UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ADRIANA AGUILAR, *et al.*,

Plaintiffs,

- against -

IMMIGRATION AND CUSTOMS ENFORCEMENT DIVISION OF THE UNITED STATES DEPARTMENT OF HOMELAND SECURITY, *et al.*,

Defendants.

ECF Case
07 Civ. 8224 (JGK) (FM)

MEMORANDUM OF LAW IN SUPPORT OF FIVE BIVENS DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

PREET BHARARA
United States Attorney for the
Southern District of New York
Attorney for defendants
86 Chambers Street
New York, New York 10007
Tel: (212) 637-2800

SHANE CARGO
KRISTIN VASSALLO
Assistant United States Attorneys
– Of Counsel –

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Preliminary Statement

Defendants ICE 19, ICE 30, ICE 32, ICE 42, and ICE 43 (the "Moving Defendants," law enforcement officers who are pseudonymously referred to in this litigation to avoid compromising their safety), through their attorney, Preet Bharara, United States Attorney for the Southern District of New York, move for summary judgment dismissing the Bivens claims asserted against them in plaintiffs' fourth amended complaint, dated December 21, 2009 (the "complaint").

The Moving Defendants should be dismissed from this case because, despite voluminous discovery, there is no evidence that any of them ever approached or entered plaintiffs' homes, much less took part in the searches, arrests, or purportedly discriminatory conduct that allegedly occurred. Nor is there any evidence that the Moving Defendants participated in planning Operation Community Shield or selecting the targets. Because there is no genuine issue of material fact with respect to the Moving Defendants' personal participation in any of the alleged constitutional violations, summary judgment should be granted, and all claims against the Moving Defendants should be dismissed.

BACKGROUND

A. The Complaint's Allegations Concerning the Moving Defendants

The Complaint alleges that ICE 19 and ICE 42 "unlawfully entered, searched, and seized [710 Jefferson Street] and unlawfully seized and detained [the residents of 710 Jefferson Street] within their home[] based upon nothing more than their Latino appearance, inability to speak, or limited proficiency in, English, accent, and/or other impermissible considerations." Compl.

¶¶ 122, 147; see also id. ¶¶ 31, 342.[1] The complaint further alleges that ICE 19 and ICE 42 "selected the residences and individuals targeted in these home raids for immigration enforcement actions because Latinos were believed to reside at the homes." Id. ¶¶ 122, 147. The complaint contains no allegations tying ICE 19 or ICE 42 to any other site or event at issue in this action.

With respect to ICE 30, ICE 32, and ICE 43, the complaint alleges that these agents "unlawfully entered, searched, and seized [22 Dogwood Lane] and unlawfully seized and detained [the residents of 22 Dogwood Lane] within their home[] based upon nothing more than their Latino appearance, inability to speak, or limited proficiency in, English, accent, and/or other impermissible considerations."[2] Id. ¶¶ 135, 137, 148; see also id. ¶¶ 33, 353. The complaint further alleges that ICE 30, ICE 32, and ICE 43 "selected the residences and individuals targeted in these home raids for immigration enforcement actions because Latinos

[1] Although the complaint states that ICE 19 was also involved in an operation at the home of Yanet Martinez, Ms. Martinez was omitted from the fourth amended complaint and is no longer a plaintiff in this case.

