IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

NANCY NJOROGE, et al.	:	
v.	:	Civil Action No. DKC 2008-1607
LT. ROBERT M. BOLESTA, et al.	:	

MEMORANDUM OPINION

Presently pending and ready for resolution in this action are: (1) a motion for partial dismissal filed by Defendant Montgomery County, Maryland ("Montgomery County") (Paper 3); and (2) a motion to dismiss or, in the alternative, for summary judgment filed by Defendants Lieutenant Robert M. Bolesta and Montgomery County (Paper 8). The issues have been fully briefed and the court now rules pursuant to Local Rule 105.6, no hearing being deemed necessary. For the reasons that follow, the motion to dismiss count V of the complaint will be granted, and the motion to dismiss, or in the alternative, for summary judgment will be granted in part and denied in part.

I. Background

At approximately 4:00 a.m. on October 6, 2005, Nancy Njoroge was at home with her two daughters, Joyce and Janet, when she was awakened by the sound of loud banging and voices outside the front door of her second floor, two bedroom apartment. Mrs. Njoroge, assuming that her husband and son locked themselves out of the apartment, jumped out of bed and ran to the door in her nightgown.

When she got to the door, she saw that it was partially opened and held closed only by the chain lock that connected the door to its frame. Mrs. Njoroge saw police officers standing outside and briefly closed the door so that she could release the chain from its lock and find out what the problem was. Before Mrs. Njoroge could open the door, the police used a battering ram to break down the front door. Plaintiffs allege that a team of approximately a dozen officers, led by Lieutenant Robert M. Bolesta, entered the family's home and yelled at Mrs. Njoroge to lie on the floor. Officers used plastic handcuffs to bind Mrs. Njoroge's hands behind her back.

Joyce and Janet were awakened by the sound of the police breaking down the front door. Upon seeing officers running down the hallway toward her room, Joyce shut the door to hide. Joyce heard voices outside of her room yelling at her to open her bedroom door. When she did not do so, the officers kicked open the bedroom door, splitting the frame. At least three officers entered the room, handcuffed Joyce and Janet, and led them to the living room/ dining room area of the apartment, where they sat at the dining room table while other officers ransacked the apartment.

Mrs. Njoroge and her daughters were immobilized within minutes of the officers entering the apartment. For approximately 15 minutes after entering, the officers continued to search the premises. After the police activity slowed down, two officers

began questioning Joyce and Janet without their mother's permission. Approximately 30 minutes after the officers forcefully entered the apartment, they announced that they had made a mistake and that their warrant authorized entry to Apartment 201, not the Njoroges' home, Apartment 202. Mrs. Njoroge was allowed to get up from the floor, the handcuffs were removed, and the police brought her over to the dining room table to sit with her daughters.

After the police acknowledged that they had entered the wrong apartment, one officer remained with the family in the apartment. When Mr. Njoroge arrived home from work at approximately 6:00 a.m., the remaining officer explained the officers' mistaken entry and search, apologized, and promised that he would talk to the property manager about fixing the doors as soon as possible at Montgomery County's expense.

Plaintiffs filed a fourteen count complaint against Lt. Bolesta in his individual capacity, Montgomery County, and 12 unidentified Montgomery County Police officers in their individual capacities. Counts I-IV allege Fourth Amendment violations for unlawful entry, unlawful search, unlawful seizure, and excessive force against Lt. Bolesta and Officers 1-12. Count V alleges a Fourth Amendment violation for failure to train and supervise against Montgomery County. Counts VI-IX allege violations of Article 26 of the Maryland Declaration of Rights for unlawful entry, unlawful search, unlawful seizure, and excessive force

against Lt. Bolesta and Officers 1-12. Count X alleges a violation of Article 26 of the Maryland Declaration of Rights against Montgomery County for *respondeat superior*. Counts XI-XIV allege state law claims against Lt. Bolesta and Officers 1-12 for false imprisonment, intentional infliction of emotional distress, trespass, and battery.

Defendant Montgomery County filed a motion to dismiss count V of the complaint for failure to state a claim under § 1983. (Paper 3). Defendants Lt. Bolesta and Montgomery County thereafter filed a motion to dismiss or, in the alternative, for summary judgment on counts I, II, III, IV, VI, VII, VIII, IX, X, XI, XII, XIII, and XIV.[1]

II. Motion to Dismiss

A. Standard of Review

The purpose of a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) is to test the sufficiency of the plaintiff's complaint. *See Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999). Except in certain specified cases, a plaintiff's complaint need only satisfy the "simplified pleading standard" of Rule 8(a), *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002), which requires a "short and plain statement of the claim showing that the

[1] Defendants Lt. Bolesta and Montgomery County refer to Count II twice in their motion to dismiss, or in the alternative, for summary judgment. The court assumes that Defendants are referring to Count III.

pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). Nevertheless, "Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief." *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 n.3 (2007). That showing must consist of at least "enough facts to state a claim to relief that is plausible on its face." *Id.* at 1974.

