06-3745-cv(L), 06-3785-cv(CON), 06-3789-cv(CON), 06-3800-cv(CON), 06-4187-cv(XAP)

United States Court of Appeals

for the

Second Circuit

IBRAHIM TURKMEN, ASIF-UR-REHMAN SAFFI, SYED AMJAD ALI JAFFRI, YASSER EBRAHIM, HANY IBRAHIM, SHAKIR BALOCH, AKHIL SACHDEVA AND ASHRAF IBRAHIM,

Plaintiff-Appellee-Cross-Appellants,

– v. –

JOHN ASHCROFT, ROBERT MUELLER, JAMES ZIGLAR, DENNIS HASTY, AND JAMES SHERMAN,

Defendant-Appellant-Cross-Appellees,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

SUPPLEMENTAL BRIEF FOR DEFENDANT-APPELLANT-CROSS-APPELLEE JAMES ZIGLAR

WILLIAM ALDEN MCDANIEL, JR.
LAW OFFICE OF WILLIAM ALDEN MCDANIEL, JR.
Attorneys for Defendant-Appellant-Cross-Appellee James Ziglar
118 West Mulberry Street
Baltimore, Maryland 21201
(410) 685-3810

UNITED STATES OF AMERICA,

Defendant-Cross-Appellee,

JOHN DOES 1-20, MDC CORRECTIONS OFFICERS, MICHAEL ZENK, WARDEN OF MDC, CHRISTOPHER WITSCHEL, CLEMETT SHACKS, BRIAN RODRIGUEZ, JON OSTEEN, RAYMOND COTTON, WILLIAM BECK, SALVATORE LOPRESTI, STEVEN BARRERE, LINDSEY BLEDSOE, JOSEPH CUCITI, HOWARD GUSSAK, MARCIAL MUNDO, DANIEL ORTIZ, STUART PRAY, ELIZABETH TORRES, PHILLIP BARNES, SYDNEY CHASE, MICHAEL DEFRANCISCO, RICHARD DIAZ, KEVIN LOPEZ, MARIO MACHADO, MICHAEL MCCABE, RAYMOND MICKENS, SCOTT ROSEBERY, UNITED STATES,

Defendants.

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PRELIMINARY STATEMENT

Plaintiffs continue to ignore the handwriting on the wall, first written by the Court's decision in *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007), and now underscored by its decision in *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937 (2009), that under the pleading requirements of FED. RULE CIV. PRO 8, plaintiffs' Third Amended Complaint fails to plead enough facts to state a claim for relief that is "plausible on its face" as regards Mr. Ziglar. *Twombly, supra*, 550 U.S. at 570. The Third Amended Complaint fails this test in two ways: it does not plead facts establishing a plausible claim that Mr. Ziglar personally participated in the constitutional torts plaintiffs have tried to allege, a participation that plaintiffs must plead to state a claim under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971); and it does not plead facts sufficient to establish any plausible claim that could overcome Mr. Ziglar's defense of qualified immunity. For these reasons, the District Court properly dismissed 1, 2, 5 (in part), and 24, but erred in refusing to dismiss claims 3, 5, 7, 8, & 20-23 as regards Mr. Ziglar.

Mr. Ziglar addressed this issue in his Reply Brief filed in this appeal and the arguments he made there have only been strengthened by the decision in *Iqbal*. In addition, Mr. Ziglar expressly adopts the arguments regarding the impact of *Iqbal* made by his co-defendants in this case.

ARGUMENT

THE THIRD AMENDED COMPLAINT DOES NOT ALLEGE SUFFICIENT FACTS TO STATE A PLAUSIBLE CLAIM UNDER *BIVENS* OF PERSONAL INVOLVEMENT BY DEFENDANT JAMES W. ZIGLAR IN THE WRONGS ALLEGED OR TO OVERCOME HIS DEFENSE OF QUALIFIED IMMUNITY

