[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 25-10545

Non-Argument Calendar

SAMUEL LEE SMITH, JR.,

Plaintiff-Appellant,

versus

CITY OF MIAMI,
A Political Subdivision,
ERIC MARTI,
An Individual,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:23-cv-24150-MD

Before BRANCH, GRANT, and LAGOA, Circuit Judges.

PER CURIAM:

This appeal is DISMISSED, *sua sponte*, for lack of jurisdiction. Samuel Smith, Jr., proceeding *pro se*, appeals the district court's February 4, 2025 order granting the defendants' motion to dismiss in part.

We lack jurisdiction over Smith's appeal because the February 4 order was not final and appealable, as several of Smith's claims remain pending before the district court and are set for trial. *See* 28 U.S.C. § 1291 (providing that appellate jurisdiction is generally limited to "final decisions of the district courts"); *Acheron Cap., Ltd. v. Mukamal*, 22 F.4th 979, 986 (11th Cir. 2022) (providing that an appealable final order ends the litigation on the merits and leaves nothing for the court to do but execute its judgment). The order is also not effectively unreviewable on appeal from a final judgment resolving the case on the merits. *See Plaintiff A v. Schair*, 744 F.3d 1247, 1252-53 (11th Cir. 2014) (explaining that a ruling that does not conclude the litigation may be appealed under the collateral order doctrine if it, *inter alia*, is "effectively unreviewable on appeal from a final judgment").

No petition for rehearing may be filed unless it complies with the timing and other requirements of 11th Cir. R. 40-3 and all other applicable rules.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 23-24150-CIV-DAMIAN/Sanchez

SAMUEL LEE SMITH JR.,

Plaintiff,

v.

THE CITY OF MIAMI, and
ERIC MARTI,

Defendants.
_____/

ORDER ON DEFENDANTS' JOINT MOTION TO DISMISS [ECF NO. 38]

THIS CAUSE came before the Court upon Defendants, the City of Miami ("the City") and Eric Marti's ("Marti"), Joint Motion to Dismiss [ECF No. 38 (the "Motion")], filed April 22, 2024.

THE COURT has reviewed the Motion, the Response [ECF No. 60 (the "Response")] and Reply [ECF No. 63 (the "Reply")] thereto, the pertinent portions of the record, and the applicable law and is otherwise fully advised. For the reasons set forth below, this Court finds that the Motion is due to be granted in part.

I. BACKGROUND

As alleged in the Second Amended Complaint,[1] on June 9, 2020, Plaintiff, Samuel Lee Smith Jr. ("Plaintiff"), was driving outside the City of Miami on Old Cutler Road and stopped at a traffic light on Southwest 144th Street. *See* SAC ¶¶ 3, 24. Plaintiff heard yelling

[1] The Court accepts the well-pleaded facts in the Second Amended Complaint as true for purposes of considering the Motion to Dismiss. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

and looked out his window to find Marti, an off-duty City of Miami Police Officer, standing near his front passenger window with a firearm pointed toward Plaintiff. *Id.* ¶ 25. Fearing for his life, Plaintiff began to record the encounter, and Marti lowered his firearm. *Id.* ¶¶ 26–28. Plaintiff then exited his car, while Marti walked towards the back of the car. *Id.* ¶ 29. Marti then directed Plaintiff to stay where he was and proceeded to walk to and sit inside a police car that was parked two or three car lengths back. *Id.* ¶ 30. The police car did not have its emergency lights activated. *Id.* Plaintiff called 911, following which Marti activated his police car's emergency lights, and Palmetto Bay officers responded. *Id.* ¶ 31, 36. According to the Second Amended Complaint, Marti never identified himself as a law enforcement officer and "illegally" detained Plaintiff. *Id.* ¶¶ 32, 33.