In its determination, the court must consider all well-pled allegations in a complaint as true, *Albright v. Oliver*, 510 U.S. 266, 268 (1994), and must construe all factual allegations in the light most favorable to the plaintiff. *See Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 783 (4th Cir. 1999) (citing *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993)). The court need not, however, accept unsupported legal allegations, *Revene v. Charles County Comm'rs*, 882 F.2d 870, 873 (4th Cir. 1989), legal conclusions couched as factual allegations, *Papasan v. Allain*, 478 U.S. 265, 286 (1986), or conclusory factual allegations devoid of any reference to actual events, *United Black Firefighters v. Hirst*, 604 F.2d 844, 847 (4th Cir. 1979). In sum, "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 127 S.Ct. at 1965 (internal citations omitted).

B. Analysis

Defendants moved to dismiss count V of the complaint on the basis that Plaintiffs have failed to allege that a governmental policy, custom, or practice related to inadequate training or supervision led to the alleged constitutional deprivation. (Paper 3, at 7). Defendants maintain that there is no *respondeat superior* liability under § 1983, but instead, Plaintiffs must show that the municipality was a participant in the alleged constitutional violation. Defendants assert that even if Lt. Bolesta or any other police officers are held liable, Montgomery County cannot be held liable unless the constitutional injury was caused by an action taken in the execution of a County policy or custom. (*Id.*).

Under *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978) and its progeny, "municipal liability results only 'when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the [constitutional] injury.'" *Spell v. McDaniel*, 824 F.2d 1380, 1385 (4th Cir. 1987), *cert. denied sub nom. City of Fayetteville, N.C. v. Spell*, 484 U.S. 1027 (1988)(quoting *Monell*, 436, U.S. at 694). Thus, "[§] 1983 plaintiffs seeking to impose liability on a municipality must, therefore, adequately plead and prove the existence of an official policy or custom that is fairly attributable to the municipality and that proximately caused the deprivation of their rights."

Jordan by Jordan v. Jackson, 15 F.3d 333, 338 (4th Cir. 1994). "Under federal law, municipalities cannot be held liable under principles of *respondeat superior* for the actions of their employees." *Int'l Ground Transp. v. Mayor & City Council Of Ocean City, Md.*, 475 F.3d 214, 224 (4th Cir. 2007)(citing *Monell*, 436 U.S. at 691). "[T]he inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388 (1989). "Deliberate indifference is a very high standard," *Grayson v. Peed*, 195 F.3d 692, 695 (4th Cir. 1999), which a plaintiff may satisfy by "demonstrat[ing] by either actual intent or reckless disregard." *Miltier v. Beorn*, 896 F.2d 848, 851 (4th Cir. 1990). "*Monell's* rule that a city is not liable under § 1983 unless a municipal policy causes a constitutional deprivation will not be satisfied by merely alleging that the existing training program . . . represents a policy for which the city is responsible." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 390 (1989).

Plaintiffs allege that Defendant Montgomery County is liable for violating, under color of law, Plaintiff's constitutional right to be free from unreasonable search and seizure. (Paper 1, ¶ 52). Plaintiffs further allege that Montgomery County's failure to train and supervise adequately its officers regarding the degree of care

needed to avoid error in executing warrants reflects a deliberate indifference on the part of the County to the rights of individuals. (*Id.*). Plaintiffs contend that the violation of their Fourth Amendment right is made actionable by § 1983.

Plaintiffs rely upon several unpublished cases, including *Cortez v. Prince George's County, Md.*, 31 Fed.Appx. 123, 2002 WL 445037 (4th Cir. Mar. 22, 2002)(unpublished), in an effort to support their argument that the allegations set forth above are sufficient to state a § 1983 claim against Montgomery County. In *Cortez*, a mother alleged that Prince George's County was liable for her son's suicide while detained at a correctional facility. The United States Court of Appeals for the Fourth Circuit reversed the district court's dismissal of the claims for deliberate indifference to serious medical needs and deliberate indifference to a substantial risk of serious harm. *Id.* at 129. The court noted that the following allegations were sufficient to survive defendant's 12(b)(6) motion:

> (1) Prince George's County maintains a policy and custom of failing to train correctional officials to provide inmates who exhibit obvious syptomatology of suicidal risk such as Antonio Cortez with adequate medical and mental health screening; and (2) as a direct and proximate result of this policy and custom, Antonio Cortez, prior to his death suffered severe physical pain, mental anguish, fear, emotional distress, bodily injury, and subsequent death.
>
> . . .

