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

REPLY AND RESPONSE BRIEF FOR DEFENDANT-APPELLANT-CROSS-APPELLEE JAMES ZIGLAR

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UNITED STATES OF AMERICA,

Defendant-Cross-Appellee,

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Defendants.

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STATEMENT OF THE ISSUES

1. The Third Amended Complaint does not allege personal involvement by defendant James W. Ziglar in the wrongs alleged or "enough facts" to overcome Mr. Ziglar's qualified immunity.

2. Mr. Ziglar expressly adopts all arguments made by the other defendants in this Court.

SUMMARY OF ARGUMENT

1. The Third Amended Complaint contains only vague conclusional averments regarding the personal involvement of Mr. Ziglar in the torts alleged, and those averments wholly fail to plead any facts establishing a plausible cause of action as to Mr. Ziglar. Plaintiffs' attempts to supply the missing averments by reference to the report of the Office of the Inspector General of the Department of Justice, which plaintiffs incorporated into their Third Amended Complaint do not remedy this deficiency, as that report not only does not establish any facts for finding Mr. Ziglar liable, that report establishes a number of facts that contradict and refute any suggestion that Mr. Ziglar can be held liable for plaintiffs' claims. The Third Amended Complaint thus fails to plead enough facts to state a claim to relief that is "plausible on its face" as regards Mr. Ziglar, *Bell Atlantic Corporation v. Twombly*, ___U.S. ___, 2007 WL 1461066, at *14 (2007),

in two ways: it fails to plead facts establishing a plausible claim that Mr. Ziglar personally participated in the constitutional torts plaintiffs alleged, which is required to plead a claim under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971); and the Third Amended Complaint fails to plead facts sufficient to establish a plausible claim that could overcome Mr. Ziglar's defense of qualified immunity. For these reasons, the District Court erred in refusing to dismiss claims 3, 5, 7, 8, & 20-23 as regards Mr. Ziglar.

2. Mr. Ziglar otherwise adopts all the arguments made by the other defendants in this Court, including those made in their briefs in reply, supporting reversal of the claims against Mr. Ziglar noted above and supporting affirmance of the District Court's judgment dismissing claims 1, 2, 5 (in part) and 24.

ARGUMENT

I. THE THIRD AMENDED COMPLAINT DOES NOT ALLEGE PERSONAL INVOLVEMENT BY DEFENDANT JAMES W. ZIGLAR IN THE WRONGS ALLEGED OR "ENOUGH FACTS" TO OVERCOME MR. ZIGLAR'S QUALIFIED IMMUNITY

Plaintiffs recognize that to state claims for relief against defendant James W. Ziglar, the former head of the former Immigration and Naturalization Service (hereinafter "INS") under *Bivens v. Six Unknown Named Agents of the*

Federal Bureau of Narcotics, 403 U.S. 388 (1971), 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). Accordingly, Mr. Ziglar "may be held liable only to the extent that [he] caused the plaintiff[s'] rights to be violated." *Leonhard v. United States*, 633 F.2d 599, 621 n.30 (C.A.2 1980). Mr. Ziglar "cannot be held liable for violations committed by [his] subordinates," *ibid.*, or for wrongs allegedly committed by other government officials, unless the plaintiffs have alleged sufficient facts to establish (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 v. Coughlin*, 76 F.3d 72, 74 (C.A.2 1996).

Plaintiffs' Third Amended Complaint fails this test. Plaintiffs have failed to alleged "enough facts to state a claim to relief *that is plausible on its face*" as regards Mr. Ziglar. *Bell Atlantic Corporation v. Twombly*, ___U.S. ___, 2007 WL 1461066, at *14 (2007) (emphasis added). In the recent decision in *Twombly, supra*, the Supreme Court discarded the standard of *Conley v. Gibson*, 355 U.S. 42, 45-46 (1957), which had held that a District Court should not dismiss a complaint unless "it appears beyond doubt that plaintiff can prove no set of facts

in support of his claim which would entitle him to relief." That standard, upon which plaintiffs rely in defending the sparse allegations of the Third Amended Complaint, has now been replaced by the requirement quoted above, that is, that the averments of a complaint must state "enough *facts*" to state a claim that is "plausible on its face." *Twombly, supra*, ____U.S. at ___, 2007 WL 1461066, at *14 (emphasis added). Measured by this standard, it is clear that plaintiffs have failed to allege "enough facts" regarding Mr. Ziglar's personal involvement to state a claim for relief against him under *Bivens.*

In their main brief, at 125-131, plaintiffs try to make their case regarding the sufficiency of their *Bivens* claims against Mr. Ziglar. They first point to the broad and conclusional allegations of the Third Amended Complaint. But the factual allegations of the Third Amended Complaint had almost nothing to say about Mr. Ziglar's personal conduct as Commissioner of the INS. Of the 450 paragraphs averring facts in the Third Amended Complaint, only five, ¶¶ 25, 72, 74, 83, and 211, so much as mentioned Mr. Ziglar by name, and even then did so only in the most conclusional and vague terms. For example, ¶ 25 alleged that "[Mr.] Ziglar was instrumental in the adoption, promulgation, and implementation of the policies and practices challenged here." But that averment never specified exactly what policies Mr. Ziglar supposedly had involvement with, or what he did with regard to any of them. A more vague accusation could hardly be imagined.