Following this encounter, Plaintiff pursued a complaint with the City's Police Internal Affairs Office. *Id.* ¶ 38. The Second Amended Complaint alleges that the Internal Affairs Office "showed little interest in investigating" the incident and "conducted an inadequate investigation." *Id.* ¶¶ 38–39. Plaintiff then pursued his complaint with the City's Civil Investigative Panel (the "Panel"). *Id.* ¶ 37. According to Plaintiff's allegations, the Panel conducted a thorough and neutral investigation, which included witness interviews, questioning of several members of the City's Police Department, and the review of arrest reports and documents. *Id.* ¶¶ 40–44. The Panel's investigation led to a recommendation that the allegation of improper procedure be sustained, but Marti was never disciplined. *Id.*

II. PROCEDURAL HISTORY

On October 31, 2023, Plaintiff filed the original complaint asserting violations of the First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution arising from Marti's alleged unlawful detention of Plaintiff. *See generally* ECF No. 1. Plaintiff then

amended the original complaint on January 30, 2024. *See generally* ECF No. 16. Defendants responded by filing their first joint motion to dismiss. *See generally* ECF No. 17. Upon a motion by Plaintiff, this Court granted Plaintiff leave to further amend the complaint and denied the first joint motion to dismiss as moot. *See* ECF Nos. 27, 28, and 34.

Plaintiff filed the Second Amended Complaint, the operative pleading, on April 4, 2024, asserting ten causes of action against Defendants: (i) unlawful seizure or false imprisonment under 42 U.S.C. § 1983 against Marti (Count I); (ii) Fourth Amendment violation for use of excessive force against Marti pursuant to § 1983 (Count II); intentional infliction of emotional distress against Marti (Count III); assault against Marti (Count IV); federal civil rights violations against the City (Count V); assault against the City (Count VI); false imprisonment against the City (Count VII); negligent training and/or supervision against the City (Count VIII); negligent supervision and retention against the City (Count IX); and negligence against both the City and Marti (Count X). *See generally* ECF No. 32.

Defendants responded by filing the Motion now before the Court. *See generally* Mot. In the Motion, Defendants generally argue that the Second Amended Complaint should be dismissed in its entirety as a shotgun pleading; the City is entitled to sovereign immunity as to the Second Amended Complaint's state-law claims (Counts VI through X); and Counts IV (the assault claim against Marti), V (federal civil rights violations claim), and X (negligence) warrant dismissal because they fail to allege facts sufficient to state a claim. *See generally id.*

Importantly, Plaintiff was represented by counsel from this case's inception through the filing of the Second Amended Complaint. On April 24, 2024, this Court granted Plaintiff's then-counsel's motion to withdraw and stayed briefing on Defendants' Motion to Dismiss to allow Plaintiff time to obtain counsel and to give the parties an opportunity to attempt to

resolve the case. *See* ECF No. 44. After an unsuccessful settlement conference (*see* ECF No. 56), the Court entered an Order on July 16, 2024, lifting the stay on the briefing of the Motion and directing Plaintiff to file a response by August 6, 2024, irrespective of whether he had obtained counsel by that time. *See generally* ECF No. 57. Plaintiff has proceeded and continues to proceed *pro se* in this case since his then-counsel's withdrawal.

Plaintiff filed a document on August 6, 2024,[2] purporting to respond to Defendants' Motion. *See generally* Response [ECF No. 60].[3] The Response, however, does not substantively address Defendants' arguments regarding deficiencies in the Second Amended Complaint. Rather, Plaintiff explains that "[t]he underlying facts that give rise to this lawsuit are as crystal clear as they come" and he reiterates the Second Amended Complaint's factual allegations that Marti, while off duty and outside of the City of Miami, pointed his firearm at Plaintiff and unlawfully detained him. *Id.* at 1–2. Acknowledging that the Second Amended Complaint contains deficiencies (*id.* at 2), Plaintiff focuses his Response on the standard

[2] In a prior Order dated December 11, 2024, the Court indicated that Plaintiff filed his response on August 7, 2024. *See* ECF No. 82 at 3. Defendants also note as much in their Reply. *See* Reply [ECF No. 63] at 1–3. Plaintiff's filing includes a stamp by the Clerk reflecting an August 6, 2024, filing date. *See* Resp. at 1. The docket entry and the Court's electronic management system's ("CM/ECF") header stamp at the top of the filing, however, reflect that the document was entered in the Court's electronic docket on August 7, 2024. *See generally* docket and Resp. Thus, the entry date of Plaintiff's filing does not coincide with the file stamp date. Given his *pro se* status and the leniency afforded to such litigants, whether Plaintiff timely filed his Response is of no moment, because this Court will nevertheless consider his Response as timely filed.