[2] Although the complaint also alleges that ICE 32 took part in the operation that occurred at the home of Raul and Gloria Amaya, 58 East 6th Street, Huntington Station, New York, see Compl. ¶ 137, these allegations are not properly a part of this case. Plaintiffs' counsel has informed the Court that the Amayas are no longer interested in proceeding as plaintiffs, which is confirmed by the fact that they are not listed as proposed class representatives in plaintiffs' motion for class certification. See Plaintiffs' Memorandum of Law in Support of Their Motion for Class Certification, dated September 22, 2011, at 3 n.5 (citing Appendix A to the supporting declaration of Aldo A. Badini). In addition, although the government noticed the Amayas' depositions, they did not appear or make any alternative arrangements. Accordingly, as this Court has already stated, the Amayas' claims, including those against ICE 32, are subject to dismissal for failure to prosecute. See Transcript of June 11, 2010, Hearing, at 46-47; see also Sease v. Doe, No. 04 Civ. 5569 (LTS) (MH), 2006 WL 3210032, at *4-5 (S.D.N.Y. Nov. 6, 2006). To avoid burdening the Court with further motion practice, the government hopes to reach an agreement concerning voluntary dismissal. Failing that, the government reserves its right to move to dismiss the their claims under Fed. R. Civ. P. 41(b).

were believed to reside at the homes. Id. ¶¶ 135, 137, 148. The complaint contains no allegations tying ICE 30, ICE 32, or ICE 43 to any other site or event at issue in this action.

Based on these allegations, plaintiffs assert a single Bivens claim against each of the defendants, including the Moving Defendants. See id. ¶¶ 484-89. Set forth in count three of the complaint, this cause of action alleges that the Moving Defendants:

> failed to intervene to protect Plaintiffs' constitutional rights from infringement, were grossly negligent in supervising subordinates who committed the wrongful acts, and/or aided and abetted and/or conspired to deprive, participated in depriving, and/or did deprive Plaintiffs of certain constitutionally protected rights, including . . .
>
> a. the right not to be subject to unlawful home raids;
>
> b. the right to be free from unlawful entries into and searches and seizures of Plaintiffs' homes without a judicial warrant or voluntary consent and in the absence of probable cause and exigent circumstances;
>
> c. the right to be free from detentions without a lawful, reasonable and articulable suspicion of unlawful activity or probable cause, including, but not limited to, the right not to have defendants surround their homes or detain their persons in connection with an otherwise unlawful home raid; and
>
> d. the right to be free from discriminatory application of the law and the right to equal protection under the law.

Id. ¶ 485.

B. The Moving Defendants' Participation in the Operations at 710 Jefferson Street and 22 Dogwood Lane

ICE 19, an ICE agent assigned to the Joint Terrorism Task Force, was asked to join the Resident Agent-in-Charge ("RAC") Long Island's September 2007 operation. See Ex. A to the Declaration of Shane Cargo, dated October 27, 2011 (ICE 19 Dep. Tr.), at 37, 63-64, 69-70.[3] He

[3] Hereinafter, all exhibit cites refer to exhibits to the Cargo declaration.

first learned of the operation about a week before it took place, and he played no role in selecting the targets or planning the operation. Id. at 63, 75-76.

On September 24, 2007, ICE 19 went to 710 Jefferson Street with several other officers. Id. at 117, 134. He remained in the street next to one of the vehicles, monitoring someone who had been arrested at an earlier location. Id. at 119-20, 136-38. From his position 20-25 yards from the front door, ICE 19 could see officers approach the location but not who opened the door. Id. at 121-23. Other than the word "police," he did not hear any conversation that took place at the front door. Id. at 147. He did not see any officers draw their weapons at the location. Id. at 131. Although he saw a van pull into the driveway and a woman get out of the van, ICE 19 did not speak with her or hear her conversation with other officers. Id. at 148-51. ICE 19 did not enter 710 Jefferson Street and did not participate in any conversation at the front door of that location. Id. at 121-23, 142-47, 161.

ICE 42, an ICE agent assigned to the Asset Identification Recovery Group, was also asked to support the September 2007 operation. See ICE 42 Dep. Tr. (Ex. B), at 43-47. She played no role in selecting or evaluating the targets of the operation. Id. at 147, 203.

