL 2335619 (N.D. Tex. May 30, 2017) ("Plaintiff has no private cause of action under 18 U.S.C. § 242, which criminalizes the deprivation of civil rights under the color of law." (citing *Pierre v. Guidry*, 75 F. App'x 300, 300

(5th Cir. 2003)); *see also Hebrew v. Houston Media Source, Inc.,* No. 09-CV-3274, 2010 WL 2944439, at *1, n. 2 (S.D. Tex. July 20, 2010), *aff'd sub nom. Hebrew v. Houston Media Source*, 453 F. App'x 479 (5th Cir. 2011) ("The court first notes that 18 U.S.C. § 242 is a criminal statute with no correlating civil cause of action" (citing *Parham v. Clinton,* No. 09–20681, 2010 WL 1141638, at *1 n. 1 (5th Cir. Mar.17, 2010)). The Texas Theft Liability Act ("TTLA") provides a private cause of action for victims of theft, as defined by the Texas Penal Code. Tex. Civ. Prac. & Rem. Code §§ 134.001–005 (2002). Texas Penal Code§ 31.03 states that a person commits a theft if he unlawfully appropriates property with intent to deprive the owner of that property. *Breckenridge Enterprises, Inc. v. Avio Alternatives, LLC,* No. 3:08-CV-1782-M, 2009 WL 1469808, at *9 (N.D. Tex. May 27, 2009). Plaintiff's Second Amended Complaint does not expressly mention the TTLA, but even broadly construing her pleading, it wholly fails to demonstrate that Defendants could be liable under the TTLA.

Moreover, the Court finds that Plaintiff's allegations that Defendants have violated "Texas Vehicle Code 226581(1)(a) section 683.011 [and] section 683.012," broadly construed as claims asserted under the Texas Abandoned Motor Vehicle Act, Texas Transportation Code §§ 683.011-.012, also do not entitle her to relief. Section 683.011 grants law enforcement agencies the authority to take an abandoned motor vehicle into custody. *Pace v. State*, No. 06-98-00261-CR, 1999 WL 519203, at *3 (Tex. App.—Texarkana July 23, 1999, no pet.). "Section 683.012 states that a law enforcement agency must send a notice of abandonment to the last known registered owner of a vehicle for which it receives a report of abandonment." *Miller v. Recovery Sys., Inc.*, No. 02-12-00468-CV, 2013 WL 5303060, at *6 (Tex. App.—Fort Worth Sept. 19, 2013, no pet.). "A 'law enforcement agency' means the Department of Public Safety, the police department of a municipality, the police department of an institution of higher

education, a sheriff or a constable." *Elite Towing, Inc. v. LSI Fin. Grp.*, 985 S.W.2d 635, 645 (Tex. App.—Austin 1999, no pet.) (quoting Tex. Transp. Code. § 683.001(3)). As she only asserts claims against First Choice Towing and the City of Princeton Code Enforcement, Plaintiff has not raised any claims against a law enforcement agency, as defined under the Texas Abandoned Motor Vehicle Act. *See id.* at 641 (court found the Texas Transportation Code to be inapplicable where the record did not indicate any law enforcement agency involvement).

As such, Plaintiff's sole remaining "claim" for consideration is her § 1983 claim. 42 U.S.C. § 1983 imposes liability on persons or entities who, under the color of state law, deprive a person "of any rights, privileges, or immunities secured by the Constitution and laws." To state a claim under § 1983, a plaintiff must allege facts indicating a deprivation of rights guaranteed by the Constitution and laws of the United States and that this deprivation resulted from conduct committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 49–50 (1988).

The previous Report and Recommendation provided Plaintiff with specific, detailed directions regarding how to cure her pleading deficiencies:

> the Amended Complaint fails to state a claim against the City of Princeton; that is, Plaintiff has not alleged her vehicle was seized, towed, and/or disposed of pursuant to any municipal policy or custom. And Plaintiff also has not alleged whether she received any notice or opportunity for a hearing, either before or after the vehicle was towed, to challenge the Defendants' action of towing the vehicle and disposing of or selling it, and when and how that hearing opportunity was provided. There is further no allegation as to the City of Princeton's stated reason for towing the vehicle and whether that reason was true, and/or whether Plaintiff was provided a reasonable opportunity to retrieve the vehicle from 1st Choice Towing (and, if so, why Plaintiff did not take advantage of that opportunity).