[3] The docket reflects that ECF Nos. 59 and 60 are duplicate filings; the only difference is that ECF No. 60 was entered as a motion in CM/ECF. The Court refers only to ECF No. 60 in the instant Order, given that it is the latest-filed document.

applicable to allowing amendment under Federal Rule of Civil Procedure 15(a) and requests that the Court grant leave to amend the Second Amended Complaint. *Id.* at 3–4.

Defendants filed a Reply on August 13, 2024, pointing out that the Response mostly amounts to a request for leave to amend and does not confront the arguments set out in the Motion to Dismiss. *See generally* Reply. Because of this, Defendants argue that the Motion is functionally unopposed. *Id.* at 4 (citing *Fawcett v. Carnival Corp.*, 682 F. Supp. 3d 1106, 1112 (S.D. Fla. 2023); *Haasbroek v. Princess Cruise Lines, Ltd.*, 286 F. Supp. 3d 1352, 1358 n.4 (S.D. Fla. 2017)).

III. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) provides that a defendant may move to dismiss a complaint that does not satisfy the applicable pleading requirements for "failure to state a claim upon which relief can be granted." In considering a Rule 12(b)(6) motion to dismiss, the court's review is generally "limited to the four corners of the complaint." *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 959 (11th Cir. 2009) (quoting *St. George v. Pinellas County*, 285 F.3d 1334, 1337 (11th Cir. 2002)). The Court must review the complaint in the light most favorable to the plaintiff, and it must generally accept the plaintiff's well-pleaded facts as true. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). However, pleadings that "are no more than conclusions[ ] are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Dismissal pursuant to a Rule 12(b)(6) motion is warranted "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations of the complaint." *Shands Teaching Hosp.*

& Clinics, Inc. v. Beech St. Corp., 208 F.3d 1308, 1310 (11th Cir. 2000) (internal quotation marks omitted) (quoting *Hishon*, 467 U.S. at 73).

Federal Rule of Civil Procedure 8(a)(2) also requires that a pleading contain a "short and plain statement of the claim" showing the pleader is entitled to relief. The complaint must "give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (cleaned up).

IV. DISCUSSION

A. Whether The Second Amended Complaint Constitutes A Shotgun Pleading.

Defendants first argue that, despite being on its third iteration, the Second Amended Complaint remains confusing and constitutes a shotgun pleading that warrants dismissal. *See* Mot. at 4–6.

Complaints that violate Rule 8(a)(2) "are often disparagingly referred to as 'shotgun pleadings.'" *Weiland v. Palm Beach Cnty. Sheriff's Off.*, 792 F.3d 1313, 1320 (11th Cir. 2015). There are four types of shotgun pleadings that violate Rule 8(a), Rule 10(b), or both:

> The most common type—by a long shot—is a complaint containing multiple counts where each count adopts the allegations of all preceding counts, causing each successive count to carry all that came before and the last count to be a combination of the entire complaint. The next most common type . . . is a complaint that does not commit the mortal sin of re-alleging all preceding counts but is guilty of the venial sin of being replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of action. The third type of shotgun pleading is one that commits the sin of not separating into a different count each cause of action or claim for relief. Fourth, and finally, there is the relatively rare sin of asserting multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions, or which of the defendants the claim is brought against.

Id. at 1321–23 (footnotes omitted). The "unifying characteristic" of shotgun pleadings is they "fail . . . to give the defendants adequate notice of the claims against them and the grounds upon which each claim rests." *Id.* at 1323 (footnote omitted).

