

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

ARTHUR D. GOLDSTEIN, )  
 )  
 Plaintiff )  
 )  
 v. ) Civil No. 98-0103-B  
 )  
 MARGOT JOLY, et al., )  
 )  
 Defendants )

***RECOMMENDED DECISION***

This action arises out of a contract between Plaintiff and James Boutilier under which Boutilier was to perform remodeling upon Plaintiff's property in Rangeley Plantation, Maine. In the most general terms, Plaintiff became dissatisfied with Boutilier's progress and billing, and the situation worsened to the point Boutilier contacted the police and complained that Plaintiff was refusing to permit Boutilier to collect his belongings from the job site. Plaintiff's home was searched, and items were seized. Some of the items belonged to Plaintiff and were thereafter returned to him. Plaintiff was charged with theft, which charges were later dismissed.

Defendants Croteau and Joly were the District Attorney and Assistant District Attorney for District Three, which encompasses Rangeley Plantation. Plaintiff has asserted various state tort claims against them, as well as a claim under 42 U.S.C. section 1983 for violations of his rights under the Fourth and Fourteenth Amendments. Defendants move for summary judgment with respect to all of Plaintiff's claims against them.

***Discussion***

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court views the record on summary judgment in the light most favorable to the nonmovant. *Levy v. FDIC*, 7 F.3d 1054, 1056 (1st Cir. 1993). "A trialworthy issue exists if the evidence is such that there is a factual controversy pertaining to an issue that may affect the outcome of the litigation under the governing law, and the evidence is 'sufficiently open-ended to permit a rational factfinder to resolve the issue in favor of either side.'" *De-Jesus-Adorno v. Browning Ferris Ind. Of Puerto Rico*, 160 F.3d 839, 841-42 (1<sup>st</sup> Cir. 1998) (quoting *National Amusements v. Town of Dedham*, 43 F.3d 731, 735 (1<sup>st</sup> Cir. 1995)).

However, summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the moving party has presented evidence of the absence of a genuine issue, the nonmoving party must respond by "placing at least one material fact in dispute." *Anchor Properties*, 13 F.3d at 30 (citing *Darr v. Muratore*, 8 F.3d 854, 859 (1st Cir. 1993)).

Plaintiff has not responded to Defendants' Motion for Summary Judgment. In this District, a party's failure to timely respond to a motion is generally construed to waive objection to the motion. D. Me. R. 7(c). However, the Federal Rules of Civil Procedure require us to examine the merits of a motion for summary judgment regardless of the opposing party's failure to object. *FDIC v. Bandon Assoc.*, 780 F. Supp. 60, 62 (D. Me. 1991). Accordingly, we will examine the merits of Defendants' Motion for Summary Judgment based on Defendants' Statement of Material Facts, which reads in its entirety as follows:

## *Statement of Facts*

### **1. *The Goldstein search, seizure, and prosecution.***

On Sunday, July 9<sup>th</sup>, James Boutilier, who had been working as a building contractor at Plaintiff's residence, telephoned the Plaintiff (hereafter "Goldstein"). Because of a contract dispute with Goldstein, Boutilier indicated he was coming to Goldstein's property to retrieve Boutilier's carpentry tools. Goldstein objected because he thought Boutilier was attempting to take those tools for the purpose of preventing Goldstein from using Boutilier's tools with another contractor to complete the projects. The end result was that both parties called law enforcement officers to the scene of their confrontation at Goldstein's residence in Rangeley Plantation. Boutilier brought Nathan Bean, a police officer for the Town of Rangeley, while Goldstein called the Franklin County Sheriff's Department, which dispatched Deputy Raymond Meldrum to the scene. []

While at Goldstein's residence on July 9<sup>th</sup> Deputy Meldrum called Norman Croteau at his residence to discuss the situation. Croteau was the District Attorney for District Three, which encompassed Rangeley Plantation.[] Croteau was told by Deputy Meldrum that Boutilier claimed he had tools and building materials located on Goldstein's property and that Goldstein admitted he was refusing to allow Boutilier to retrieve those items from his property.[] District Attorney Croteau advised Deputy Meldrum to make sure that Goldstein knew that, if Goldstein persisted in holding any tools and materials belonging to Boutilier, Goldstein could be charged with theft.[]

