

1998). Dismissal is warranted only if, under any set of facts that the plaintiff can prove consistent with the allegations, it is clear that no relief can be granted. See Tarshis v. Riese Org., 211 F.3d 30, 35 (2d Cir. 2000); Cooper v. Parsky, 140 F.3d 433, 440 (2d Cir. 1998). "The issue on a motion to dismiss is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support his or her claims." Branham v. Meachum, 77 F.3d 626, 628 (2d Cir. 1996) (quoting Grant v. Wallingford Bd. of Educ., 69 F.3d 669, 673 (2d Cir. 1995) (internal quotations omitted)). In its review of a motion to dismiss, the court may consider "only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings and matters of which judicial notice may be taken." Samuels v. Air Transport Local 504, 992 F.2d 12, 15 (2d Cir. 1993). The Second Circuit "ordinarily require[s] the district courts to give substantial leeway to pro se litigants." Gomes v. Avco Corp., 964 F.2d 1330, 1335 (2d Cir. 1992).

II. Facts

The court accepts as true the following allegations taken from the amended complaint.

On February 29, 2000, Gombert and his girlfriend were involved in a domestic dispute. Defendants, members of the New Milford, Connecticut, police department, responded to the scene

and arrested Gombert without conducting any investigation. Despite the fact that Gombert's statement to police and injuries supported his claim that his girlfriend assaulted him, defendants did not charge his girlfriend as a result of the incident. Even when his girlfriend admitted in court that she had assaulted Gombert, no charges were filed against her.

In addition, defendants searched Gombert's car and removed personal property unrelated to the domestic dispute without a warrant. Defendant Lynch has repeatedly refused to comply with a court order that he release the personal items to Gombert's attorney.

III. Discussion

Defendants characterize the amended complaint as asserting claims of false arrest, false imprisonment and malicious prosecution. They contend that none of these claims are cognizable because Gombert was convicted of the charges. In addition, they contend that any other claims are barred by the Supreme Court's holding in Heck v. Humphrey, 512 U.S. 477 (1994). In response, Gombert asks the court to deny the motion to dismiss because defendants never served him with a copy of the motion. In addition, he argues that defendants have mischaracterized the claims set forth in the amended complaint.

A. Service on Gombert

In his first response to the motion to dismiss, Gombert states that defendants did not mail him a copy of the motion. He has attached copies of prison records documenting all of the legal mail he received during the relevant period to show that nothing was received from defendants. He did not know that the motion had been filed until the court issued a notice informing him that he was required to respond to the motion. Defendants did not send Gombert another copy of the motion to ensure service. Instead, the court had to send a copy of the motion to Gombert to enable him to respond to the merits of the motion.

Rule 5, Fed. R. Civ. P., requires that service be made on opposing parties. Although Gombert's request that the motion to dismiss be denied because defendants failed to send him a copy of their motion is denied, defendants are requested to ensure that all future filing are sent to Gombert.

B. False Arrest, False Imprisonment, Malicious Prosecution

Defendants argue that Gombert's claims for false arrest, false imprisonment and malicious prosecution are not cognizable because he was convicted on the charge for which he was arrested. In response, Gombert states that he has not included claims for false arrest, false imprisonment or malicious prosecution.

When reviewing a pro se complaint, the court must liberally

construe the pleading and consider all possible claims that are cognizable under the factual scenario alleged. Gombert alleges that defendants violated his right to equal protection of the laws when he was arrested but his girlfriend was not. In addition, he asserts Fourth Amendment claims for illegal search and seizure of property unrelated to the charges for which he was arrested. These are the claims identified by Gombert in response to the motion to dismiss.

Because Gombert states that he does not assert claims of false arrest, false imprisonment or malicious prosecution in this action, defendants' motion to dismiss is denied on this ground.

C. Other Constitutional Claims

Defendants also argue that any other constitutional claims are barred by Heck v. Humphrey, 512 U.S. 477 (1994). In Heck v. Humphrey, the Supreme Court determined that where a judgment in favor of the plaintiff would necessarily implicate the validity of the plaintiff's conviction or the length of his sentence, a cause of action under section 1983 is not cognizable unless the plaintiff can show that his underlying "conviction or sentence had been reversed on direct appeal, declared invalid by a state tribunal authorized to make such a determination, or called into question by the issuance of a federal writ of habeas corpus." Id. at 487.

Gombert argues, and it appears from the allegations in the amended complaint, that his Fourth Amendment claims are unrelated to the charges underlying his conviction. Thus, a ruling in his favor would not implicate the validity of his conviction. Defendants' motion to dismiss is denied on this ground as well.

IV. Conclusion

Defendants' Motion to Dismiss [**doc. #31**] is **DENIED**.

Defendants are directed to file their answer within **twenty (20)** days from the date of this order. The parties are directed to conclude discovery in this case, which has been pending for over two years, within **sixty (60)** days from the date of this order and to file any dispositive motions within **ninety (90)** days from the date of this order.

SO ORDERED this 10th day of June, 2004, at Hartford, Connecticut.

/s/DJS

Dominic J. Squatrito
United States District Judge