

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 3:06-CV-12238-KPN

DAVID BUNN; JUDITH BUNN; CHRISTENA)
DODGE; DANIEL COLLINS; JAMIE DODGE,)
COUGAR JOHN BUNN; PHOENIX DODGE)
per proxima amici CHRISTENA DODGE,)
JUSTICE DODGE, *per proxima amici*)
CHRISTENA DODGE,)

Plaintiffs)

vs.)

CHIEF KEVIN GLEASON, OFFICER KENNETH)
FITZGERALD, AGENT SCOTT E. HALEY,)
HOLLAND POLICE OFFICER JOHN DOE 1,)
HOLLAND POLICE OFFICER JOHN DOE 2,)
HOLLAND POLICE OFFICER JOHN DOE 3,)
HOLLAND POLICE OFFICER JOHN DOE 4,)
HOLLAND POLICE OFFICER JOHN DOE 5,)
HOLLAND POLICE OFFICER JOHN DOE 6,)
EASTERN HAMPDEN TASK FORCE AGENT)
JOHN DOE 1, EASTERN HAMPDEN TASK)
FORCE AGENT JOHN DOE 2, EASTERN)
HAMPDEN TASK FORCE AGENT)
JOHN DOE 3, EASTERN HAMPDEN TASK)
FORCE AGENT JOHN DOE 4, EASTERN)
HAMPDEN TASK FORCE AGENT)
JOHN DOE 5, in their official and)
individual capacities)
Defendants)

**DEFENDANTS, CHIEF KEVIN GLEASON AND OFFICER KENNETH
FITZGERALD’S, MOTION TO STRIKE**

NOW COME the defendants, Chief Kevin Gleason and Officer Kenneth Fitzgerald (collectively, “defendants”), and move to strike so much of Plaintiffs’ Statement of Facts in Dispute in Support of their Memorandum in Opposition to the Defendants’ Motion for Summary

Judgment (“Plaintiff’s Statement of Facts”), Plaintiffs’ Facts in Dispute¹ and corresponding portions of Plaintiffs’ Memorandum in Opposition to the Defendants’ Motion for Summary Judgment (“Plaintiffs’ Memorandum”) as are unsupported by or misrepresent admissible evidence. Plaintiffs’ Statement of Facts and Plaintiffs’ Facts in Dispute contain factual contentions which are either unsupported by the record or misrepresent the facts in the record. In turn, Plaintiffs’ Memorandum relies on these unsupported assertions and misrepresentations. Therefore, the defendants move to strike all such representations. Defendants submit that enumerating every deficiency in plaintiffs’ summary judgment materials would require inordinate expense and volume of briefing. Defendants submit the following specific, egregious examples, which should be stricken.

A. As to Plaintiffs’ Statement of Facts.

Paragraph 2 of Plaintiffs’ Statement of Facts implies that an investigation of David Bunn was already under way at the time that Sergeant Moran of the Holland Police Department informed Chief Kevin Gleason that he had been given information that residents of the Bunn home were selling marijuana. Paragraph 2 further implies that this supposed on-going investigation was based upon rumors and Chief Gleason’s knowledge that David Bunn was a pro-marijuana activist. Plaintiffs’ Statement of Facts provides no support for any of these propositions.

In fact, in the portions of Chief Gleason’s deposition testimony which are relied on by the plaintiffs in support of Paragraph 2, Chief Gleason testified that he had heard rumors in town to the effect “[T]hat they were doing a lot of drugs up there.” Deposition of Kevin Gleason, May 6,

¹ Plaintiffs’ Statement of Facts, which consists of responses to Defendants, Chief Kevin Gleason and Officer Kenneth Fitzgerald’s, Local Rule 56.1 Statement of Material Facts, and Plaintiffs’ Facts in Dispute, which is separately numbered, are contained in the same document. For ease of reference, defendants will refer to these statements separately.