Defendants argue the Second Amended Complaint is a shotgun pleading because, generally, it alleges, at times, that Marti engaged in joint conduct or in concert with others without identifying who the other individuals are, it contains references to irrelevant matters, it refers to terms that are not relevant to the causes of action alleged, and it cites statutes that do not apply to particular causes of action. This Court has carefully reviewed the pleading in its entirety. Although there are certainly some inartfully pled allegations and irrelevant references that might warrant striking, the undersigned does not agree the pleading rises to the level of a shotgun pleading.

To the contrary, each Count identifies the cause of action alleged and the Defendant at issue, and each Count incorporates only the general allegations and includes supporting allegations.

Therefore, this Court finds the Second Amended Complaint is not a shotgun pleading and denies the Motion to the extent it is based on a challenge that it is.

B. Whether Defendants Are Entitled To Sovereign Immunity On The State-Law Causes Of Action (Counts VI–X).

Defendants argue that the state-law claims asserted against the City are barred under the doctrine of sovereign immunity because the Second Amended Complaint makes clear that Marti's actions were not taken within the course and scope of his employment with the City. Mot. at 7–10. The state law claims at issue are: assault (Count VI); false imprisonment (Count VII); negligent training and/or supervision (Count VIII); negligent supervision and retention

(Count IX); and negligence (Count X, specifically as to the City). *See generally* SAC ¶¶ 104–36.

> Relevant here, section 768.28, Florida Statutes, provides:
>
> The state or its subdivisions shall not be liable in tort for the acts or omissions of an officer, employee, or agent committed while acting *outside the course and scope of her or his employment* or committed in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

§ 768.28(9)(a), Fla. Stat. (emphasis added). In Florida,

> An employee's conduct is within the scope of his employment, where (1) the conduct is of the kind he was employed to perform, (2) the conduct occurs substantially within the time and space limits authorized or required by the work to be performed, and (3) the conduct is activated at least in part by a purpose to serve the master.

Iglesia Cristiana La Casa Del Señor, Inc. v. L.M., 783 So. 2d 353, 357 (Fla. 3d DCA 2001) (citation omitted). "A municipality can be held liable for an intentional tort committed by an employee, provided that the action at issue was within the scope of the employee's employment, and the conduct did not involve bad faith, malicious purpose, or a wanton and willful disregard of human rights, safety, or property." *Geidel v. City of Bradenton Beach*, 56 F. Supp. 2d 1359, 1365 (M.D. Fla. 1999).

As Defendants point out in the Motion (*see* Mot. at 6), the Second Amended Complaint expressly alleges that the encounter between Plaintiff and Marti took place outside the City's jurisdictional limits.[4] *See, e.g.*, SAC ¶¶ 3, 24. Moreover, in the Second Amended

[4] The Court takes judicial notice of the fact that the encounter between Plaintiff and Marti took place outside the jurisdictional limits of the City of Miami. *See* Fed. R. Evid. 201; *United States v. Garcia*, 672 F.2d 1349, 1356 (11th Cir. 1982) ("The trial judge was free to take judicial notice of the fact that [a certain location] . . . was well beyond the three-mile territorial limit that has been recognized as the border of the United States for purposes of ocean border-crossing cases." (footnote omitted)).

Complaint, Plaintiff alleges that, at the time of the incident, Marti was off-duty and wearing a white cut off shirt. *Id.*; *see also id.* ¶ 25. These concessions are fatal to the Second Amended Complaint's state-law claims against the City because, based on the express allegations in the pleading, Marti was not at work when he allegedly pointed his firearm at and detained Plaintiff, and, thus, the "course and scope" requirement under section 768.28(9)(a) is not met.

This Court therefore agrees with Defendants that, taking the allegations in the Second Amended Complaint as true, Marti was not acting within the course and scope of his employment during the incident at issue, and, as a result, dismissal of the state-law claims against the City on sovereign immunity grounds is warranted.[5] *See, e.g.*, *Geidel*, 56 F. Supp. 2d at 1365 (dismissing claims where plaintiffs' allegations immunized municipality pursuant to section 768.28(9)(1), Florida Statutes); *Ghandour v. City of Miami*, No. 23-21970-CIV, 2024 WL 95391, at *2 (S.D. Fla. Jan. 9, 2024) (Altonaga, C.J.) (dismissing state-law claims on sovereign immunity grounds).