And of the five paragraphs naming Mr. Ziglar, four of them made their allegations on "information and belief" only, underlining the lack of facts pleaded regarding Mr. Ziglar's involvement in committing the torts alleged.

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 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.

The closest the Third Amended Complaint comes to alleging that Mr. Ziglar, as the head of the INS, committed some sort of actionable wrong is ¶ 83. There plaintiffs once again lump 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 these claims 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. And indeed, in this Court, plaintiffs rely on the *OIG Report* in support of their argument that the Third Amended Complaint stated claims against Mr. Ziglar.

Specifically, plaintiffs first point to JA 304, which plaintiffs claim contains citations to "statements by various government officials regarding creation and implementation of the hold-until-cleared policy by James Ziglar." *Brief For Plaintiff-Appellee-Cross-Appellants* (hereinafter "*Plaintiffs' Brief*"), at 126. That page of the *OIG Report*, however, says nothing about Mr. Ziglar having "created" the policy at issue. All it says is that Michael Pearson, "the INS Executive Assistant Commissioner for Field Operations," said that, in addition to being told of this policy by an Associate Deputy Attorney General, Mr. Pearson "also received instructions from INS Commissioner James Ziglar that none of the

detainees should be released by the INS until they had been cleared by the FBI of any connections to terrorism."

This statement says nothing whatsoever, about Mr. Ziglar having "created" any such policy. Indeed, the passage as a whole makes it clear that Mr. Pearson learned of the policy first from Associate Deputy Attorney General Stuart Levey, who was not someone who worked for Mr. Ziglar. More important, this passage says nothing about Mr. Ziglar's participation in any way in 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. To the contrary, other parts of the *OIG Report* make it clear that Mr. Ziglar expressed his concerns that the detainees were being held longer than necessary to determine their immigration status and that Mr. Ziglar tried to speed the matter along to avoid any problems. The *OIG Report* specifically stated that: Mr. "Ziglar also told the OIG that he contacted the Attorney General's Office on November 7, 2001, to discuss concerns about the clearance process, especially the impact of adding the New York cases to the INS Custody List. [Mr. Ziglar] initially called David Ayres, the Attorney General's Chief of Staff, but recalls reaching David Israelite, the [Attorney General's] Deputy Chief of Staff." The *OIG Report* then states what Mr. Ziglar stated that he told Mr. Israelite:

> "he alerted Israelite to the fact that September 11 detainee cases were not being managed properly and warned of possible problems for the Department. Ziglar told the OIG that he was frustrated at this time and felt powerless to resolve the situation because he had no authority over the FBI, which was responsible for determining which detainees were 'of interest.'" JA 333.

The *OIG Report* notes that Mr. Ziglar's call to Mr. Israelite followed an earlier call by Mr. Ziglar to FBI Director Mueller, on October 2, 2001, a call taken by FBI Deputy Director Thomas Pickard. In that earlier call, Mr. Ziglar "told Pickard that the FBI was putting the INS in the awkward position of holding aliens in whom the FBI had expressed 'interest' but then failing to follow through with a timely investigation." JA 332. Mr. Ziglar told the OIG that he informed Pickard:

> "unless the INS received written releases in a timely manner, the INS would have to start releasing September 11 detainees." JA 332.

"[B]ased on these and other contacts with senior Department [of Justice] officials," Mr. Ziglar told the OIG that "he believed the Department was fully aware of the INS's concerns about the ramifications cased by the slow pace of the detainee clearance process." JA 333.

Mr. Ziglar also said, according to the *OIG Report*, that he believed "it would have been futile to approach [the Attorney General or the Deputy Attorney General] about these issues because he did not think the outcome would have been different." *Ibid*. In this regard, 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.