2008, attached hereto as Exhibit A, at p. 114. Chief Gleason testified that the rumors were not specific to any single person and that with regard to David Bunn, he had heard “Again, rumors around town, there was a lot of drugs up there, and not necessarily dealing, but just a lot of drugs up there.” *Id.* at p. 115. There is no evidence in the record which would indicate that an investigation of David Bunn or any other member of the Bunn household was instituted before Sergeant Moran received information from a confidential informant that residents of the Bunn home were selling marijuana. Plaintiffs’ Statement of Facts and corresponding sections of Plaintiffs’ Memorandum should be stricken to the extent that they indicate otherwise.

Paragraph 4 of Plaintiffs’ Statement of Facts is non-responsive to the corresponding paragraph in defendants’ Local Rule 56.1 statement of facts and is misleading in that it implies that Chief Gleason retained sole control over the investigation after the matter had been referred to the Eastern Hampden County Drug Task Force (the “Drug Task Force”). To the extent that Paragraph 4 of Plaintiffs’ Statement of Facts is intended to state that Chief Gleason retained certain authority as the chief law enforcement officer employed by the Town of Holland, this statement is so broad as to be meaningless and does not present a fact at issue but rather raises a legal issue or conclusion.

Paragraph 5 of Plaintiffs’ Statement of Facts directly asserts that Chief Gleason retained full oversight and control over the investigation into the Bunn home. This proposition is not supported by the testimony upon which it relies. Chief Gleason testified “We more or less were handing off the investigation to the Drug Task Force.” He also testified that Agent Haley did not tell him the Drug Task Force was going to take over the investigation. Exhibit A at p. 80. Plaintiffs twist the distinction between whether the investigation was turned over to the Drug Task Force willingly as opposed to at Agent Haley’s insistence into an assertion that Chief

Gleason retained control of the investigation. This is a blatant misrepresentation of Chief Gleason's testimony. See Exhibit A at pp. 80-83. For example, Chief Gleason testified "There really wasn't much of a [Holland Police Department] file because the Drug Task Force was leading the charge." Exhibit A at p. 83 (emphasis added).

Paragraph 5 also relies on the testimony of Agent Scott Haley. However, Agent Haley testified only that, if he had consulted with someone else as to whether or not to make an arrest on the day the search warrant was executed, it would have been Chief Gleason. See Deposition of Scott E. Haley, May 30, 2008, attached hereto as Exhibit B at pp. 67-68. Notably, Chief Gleason testified that Agent Haley led the search and directed all of the law enforcement personnel who took part in the search, regardless of their agency. Exhibit A at p. 129. Paragraph 5 should be stricken as it relies on unsupported conclusory statements and misrepresents the testimony upon which it purportedly relies.

Paragraph 6 also contains material misrepresentations of facts in the record. Chief Gleason testified that the initial contact between Agent Haley and the confidential informant was arranged through Sergeant Moran. Exhibit A at p. 80. Chief Gleason did meet with the confidential informant but only in the context of the two controlled buys in which he took part. Exhibit A at pp. 90-94. Chief Gleason did not introduce Agent Haley to the confidential informant, rather, Chief Gleason testified that he had very little interaction with the confidential informant during the second controlled buy. "An introduction as to who I was. And that was about it ... I believe it was in Sergeant Haley's vehicle and I believe Sergeant Haley made the introductions. I didn't." Exhibit A at pp. 91-92. Paragraph 6 of Plaintiffs' Statement of Facts is directly contradicted by the deposition testimony on which it relies and it should, therefore, be stricken along with corresponding sections of Plaintiffs' Memorandum.

Paragraphs 19 and 20, which deny the existence of a confidential informant, should be stricken. Plaintiffs' Statement of Facts elsewhere admits or assumes the existence of a confidential informant. See Plaintiffs' Statement of Facts at ¶¶ 6, 9, 11.