As such, Defendants' Motion is due to be granted insofar as it is based on sovereign immunity, and Counts VI–X will be dismissed.

C. The Sufficiency Of Counts IV, V, And X (As Asserted Against Marti).

Defendants next contend Counts IV (assault claim against Marti), V (federal civil rights violations claim against the City), and Count X (as to Marti) fail to state a claim. The Court considers each of these Counts in turn.

---

[5] Although Defendants raised additional arguments with regard to Counts VI through IX (*see* Mot. at 11–18), these issues are moot in light of its finding that the claims are barred on sovereign immunity grounds.

1. Count IV—Assault.

Count IV asserts a claim for assault against Marti, individually. SAC ¶¶ 80–84. Defendants argue that the assault claim against Marti fails to state a claim because the Second Amended Complaint does not allege that Marti's conduct was intentional. Mot. at 7.

Florida law provides that assault is "an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent." § 784.011, Fla. Stat.; *see also State v. Wilson*, 276 So. 2d 45, 46 (Fla. 1973). It therefore follows that to assert a claim for assault under Florida law, at a minimum, a plaintiff must allege an intentional act and the apprehension of immediate and harmful or offensive conduct. *See, e.g., Rinker v. Carnival Corp.*, No. 09-23154-CIV, 2011 WL 4072217, at *3 (S.D. Fla. Sept. 13, 2011) (Seitz, J.). The required intent is to do the act, not the intent to do violence to the victim. *Cambell v. State*, 37 So. 3d 948, 950 (Fla. 5th DCA 2010). And in a civil assault claim, "[t]he element of intent . . . does not necessarily involve the subjective intent to do harm." *Geovera Specialty Ins. Co. v. Hutchins*, 831 F.Supp. 2d 1306, 1312 (M.D. Fla. 2011) *aff'd*, 504 Fed. Appx. 851 (11th Cir. 2013) (citing *Spivey v. Battaglia*, 258 So. 2d 815 (Fla. 1972)).

Review of the Second Amended Complaint reflects that Plaintiff has adequately alleged the elements of an assault claim, including the intent element. While Defendants correctly note that the Second Amended Complaint alleges that "Marti committed acts intended to cause [Plaintiff] an apprehension of harmful or offensive contact," (SAC ¶ 81) they appear to overlook that paragraph 83 of the operative pleading does in fact allege that "Marti acted *intentionally* . . . by pointing his loaded gun in . . . Plaintiff's face without provocation." *Id.* ¶ 83. And, in a subsequent argument, Defendants concede that pointing a

firearm directly at an individual is an intentional act. *See* Mot. at 20 ("The Defendants emphasize the word 'intentional' here because pointing a firearm directly at an individual sitting in their car, particularly as described in the SAC, is an intentional act.").

Thus, Defendants' challenges to Count IV fail, and the Motion will be denied as to Count IV.

2. Count V—Federal Civil Rights Violations.

In Count V, Plaintiff alleges the City violated Plaintiff's rights under the Fourth and Fourteenth Amendments to the United States Constitution through numerous *de facto* policies and procedures. *See* SAC ¶¶ 85–103. Defendants aver that Count V should be dismissed because it alleges no facts sufficient to support the "litany of legal conclusions" advanced therein. *See* Mot. at 11–12. The undersigned agrees with Defendants that this particular claim should be construed as a *Monell* claim.

As the Supreme Court explained in *Monell v. Department of Social Services*, "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." 463 U.S. 658, 692 (1978). Rather, "to impose municipal liability under § 1983, a plaintiff must allege facts showing (1) that his constitutional rights were violated; (2) that the municipality had a custom or policy that constituted deliberate indifference to that constitutional right; and (3) that the policy or custom caused the violation." *Gurrera v. Palm Beach Cty. Sheriff's Office*, 657 F. App'x 886, 892–93 (11th Cir. 2016) (internal quotation marks and citations omitted).