On September 24, 2007, ICE 42 went to 710 Jefferson Street with several other officers. Id. at 75, 119-20. She remained near one of the vehicles, monitoring one or two people who had been arrested at an earlier location. Id. at 75, 93, 124, 126-27, 130; ICE 19 Dep. Tr. (Ex. A), at 139. Because she was occupied watching the arrestee, ICE 42 did not see anything that took place at 710 Jefferson, including what occurred at the front door. See ICE 42 Dep. Tr. (Ex. B), at 124, 127, 134-35. She did not approach the front door of any home she visited on September 24, 2007, including 710 Jefferson. Id. at 102. She did not see any officers draw their

weapons at the location. Id. at 240. ICE 42 did not enter 710 Jefferson Street and did not participate in any conversation at the front door of that location. Id. at 75-76, 121, 127.

ICE 30, an ICE agent assigned to the New York City field office, was also asked to join the September 2007 operation. See ICE 30 Dep. Tr. (Ex. C), at 156. He first learned of the operation about a week before it took place, and he played no role in selecting targets or planning the operation. Id. at 153-54, 165, 167-68, 334-36.

On September 24, 2007, ICE 30 went to 22 Dogwood Lane with several other officers. Id. at 231. Once there, he took a perimeter position on the side of the house. Id. at 241-44, 254, 261-63; ICE 43 Dep. Tr. (Ex. D), at 127-28. While he was standing there, ICE 30 never unholstered or placed his hands on his weapon. See ICE 30 Dep. Tr. (Ex. C), at 260. Although he saw officers approach the front door, he did not observe what happened there or who, if anyone, entered the house. Id. at 245-46, 255-56, 260-61. Other than hearing a knock and the word "Police," he did not hear what took place. Id. at 255-59. ICE 30 did not enter 22 Dogwood Lane or participate in any conversation at the front door of that location. Id. at 255-63, 273-74, 280.

ICE 32, an ICE agent assigned to the New York City field office, was also asked to support the September 2007 operation. See ICE 32 Dep. Tr. (Ex. E), at 12, 55-56, 108-09. He played no role in planning the operation or selecting targets. Id. at 109.

On September 24, 2007, ICE 32 went to 22 Dogwood Lane with several other law enforcement officers. Id. at 135. Upon arrival, ICE 32 remained on the street next to one of the cars, never venturing more than ten feet away from the vehicle. Id. at 136-38, 150-51. He did not see any officer unholster a weapon at 22 Dogwood Lane, and did not see or hear anything that happened at the front door. Id. at 160-65, 182. ICE 32 did not enter or approach

22 Dogwood Lane and did not participate in any conversation at the front door. Id. at 138, 150, 162-65.

ICE 43, an ICE agent assigned to the New York City field office, was also asked to join the September 2007 operation. See ICE 30 Dep. Tr. (Ex. C), at 160, 175-76; ICE 43 Dep. Tr. (Ex. D), at 41-42, 64-65. She first learned of the operation a few days before it took place, and she played no role in planning it or selecting the targets. See ICE 43 Dep. Tr. (Ex. D), at 60-66.

On September 24, 2007, ICE 43 went to 22 Dogwood Lane with several other officers. See ICE 30 Dep. Tr. (Ex. C), at 235; ICE 43 Dep. Tr. (Ex. D), at 84-85, 113-14. Once there, she took a perimeter position in the right corner of the front yard, about 30 feet from the front door. See ICE 43 Dep. Tr. (Ex. D), at 127. ICE 43 remained in that spot for the duration of the operation, only pacing back and forth in the front yard and never venturing into the backyard. Id. at 128, 142, 150-55, 165. She never took her weapon out of her holster. Id. at 121. She did not see who answered the front door or hear any conversations that took place, and she never entered the house. Id. at 137-41, 145-49, 152, 159-60.

Despite extraordinary amounts of discovery, including 141 depositions, the government knows of no evidence showing that any of the Moving Defendants had any more active role as to any site or event at issue in this action.