> (1) Prince George's County maintains a policy and custom of failing to provide inmates, and in particular Antonio Cortez, with protection from clearly identified and known risks of suicide; (2) Prince George's County maintains a policy and custom of failing to train correctional officers and medical providers to provide inmates, and in particular Antonio Cortez, with adequate protection from clearly identifiable known risks of suicide attempts; and (3) as a direct and proximate result of these policies and customs, Antonio Cortez, prior to his death, suffered severe physical pain, mental anguish, fear, emotional distress, bodily injury, and subsequent death.

Id. Importantly, the court affirmed the district court's dismissal "to the extent Counts Three and Four alleged that Prince George's County violated Antonio Cortez's constitutional rights *without alleging a policy or custom of Prince George's County that resulted in the harm alleged*." *Id.* at n.* (emphasis in original). The court noted,

> the complaint alleges . . . that Prince George's County was deliberately indifferent to Antonio Cortez's substantial risk of serious harm by failing to properly follow up on psychiatric referrals and evaluations. Prince George's County *cannot* be held liable under § 1983 in regard to this allegation for two reasons. First, the allegation, at most, states a negligence claim, which falls far short of the deliberate indifference standard required under § 1983 in the context of this case. *Farmer v. Brennan*, 511 U.S. 825, 835-36 (1994). Second, *Count Four contains no related allegation of a policy of custom of Prince George's County that resulted in the serious harm alleged, which is necessary to impose liability on Prince George's County*. *Board of County Comm'rs [v. Brown]*, 520 U.S. [397], 403-04 [(1997)].

Id. (emphasis added). Plaintiffs also cite *Marshall v. Ilczuk*, 1993 WL 642946 (D.Md. Jan. 3, 1994) and *Mason v. Mayor & City Council of Baltimore*, 1995 WL 168037 (D.Md. Mar. 24, 1995), but fail to recognize that in each case, the complaint survived a motion to dismiss because it included allegations of a custom or policy. *See, e.g.*, *Marshall*, 1993 WL 642946 at * 4 ("Despite the factual paucity of [the plaintiff]'s complaint, he has alleged that Berlin has a policy, or has acquiesced in a custom of, failing to train and failing to discipline its police officers."); *Mason*, 1995 WL 168037 at *5 ("The Complaint plainly alleges injury resulting from a government policy of inadequate training or supervision that amounts to deliberate indifference to the rights of persons with whom the police come in contact.").

Plaintiffs' reliance on all of these cases is misplaced. In addition to being unpublished, and thus, of no precedential value, all precede *Twombly*, in which the Supreme Court directed courts to focus on alleged facts, and not conclusions. Plaintiffs have not alleged facts to show that Montgomery County has a custom or policy that resulted in the alleged harm.

Here, while Plaintiffs have include the language "deliberate indifference" in the complaint, they provide no allegations, aside from the incident giving rise to this action, to show that Montgomery County has a policy or custom of failing properly to execute warrants. They argue only that the fact that twelve

officers participated in the execution of the warrant means that twelve officers were improperly trained or supervised, thus demonstrating deliberate indifference. The fact remains that there was but one event and one mistake. If Plaintiffs cannot allege facts showing a County custom or policy leading to the alleged constitutional violations, and showing that individual state officials have acted in a fashion to violate Plaintiffs' rights, they cannot state a claim against Montgomery County under *Monell*.

III. Motion to Dismiss, or in the Alternative, for Summary Judgment

A. Standard of Review

A motion for summary judgment will be granted only if there exists no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Emmett v. Johnson*, 532 F.3d 291, 297 (4th Cir. 2008). In other words, if there clearly exist factual issues "that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party," then summary judgment is inappropriate. *Anderson*, 477 U.S. at 250; *JKC Holding Co. LLC v. Washington Sports Ventures, Inc.*, 264 F.3d 459, 465 (4th Cir. 2001). The moving party bears the burden of showing that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Catawba Indian Tribe of*

S.C. v. South Carolina, 978 F.2d 1334, 1339 (4th Cir. 1992), *cert. denied*, 507 U.S. 972 (1993).

When ruling on a motion for summary judgment, the court must construe the facts alleged in the light most favorable to the party opposing the motion. *United States v. Diebold*, 369 U.S. 654, 655 (1962); *Gill v. Rollins Protective Servs. Co.*, 773 F.2d 592, 595 (4th Cir. 1985). A party who bears the burden of proof on a particular claim must factually support each element of his or her claim. "[A] complete failure of proof concerning an essential element . . . necessarily renders all other facts immaterial." *Celetox Corp.*, 477 U.S. at 323. Thus, on those issues on which the nonmoving party will have the burden of proof, it is his or her responsibility to confront the motion for summary judgment with an affidavit or other similar evidence in order to show the existence of a genuine issue for trial. *See Anderson*, 477 U.S. at 256; *Celotex Corp.*, 477 U.S. at 324. However, "[a] mere scintilla of evidence in support of the nonmovant's position will not defeat a motion for summary judgment." *Detrick v. Panalpina, Inc.*, 108 F.3d 529, 536 (4th Cir. 1997), *cert. denied*, 522 U.S. 810 (1997). There must be "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted).