Paragraph 22 of Plaintiffs' Statement of Facts asserts that neither Agent Haley nor the Eastern Hampden County Drug Task Force lead the investigation into the Bunn household. It further asserts that Chief Gleason assisted in the preparation of the search warrant. These assertions are unsupported by the deposition testimony upon which they rely and should be stricken both in Plaintiffs' Statement of Facts and in corresponding portions of Plaintiffs' Memorandum.

Paragraph 26 of Plaintiffs' Statement of Facts should be stricken because it is not responsive to the corresponding paragraph of the defendants' Local Rule 56.1 statement of facts. While it is undisputed that information that Agent Haley had previously received from Chief Gleason was incorporated into Agent Haley's affidavit in support of the search warrant application, this simply does not support the proposition that Chief Gleason therefore "assisted in the preparation of the Search Warrant." Paragraph 26 does not attempt to address the defendants' statement to which it refers except to state unsupported conclusions.

Paragraph 61 of Plaintiffs' Statement of Facts should be stricken because it is not supported by the deposition testimony upon which it relies. Daniel Collins did not testify that he heard either Chief Gleason or Officer Fitzgerald yell, swear or direct threats of physical violence at any of the plaintiffs. See Deposition of Daniel Collins, May 16, 2008, attached hereto as Exhibit C at pp. 51-52, 57, 60, 73. Notably, Chief Gleason's deposition testimony upon which this statement relies states only that Chief Gleason heard other officers yelling "police" and "search warrant." Exhibit A at p. 135.

Paragraph 73 of Plaintiffs' Statement of Facts, which denies that a toilet at the Bunn home was broken, should be stricken. The plaintiffs' cannot create a disputed issue of fact by relying on their own inconsistent testimony. Christena Dodge testified that one of the plaintiffs' toilets was, in fact, broken. Deposition of Christena Dodge, May 1, 2008, attached hereto as Exhibit D, at p 69. In the deposition testimony which the plaintiffs rely on for this statement, Chief Gleason testified that he received a report that one of the toilets in the Bunn home was not in working condition. Exhibit A at p. 170.

B. As to Plaintiffs' Facts in Dispute.

Paragraph 7 of Plaintiffs' Facts in Dispute asserts "The Bunn family's house was raided because of rumors and because of David Bunn's public protected speech" Plaintiffs' Facts in Dispute at ¶ 7. This assertion is not supported by the deposition testimony on which it relies. As the testimony quoted by plaintiffs plainly indicates, Agent Haley testified only that information regarding David Bunn's criminal history and activism provided corroboration for the information regarding controlled buys of marijuana that established probable cause for the issuance of the search warrant. Exhibit B at p. 125. Any assertion that the Bunn home was raided because of David Bunn's activism is unsupported and should be stricken both from Plaintiffs' Facts in Dispute and from corresponding portions of Plaintiffs' Memorandum.

Paragraph 8 of Plaintiffs' Facts in Dispute should be stricken because, as set forth above with regard to Paragraph 26 of Plaintiffs' Statement of Facts, plaintiffs can not simply equate Agent Haley's incorporation of information he received from Chief Gleason into his affidavit in support of the search warrant application with Chief Gleason's actual participation in the preparation of the search warrant application. Any assertion that Chief Gleason participated in

the preparation of the search warrant application should be stricken both from Plaintiffs' Facts in Dispute and from corresponding portions of Plaintiffs' Memorandum as unsupported.

Paragraph 10 of Plaintiffs' Facts in Dispute, which asserts that Chief Gleason knowingly provided Agent Haley with false information, is also unsupported by the deposition testimony upon which it relies. See Exhibit A at pp. 110, 113-115. Therefore, any such assertion should be stricken both from Plaintiffs' Facts in Dispute and from corresponding portions of Plaintiffs' Memorandum as unsupported.