ARGUMENT

THE COURT SHOULD GRANT THE MOVING DEFENDANTS' SUMMARY-JUDGMENT MOTION BECAUSE THERE IS NO GENUINE ISSUE WITH RESPECT TO THEIR PARTICIPATON IN ANY ALLEGED CONSTITUTIONAL VIOLATIONS

The Moving Defendants are entitled to summary judgment dismissing plaintiffs' claims against them because no evidence even suggests that they were personally involved in any alleged constitutional violations.

Summary judgment should be granted when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).[4] To defeat a motion for summary judgment, it is not enough that the non-moving party show the existence of any factual dispute; the non-moving party must show the existence of a genuine issue of material fact. See Scott v. Harris, 550 U.S. 372, 380 (2007). Conclusory allegations or denials are insufficient to rebut a properly supported motion for summary judgment. See Davis v. New York, 316 F.3d 93, 100 (2d Cir. 2002); Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir. 1985).

Plaintiffs' claims against the Moving Defendants arise under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), which "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." Ashcroft v. Iqbal, 556 U.S. 662, 1947-48 (2009) (citation omitted). To establish Bivens liability, a plaintiff must show that the defendant was personally involved in the alleged violations. See Cuoco v. Moritsugu, 222 F.3d 99, 109 (2d Cir. 2000);

[4] Although Rule 56 was extensively rewritten effective December 1, 2010, the advisory committee stated that despite the new language, the "standard for granting summary judgment remains unchanged," and "[s]ubdivision (a) carries forward the summary-judgment standard expressed in former subdivision (c)." Fed. R. Civ. P. 56 adv. comm. note 2010.

Castellar v. Caporale, No. CV-04-3402 (DGT), 2010 WL 3522814, at *4 (E.D.N.Y. Sept. 2, 2010); see also Farrell v. Burke, 449 F.3d 470, 484 (2d Cir. 2006).[5] Thus, a plaintiff must satisfy this requirement by proving that the defendants directly participated in the alleged violations. See, e.g., Wallace v. Conroy, 945 F. Supp. 628, 637 (S.D.N.Y. 1996).[6]

In this case, there is no genuine issue as to whether the Moving Defendants directly participated in any alleged constitutional violations. As their deposition testimony makes clear, none of the Moving Defendants took part in the conduct at the heart of this case: the encounters with plaintiffs at the front doors of 710 Jefferson Street and 22 Dogwood Lane during which, plaintiffs allege, their consent to search was not properly obtained. To the contrary, the Moving Defendants each remained outside the houses, either watching arrestees in parked vehicles (ICE 19 and ICE 42) or guarding the perimeter (ICE 30, ICE 32, and ICE 43). The Moving Defendants never approached, entered, searched, or arrested anyone at plaintiffs' homes.[7] Furthermore, there is no evidence that any of the Moving Defendants, who all worked outside the RAC Long Island and learned of the operation shortly before it took place, played any role in the planning of the operation or the selection of its targets, and the Moving Defendants'

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[5] Although the constitutional claims asserted in Farrell and other cases cited in this brief were brought under 42 U.S.C. § 1983, "federal courts have typically incorporated § 1983 law into Bivens actions." Tavarez v. Reno, 54 F.3d 109, 110 (2d Cir. 1995).

[6] As this Court has noted, see Aguilar v. Immigration and Customs Enforcement, No. 07 Civ. 8224 (JGK), _ F. Supp. 2d _, 2011 WL 3273160, at *10 (S.D.N.Y. Aug. 1, 2011), courts in this Circuit have reached differing conclusions as to the type of conduct required, post-Iqbal, to assert Bivens claims against supervisory officials. It is unnecessary, however, to resolve the issue here because there is no allegation that the Moving Defendants were acting as supervisors in connection with Operation Community Shield.