[Dkt. 33 at 5]. The undersigned further recommended that because "this [was] the first time the Court has addressed whether Plaintiff's pleadings sufficiently state a claim on which relief can be granted[,] Plaintiff *pro se* could potentially cure the pleading deficiencies identified if

provided a second opportunity to amend" [Dkt. 33 at 5]. Despite direction as to how to cure her pleading deficiencies and the opportunity to do so, Plaintiff still has wholly failed to state a claim for relief against the City of Princeton or Angell, as set forth below.

1. Claims Against the City of Princeton

The City of Princeton argues that Plaintiff's claims should be dismissed because: "(a) she has not alleged that her vehicle was seized, towed, and/or disposed of pursuant to any municipal policy or custom of the City; (b) has not alleged whether she received any notice of or an opportunity for, a hearing either before or after her vehicle was towed to challenge the towing of same or the disposing or selling of it; (c) has not alleged whether the City's stated reason for towing the vehicle was true and/or whether she was provided an opportunity to retrieve the vehicle, and, if so, why she did not take advantage of that opportunity" [Dkt. 48 at 4].

As to claims asserted under 42 U.S.C. § 1983, a city cannot be held vicariously liable for the conduct of its employees. *Connick v. Thompson*, 563 U.S. 51, 60 (2011). Rather, Plaintiff must allege and prove that an action performed pursuant to official policy caused her injury. *Hicks-Fields v. Harris Cty., Texas,* No. 16-20003, 2017 WL 2729081, at *2–3 (5th Cir. June 26, 2017); *see also Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 691 (1978) ("Plaintiffs who seek to impose liability on local governments under § 1983 must prove that 'action pursuant to official municipal policy' caused their injury."). To allege the City of Princeton's liability under § 1983, Plaintiff must assert that: (1) a policy or custom existed; (2) the policymakers actually or constructively knew of its existence; (3) a constitutional violation occurred; and (4) the custom or policy served as the moving force behind the violation. *Pineda v. City of Houston*, 291 F.3d 325, 328 (5th Cir. 2002); *Meadowbriar Home for Child. v. G.B. Gunn*, 81 F.3d 521, 532–33 (5th Cir. 1996). The City of Princeton's policy may be: (1) a

"policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the [City's] final lawmaking officers;" or (2) a "persistent, widespread practice of the [City's] officials or employees, although not authorized by officially adopted and promulgated policy, is so common and well settled so as to constitute a custom that fairly represents the [City's] policy." *Pineda*, 291 F.3d at 328. Plaintiff must describe the City of Princeton's policy or custom and its relationship to the underlying constitutional violation with specific facts. *Spiller v. City of Texas City, Police Dep't*, 130 F.3d 162, 167 (5th Cir. 1997). Furthermore, if the policy at issue is not facially unconstitutional, Plaintiff must also show that the City of Princeton adopted the policy with deliberate indifference as to its known or obvious consequences. *James*, 577 F.3d at 617. Finally, Plaintiff must establish a "direct causal link" between the City of Princeton's policy and the constitutional deprivation in which the policy is affirmatively linked to the constitutional violation and is the moving force behind it. *Johnson v. Deep E. Tex. Reg'l Narcotics Trafficking Task Force*, 379 F.3d 293, 310 (5th Cir. 2004) (quoting *Fraire v. City of Arlington,* 957 F.2d 1268, 1281 (5th Cir.1992)). This "must be more than a mere 'but for' coupling between cause and effect." *Id.* Importantly, the moving-force and deliberate-indifference elements of municipal liability "must not be diluted, for '[w]here a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into *respondeat superior* liability.'" *James*, 577 F.3d at 618 (quoting *Bd. Of Cty. Comm'rs of Bryan Cty., Okl. v. Brown*, 520 U.S. 397, 415 (1997).

