

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DWAYNE IVERY,

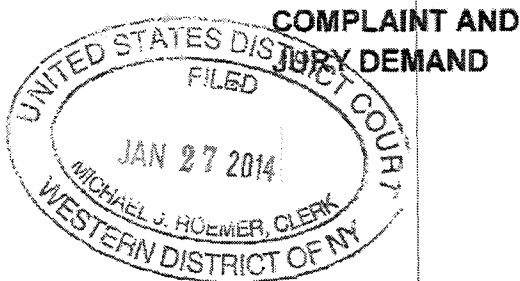
Plaintiff,

CA: No. 14CV6041 L

vs.

ALEXANDER C. BALDAUF,
RICKEY J. HARRIS, JR.,
JAMES M. SHEPPARD and
CITY OF ROCHESTER,

Defendants.



Plaintiff Dwayne Ivery (hereinafter "Plaintiff"), by and through his attorney, Burkwit Law Firm, PLLC, as and for his complaint against Defendants Alexander C. Baldauf, Rickey J. Harris, Jr., James M. Sheppard and City of Rochester (collectively "Defendants"), alleges as follows:

INTRODUCTION

1. This is an action for declaratory judgment and monetary damages for violations of Plaintiff Dwayne Ivery's constitutional rights brought pursuant to 42 U.S.C. 1983, 1985, 1988 and related New York State law claims. Plaintiff alleges that the Defendants, while acting in their official capacities and under color of State law, illegally searched and arrested Plaintiff Dwayne Ivery and used excessive force in effectuating that arrest in violation of the Fourth and Fourteenth Amendments to

the United States Constitution. Plaintiff Dwayne Ivery also brings claims against Defendants under New York State Law for battery, assault, intentional infliction of emotional distress or in the alternative, negligent infliction of emotional distress and negligence, including negligent training, supervision and retention. Plaintiff Dwayne Ivery further alleges that the Defendant officers conspired to violate his rights under the Fourth and Fourteenth Amendments and that Defendants City of Rochester and James M. Sheppard have demonstrated a custom and policy of deliberate indifference to the constitutional rights of its citizens.

JURISDICTION

2. This action arises in part under 42 U.S.C. Section 1983 and accordingly, this Court has original subject matter jurisdiction under 28 U.S.C. Section 1331. For all remaining claims which do not present a federal question under 28 U.S.C. Section 1331, this Court has supplemental jurisdiction under 28 U.S.C. Section 1367.

3. The causes of action alleged herein arise from the factual allegations which occurred in this judicial district. All parties are domiciled within the Western District of New York and therefore, this Court has personal jurisdiction over the Defendants.

VENUE

4. Venue is proper in the United States District Court for the Western District of New York pursuant to 28 U.S.C. Section 1391 because the events or omissions giving rise to the claim occurred within this District and at all times relevant herein, all parties resided within this District.

PARTIES

5. At all times relevant herein, Plaintiff Dwayne Ivery was and still is a resident of the City of Rochester, County of Monroe and State of New York.

6. Defendant Alexander C. Baldauf (hereinafter "Defendant Baldauf") is and at all times relevant herein was a citizen of New York State residing in Monroe County and was employed as a police officer with the City of Rochester Police Department.

7. At all times relevant to this Complaint, Defendant Baldauf was acting under color of law and is sued in his individual capacity and in his official capacity as a police officer for the Defendant City of Rochester.

8. Defendant Rickey J. Harris, Jr. (hereinafter "Defendant Harris") is and at all times relevant herein was a citizen of New York State residing in Monroe County and was employed as a police officer with the City of Rochester Police Department.

9. At all times relevant to this Complaint, Defendant Harris was acting under color of law and is sued in his individual capacity and in his official capacity as a police officer for the Defendant City of Rochester.

10. Defendant James M. Sheppard (hereinafter "Defendant Sheppard") is and at all times relevant herein was a citizen of New York State residing in Monroe County and was employed as a police officer with the City of Rochester Police Department.