To state claims for relief under *Bivens, supra,* against Mr. Ziglar, the former head of the former Immigration and Naturalization Service (hereinafter "INS"), the Third Amended Complaint had to allege Mr. Ziglar's "personal involvement … in the alleged constitutional deprivations" that plaintiffs sought to plead in claims 3, 5, 7, 8, & 20-23. *Thomas v. Ashcroft*, 470 F.3d 491, 496 (C.A.2 2006). The decision in *Iqbal* emphasized that "Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*." *Ashcroft v. Iqbal, supra,* ___ U.S. at ___, 129 S. Ct. at 1948. The Court there stated that "each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Ibid.,* 129 S. Ct. at 1949. The Court specifically rejected the plaintiffs' argument that Government officials like Mr. Ziglar "can be liable for 'knowledge and acquiescence in their subordinates'" unconstitutional conduct. *Ibid.,* 129 S. Ct. at 1949 (quoting brief of plaintiffs, at 45-46). "Because vicarious liability is inapplicable to *Bivens* and § 1983 actions," the Court held, "a plaintiff must plead that each Government-official defendant, through that official's own individual actions, has violated the

Constitution." *Id.* at ___, 129 S. Ct. at 1948. So while it is true, as plaintiffs note, that "an official [may be] charged with violations arising from his or her superintendent responsibilities," *id.* at ___, 129 S. Ct. at 1949, such a charge "must plead" sufficient facts to make it plausible that the official, "through that official's own individual actions, has violated the Constitution." *Id.* at ___, 129 S. Ct. at 1948.

Accordingly, under this court's holding in *Black v. Coughlin*, 76 F.3d 72 (C.A. 2 1996), *Iqbal* and *Twombly* require plaintiffs to have pleaded sufficient facts to make out a plausible case of (1) Mr. Ziglar's "direct participation" in the alleged torts; (2) Mr. Ziglar's "failure to remedy the alleged wrong after learning of it; (3) Mr. Ziglar's creation of a policy or custom under which unconstitutional practices occurred;" or (4) Mr. Ziglar's gross negligence in managing subordinates." *Black, supra*, 76 F.3d at 74.

In their Supplemental Brief on the impact of *Iqbal*, at pages 8-10 & 14-17, strive to show that they have met the pleading test with regard to Mr. Ziglar. First, they point to ¶ 83, where the Third Amended Complaint lumps Mr. Ziglar in with the Attorney General and the Director of the FBI, alleging that "INS Commissioner Ziglar, FBI Director Mueller, and Attorney General Ashcroft ordered and/or condoned the prolonged placement of these detainees in extremely restrictive confinement." Third Amended Complaint ¶ 83. The Third Amended

Complaint then cited as a basis for this averment several pages of a report prepared by the Office of the Inspector General of the Department of Justice, entitled *The September 11 Detainees: A Review Of The Treatment Of Aliens Held On Immigration Charges In Connection With The Investigation Of the September 11 Attack* (hereinafter "*OIG Report*"). JA 260-477.

Mr. Ziglar addressed this argument in detail in his Reply Brief, and will not repeat those arguments here. He notes at this stage that there is nothing in the Third Amended Compliant or the *OIG Report* that remotely supports any contention that Mr. Ziglar created or had any role in implementing any policy to hold detainees beyond the time necessary to determine their deportation status, which is the aspect of the policy that forms the basis for plaintiffs' claims of illegality in this regard. To the contrary, the *OIG Report* made it clear that the "hold-until-cleared" policy was formulated and approved, not by James Ziglar, but by his superiors in the Department of Justice: Associate Deputy Attorney General Levey "told the OIG that" the "hold-until-cleared" policy "came from 'at least' the Attorney General" and that the policy "was 'not up for debate'" in the Department of Justice (which at that time included the INS). JA 304. The OIG "found that this" policy was "communicated to the INS …by a number of Department [of Justice] officials, including Stuart Levey." JA 303. There is no evidence in the

OIG Report to suggest that Mr. Ziglar had any role in creating this policy or in deciding to implement it.

