[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-10819
Non-Argument Calendar

D.C. Docket No. 2:18-cv-00475-SPC-MRM

GELU TOPA,

Plaintiff-Appellant,

versus

ALMONTE KERBS,
OFFICER ROCHELLE MEJIAS,
et al,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(July 29, 2019)

Before MARTIN, NEWSOM, and ANDERSON, Circuit Judges.

PER CURIAM:

Gelu Topa, proceeding *pro se*, appeals the dismissal of his 42 U.S.C. § 1983 action, alleging entrapment and false arrest, for failing to state a claim upon which relief may be granted and for improperly serving the complaint. On appeal, Topa argues that the police failed to follow procedures during his arrest and subsequently filed a false police report. Topa does not argue that process was properly served.

I.

A district court's dismissal for failure to state a claim is reviewed *de novo*. *Am. United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1056–57 (11th Cir. 2007). The complaint is viewed in the light most favorable to the plaintiff, and all of the plaintiff's well-pleaded facts are accepted as true. *Id.* at 1057. To survive a motion to dismiss, a plaintiff's factual allegations must state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A plausible claim is one which allows a court to draw reasonable inferences that the defendant is liable for the claims. *Id.* *Pro se* pleadings are liberally construed and held to less stringent standards than pleadings drafted by attorneys. *Campbell v. Air Jam. Ltd.*, 760 F.3d 1165, 1168–69 (11th Cir. 2014). However, this leniency does not allow courts to serve as *de facto* counsel or to rewrite *pro se* pleadings. *Id.*

district court properly dismissed this claim upon the defendants' 12(b)(6) motion. Additionally, Topa has failed to show that the officers did not have probable cause to arrest him for said crime. By asserting that he showed interest in the woman and had her wait for him elsewhere, Topa created circumstances showing a substantial chance of criminal activity. Accordingly, we conclude that the district court did not err in dismissing Topa's second amended complaint for failure to state a claim pursuant to the defendants' 12(b)(6) motion and affirm.

AFFIRMED

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

GELU TOPA,

Plaintiff,

v. Case No: 2:18-cv-475-FtM-38MRM

ALMONTE KERBS, ROCHELLE MEJIAS, DONALD WEATHERS, DANIEL WOLFGANG and GABRIEL ALMONTE,

Defendants.

JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED that pursuant to this Court's Order of February 11, 2019, the Defendant's Motion to Dismiss (Doc. 27) is GRANTED and this matter is DISMISSED with prejudice.

February 12, 2019

ELIZABETH M. WARREN,
CLERK

/s/ Michele L. Stress, Deputy Clerk

Copies to:

Counsel of Record

Unrepresented Parties

CIVIL APPEALS JURISDICTION CHECKLIST

1. **Appealable Orders**: Courts of Appeals have jurisdiction conferred and strictly limited by statute:

   (a) **Appeals from final orders pursuant to 28 U.S.C. Section 1291**: Only final orders and judgments of district courts, or final orders of bankruptcy courts which have been appealed to and fully resolved by a district court under 28 U.S.C. Section 158, generally are appealable. A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Pitney Bowes, Inc. V. Mestre, 701 F.2d 1365, 1368 (11th Cir. 1983). A magistrate judge's report and recommendation is not final and appealable until judgment thereon is entered by a district court judge. 28 U.S.C. Section 636(c).

   (b) **In cases involving multiple parties or multiple claims**, a judgment as to fewer than all parties or all claims is not a final, appealable decision unless the district court has certified the judgment for immediate review under Fed.R.Civ.P. 54(b), Williams v. Bishop, 732 F.2d 885, 885-86 (11th Cir. 1984). A judgment which resolves all issues except matters, such as attorneys' fees and costs, that are collateral to the merits, is immediately appealable. Budinich v. Becton Dickinson & Co., 486 U.S. 196, 201, 108 S. Ct. 1717, 1721-22, 100 L.Ed.2d 178 (1988); LaChance v. Duffy's Draft House, Inc., 146 F.3d 832, 837 (11th Cir. 1998).

   (c) **Appeals pursuant to 28 U.S.C. Section 1292(a)**: Appeals are permitted from orders "granting, continuing, modifying, refusing or dissolving injunctions or refusing to dissolve or modify injunctions..." and from "[i]nterlocutory decrees...determining the rights and liabilities of parties to admiralty cases in which appeals from final decrees are allowed." Interlocutory appeals from orders denying temporary restraining orders are not permitted.

   (d) **Appeals pursuant to 28 U.S.C. Section 1292(b) and Fed.R.App.P.5:** The certification specified in 28 U.S.C. Section 1292(b) must be obtained before a petition for permission to appeal is filed in the Court of Appeals. The district court's denial of a motion for certification is not itself appealable.

   (e) **Appeals pursuant to judicially created exceptions to the finality rule:** Limited exceptions are discussed in cases including, but not limited to: Cohen V. Beneficial Indus. Loan Corp., 337 U.S. 541,546,69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949); Atlantic Fed. Sav. & Loan Ass'n v. Blythe Eastman Paine Webber, Inc., 890 F. 2d 371, 376 (11th Cir. 1989); Gillespie v. United States Steel Corp., 379 U.S. 148, 157, 85 S. Ct. 308, 312, 13 L.Ed.2d 199 (1964).

