

FILED

United States Court of Appeals  
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

August 24, 2021

Christopher M. Wolpert  
Clerk of Court

JOHN W. WINNINGHAM, JR.

Plaintiff - Appellant,

v.

CITY OF BROKEN ARROW; BROKEN  
ARROW POLICE; COUNTY OF TULSA;  
CITY OF SALLISAW; L.  
RADEMACHER, Broken Arrow Police  
Patrol; T. JESSE, Broken Arrow Police  
Patrol,

Defendants - Appellees.

No. 21-7004  
(D.C. No. 6:20-CV-00086-Raw)  
(E.D. Okla.)

ORDER AND JUDGMENT\*

Before McHUGH, BALDOCK, and MORITZ, Circuit Judges.

John W. Winningham, Jr., pro se, appeals the district court's order dismissing his suit against the City of Broken Arrow, the Broken Arrow Police, the County of Tulsa, the City of Sallisaw, L. Rademacher, and T. Jesse. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

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\* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

made in 199[9], it is barred by the applicable two-year statute of limitations.” *Id.* at 145. Moreover, the court dismissed any claims against the City as “conclusory” because “[t]he only specific allegation is that a judge in the City of Sallisaw signed the allegedly false charge in 199[9].” *Id.* Therefore, Mr. Winningham “has not alleged plausible claims.” *Id.*

Third, the claims against the Broken Arrow Police were dismissed on the grounds that “[t]he Broken Arrow Police Department is a department within the City of Broken Arrow, not a separate entity capable of being sued.” *Id.* at 146. Next, the district court dismissed the § 1983 claims against the City of Broken Arrow because Mr. Winningham failed to “allege any facts regarding any specific policies or customs of the City of Broken Arrow or the Broken Arrow Police Department related to [Mr. Winningham’s] claims.” *Id.* And the state-law claims were dismissed as untimely under the Oklahoma Governmental Tort Claims Act.

Last, the district court dismissed the § 1983 claims against Rademacher and Jesse as “conclusory.” *Id.* at 145. “While [Mr. Winningham] ties the stop to the 199[9] Sallisaw warrant, he does not allege that the warrant was withdrawn or dismissed. He further offers no allegations as to how or why the officers would or should have had reason to know that the warrant was ‘falsified’ or invalid.” *Id.* And the state-law claims were dismissed as time barred under the statute of limitations.

“Although we liberally construe *pro se* filings, we do not assume the role of advocate.” *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008) (internal quotation marks omitted). “Our rules of appeal require appellants to sufficiently

The judgment of the district court is affirmed. We deny Mr. Winningham's motion to supplement the record.

Entered for the Court

Bobby R. Baldock  
Circuit Judge

FILED

United States Court of Appeals  
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

September 13, 2021

Christopher M. Wolpert  
Clerk of Court

JOHN W. WINNINGHAM, JR.

Plaintiff - Appellant,

v.

CITY OF BROKEN ARROW; BROKEN  
ARROW POLICE; COUNTY OF TULSA;  
CITY OF SALLISAW; L.  
RADEMACHER, Broken Arrow Police  
Patrol; T. JESSE, Broken Arrow Police  
Patrol,

Defendants - Appellees.

No. 21-7004  
(D.C. No. 6:20-CV-00086-Raw)  
(E.D. Okla.)

ORDER

Before **McHUGH**, **BALDOCK**, and **MORITZ**, Circuit Judges.

On September 3, 2021, this court received a packet of materials from John W. Winningham, Jr., which we construe as a petition for panel rehearing. Having reviewed the materials, Mr. Winningham's petition for rehearing is denied.

Entered for the Court



CHRISTOPHER M. WOLPERT, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF OKLAHOMA

JOHN W. WINNINGHAM, JR.,

*Plaintiff,*

v.

1. CITY OF BROKEN ARROW,
2. BROKEN ARROW POLICE,
3. COUNTY OF TULSA,
4. CITY OF SALLISAW,
5. L. RADEMACHER, BROKEN ARROW  
POLICE PATROL,
6. T. JESSE, BROKEN ARROW POLICE  
PATROL,

*Defendants,*

Case No. CIV-20-086-Raw

**ORDER**

Before the court are the motion to dismiss by the City of Sallisaw [Docket No. 22] and motions to dismiss by the City of Broken Arrow, the Broken Arrow Police, L. Rademacher, and T. Jesse (hereinafter the “Broken Arrow Defendants”) [Docket Nos. 19, 20, and 26]. Also before the court are the City of Sallisaw’s motion to dismiss the Amended Complaint [Docket No. 36] and the Broken Arrow Defendants’ motion to strike, or in the alternative, motion to dismiss the Amended Complaint [Docket No. 37].