To reiterate, the Court has already explicitly pointed out to Plaintiff that she must establish these requirements to allege a claim under § 1983 against the City of Princeton and afforded Plaintiff an extension of time to cure her pleading deficiencies [Dkts. 33, 44]. Despite this, Plaintiff's Second Amended Complaint makes no mention of any City of Princeton policy,

whether formally adopted or arising from custom, that caused any alleged injury to Plaintiff. Absent such allegations, Plaintiff has failed to state a § 1983 claim against the City of Princeton.[9]

2. Claims Against the City of Princeton's Code Enforcement Department[10]

Insofar as Plaintiff seeks to raise claims against the City of Princeton's Code Enforcement Department (which is unclear), these claims fail because the Code Enforcement Department is not a jural entity and therefore, cannot be sued. The City of Princeton argues that "it has not designated its Code Enforcement Department as a separate and distinct entity that can be sued individually" [Dkt. 48 at 9]. "The capacity of an entity to be sued is 'determined by the law of the state in which the district court is held.'" *Hutchinson v. Box*, No. 4:10CV240, 2010 WL 5830499, at *1 (E.D. Tex. Aug. 20, 2010), *report and recommendation adopted,* No. 4:10-CV-240, 2011 WL 839864 (E.D. Tex. Feb. 17, 2011) (quoting Fed.R.Civ.P. 17(b)). To sue a city department in Texas, the city department "must enjoy a separate legal existence;" it must be a "separate and distinct corporate entity." *Darby v. Pasadena Police Dep't*, 939 F.2d 311, 313 (5th Cir. 1991)). "[U]nless the 'true political entity' has explicitly '[granted] the servient agency with jural authority,' it may not sue or be sued." *Id.* (quoting *Darby*, 939 F.2d at 313). "A plaintiff has the burden of showing that a county department has the capacity to be sued. However, if a plaintiff fails to allege or demonstrate that such defendant is a separate legal entity having jural authority, then claims against that entity should be dismissed as frivolous and for failing to state a claim." *Hutchinson v. Box*, No. 4:10CV240, 2010 WL 5830499, at *1 (E.D. Tex. Aug. 20, 2010), *report and recommendation adopted,* No. 4:10-CV-240, 2011 WL 839864 (E.D. Tex. Feb. 17, 2011) (internal citations and quotation marks omitted). Plaintiff has

[9] In addition, Plaintiff has failed to state a claim against the City of Princeton for punitive damages. A municipality is immune from punitive damages under § 1983. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 248 (1981).
[10] Because Plaintiff is proceeding *in forma pauperis*, the Court considers the merits of Plaintiff's potential claims against the City of Princeton's Code Enforcement Department under § 1915.

not alleged that the City of Princeton has granted the Code Enforcement Department the power to sue or be sued. Accordingly, these claims against the Code Enforcement Department "should be dismissed as frivolous and for failing to state a claim." *See id.*

3. Claims Against Angell[11]

Plaintiff alleges that she is entitled to relief against Angell (First Choice Towing) because First Choice Towing violated municipal ordinances in towing Plaintiff's vehicle from the curb of her residence [Dkt. 46 at 2]. To state a claim under § 1983, Plaintiff must allege that a person acting under color of state law deprived her of a right secured by the Constitution or the laws of the United States. *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49 (1999); *Augustine v. Doe*, 740 F.2d 322, 324-25 (5th Cir. 1984). Where a private citizen is alleged to have committed a § 1983 violation, such as Plaintiff's allegations against Angell, Plaintiff must offer proof that Angell is either a state actor or conspired with state actors. *Ferguson v. Dunn*, No. 1:16-CV-272, 2017 WL 3033338, at *3 (E.D. Tex. May 24, 2017), *report and recommendation adopted,* No. 1:16-CV-272, 2017 WL 3020931 (E.D. Tex. July 17, 2017)(citing *Priester v. Lowndes Cty.*, 354 F.3d 414, 420 (5th Cir. 2004).