[7] See ICE 19 Dep. Tr. (Ex. A), at 119-23, 136-39, 142-47, 161; ICE 42 Dep. Tr. (Ex. B), at 75-76, 93, 102, 121, 124, 126-27, 130, 134-35; ICE 30 Dep. Tr. (Ex. C), at 241-44, 254-63, 273, 280; ICE 43 Dep. Tr. (Ex. D), at 127-28, 137-40, 142, 145-55, 159-60, 165; ICE 32 Dep. Tr. (Ex. E), at 136-38, 150-51, 162-65.

unrebutted testimony establishes that they had no such role.[8] Because plaintiffs have adduced no evidence creating a genuine factual dispute with respect to the Moving Defendants' direct participation in any constitutional violations, the Moving Defendants should be dismissed from the case.

Nor can plaintiffs succeed on a theory of bystander liability. Although courts have allowed plaintiffs in § 1983 and Bivens actions to sue law enforcement officers for failing to intervene in violations committed by other officers, they have done so only in narrowly limited circumstances, where there is sufficient evidence "to support a conclusion that an officer who stood by without trying to assist the victim became a tacit collaborator." See O'Neill v. Krzeminski, 839 F.2d 9, 11-12 (2d Cir. 1988); Castellar, 2010 WL 3522814, at *4; Jean-Laurent v. Wilkinson, 540 F. Supp. 2d 501, 512 (S.D.N.Y. 2008); Collier v. Locicero, 820 F. Supp. 673, 682 (D. Conn. 1993). Accordingly, a plaintiff seeking to establish Bivens liability based on failure to intervene must show that (i) the alleged violation took place in the officer's presence; (ii) the officer had a realistic opportunity to intercede and prevent the harm; (iii) a reasonable person in the officer's position would know that the plaintiff's rights were being violated; and (iv) the officer did not take reasonable steps to intervene. See Anderson v. Branen, 17 F.3d 552, 557 (2d Cir. 1994); O'Neill, 839 F.2d at 11-12; Jean-Laurent, 438 F. Supp. 2d at 327. When an officer is standing at a distance from an alleged violation, or the violation occurs quickly, the officer does not have a realistic opportunity to intervene and is therefore insulated from liability.

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[8] See ICE 19 Dep. Tr. (Ex. A), at 63, 75-76; ICE 42 Dep. Tr. (Ex. B), at 147, 203; ICE 30 Dep. Tr. (Ex. C), at 153-54, 165, 167-68, 334-36; ICE 43 Dep. Tr. (Ex. D), at 60-66; ICE 32 Dep. Tr. (Ex. E), at 109.

See O'Neill, 839 F.2d at 11-12; Castellar, 2010 WL 3522814, at *4-5; Rasanen v. Brown, 603 F. Supp. 2d 550, 553-554 (E.D.N.Y. 2009); Jean-Laurent, 540 F. Supp. 2d at 327.

Applying these principles here, summary judgment should be granted to the Moving Defendants because there is no genuine issue of fact with respect to any alleged failure to intervene. First, plaintiffs cannot establish that a reasonable person in the Moving Defendants' position would have known that plaintiffs' rights were being violated. Because these defendants never set foot in 710 Jefferson Street or 22 Dogwood Lane, they were in no position to observe any searches or detentions occurring inside. In fact, the Moving Defendants were not even able to observe what happened at the front door, before other officers entered the houses. Stationed near the street or on the side of the houses up to 20-25 yards from the entrances, the Moving Defendants were not in a position to witness the interactions with the residents. ICE 19 and ICE 30 heard only the word "Police," and ICE 32, ICE 42, and ICE 43 heard no part of the conversations.[9] Despite pursuing extraordinarily thorough evidence, including by taking 94 depositions, plaintiffs have uncovered no evidence to the contrary.