Throughout Count V, Plaintiff repeatedly alleges the City has *de facto* policies and procedures in place. *See* SAC ¶¶ 89–96. However, those alleged policies primarily address the City's handling of the investigation of Marti and the incident and the failure to discipline

Marti after the incident. These alleged policies could not form the basis of a claim against the City under *Monell* unless they led to or caused the alleged constitutional violations. *McCants v. City of Mobile*, 752 F. App'x 744, 748 (11th Cir. 2018) ("A municipality may be held accountable in damages for the conduct of a particular governmental actor only when the plaintiff shows that the execution of the municipality's official 'policy' or 'custom' effectively *was the cause of the complained of injury*." (emphasis added)). The allegations concerning the Panel's investigation amount to an after-the-fact investigation into Marti, and such an investigation, even if inadequate, "will not sustain a claim of municipal liability, because the after-the-fact . . . investigation could not have been the legal cause of . . . [P]laintiff's injury." *Feliciano v. City of Miami Beach*, 847 F. Supp. 2d 1359, 1367 (S.D. Fla. 2012) (Lenard, J.). Moreover, the allegations do not identify any widespread pattern or deficiencies in any of the City's policies or procedures of which the City was made aware *before* Plaintiff's encounter with Marti. *See, e.g., Coakley v. City of Hollywood*, No. 19-CV-62328, 2021 WL 2018914, at *4 (S.D. Fla. Jan. 15, 2021) (Strauss, M.J.), *report and recommendation adopted*, No. 0:19-CV-62328, 2021 WL 2012360 (S.D. Fla. May 20, 2021).

Furthermore, although the Second Amended Complaint does allege that the City has a *de facto* policy of a "code of silence"[6] that created an atmosphere that led Marti to believe he could get away with the conduct alleged, these are conclusory allegations that fail to identify specific instances forming a persistent and widespread practice necessary to establish

[6] According to the Second Amended Complaint, the policy of a "code of silence" is also referred to as the "blue line" or "blue shield" and constitutes "an implicit understanding between and among members of the City Police Department resulting in a refusal or failure to report instances of misconduct of which they are aware . . . . to protect themselves or their fellow officers from discipline, criminal prosecution, or civil liability." SAC ¶ 94.

a custom and, thus, are insufficient to state such a claim. *See McCants*, 752 F. App'x at 748 (affirming dismissal of claims against city because factual allegations did not "raise a right to relief above the speculative level" where allegations of widespread issues were unsupported and where no "specific" ordinance, rule, or regulation was identified). Plaintiff's allegations do not provide facts regarding any other specific incidents, besides Plaintiff's, to demonstrate any pattern of unconstitutional activity. *See Gurrera*, 657 F. App'x at 893–94 (affirming dismissal of complaint and stating that aside from "conclusory allegations, Plaintiff fail[ed] to identify any examples beyond his own arrest of widespread unconstitutional conduct." (citing *Craig v. Floyd Cnty., Ga.*, 643 F.3d 1306, 1311–12 (11th Cir. 2011))); *Casado v. Miami-Dade Cnty.*, 340 F. Supp. 3d 1320, 1327 (S.D. Fla. 2018) ("The Amended Complaint is devoid of any factual allegations of any prior incidents or the County's alleged knowledge and alleged failure to deter the conduct at issue. Neither the Supreme Court nor the Eleventh Circuit has ever imposed municipal liability based on a single incident under *Monell*." (citations omitted)).

Because pleadings that "are no more than conclusions [] are not entitled to the assumption of truth," *Iqbal*, 556 U.S. at 679, the Second Amended Complaint fails to establish entitlement to relief on this claim, and, therefore, Count V is due to be dismissed.

3. Count X—Negligence Against Marti.

In Count X, Plaintiff alleges Marti was negligent in pointing his firearm at Plaintiff. SAC ¶¶ 129–36. Defendants argue that Count X fails to state a claim because brandishing and pointing a gun, without more, does not sound in negligence. Mot. at 19–21.