The Court has clearly and expressly addressed Plaintiff's pleading deficiencies regarding her claims against Angell, specifically on the issue of whether or not Angell is a state actor capable of being sued under § 1983; moreover, Plaintiff has been provided an opportunity to remedy these shortcomings [Dkts. 33, 44]. The Court explicitly noted that through First Choice Towing, Defendant Angell's joint participation with the City of Princeton in towing Plaintiff's vehicle could potentially constitute state action and could expose Angell, as the sole proprietor of the towing company, to liability under § 1983. *Goichman v. Rheuban Motors, Inc.*, 682 F.2d

[11] Angell filed her Motion to Dismiss Plaintiff's First Amended Complaint [Dkt. 29], but has not filed a motion to dismiss Plaintiff's Second Amended Complaint. Because Plaintiff is proceeding *in forma pauperis*, the Court considers the merits of Plaintiff's claims against Angell under § 1915.

1320, 1322 (9th Cir. 1982) (private towing company that towed vehicle at behest of state police officer for purpose of enforcing statute providing for towing of illegally parked vehicles was subject to liability under § 1983); *Coleman v. Turpen*, 697 F.2d 1341, 1345 (10th Cir. 1982). Even with the Court's instruction, Plaintiff's Second Amended Complaint is more convoluted and conclusory than her previous pleadings. Plaintiff wholly fails to address the issue of Angell's potential status as a state actor. Plaintiff asserts that "[b]oth Defendants the City of Princeton, Texas (code enforcement) and First Choice Towing (Anne Angelle [sic]) knowingly that the property (1989 Chevrolet Cavalier would be and was unlawfully involved in a financial institution transaction that represents the proceeds of some form of illegal activity....did not obey the Municipal Code and Ordinances for its Mandatory Home Owners Association" [Dkt. 46 at 2]. These allegations are insufficient to establish Angell's involvement as a state actor in this case. "In order for a plaintiff to sustain a § 1983 against private citizens on the basis that the private citizens acted together with a state actor, the plaintiff must allege facts demonstrating an agreement or meeting of the minds between the private citizens and the state actor to act in concert to deprive the plaintiff of his constitutional rights." *Ferguson v. Dunn*, No. 1:16-CV-272, 2017 WL 3033338, at *3 (citing *Mylett v. Jeane*, 879 F.2d 1272, 1275 (5th Cir. 1989)). Plaintiff fails to allege, much less support with facts," any agreement existed between First Choice Towing and the City of Princeton "to commit an illegal act in violation of [Plaintiff's] constitutional rights, 'nor does it allege specific facts to show an agreement.'" *See id.* (citing *Priester*, 354 F.3d at 420). Plaintiff fails to demonstrate that First Choice Towing and the City of Princeton are sufficiently intertwined in their interactions, *Ferguson v. Dunn*, 2017 WL 3020931, at *2, that First Choice Towing is a "willful participant in a joint activity with the State or its agents," *United States v. Price*, 383 U.S. 787, 794, (1966) or that there is a

"sufficiently close nexus between the State and the challenged action of the (towing company) so that the action of the latter may be fairly treated as that of the State itself," *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351, (1974); thereby making First Choice Towing a state actor. Accordingly, Plaintiff's Second Amended Complaint fails to state a claim for relief under § 1983 against Angell.[12]

Plaintiff's Motion for Judgment on the Pleadings

The Court broadly construes Plaintiff's Motion Judgment for a Matter of Law [Dkt. 43] as a motion for judgment on the pleadings. Under Federal Rule of Civil Procedure 12(c), "[a]fter the pleadings are closed--but early enough not to delay trial--a party may move for judgment on the pleadings." "A motion for judgment on the pleadings pursuant to Rule 12(c), Fed.R.Civ.P. is designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts." *Rosa v. Morvant*, No. CIV.A. 9:06CV252, 2007 WL 3132613, at *1 (E.D. Tex. Oct. 23, 2007) (citing *Hebert Abstract v. Touchstone Properties, Ltd.*, 914 F.2d 74, 76 (5th Cir. 1990)). "Like a motion for summary judgment, a Rule 12(c) motion is appropriate only if there is no issue of material fact and if the pleadings show the moving party is entitled to judgment as a matter of law." *Frost v. Martin*, No. CIV.A. 1:08CV65, 2009 WL 3063386, at *2 (E.D. Tex. Sept. 22, 2009) (citing *Voest–Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 891

