

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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NELLIE PEREZ, as Mother and the
intended administratrix of the Goods,
Chattels, and Credits which were of
FRANK PEREZ, deceased, and NELLIE
PEREZ, Individually,

97 cv 2915

MEMORANDUM
AND
ORDER

Plaintiff,

-against-

THE CITY OF NEW YORK, MAYOR RUDOLPH
GIULIANI, THE POLICE DEPARTMENT OF
THE CITY OF NEW YORK, Police Officer
CHRISTOPHER CHARLES, Various JOHN DOE
Police Officers Whose Names are
Presently Unknown, INTERNAL AFFAIRS
DIVISION OF THE NEW YORK CITY POLICE
DEPARTMENT, and its Agents, Employees,

Defendants.

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for plaintiff

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LYSAGHT, LYSAGHT & KRAMER
(Paul Nack, of counsel)

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for defendant Christopher Charles

NICKERSON, District Judge:

Plaintiff, as the mother and intended administratrix of her son, Frank Perez (Perez), brought this action pursuant to 42 U.S.C. §§ 1981, 1983, 1985 and 1986, as well as the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-68. Defendants move to dismiss the complaint.

On May 22, 1994 Perez was shot twice and killed by defendant Christopher Charles, an off-duty police officer, after a traffic dispute at Beach 40th Street and Edgemere Avenue in Far Rockaway, New York. Perez was apparently wielding a metal pipe, although there is some dispute about whether he dropped it after officer Charles fired the first shot. The incident was investigated by the Internal Affairs Division of the New York City Police Department (Internal Affairs) and by the Queens County District Attorney's office (the District Attorney's office). Although the complaint

says that the case was presented to the grand jury, no indictment was returned against officer Charles.

The complaint also alleges that the New York City Police Department (the Police Department) and the Queens County District Attorney's office engaged in a pattern of civil rights violations by failing adequately to screen, train and supervise their employees. It sets forth four causes of action: (1) conspiracy to cover up illegal police activity, (2) personal injury, (3) wrongful death, and (4) a pattern of civil rights violations.

Plaintiff concedes that the cause of action for wrongful death was not timely filed and is barred by the New York statute of limitations. Plaintiff further concedes that the claims brought pursuant to 42 U.S.C. § 1981 and RICO claims should be dismissed. Finally plaintiff agrees that the claims against the Police Department and Internal Affairs should also be dismissed. The court will only consider the remaining claims.

Plaintiff's first claim alleges that the District Attorney's office did not adequately pursue its investigation into the shooting of Perez and conspired with the Police Department and Internal Affairs to exonerate officer Charles. Absolute immunity protects a prosecutor from liability under 42 U.S.C. § 1983 for acts undertaken "in preparing for the initiation of judicial proceedings or for trial," including acts taken when seeking an indictment before a grand jury. Buckley v. Fitzsimmons, 509 U.S. 259, 113 S. Ct. 2606 (1993). A prosecutor's acts of investigation or administration are only protected by qualified immunity. See id.

To the extent that plaintiff's first claim complains of the District Attorney's failure to obtain an indictment of officer Charles, those acts are protected by absolute immunity. The complaint alleges that the District Attorney "did not vigorously nor adequately pursue an investigation of the manner in which the shooting of Frank Perez took place." But the courts have not recognized inadequate investigation "as

sufficient to state a civil rights claim unless there was another recognizable constitutional right involved." Gomez v. Whitney, 757 F.2d 1005, 1006 (9th Cir. 1985) (per curiam); see also Stone v. Department of Investigation of New York, 1992 WL 25202 (S.D.N.Y.) ("There is . . . no constitutional right to an investigation by government officials.").

The first claims also alleges that defendants "actively whitewashed and covered up the improper and illegal actions of the NYCPD and D.A. personnel" and "acted in concert, with a common purpose of exonerating the shooter." Under New York law a conspiracy to commit a tort alone never of itself states a cause of action. See Alexander & Alexander of New York, Inc. v. Fritzen, 68 N.Y.2d 968, 969 (1986). Moreover a complaint "containing only conclusory, vague, or general allegations of conspiracy to deprive a person of constitutional rights cannot withstand a motion to dismiss." Sommer v. Dixon, 709 F.2d 173, 175 (2d Cir. 1983) (per curiam). The complaint sets forth no

specific facts to support its claim of conspiracy. The first claim is dismissed.