On July 11, 1995, Franklin County Deputy Sheriff Steven Lowell took over handling the Goldstein-Boutilier investigation. In an effort to avoid charging Goldstein with a crime, Lowell went to the Goldstein property to again attempt to get Goldstein to release any property belonging to Boutilier. Again, no property was released. Deputy Lowell reminded Goldstein of Deputy Meldrum's conversation with District Attorney Croteau about Goldstein being charged with theft. Goldstein ignored this additional warning.[]

On approximately July 13, 1995 Assistant District Attorney Margot Joly first became involved in this situation when Deputy Lowell contacted her and told her that Boutilier was working on a construction project for Goldstein and had left tools and building supplies at Goldstein's property. She was told that Goldstein was refusing to give Boutilier access to Boutilier's tools.[]

An affidavit and application for a search warrant to search the Goldstein residence was prepared by Franklin County Deputy Niles Yeaton on July 13, 1995. Croteau had no involvement in preparing the application for a search warrant. Joly spoke with Deputy Yeaton about a proposed search warrant and told him to be sure to obtain a detailed list of the personal property Boutilier claimed was on Goldstein's property and to include that list in the search warrant application. This was the extent of Joly's involvement before the warrant was issued.[]

Boutilier gave a written statement to Deputy Yeaton on July 13. It outlined the circumstances of Goldstein's refusal to turn over the property and listed the property Boutilier claimed Goldstein was holding. On July 14, 1995, Deputy Yeaton delivered a copy of the final draft of the search warrant affidavit to the District Attorney's Office in Farmington. Joly did not review the affidavit at any time. She was not at the office. She was at home with a sick child. Instead, a staff member at the Farmington DA's office faxed a copy of that application to the Auburn office of the District Attorney, where it was apparently reviewed by an assistant district attorney whose identity is not known. On Monday, July 17 the affidavit was signed by a Justice of the Peace in Farmington.[]

On July 18, 1995 several Deputy Sheriffs went to the Goldstein residence to execute a search pursuant to the warrant. They maintained a detailed list of the property taken pursuant to the warrant. During the search there was a phone conversation between Deputy Yeaton and ADA Joly about whether to take some of the property listed on the warrant. Removal of some of the items would damage the structure. Joly was also told there was an ownership dispute about some of the building materials. Both participants in that conversation indicate that Holy's advice was that, even though pump jacks, scaffolding, roof brackets, and building materials were listed in the search warrant, the Deputies should not take those items as part of the search, and those items were left on the property. At the time of the search, Goldstein was also served by the deputies with a criminal summons for theft.[]

After returning to the Sheriff's Department with the seized items, the Deputy Sheriffs called ADA Joly to determine whether there was an evidentiary need to retain the actual items pending the theft trial. Joly consented to release of the items pending trial because she did not anticipate any party needing to perform testing on the items. There was, therefore, no need to maintain a chain of custody on the items. Joly considered that the seized items could be sufficiently identified with proper photographing of the items and that Boutilier could still produce and identify the items, if necessary, for demonstrative purposes at trial. This was a procedure that she had followed in numerous other cases, some of which had actually gone to trial with the items being used as evidence.[]

After the seized items were taken back to the Franklin County Sheriff's Department, they were shown to Boutilier. He identified them as items Goldstein had withheld from him, with the exception of four items, which were returned to Goldstein on July 19, 1995.[] The remaining items were photographed and inventoried by the sheriffs and returned to Boutilier. Boutilier signed a receipt detailing the items he received.[]

On July 28, 1995 Walter Hanstein, Esq. Entered his appearance as attorney for Goldstein in the criminal matter. Mr. Hanstein initiated a proposal to Joly which called for the items turned over to Boutilier to remain with Boutilier, and for Goldstein to return any remaining items that had not been seized in the search to Boutilier [sic] or make restitution to Boutilier for any that could not be accounted for. In return, the charges would be dismissed. This was implemented and the charges

were formally dismissed on December 7, 1995. Over two years later Goldstein filed this law suit.[] [Goldstein filed no notice of claim under the Maine Tort Claims Act with respect to his claims against Defendants Croteau and Joly.]