The court first addresses the motion to strike and the motions to dismiss the Amended Complaint. Plaintiff filed his fifteen-page *pro se*<sup>1</sup> Complaint on March 25, 2020. After motions

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<sup>1</sup> The court construes liberally the pleadings of all *pro se* litigants. *Hall v. Bellmon*, 93 F2d 1106, 1110 (10th Cir. 1991). Nevertheless, *pro se* parties are subject to “the same rules of procedure that govern other litigants.” *Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994) (citations omitted). Moreover, “the court cannot take on the responsibility of serving as the litigant’s

and/or 34 as an Amended Complaint. Accordingly, the motion to strike and the motions to dismiss the Amended Complaint [Docket Nos. 36 and 37] are moot.

**Motions to Dismiss**

For purposes of the motion to dismiss, the court accepts as true all well-pleaded facts in the Complaint and construes those facts in the light most favorable to Plaintiff. *Western Watersheds Project v. Michael*, 869 F.3d 1189, 1193 (10th Cir. 2017). Of course, the court does not accept as true conclusory statements or legal conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

To survive the motion to dismiss, the Complaint “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). Plaintiff must nudge his “claims across the line from conceivable to plausible.” *Twombly*, 550 U.S. at 570. The well-pleaded facts must “permit the court to infer more than the mere possibility of misconduct.” *Iqbal*, 556 U.S. at 679.

The Tenth Circuit has held that the “*Twombly/Iqbal* standard is a middle ground between heightened fact pleading, which is expressly rejected, and allowing complaints that are no more than labels and conclusions or a formulaic recitation of the elements of a cause of action, which the Court stated will not do.” *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012) (citing *Robbins v. Oklahoma*, 519 F.3d, 1242, 1247 (10th Cir. 2008)). “In other words, *Rule 8(a)(2) still lives.*” *Id.* (emphasis added). “Under Rule 8, *specific facts are not necessary*; the statement need only give the defendant fair notice of what the claim is and the grounds upon which it rests.” *Burnett v. Mortgage Elec. Registration Sys., Inc.*, 706 F.3d 1231, 1235-36 (10th Cir. 2013) (quoting *Khalik*, 671 F.3d at 1191) (emphasis added).

malicious prosecution, the one-year statute of limitations passed before Plaintiff filed his claims.

*See* 12 OKLA. STAT. § 95(4).

As the Broken Arrow Defendants argue, Plaintiff offers no authority for his right to sue the Broken Arrow Police Department. The Broken Arrow Police Department is a department within the City of Broken Arrow, not a separate entity capable of being sued. Plaintiff has not stated any claim against the City of Broken Arrow. A city or county is not liable under the doctrine of respondeat superior; it is liable only if its employees deprived an individual of his constitutional rights pursuant to a policy or custom of the city or county. *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690-91 (1978). Plaintiff did not allege any facts regarding any specific policies or customs of the City of Broken Arrow or the Broken Arrow Police Department related to Plaintiff's claims.

Moreover, as to any state law claims against the City of Broken Arrow, Plaintiff has not alleged that he complied with Oklahoma's Governmental Tort Claims Act ("GTCA") before filing this suit. The GTCA provides that a "claim against the state or a political subdivision shall be forever barred unless notice thereof is presented within one (1) year after the loss occurs." 51 OKLA. STAT. § 156(B). The Broken Arrow Defendants' motions to dismiss are granted.

#### **Tulsa County**

Tulsa County has not entered an appearance in this case. Nevertheless, as noted above, Plaintiff did not follow this court's order to show cause by September 16, 2020 for failure to timely serve his Complaint and Summons on the Defendants in accordance with Rule 4(m) of the Federal Rules of Civil Procedure. The court admonished him that failure to comply with the order could result in dismissal of this action. More importantly, this court is not the proper venue for an action against Tulsa County, 28 U.S.C. § 1391(b), and Plaintiff has made no

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