The second claim alleges damages for the personal injury to Perez for the time between when he was shot and the time of his death. The complaint was filed on May 22, 1997, three years after the death of Perez. It is not clear from the complaint whether this claim is brought under state law or pursuant to the federal civil rights statute. Under New York state law a personal injury action against a city officer must be brought within one year and 90 days after the cause of action accrues. See N.Y. Gen. Mun. Law § 50-i.

Actions brought pursuant to sections 1983 or 1985 of the federal Civil Rights Act are governed by the state statute applicable to personal injury claims, which is three years in New York. See N.Y. Civ. Prac. L. & R. § 214(5). A one-year statute of limitations applies to claims brought under 42 U.S.C. § 1986. Therefore only the personal injury claims brought under 42 U.S.C. §§ 1983 and 1985 may still be timely.

But pre-death claims brought pursuant to 42 U.S.C. §§ 1983 and 1985 may only be asserted by the decedent's estate and not by plaintiff in her individual capacity. See Barrett v. United States, 689 F.2d 324, 331 (2d Cir. 1982) (§ 1983 claims); Johnson v. City of New York, 1991 WL 41636 (S.D.N.Y.) (§ 1985 claims). As plaintiff has not yet been appointed the administratrix of Perez's estate, the personal injury claim is dismissed without prejudice. Plaintiff may refile this claim if and when she becomes the administratrix of the estate.

Plaintiff's final claim is that the City of New York employed various officers in the Police Department and the District Attorney's office who engaged in a pattern of civil rights violations. The complaint alleges that the Police Department and the District Attorney's office allows the hiring into the police force of "'Rambo-type' personalities who tend to shoot first and ask questions later," and that these institutions failed adequately to train, monitor, supervise, discipline and investigate these employees.

The complaint also alleges failure of the District Attorney's office to present sufficient evidence to the grand jury to obtain an indictment, and conspiracy to cover up police violence.

The District Attorney is a state, not a city official. In the absence of any allegations that there was some contractual arrangement between the District Attorney's office and the City of New York in which the District Attorney's office was to participate in the hiring, training, or supervision of the police, the complaint fails to state any claim against the District Attorney's office. The complaint is dismissed with prejudice as to the District Attorney's office.

It is not clear from the complaint whether plaintiff is asserting damage to herself individually or to her son. Defendants argue that plaintiff has no standing to bring this claim as she cannot sue in her individual capacity for deprivation of the constitutional rights of her son. The general rule is that a plaintiff has standing to seek redress for injuries done to her. But she may not seek redress for

injuries done to others. See Moose Lodge No. 197 v. Irvis, 407 U.S. 163, 166, 92 S. Ct. 1965, 1968 (1972). Plaintiff, when appointed as administratrix, may sue in a representative capacity to redress deprivations of Perez's constitutional rights. See Barrett, 689 F.2d at 331.

Defendants also argue that if plaintiff is alleging deprivation of her own civil rights, she has failed to demonstrate that she has suffered some distinct and palpable injury particularized to her, fairly traceable to defendants' conduct, and redressable by removal of that conduct. Allen v. Wright, 468 U.S. 737, 751, 104 S. Ct. 3315, 3324 (1984).

While the complaint does not presently contain specific allegations that establish a nexus between defendants' conduct and plaintiff's injury, it does not appear to the court beyond a reasonable doubt that the plaintiff is unable to prove a set of facts in support of the claim entitling her to relief. See Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02

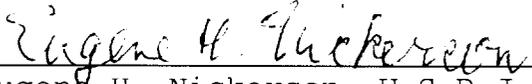
(1957). The court will grant plaintiff leave to amend the complaint to allege any specific facts that demonstrate that any policy or practice of defendants caused her injury. If plaintiff becomes the administratrix of Perez's estate, she may also bring the claim of a pattern of civil rights violations on his behalf.

Defendants' motions are granted in part and denied in part. Plaintiff's wrongful death claim, RICO claims, section 1981 claims, and the claims against Internal Affairs, the Police Department, and the District Attorney's office are dismissed with prejudice. Plaintiff's first cause of action for conspiracy is also dismissed with prejudice. The personal injury claim is dismissed without prejudice and may be refiled if and when plaintiff becomes administratrix of Perez's estate. Plaintiff is granted leave to amend the claim of a pattern of civil rights violations. Insofar as this claim alleges deprivations of Perez's constitutional rights, plaintiff may refile

this claim if and when she becomes the representative
of the estate.

So ordered.

Dated: Brooklyn, New York
June 18, 1998


Eugene H. Nickerson, U.S.D.J.