**2. Events surrounding the subsequent alleged Lambert theft.**

Count VIII of Goldstein's complaint raises a different set of factual circumstances from the remainder of his complaint.[] Goldstein claims that roughly nine months after the original incidents involving the search and seizure, he discovered that his residence had been burglarized by someone, whom he suspected was Donald Lambert.[]

Goldstein states he was in the process of evicting Mr. Lambert when he was told that Lambert was vacating the property and had a van pulled up to the house. When Goldstein arrived at the residence, he found that many items of his personal property had been removed. He reported this to the Sheriff's Department. After locating where he suspected Lambert had moved to in Farmington, Maine, Goldstein also reported that location to the Sheriff's Department.[]

Deputy Lowell went to the suspected location in Farmington on several occasions to attempt to find some of the missing items. He was unable to see any of the missing items at that site. Lowell was attempting to establish a nexus between that location and the stolen property in order to apply for a search warrant. He discussed this with ADA Joly. They determined that no nexus had been established. Therefore, no warrant was sought.[]

Def. Memo. at 2-7 (citations and footnotes omitted).

Defendants first argue that they are entitled to judgment as a matter of law of Plaintiff's state law claims for Plaintiff's failure to comply with the notice provisions of the Maine Tort Claims Act, 14 M.R.S.A. sec. 8101-8118. That provision requires a claimant seeking to assert a cause of action against a state employee to file a written notice of claim with the employing agency and the Attorney General no later than 180 days after the cause of action accrues. 14 M.R.S.A. § 8107. It is uncontroverted that no notice was filed in this case, and Plaintiff's tort claims are therefore time barred as a matter of law. *Begin v. City of Auburn*, 574 A.2d 888, 889 (Me. 1990).

Defendants next argue that they are immune from Plaintiff's claims under section 1983. Prosecutors enjoy absolute immunity from suit under section 1983, as long as their actions are "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424

U.S. 409, 430 (1976). These Defendants' actions relative to the decision whether to charge and the subsequent treatment of the State's case against Plaintiff are therefore protected. *Id.* at 430-31. Further, while Defendants are not entitled to absolute, but rather only qualified, immunity for their actions in giving advice to the police relative to the search warrant, it is undisputed that the only advice given by these Defendants is not the basis for Plaintiff's claims. *Burns v. Reed*, 500 U.S. 478, 496 (1991). Defendant Croteau only told the officers to warn Plaintiff he could be charged with theft. Defendant Joly recommended a list of the items the officers would be searching for, and counseled them to leave materials that would have caused damage to Plaintiff's property by being removed during the search. Both of these pieces of advice benefitted Plaintiff. Defendants are also entitled to judgment as a matter of law on Plaintiff's claims under section 1983 regarding the search of his residence and his subsequent prosecution.

Finally, Defendant Joly argues that she is entitled to absolute immunity with respect to her advice to Deputy Lowell not to seek a search warrant for Lambert's residence in Farmington. Defendant is correct. *Harrington v. Almy*, 977 F.2d 37, 41 (1<sup>st</sup> Cir. 1992) ("given the availability of immunity for the decision to charge, it becomes even more important that symmetrical protection be available for the decision not to charge"). Defendant Joly is entitled to judgment on Plaintiff's claim in Count VIII of the Complaint.

### ***Conclusion***

For the foregoing reasons, I hereby recommend Defendants Croteau's and Joly's Motion for Summary Judgment be GRANTED.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

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Eugene W. Beaulieu  
United States Magistrate Judge

Dated on: August 19, 1999