2. **Time for Filing:** The timely filing of a notice of appeal is mandatory and jurisdictional. Rinaldo v. Corbett, 256 F.3d 1276, 1278 (11th Cir. 2001). In civil cases, Fed.R.App.P.4(a) and (c) set the following time limits:

   (a) **Fed.R.App.P. 4(a)(1)**: A notice of appeal in compliance with the requirements set forth in Fed.R.App.P. 3 must be filed in the district court within 30 days after the entry of the order or judgment appealed from. However, if the United States or an officer or agency thereof is a party, the notice of appeal must be filed in the district court within 60 days after such entry. **THE NOTICE MUST BE RECEIVED AND FILED IN THE DISTRICT COURT NO LATER THAN THE LAST DAY OF THE APPEAL PERIOD - no additional days are provided for mailing.** Special filing provisions for inmates are discussed below.

   (b) **Fed.R.App.P. 4(a)(3)**: "If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later."

   (c) **Fed.R.App.P.4(a)(4)**: If any party makes a timely motion in the district court under the Federal Rules of Civil Procedure of a type specified in this rule, the time for appeal for all parties runs from the date of entry of the order disposing of the last such timely filed motion.

   (d) **Fed.R.App.P.4(a)(5) and 4(a)(6)**: Under certain limited circumstances, the district court may extend the time to file a notice of appeal. Under Rule 4(a)(5), the time may be extended if a motion for an extension is filed within 30 days after expiration of the time otherwise provided to file a notice of appeal, upon a showing of excusable neglect or good cause. Under Rule 4(a)(6), the time may be extended if the district court finds upon motion that a party did not timely receive notice of the entry of the judgment or order, and that no party would be prejudiced by an extension.

   (e) **Fed.R.App.P.4(c)**: If an inmate confined to an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a declaration in compliance with 28 U.S.C. Section 1746 or a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

3. **Format of the notice of appeal**: Form 1, Appendix of Forms to the Federal Rules of Appellate Procedure, is a suitable format. See also Fed.R.App.P. 3(c). A pro se notice of appeal must be signed by the appellant.

4. **Effect of a notice of appeal**: A district court loses jurisdiction (authority) to act after the filing of a timely notice of appeal, except for actions in aid of appellate jurisdiction or to rule on a timely motion of the type specified in Fed.R.App.P. 4(a)(4).

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

GELU TOPA,

Plaintiff,

v. Case No: 2:18-cv-475-FtM-38MRM

ALMONTE KERBS, ROCHELLE MEJIAS, DONALD WEATHERS, DANIEL WOLFGANG, and GABRIEL ALMONTE,

Defendants.
_____/

OPINION AND ORDER[1]

Before the Court is Defendants Almonte Kerbs, Rochelle Mejias, Donald Weathers, and Daniel Wolfgang's Motion to Dismiss the Second Amended Complaint. (Doc. 35). Defendants argue that dismissal is proper for failure to state a claim and improper service. Plaintiff Gelu Topa, appearing *pro se*, failed to respond, and the time to do so expired. For the following reasons, the Court grants the Motion with prejudice.

BACKGROUND

Twice, the Court dismissed Topa's previous complaints for failing to state a claim and insufficient service. This is Topa's third strike. When liberally construing the Second

[1] Disclaimer: Documents filed in CM/ECF may contain hyperlinks to other documents or websites. These hyperlinks are provided only for users' convenience. Users are cautioned that hyperlinked documents in CM/ECF are subject to PACER fees. By allowing hyperlinks to other websites, this Court does not endorse, recommend, approve, or guarantee any third parties or the services or products they provide on their websites. Likewise, the Court has no agreements with any of these third parties or their websites. The Court accepts no responsibility for the availability or functionality of any hyperlink. Thus, the fact that a hyperlink ceases to work or directs the user to some other site does not affect the opinion of the Court.

Amended Complaint ("SAC"), Topa sues Defendants—who are Fort Myers police officers—for excessive force, false arrest, and entrapment under 42 U.S.C. § 1983. The SAC's alleged facts are scattershot, but here is how it happened according to Topa.

During rush hour, "on a rainy day, when cars on Cleveland [A]ve. were like a river flowing on both sides," Topa was arrested for solicitation of a prostitute. (Doc. 27). A flawed sting operation caused the arrest. (*Id.*). Posing as an undercover prostitute, Mejias said that Topa waived at her to come towards his car then pulled into a parking lot. (*Id.*). Topa contests these events. (*Id.*). Topa contends that he did not waive at Mejias; instead, he states that Mejias approached his car in a Taco Bell parking lot as he was about to leave. (*Id.*). And Topa only led Mejias to believe that he solicited to get her to leave him alone. (*Id.*). Moments later, the arrest occurred. (*Id.*). Kerbs rushed Topa's car, yanked him out, slammed his head on the car's roof, and arrested him. (*Id.*). None of Defendants besides Mejias and Kerbs are mentioned. (*Id.*).