This report by the OIG of Mr. Ziglar's beliefs and actions form part of plaintiffs' pleadings in this case. Indeed, in this Court plaintiffs actually refer to this portion of the *OIG Report* as supporting plaintiffs' claims. *Plaintiffs' Brief*, at 127. But this portion of the *OIG Report* flatly contradicts plaintiffs' allegation that Mr. Ziglar had any role in creating or deciding to implement the "hold-until-clear" policy or that he had any role in any policy that detained plaintiffs longer than necessary to determine their immigration status. Indeed, Mr. Ziglar complained

about the 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. Plaintiffs have pleaded these facts, and this inconsistent pleading is fatal to their claims against Mr. Ziglar regarding the "hold-until-clear" policy. Plaintiffs' contention that the *OIG Report* passages quoted above somehow place Mr. Ziglar "at the center of the decision-making process regarding Plaintiffs' detention" has no support in the record. *Plaintiffs' Brief,* at 128. To the contrary: plaintiffs' own allegations, incorporating the *OIG Report,* refute this contention.

The only other allegation to which plaintiffs direct this Court in support of their claims against Mr. Ziglar is the finding in the *OIG Report* that Mr. Pearson decided where to house detainees. *Plaintiffs' Brief,* at 128, citing JA 284. But that passage of the *OIG Report* says nothing about Mr. Ziglar: it 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*, as plaintiffs admit when they offer the fact that Mr. "Pearson …directly reported to Ziglar" in support of their contention that Mr. Pearson's housing decisions support their claims against Mr. Ziglar. As such, this argument furnishes no basis for imposition of *Bivens* liability on Mr Ziglar.

Other than these passages from the *OIG Report*, plaintiffs point to no other allegations in the Third Amended Complaint that specify what Mr. Ziglar did to violate plaintiffs' constitutional rights. The remaining allegations about Mr. Ziglar are too vague and conclusional to support any claim for relief. As such, the Third Amended Complaint did not state "enough facts" to state a claim under *Bivens* against Mr. Ziglar that is "plausible on its face." *Twombly,* ____U.S. at

___, 2007 WL 1461066, at *14. 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, but to the contrary, 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.

Plaintiffs' heavy reliance on the *OIG Report* to supply the necessary factual pleadings to support their causes of action puts plaintiffs in an awkward position. The *OIG Report*, as demonstrated above, contradicts and refutes the general averments regarding Mr. Ziglar's liability pleaded in the Third Amended Complaint. In light of this, 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). *See, e.g., Hirsch v. Arthur Andersen & Co.,* 72 F.3d 1085, 1095 (C.A.2 1995) (sustaining dismissal of the complaint where "attenuated allegations" supporting a claim "are contradicted both by more specific allegations in the complaint and by facts of which [the court] may take judicial notice"); *Chill v. General Elec. Co.,* 101 F.3d 263, 267 (C.A. 2 1996) (plaintiffs do not have "license to base claims of

fraud on speculation and conclusory allegations"); *Salahuddin v. Jones,* 992 F.2d 447, 449 (C.A. 2 1993)(dismissing claim that is based on "wholly conclusory and inconsistent allegations"); *Rapoport v. Asia Elecs. Holding Co.,* 88 F.Supp.2d 179, 184 (S.D.N.Y.2000) (granting motion to dismiss where the documents on which plaintiffs' securities fraud claim purport to rely contradict allegations in plaintiffs' complaint); *American Centennial Ins. Co. v. Seguros La Republica, S.A.,* No. 91 Civ. 1235, 1996 WL 304436 at *16 (S.D.N.Y. June 5, 1996)("Allegations are not well pleaded if they are 'made indefinite or erroneous by other allegations in the same complaint[, or] ... are contrary to facts of which the Court will take judicial notice.' ") (quoting *Trans World Airlines, Inc. v. Hughes,* 449 F.2d 51, 63 (C.A. 2 1971)); *Maywalt v. Parker & Parsley Petroleum Co.,* 808 F.Supp. 1037, 1046 (S.D.N.Y.1992); *see also In re Burlington Coat Factory Sec. Litig.,* 114 F.3d 1410, 1418 (C.A.3 1997) ("[B]oilerplate and conclusory allegations will not suffice. Plaintiffs must accompany their legal theory with factual allegations that make their theoretically viable claim plausible"). 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.

For these reasons, the District Court should have dismissed claims 3, 5, 7, 8, and 20-23 against James W. Ziglar.

II. MR. ZIGLAR EXPRESSLY ADOPTS ALL ARGUMENTS MADE BY THE OTHER DEFENDANTS IN THIS COURT

Mr. Ziglar did not file a separate opening brief in this court, but instead by letter to the Clerk adopted the arguments made in this Court by the other defendants. Likewise, Mr. Ziglar hereby adopts the arguments made by the other defendants in any brief in reply they file in this court.

III. CONCLUSION

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

Respectfully Submitted,

_____

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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 3,284 words (which does not exceed the applicable 7,000 word limit).

_____
William Alden McDaniel, Jr.

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CASE NAME: Turkmen v. Ashcroft

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