11. At all times relevant to this Complaint, Defendant Sheppard was acting under color of law and is sued in his individual capacity and in his official capacity as a police officer for the Defendant City of Rochester.

12. At all times relevant to this Complaint, as Chief of Police for the City of Rochester Police Department, Defendant Sheppard was responsible for the

supervision, training and retention of Defendants Baldauf and Harris and for making and implementing policies, customs and practices used by law enforcement officers employed by Defendant City of Rochester regarding arrests and the use of force in performance of the acts herein alleged.

13. At all times material to the allegations on this Complaint, Defendants Baldauf, Harris and Sheppard were acting in their capacities as police officers employed by Defendant City of Rochester and were acting under color of State law.

14. Defendant City of Rochester is and at all times relevant herein, was and still is a municipal corporation duly organized and existing under the laws of the State of New York with its principal place of business in the County of Monroe, State of New York.

15. Defendant City of Rochester is a political subdivision of the State of New York for which at all times relevant to this Complaint, Defendants Baldauf, Harris and Sheppard were employed by and served as police officers.

16. Defendant City of Rochester is responsible for the hiring, training, supervision and retention of Defendants Baldauf, Harris and Sheppard.

17. At all times relevant herein, Defendant City of Rochester has established and/or delegated to Defendant Sheppard the responsibility for establishing and implementing policies, practices, procedures and customs used by law enforcement officers employed by the City of Rochester regarding arrests and the use of force on persons.

18. At all times herein relevant, Defendants Baldauf, Harris and Sheppard were and/or are agents and/or employees of Defendant City of Rochester and were acting within the course and scope of their employment and/or agency in performance of the acts herein alleged.

19. On or about November 13, 2013, Defendant City of Rochester was served with a Verified Notice of Claim detailing its culpability and Plaintiff's damages.

Defendant City of Rochester has failed and refused to make payment to Plaintiff in accordance with said Verified Notice of Claim.

20. At least thirty (30) days have elapsed since the service of the Verified Notice of Claim upon Defendant City of Rochester and adjustment of payment thereof has been neglected or refused by Defendant City of Rochester.

FACTS

21. On August 17, 2013 at approximately 10:15 p.m., Defendants Baldauf and Harris were dispatched to Plaintiff Dwayne Ivery's property located at 1509 East Main Street, Rochester, New York 14609.

22. Defendants Baldauf and Harris were dispatched to Plaintiff Dwayne Ivery's property due to a disagreement between Plaintiff and his girlfriend Winnette Delancy who had called 911.

23. When Defendants Baldauf and Harris arrived at Plaintiff Dwayne Ivery's property, Plaintiff Dwayne Ivery came outside his home and went to his driveway where he and Winnette Delancy began discussing removing license plates from a GMC truck in Plaintiff's driveway. The GMC truck was registered to Winnette Delancy and titled to plaintiff Dwayne Ivery.

24. Plaintiff Dwayne Ivery agreed that Winnette Delancy could remove the license plates from the GMC truck in his driveway since the vehicle was titled in Plaintiff's name but was registered in her name.

25. Plaintiff Dwayne Ivery stood at the back of the GMC truck with Defendant Harris while Winnette Delancy went to the front of the GMC truck with Defendant Baldauf who assisted her with removing the front license plate.

26. As Defendant Baldauf was at the front of the GMC truck removing the front license plate, Plaintiff Dwayne Ivery walked calmly and slowly from the rear of the

truck towards the front of the truck and asked Defendant Baldauf if he or Defendant Harris could go with him to Winnette Delancy's home to retrieve two (2) of his televisions.

27. When Plaintiff Dwayne Ivery calmly and slowly approached the front of the GMC truck and asked if one of the Defendant officers could assist him getting his television sets from Winnette Delancy's home, Defendant Baldauf stood up, and said "I thought I told you to be quiet". Defendant Baldauf then reached out and grabbed Plaintiff Dwayne Ivery's hand.