Indeed, the *OIG Report*—and thus, the Third Amended Complaint, which incorporates it—stated that Mr. Ziglar had complained about the length of time it was taking to "clear" the detainees, because he intended to have the INS release the September 11 detainees regardless of the policy if the reviews were not timely completed. By incorporating the *OIG Report* into their Third Amended Complaint, plaintiffs have pleaded these facts, and this inconsistent pleading is fatal to their claims against Mr. Ziglar regarding the "hold-until-clear" policy. The averments of ¶ 83 do not support any plausible claim against Mr. Ziglar.

Second, plaintiffs point to ¶¶ 71-73 of the Third Amended Complaint. Those averments again lump Mr. Ziglar in with defendants Ashcroft and Mueller and a number of other defendants, alleging that defendants imposed a communications blackout on the plaintiffs. These paragraphs say nothing about what Mr. Ziglar specifically did that violated the rights of any plaintiff. This constitutes precisely the type of bald, conclusional averment that does not meet the test of *Iqbal* and *Twombly*. Averments such as this, which "are no more than conclusions," are "not entitled to the assumption of truth." *Iqbal*, *supra*, ___ U.S. at ___, 129 S. Ct. at 1950. In *Iqbal*, the Court held that averments that defendant

Ashcroft had been the "principal architect" of a challenged policy or that defendant Mueller had been "instrumental" in adopting and implementing that policy were "bare assertions" that did not state plausible claims. *Id.* at ___, 129 S. Ct. at 1951. The averments of ¶¶ 71-73 fail that test in the same way. The averments here are even less plausible, in that they contain no allegations specifying anything that Mr. Ziglar did that in any way created or implemented the policies at issue.

Third, plaintiffs allege that defendants Ziglar, Ashcroft, and Mueller violated plaintiffs' rights to legal counsel and access to the courts by adopting policies of not serving notices in a timely fashion, imposing a communications blackout, and assigning plaintiffs to high-security detention. Here, again, these allegations, contained in ¶ 5, do not aver that Mr. Ziglar did or failed to do anything to promulgate or implement the wrong of which plaintiffs complain. These averments thus also constitute "bare assertions" that do not suffice to plead a claim for relief.

Next, plaintiffs refer to the *OIG Report*, which they seem to believe contains numerous statements regarding Mr. Ziglar's "orders and awareness of the challenged conditions of confinement." *Iqbal* made it clear that "awareness" cannot be a basis for imposing *Bivens* liability. And as noted above, and as detailed in Mr. Ziglar's reply brief, the *OIG Report* not only contains no support

for claims against Mr. Ziglar, it establishes that Mr. Ziglar cannot be held liable for any of plaintiffs' claims against him.

For example, plaintiffs argue that the *OIG Report* supports their allegation that Mr. Ziglar is liable for decisions as to where to house detainees. But the *OIG Report* makes it clear that Mr. Ziglar had no role in that decision, but that it was made by Michael Pearson. The *OIG Report* categorically states that "[f]rom September 11 to September 21, 2001, INS Executive Associate Commissioner for Field Operations Michael Pearson made *all* decisions regarding where to house September 11 detainees." JA 284 (emphasis added). The OIG concluded that during that time, "Pearson decided whether a detainee should be confined at a [Bureau of Prisons] facility (such as the MDC), an INS facility, or an INS contract facility (such as Passaic)." *Ibid.* The OIG then stated that "Pearson's decision" regarding where to send the detainee "was relayed to the INS New York District, which transferred the detainees to the appropriate facility." *Ibid.* The *OIG Report* found that after September 21, 2001, housing decisions were made by "three INS District Directors" on the basis of "input provided by the FBI." JA 284-285.