A. Failure to State a Claim

A complaint must recite "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Rule 8 "does not require 'detailed factual allegations,' but it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "To survive a motion to dismiss, a complaint must contain factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570). A claim is facially plausible if the facts allow a "court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

Rule 8 works with Rule 10. *Weiland v. Palm Beach Cty. Sheriff's Office*, 792 F.3d 1313, 1320 (11th Cir. 2015). Rule 10 requires a complaint to assert claims in separate, numbered paragraphs, with "each limited as far as practicable to a single set of circumstances." Fed. R. Civ. P. 10(b). Together, these rules "require the pleader to present his claims discretely and succinctly, so that his adversary can discern what he is claiming and frame a responsive pleading, [and so] the court can determine which facts support which claims and whether the plaintiff has stated any claims upon which relief can be granted." *Fikes v. City of Daphne*, 79 F.3d 1079, 1082 (11th Cir. 1996) (citation omitted).

Courts hold *pro se* pleadings to a "less strict standard" than attorney pleadings. *Alba v. Montford*, 517 F.3d 1249, 1252 (11th Cir. 2008). "Yet even in the case of *pro se* litigants this leniency does not give a court license to serve as *de facto* counsel for a party or to rewrite an otherwise deficient pleading in order to sustain an action." *Campbell v. Air Jamaica Ltd.*, 760 F.3d 1165, 1168-69 (11th Cir. 2014) (citation omitted).

After liberally reviewing the SAC, the Court again concludes that Topa "submitted the type of pleading the Federal Rules of Civil Procedure prohibit." (Doc. 26 at 4). On the third try, there are still no numbered paragraphs or any organization to speak of. The only claim explicitly pleaded, entrapment, cannot support a § 1983 claim alone, which this Court stated in both previous Orders. (Doc. 20 at 3-4; Doc. 26 at 2). The other two—which are less pleaded and more inferred from a liberal review of the SAC—fail as well.

First, the excessive force claim is insufficiently pleaded. Even accepting Topa's version of events, nothing suggests that the force was excessive. This claim is "governed by the Fourth Amendment's objective reasonableness standard." *Hadley v. Gutierrez*,

526 F.3d 1324, 1329 (11th Cir. 2008) (internal quotations omitted) (citation omitted). Courts look at several factors like the need for force, relationship between the need and the amount of force, and the injury inflicted. *Slicker v. Jackson*, 215 F.3d 1225, 1233 (11th Cir. 2000). Topa pleads no amount of force that rises to an excessive level. In fact, he does not even plead any resulting injury from his arrest. *See Nolin v. Isbell*, 207 F.3d 1253, 1255-58 (11th Cir. 2000) (excusing *de minimis* force). So this claim fails.

Second, the SAC insufficiently pleads a false arrest claim. Probable cause is "an absolute bar to a section 1983 action for false arrest." *Kingsland v. City of Miami*, 382 F.3d 1220, 1226 (11th Cir. 2004). At best, the SAC attempts to show a lack of probable cause by contesting whether Topa waived at Mejias to come to his car. But the SAC eventually pleads itself into the absolute bar. Topa alleges that he "gave [Mejias] the impression [that he was] interested" and "made her go away and wait for [him] in another place." (Doc. 27). From Topa's own pleading, Defendants had probable cause to believe that Topa committed the crime of solicitation. Topa's subjective intentions are irrelevant because probable cause is determined by an objective reasonableness standard based on the totality of the circumstances. *Rankin v. Evans*, 133 F.3d 1425, 1435 (11th Cir. 1998). By leading an undercover officer to believe that he was soliciting a prostitute, Topa handed Defendants probable cause for his arrest. *Id.* And by pleading the existence of probable cause here, Topa dooms his false arrest claim.

Thus, dismissal of the SAC is proper. In its last Order, the Court warned Topa that he had "one final opportunity to file (and properly serve)" the SAC. (Doc. 26 at 4). Because he failed to do so again and there is no indication that another amendment will cure any deficiencies, this dismissal is with prejudice.

B. Insufficient Service of Process

Leaving aside the pleading deficiencies, the SAC also fails for insufficient service of process. Rule 4(c)(2) requires service by a "person who is at least 18 years old and not a party." Fed. R. Civ. P. 4(c)(2). In both previous Orders, the Court directed Topa to this provision. (Doc. 20, 26). Yet he still personally served four Defendants. (Doc. 30, 31, 32, 33). Topa's decision to follow his employee's advice rather than Rule 4 does not excuse inadequate service. Thus, dismissal is proper on this basis as well.

Accordingly, it is now

ORDERED:

1. Defendants' Motion to Dismiss (Doc. 35) is **GRANTED**.
2. Topa's SAC (Doc. 27) is **DISMISSED WITH PREJUDICE**.
3. The Clerk of the Court is **DIRECTED** to enter judgment accordingly, terminate any pending motions or deadlines, and close the file.

DONE and **ORDERED** in Fort Myers, Florida this 11th day of February, 2019.

Sheri Polster Chappell

SHERI POLSTER CHAPPELL
UNITED STATES DISTRICT JUDGE

Copies: All Parties of Record

Additional material from this filing is available in the Clerk's Office.