[12] Even if Angell could be considered a state actor, Plaintiff's allegations against Angell and First Choice Towing still fail. Plaintiff alleges First Choice Towing towed her vehicle from the curb of her residence, which could potentially be broadly construed as claims for the violation of Plaintiff's Fourth Amendment rights and due process rights for the deprivation of a property interest. The previous Report and Recommendation pointed out that "Plaintiff also has not alleged whether she received any notice or opportunity for a hearing, either before or after the vehicle was towed, to challenge the Defendants' action of towing the vehicle and disposing of or selling it, and when and how that hearing opportunity was provided. There is further no allegation as to the City of Princeton's stated reason for towing the vehicle and whether that reason was true, and/or whether Plaintiff was provided a reasonable opportunity to retrieve the vehicle from 1st Choice Towing (and, if so, why Plaintiff did not take advantage of that opportunity)" [Dkt. 33]. Despite this clear recitation of her pleading deficiencies and the opportunity to remedy those deficiencies, Plaintiff's Second Amended Complaint wholly fails to address any of these shortcomings. *Twombly,* 550 U.S. at 555 ("detailed factual allegations" are not necessary, but a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do").

(5th Cir.), cert. denied, 525 U.S. 1041 (1998). "Accordingly, a court considering such a motion must assume the truth of all material facts alleged in the complaint, as well as all reasonable inferences that can be drawn from such facts." *Id.* (citing *St. Paul Insurance v. AFIA Worldwide Ins.*, 937 F.2d 274 (5th Cir. 1991)). When, as is the case here, a plaintiff "ha[s] not nudged [her] claims across the line from conceivable to plausible, [her] complaint must be dismissed." *Twombly,* 550 U.S. at 570. Accordingly, Plaintiff's Motion Judgment for a Matter of Law should be denied [Dkt. 43].

CONCLUSION AND RECOMMENDATION

The Court recommends that Plaintiff's "Motion Judgment for Matter of Law" be **DENIED** [Dkt. 43]. The Court further recommends that each of Defendant City of Princeton, Texas's Motion to Dismiss [Dkt. 48] and Motion to Strike Plaintiff's Third Amended Complaint be **GRANTED** [Dkts. 54, 57]. Accordingly, Plaintiff's Third Amended Complaint should be **STRICKEN** [Dkt. 49], and Plaintiff's claims against the City of Princeton should be **DISMISSED**. Further, upon review under 28 U.S.C. § 1915, the Court recommends that Plaintiff's claims against Defendant Anne Angell and to the extent asserted, the Department of Code Enforcement be **DISMISSED**.

Within fourteen (14) days after service of the magistrate judge's report, any party must serve and file specific written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific.

Failure to file specific, written objections will bar the party from appealing the unobjected-to factual findings and legal conclusions of the magistrate judge that are accepted by the district court, except upon grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

SIGNED this 31st day of October, 2017.

Christine A. Nowak
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-40059

JOYCE ANN SMITH,

Plaintiff - Appellant

v.

CITY OF PRINCETON, TEXAS; ANNE ANGELL, doing business as First Choice Towing,

Defendants - Appellees

Appeal from the United States District Court
for the Eastern District of Texas

O R D E R:

On August 3, 2018, the clerk denied Appellant's opposed motion to reopen this case. Upon consideration of Appellant's opposed motion for reconsideration, IT IS ORDERED that the motion is DENIED.

KURT D. ENGELHARDT
UNITED STATES CIRCUIT JUDGE

Appendix B