Paragraphs 11 through 14 of Plaintiffs' Facts in Dispute explicitly or implicitly assert that Chief Gleason retained full oversight and control over the investigation into the Bunn home. As set for the above with regard to Paragraph 5 of Plaintiffs' Statement of Facts, this proposition is not supported by the testimony upon which it relies. Paragraphs 11 through 13 should be stricken as they rely on unsupported conclusory statements and misrepresent the testimony upon which they purportedly rely.

Paragraph 16 of Plaintiffs' Facts in Dispute is wholly unsupported by the deposition testimony upon which it relies. Plaintiffs' assert "Chief Gleason supervised his Holland Police Officers at the Raid. Gleason Depo., p. 37." Plaintiffs' Facts in Dispute at ¶ 16. However, in the cited testimony, Chief Gleason merely listed the names of the officers employed by the Town of Holland's police department in March of 2003. See Exhibit A at p. 37. The assertion contained in Paragraph 16 of Plaintiffs' Facts in Dispute should be stricken both from Plaintiffs' Facts in Dispute and from corresponding portions of Plaintiffs' Memorandum as unsupported.

Paragraph 17 of Plaintiffs' Facts in Dispute is also unsupported by the testimony upon which it relies. Paragraph 17 asserts "Chief Gleason knew that David Bunn was an activist for the legalization of medical marijuana when he initiated the investigation against David Bunn and

90 Maybrook Road. Gleason Depo., p. 124-125.” Plaintiffs’ Facts in Dispute at ¶ 17. In the cited portion of his deposition transcript, Chief Gleason testified only that that he knew that David Bunn was an activist prior to the execution of the search warrant. See Exhibit A at pp. 124-125. The assertions contained in Paragraph 17 of Plaintiffs’ Facts in Dispute should be stricken both from Plaintiffs’ Facts in Dispute and from corresponding portions of Plaintiffs’ Memorandum as unsupported.

Paragraph 18 of Plaintiffs’ Facts in Dispute asserts “Chief Gleason . . . relied upon rumors that residents at 90 Maybrook Road were doing drugs.” Plaintiffs’ Facts in Dispute at ¶ 18. Paragraph 18 is silent as to how Chief Gleason allegedly relied upon these rumors. Paragraph 18 of Plaintiff’s Facts in Dispute apparently implies that the investigation was initiated based on such rumors. As set forth above, with regard to Paragraph 2 of Plaintiffs’ Statement of Facts, any such assertion should be stricken from Plaintiffs’ Facts in Dispute and from corresponding portions of Plaintiffs’ Memorandum.

Paragraph 20 of Plaintiffs’ Facts in Dispute should be stricken to the extent it attempts to misrepresent the testimony upon which it relies. Paragraph 20 asserts “Chief Gleason met personally with the Confidential Informant. Gleason Depo., p. 91.” Plaintiffs’ Facts in Dispute at ¶ 20. Chief Gleason met with the confidential informant but only in the context that the two controlled buys in which he took part. Exhibit A at pp. 90-94. To the extent that Paragraph 20 misrepresents the nature or level of Chief Gleason’s interactions with the confidential informant, it should be stricken both from Plaintiffs’ Facts in Dispute and from corresponding portions of Plaintiffs’ Memorandum.

Paragraph 22 of Plaintiffs’ Facts in Dispute is wholly unsupported by the deposition testimony upon which it relies. Plaintiffs assert “Chief Gleason supervised Officer Moorehouse,

and Officer Fitzgerald during the Raid of 90 Maybrook. Gleason Deposition, p. 22.” Plaintiffs’ Facts in Dispute at ¶ 22. However, in the cited testimony, Chief Gleason testified that Sergeant Moran was the only officer that he has ever supervised while Chief of Police for the Town of Holland who “participated in surveillance.” Exhibit A at p. 22. The assertion contained in Paragraph 22 of Plaintiffs’ Facts in Dispute should be stricken both from Plaintiffs’ Facts in Dispute and from corresponding portions of Plaintiffs’ Memorandum as unsupported