Nothing at this point (or anywhere else) in the *OIG Report* shows that Mr. Ziglar had any involvement in these decisions or that Mr. Pearson (or the three

INS District Directors who performed this function after September 21, 2001) communicated with Mr. Ziglar at any time regarding this issue. Plaintiffs' argument on this point is pure *respondeat superior.*

It bears emphasis that, with the exception of ¶ 25, an averment that does no more than identify Mr. Ziglar as one of the defendants, every paragraph of the Third Amended Complaint that names Mr. Ziglar lumps him in with defendant Ashcroft, defendant Mueller, and various employees of the Bureau of Prisons without distinguishing what role Mr. Ziglar supposedly played in the torts alleged. In the same way, even when mentioning Mr. Ziglar by name, the Third Amended Complaint alleged that he has liability for various actions taken by the Attorney General, the FBI, or the Bureau of Prisons, as though Mr. Ziglar had some role in the direction of those organizations. Mr. Ziglar was the head of the INS: he was not the head of the Justice Department, the Director of the FBI, or the head of the Bureau of Prisons. Nor did he work for any of those agencies or any other instrumentality of the United States government, other than the INS. Mr. Ziglar accordingly is answerable in his individual capacity only for *his* actions as the head of the INS. Because the Third Amended Complaint contains no averments that make out a plausible claim on their face as regards Mr. Ziglar, the District Court should have dismissed it in it entirety as to him.

In the same way, the Third Amended Complaint, as regards James W. Ziglar, failed to allege "enough facts" to overcome Mr. Ziglar's qualified immunity defense, because the Third Amended Complaint itself averred nothing that linked Mr. Ziglar with the unconstitutional policies of which plaintiffs complain. To the contrary, by virtue of its reliance on and incorporation of the *OIG Report*, the Third Amended Complaint must be read as having averred that in matters where Mr. Ziglar was involved, he did all he could to ensure that Justice Department policies imposed on him by his superiors were carried out lawfully. A federal court "need not feel constrained to accept as truth conflicting pleadings that … are contradicted either by statements in the complaint itself or by documents upon which its pleadings rely." *In Re Livent, Inc. Noteholders Securities Litigation*,151 F.Supp.2d 371, 405 (S.D.N.Y 2001). Indeed, read as a whole, the Third Amended Complaint fails to set forth any facts, let alone "enough facts," to support a plausible *Bivens* claim against Mr. Ziglar or to overcome his defense of qualified immunity.

CONCLUSION

The judgment of the District Court refusing to dismiss claims 3, 5, 7, 8, & 20-23 as to defendant James W. Ziglar should be reversed; the judgment of the District Court should otherwise be affirmed.

Respectfully Submitted,

William Alden McDaniel, Jr.

LAW OFFICES OF
WILLIAM ALDEN MCDANIEL, JR.
118 West Mulberry Street
Baltimore, Maryland 21201-3603
Tel.: 410.685.3810
Fax: 410.685.0203
E-Mail: wam@wamcd.com
E-Mail: bb@wamcd.com

Lawyers for Defendant-Appellant-Cross-Appellee James W. Ziglar

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I hereby certify, pursuant to FED. RULE APP. PRO. 32(a)(7)(C), that the foregoing brief is proportionally spaced, has a typeface of 14 point and contains 2,274 words (excluding the parts of the brief exempted by Fed. R. App. P.32(a)(7)(B)(iii)), which is within the 2,500-word limit set by this Court's June 17, 2009 order.

/s/
William Alden McDaniel, Jr.

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SERVICE LIST:

RACHEL MEEROPOL, ESQ.
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
Rachelm@ccr-ny.org

MICHAEL WINGER, ESQ.
COVINGTON & BURLING
1330 Avenue of the Americas
New York, New York 10020
Mwinger@cov.com

Attorneys for Plaintiff-Appellee-Cross-Appellants

ROBERT M. LOEB, ESQ.
U.S. DEPARTMENT OF JUSTICE
CIVIL DIVISION, APPELLATE STAFF
950 Pennsylvania Avenue, N.W., Room 7268
Washington, DC 20530
Robert.loeb@usdog.gov

Attorneys for Defendant-Appellee-Cross-Appellants
John Ashcroft and Robert Mueller

LARRY L. GREGG, ESQ.
DENNIS BARGHAAN, ESQ.
UNITED STATES ATTORNEYS OFFICE
EASTERN DISTRICT OF VIRGINIA
2100 Jamieson Avenue
Alexandria, Virginia 22314
Larry.gregg@usdoj.gov
Dennis.barghaan@usdoj.gov

Attorneys for Defendant-Appellant-Cross-Appellee
John Ashcroft

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