28. After Defendant Baldauf grabbed Plaintiff Dwayne Ivery's hand, Defendant Baldauf punched Plaintiff Dwayne Ivery in the head. Plaintiff Dwayne Ivery then stumbled around the front of the vehicle and tried to move away from Defendant Baldauf who continued punching him numerous times in the head and face before Defendant Baldauf landed Plaintiff Dwayne Ivery on the ground near the rear passenger side of the parked GMC truck.

29. After Defendant Baldauf landed Plaintiff Dwayne Ivery on the ground, Defendant Baldauf jumped on Plaintiff Dwayne Ivery and continued punching Plaintiff in the head, face and over many areas of his body. Defendant Baldauf stomped on Plaintiff's head with his foot. Defendant Harris stood quietly and watched as Defendant Baldauf continued beating Plaintiff Dwayne Ivery who lost consciousness.

30. After numerous more punches to Plaintiff's body, Defendant Harris and/or Baldauf placed handcuffs on Plaintiff Dwayne Ivery.

31. After Plaintiff Dwayne Ivery was placed in handcuffs, Defendant Baldauf continued punching and beating Plaintiff Dwayne Ivery who screamed asking Defendant Harris why he was letting Defendant Baldauf beat him.

32. After Defendant Baldauf delivered more punches to Plaintiff Dwayne Ivery, Defendant Harris replied "Alright". Defendant Baldauf then punched Plaintiff

Dwayne Ivery a couple more times in the head and then stopped physically harming Plaintiff.

33. Defendant Baldauf then stood Plaintiff Dwayne Ivery to his feet and placed him in a police car. Defendant Harris stood quiet as Plaintiff was brought to the police vehicle. The aforescribed incident was captured on an outdoor video surveillance camera at Plaintiff's home.

34. As a result of Plaintiff's injuries, an ambulance was called and Plaintiff Dwayne Ivery was handcuffed to a gurney and transported to Rochester General Hospital for medical treatment.

35. After Plaintiff Dwayne Ivery received medical treatment at Rochester General Hospital, he was transported to Monroe County Jail where he was placed in a jail cell.

36. Plaintiff Dwayne Ivery was charged in Rochester City Court with Harassment in the Second degree in violation of Penal Law Section 240.26 (1) and Resisting Arrest in violation of Penal Law Section 205.30.

37. On or about November 13, 2013, an Adjournment In Contemplation of Dismissal was granted by Rochester City Court with respect to both charges.

38. Upon information and belief, the accusatory informations/complaints which were filed by Defendant Baldauf contained false and fabricated allegations in an effort to justify the harassment and resisting arrest charges against Plaintiff Dwayne Ivery.

39. Before and during the aforescribed incident, Plaintiff Dwayne Ivery was never told he was being placed under arrest, was not engaged in any unlawful activity and he did not resist arrest as Defendants Baldauf and Harris proceeded to arrest, search and apply physical force to his person.

40. Upon information and belief, Defendants Baldauf and Harris were never reprimanded, suspended or terminated from their employment by Defendant Sheppard or Defendant City of Rochester following the August 17, 2013 incident involving Plaintiff Dwayne Ivery and upon information and belief, said officers remain on full time active duty patrol as City of Rochester Police officers.

41. Upon information and belief, Defendants Baldauf and Harris had inadequate training and supervision regarding arrests and reasonable use of force which led to constitutional and New York State law violations in this case.

42. Based on the foregoing, Defendants City of Rochester and Sheppard failed to adequately train and supervise Defendants Baldauf and Harris.

43. Defendants City of Rochester and Sheppard's failure to properly train and/or supervise their subordinates, including but not limited to Defendants Baldauf and Harris, amounts to a deliberate indifference to the rights of those with whom City of Rochester employees and officers will come into contact, including Plaintiff Dwayne Ivery.