Paragraph 28 of Plaintiffs’ Facts in Dispute asserts “Chief Gleason requested an inspection by the Board of Health to investigate dog feces in the basement but did not remember seeing dog feces in the basement. Gleason Depo., 133, 172.” Plaintiffs’ Facts in Dispute at ¶ 28. The cited testimony is silent as to the proposition for which it is proffered. Exhibit A at pp. 133, 172. In fact, Chief Gleason testified:

Q. Did you see any dog feces anywhere in the house?

A. Yes, in the basement.

Exhibit A at p. 130. Paragraph 28 of Plaintiffs’ Facts in Dispute should be stricken along with corresponding sections of Plaintiffs’ Memorandum.

Paragraph 35 of Plaintiffs’ Facts in Dispute is directly contradicted by the deposition testimony upon which it relies. Paragraph 35 asserts “As of May 6, 2008, [the date of Chief Gleason’s deposition] all of the evidence taken from 90 Maybrook was still at the Holland Police Department. Gleason Depo., p. 144.” Plaintiffs’ Facts in Dispute at ¶ 35. In fact, Chief Gleason testified “The pipes and all the other paraphernalia were all destroyed.” Exhibit A at p. 144. Paragraph 35 of Plaintiffs’ Facts in Dispute should be stricken along with corresponding sections of Plaintiffs’ Memorandum.

Paragraph 36 of Plaintiffs' Facts in Dispute is incomprehensible. Paragraph 36 asserts "Judith Bunn requested the return of the Bunn Home taken from 90 Maybrook and Chief Gleason denied this request. Gleason Depo., p. 147." Plaintiffs' Facts in Dispute at ¶ 36. Paragraph 36 of Plaintiffs' Facts in Dispute should be stricken along with corresponding sections of Plaintiffs' Memorandum.

Paragraph 39 of Plaintiffs' Facts in Dispute is not supported by the deposition testimony upon which it relies. Paragraph 39 states "David Bunn did not have any convictions for the sale of drugs. Haley Depo., p. 87." Plaintiffs' Facts in Dispute at ¶ 39. In the deposition testimony cited, Agent Haley testified that he did not have David Bunn's full criminal history in front of him, but that "[M]y recollection of Mr. Bunn was that he had marijuana arrests and convictions that pretty much hit the floor when you held it up, okay? That was my recollection of him." Exhibit B at p. 87. Paragraph 39 of Plaintiffs' Facts in Dispute should be stricken along with corresponding sections of Plaintiffs' Memorandum.

Plaintiffs' Statement of Facts, Plaintiffs' Facts in Dispute and Plaintiff's Memorandum attempt to present a narrative that is simply not supported by the evidence. As set forth above, unsupported assertions contained in Plaintiffs' Statement of Facts and Plaintiffs' Facts in Dispute, as well as corresponding portions of Plaintiffs' Memorandum, should be stricken.

THE DEFENDANTS
CHIEF KEVIN GLEASON and OFFICER
KENNETH FITZGERALD

By /s/ Nancy Frankel Pelletier, Esq.
Nancy Frankel Pelletier, Esq., and

By /s/ David S. Lawless, Esq.
David S. Lawless, Esq., both of
Robinson Donovan, P.C.
1500 Main Street, Suite 1600
Springfield, Massachusetts 01115
Phone (413) 732-2301 Fax (413) 785-4658
NFP BBO No.: 544402
DSL BBO No.: 664754

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1

I hereby certify that on October 4, 2008, I conferred with plaintiffs' counsel, Erin O'Neil-Baker, in a good faith attempt resolve or narrow the issues presented by the instant motion.

/s/ David S. Lawless, Esq.
David S. Lawless, Esq.

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on this 4th day of November, 2008.

/s/ Nancy Frankel Pelletier, Esq.
Nancy Frankel Pelletier, Esq.