"To state a claim for negligence under Florida law, a plaintiff must allege that the defendant owed the plaintiff a duty of care, that the defendant breached that duty, and that

the breach caused the plaintiff to suffer damages." *Lewis v. City of St. Petersburg*, 260 F.3d 1260, 1262 (11th Cir. 2001) (citation omitted).

The problem with Plaintiff's claim against Marti in Count X is that Marti's pointing his firearm at Plaintiff was necessarily an intentional act, whereas negligence connotes an *unintentional* act. *See City of Miami v. Sanders*, 672 So. 2d 46, 47 (Fla. 3d DCA 1996). Since it is not possible to assert a cause of action for "negligent" brandishing of a firearm "because there is no such thing as the negligent commission of an intentional tort," *Sanders*, 672 at 48, Count X fails to state a claim for negligence against Marti. Accordingly, Count X is due to be dismissed.

For the above reasons, Defendant's Motion will be granted as to Counts V and X and denied as to Count IV.

D. Leave to Amend.

As noted above, the Second Amended Complaint is the third iteration of Plaintiff's pleading. Plaintiff amended the original complaint as a matter of course. *See* ECF No. 16; Fed. R. Civ. P. 15(a)). And, after Defendants filed a motion to dismiss [ECF No. 17] identifying deficiencies in the First Amended Complaint, this Court granted Plaintiff leave to file the Second Amended Complaint [ECF No. 28].

At every amendment, Plaintiff was represented by counsel. Yet, for the reasons stated herein, there are deficiencies in the Second Amended Complaint that have not been cured, and Plaintiff acknowledges as much (*see* Resp. at 2). Therefore, given the repeated failures to correct the pleading deficiencies discussed here, this Court declines to grant Plaintiff leave to amend a third time. *See Barrett v. Scutieri*, 281 F. App'x 952 (11th Cir. 2008) ("[I]f there has been a repeated failure to cure deficiencies by amendments previously allowed, the district

court does not have to allow the party to amend the pleading."); *see also Spaulding v. Poitier*, 548 F. App'x 587, 594 (11th Cir. 2013) (holding that there was no abuse of discretion in denying plaintiff leave to amend his complaint because such an amendment would have been futile (citing *Cockrell v. Sparks*, 510 F.3d 1307, 1310 (11th Cir. 2007))); *Hall v. United Ins. Co. of Am.*, 367 F.3d 1255, 1263 (11th Cir. 2004) (observing that courts "properly deny leave to amend the complaint under [Federal Rule of Civil Procedure] 15(a) when such amendment would be futile . . . [such as] 'when the complaint as amended is still subject to dismissal.'" (first citing *Foman v. Davis*, 371 U.S. 178, 182 (1962); and then quoting *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1320 (11th Cir. 1999))).

Moreover, amendment of the state-law claims asserted against the City—that is, Counts VI through X—would be futile in light of the Court's finding of sovereign immunity and, therefore, Counts VI–X are dismissed with prejudice. *See Lordeus v. Miami-Dade Cnty.*, 263 F. Supp. 3d 1307, 1312 (S.D. Fla. 2017) (dismissing claim where "even if [p]laintiff were granted leave to amend his claim, such an amendment would be futile in light of the County's argument regarding sovereign immunity"). To the extent Count X asserts a negligence claim against Marti, that too is dismissed with prejudice because further amendment would be futile. *See Hall*, 367 F.3d at 1263.

V. CONCLUSION

Accordingly, for the reasons set forth above, it is

ORDERED AND ADJUDGED as follows:

1. Defendants' Joint Motion to Dismiss **[ECF No. 38]** is **GRANTED IN PART AND DENIED IN PART**.

2. Counts V through X of the Second Amended Complaint are **DISMISSED WITH PREJUDICE**.

3. Defendant shall file an Answer to the remaining Counts **within fifteen days of the date of this Order**.

4. In light of the Court's ruling herein, Plaintiff's Motion for Clarification **[ECF No. 83]** is **DENIED AS MOOT**.

DONE AND ORDERED in Chambers in the Southern District of Florida, this 4th day of February, 2025.

MELISSA DAMIAN
UNITED STATES DISTRICT JUDGE

CC: Counsel of Record

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