44. Defendants Sheppard and City of Rochester were aware or should have been aware that their officers, including Defendants Baldauf and Harris, require special training, procedures, policies and customs to be used so as to not infringe upon the legal and constitutional rights of City of Rochester citizens, including Plaintiff Dwayne Ivery. The failure to promulgate and implement such procedures, policies or customs led to the violation of Plaintiff Dwayne Ivery's legal and constitutional rights and the use of excessive and unreasonable force against his person.

45. The foregoing actions taken or decisions made by City of Rochester government officials responsible for establishing municipal policies caused the alleged violations of Plaintiff Dwayne Ivery's civil rights.

46. The policies and practices of the City of Rochester in authorizing its police officers to use excessive force is so persistent and widespread that it constitutes

a custom or usage and implies the actual or constructive knowledge of City of Rochester policy-making officials.

47. As a consequence of the aforescribed August 17, 2013 incident and the use of unreasonable and excessive force upon Plaintiff by Defendants, Plaintiff Dwayne Ivery suffered a mildly displaced left nasal fracture, left eye pain, hematoma superior to left eye, seven or more large throbbing bumps on his face and neck, multiple contusions, right elbow pain and tendonitis, eyes swollen shut, left facial swelling, loss of consciousness multiple times, neck pain, multiple facial and head contusions, neck, back, head and right arm pain, headaches, post concussive syndrome, memory problems/closed head injury, right shoulder pain, posttraumatic stress disorder, together with other physical injuries. The full nature and extent of Claimant's injuries is unknown as Claimant Dwayne Ivery continues treating for his injuries.

48. As a direct and proximate result of the intentional and/or negligent acts of the Defendants, Plaintiff Dwayne Ivery has suffered and continues to suffer serious physical and mental injuries and pain and suffering and other damages in an amount that will be established at trial.

49. Plaintiff Dwayne Ivery is entitled to compensation for the constitutional harms and State law violations that Defendants inflicted upon him.

CAUSES OF ACTION

COUNT I

VIOLATION OF 42 U.S.C. SECTION 1983 BY DEFENDANTS BALDAUF, HARRIS AND CITY OF ROCHESTER FOR ILLEGAL SEARCH AND SEIZURE OF PLAINTIFF DWAYNE IVERY'S PERSON

50. The Plaintiff repeats and realleges the allegations in paragraphs 1 through 49 above and incorporates them by reference as if set forth in their entirety herein.

51. On August 17, 2013 at approximately 10:27 p.m., Defendants Baldauf and Harris illegally searched and seized Plaintiff Dwayne Ivery's person without probable cause or reasonable suspicion that a crime has been or was being committed in violation of the Fourth Amendment to the United States Constitution.

52. By the actions described in paragraphs 1 through 51 above, Defendants, without a warrant or without probable cause and while acting under color of law, arrested Plaintiff Dwayne Ivery and deprived him of certain constitutionally protected rights to be free from unreasonable searches and seizures, the right not to be deprived of liberty without due process of law and the right to be free from false arrest, all in violation of 42 U.S.C. Section 1983 and his Fourth and Fourteenth Amendment rights as guaranteed by the United States Constitution.

53. Defendants Baldauf and Harris were acting under color of state law when they, without probable cause or reasonable suspicion, exercised their authority as police officers by falsely arresting and searching Plaintiff Dwayne Ivery while he was cooperative and acting in a lawful manner on his own property in the City of Rochester, New York.

54. Plaintiff Dwayne Ivery was not free to leave by Defendants Baldauf and Harris' show of authority and Plaintiff was therefore seized within the meaning of the Fourth Amendment.

55. By illegally seizing Plaintiff Dwayne Ivery, Defendants Baldauf and Harris caused Plaintiff Dwayne Ivery to suffer a violation of his Fourth Amendment right to be secure in his person.