Given this unrebutted testimony, no reasonable person in the Moving Defendants' position would have had reason to believe that plaintiffs' rights were allegedly being violated. And there is no evidence from which a reasonable fact-finder could infer that the Moving Defendants had a realistic opportunity to intercede and prevent such alleged violations. Therefore, summary judgment should be entered dismissing any failure-to-intervene claims. See Bonilla v. United States, 357 Fed. Appx. 334, 335 (2d Cir. 2009) (affirming summary-judgment

[9] See ICE 19 Dep. Tr. (Ex. A), at 121-23, 142-51; ICE 42 Dep. Tr. (Ex. B), at 127; ICE 30 Dep. Tr. (Ex. C), at 255-63; ICE 43 Dep. Tr. (Ex. D), at 137-41, 145-49, 152, 159-60; ICE 32 Dep. Tr. (Ex. E), at 160-65.

dismissal where officer undisputedly did not enter or search plaintiff's apartment); Loria v. Gorman, 306 F.3d 1271, 1288 (2d Cir. 2002) (no claim for unlawful entry where officer did not enter the house but instead witnessed plaintiff attempting to close door on fellow officer); Castellar, 2010 WL 3522814 at *5 (where alleged violation took place in bedroom, no personal involvement as to officers on ground floor and outside); Rasanen, 603 F. Supp. 2d at 554 (dismissing claims against defendants who were not in bedroom where another officer shot plaintiff because they "could not possibly have had a reasonable opportunity to intervene"); Waananen v. Barry, 343 F. Supp. 2d 161, 169 (D. Conn. 2004), aff'd, 160 Fed. Appx. 102 (2d Cir. 2005) (no personal involvement because lack of evidence that officers ever searched or entered plaintiff's home); Harvey v. New York City Police Dep't, No. 93 Civ.7563 (JSR), 1997 WL 292112, at *1 (S.D.N.Y. June 3, 1997) (where arrest and excessive force took place in bedroom, no personal involvement by officer standing in entryway).

Finally, to the extent plaintiffs seek to premise liability on the theory that the Moving Defendants helped to "surround[]" their homes, see Compl. ¶ 492, the Moving Defendants are entitled to summary judgment on these claims as well. Plaintiffs' theory that the defendants unlawfully seized their homes is essentially a claim for false imprisonment or arrest. To succeed on such a claim, a plaintiff must show that "(1) the defendant intended to confine [the plaintiff], (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement and (4) the confinement was not otherwise privileged." Curry v. City of Syracuse, 316 F.3d 324, 335 (2d Cir. 2003) (quoting Weyant v. Okst, 101 F.3d 845, 853 (2d Cir. 1996)). In this case, plaintiffs have adduced no evidence that the Moving Defendants confined plaintiffs, or intended to confine plaintiffs, when they stood by their cars monitoring previous arrestees or watched the corner of the yard while other officers approached the front door. Likewise, even if

some of the plaintiffs observed law enforcement officers outside their homes, they have presented no testimony they were aware these specific agents were "confining" them. In light of these circumstances, there is no genuine issue with respect to any claim of false imprisonment or arrest by the Moving Defendants. See Graham v. City of New York, No. 08-CV-3518 (KAM)(RML), 2011 WL 3625074, at *9-11 (E.D.N.Y. Aug. 17, 2011) (no evidence that defendant intended to confine child plaintiff or that child plaintiff was aware of confinement); Serby v. Town of Hempstead, No. 04 Civ. 901 (DRH)(MLO), 2006 WL 2853869 (E.D.N.Y. 2006) (dismissing § 1983 false-imprisonment claim because plaintiff's mere suspicion that police officers might be waiting for him did not establish consciousness of confinement, and no evidence that defendants intended to confine plaintiff).

CONCLUSION

For the foregoing reasons, the Court should grant the Moving Defendants' motion for summary judgment.

Dated: New York, New York
October 28, 2011

PREET BHARARA
United States Attorney for the
Southern District of New York,
Attorney for Defendants

By: /s/

DAVID BOBER
SHANE CARGO
BRANDON COWART
LOUIS A. PELLEGRINO
Assistant United States Attorneys
86 Chambers Street
New York, New York 10007
Tel. (212) 637-2711
Fax (212) 637-2786