B. Analysis

Defendants have moved to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6), or alternatively, for summary judgment under Fed.R.Civ.P. 56. A court considers only the pleadings when deciding a Rule 12(b)(6) motion. Where the parties present matters outside of the pleadings and the court considers those matters as it does here, the court will treat the motion as one for summary judgment. *See Gadsby by Gadsby v. Grasmick*, 109 F.3d 940, 949 (4th Cir. 1997); *Paukstis v. Kenwood Golf & Country Club, Inc.*, 241 F.Supp.2d 551, 556 (D.Md. 2003).

1. Lieutenant Bolesta

a. Federal and Maryland Declaration of Rights Claims

Plaintiffs allege in counts I-IV and VI-IX of the complaint that Lt. Bolesta and twelve unidentified officers mistakenly executed a warrant, thereby committing an unlawful entry, unlawful search, and unlawful seizure, and used excessive force in violation of the Fourth Amendment and Article 26 of the Maryland Declaration of Rights.

To prevail on a claim pursuant to § 1983, a plaintiff must prove that (1) the defendant deprived him of a right secured by the Constitution or the laws of the United States and (2) and the deprivation was achieved by defendants acting under color of state law. *Paul v. Davis*, 424 U.S. 693, 696-97 (1976). To state a Maryland constitutional claim similar to § 1983, plaintiff must

establish "(1) The defendant-officer engaged in activity that violated one of the plaintiff's Maryland constitutional rights, and (2) The defendant-officer engaged in such activity with actual malice toward the plaintiff." *Davis v. DiPino*, 99 Md.App. 282, 289 (1994), *rev'd on other grounds*, 337 Md. 642 (1995). Plaintiffs' Fourth Amendment claims (Counts I-IV) and Maryland Declaration of rights claims (Counts VI-IX) are analyzed under the same standard.

> [Maryland courts] have long recognized that Article 26 is *in pari materia* with the Fourth Amendment and that decisions of the Supreme Court interpreting the Federal right are entitled to great respect in construing the State counterpart. *See Gadson v. State*, 341 Md. 1, 8 n.3, 668 A.2d 22, 26 n.3 (1995); *DiPino v. Davis*, 354 Md. 18, 43, 729 A.2d 354, 367-68 (1999).

Richardson v. McGriff, 361 Md. 437, 452-53 (2000).

Defendants do not contest that Lt. Bolesta was acting under color of state law. Rather, Defendants argue that Lt. Bolesta had no involvement in the execution of the warrant, other than responding to the scene after the incident was over and therefore did not participate in the alleged unlawful entry, unlawful search, unlawful seizure, and use of excessive force. Defendants argue that, contrary to Plaintiffs' mistaken assertions, Lt. Bolesta was not present during the initial entry into Apartment 202 or the preliminary pre-raid discussions of which apartment to enter. Defendants insist that Lt. Bolesta did not prepare the application for the search warrant or conduct any investigation in this matter.

Lt. Bolesta submits an affidavit, stating that he "did not participate in the investigation or the execution of the search warrant which led to the police entry into Apartment 202 . . . ." (Paper 8, Bolesta Aff., ¶ 3). Bolesta asserts that he "arrived on the scene of this event . . . a short time after the execution of the search warrant on Apartment 202 . . . after being advised that there had been a mistake in the entry into Apartment 202 by police officers." (*Id.* ¶ 7).

Plaintiffs respond with the Declaration of Nancy Njoroge to challenge Lt. Bolesta's assertion that he did not participate in executing the warrant. (Paper 19, Njoroge Decl.). Plaintiffs argue that there is a genuine issue of material fact regarding the extent of Lt. Bolesta's participation in the raid. (*Id.* at 9). Plaintiffs argue that the fact that Lt. Bolesta was in the room within, at most, 2-3 minutes after her handcuffs were removed appears to conflict with Lt. Bolesta's affidavit in which Lt. Bolesta states that he did not arrive until the raid was over. (*Id.* at 10). Alternatively, Plaintiffs argue that the court should permit discovery to determine the extent of Lt. Bolesta's participation in the raid. (*Id.*).

Mrs. Njoroge's declaration does not create a genuine issue of material fact. Mrs. Njoroge states that "[w]ithin seconds of opening the door, I was forced to lay [lie] down on the floor, on my stomach, with my hands cuffed behind my back. Due to my

position on the floor, I could not see any of the officers' faces." (Paper 19, Njoroge Decl. ¶ 3). Mrs. Njoroge states that the first officer she remembers seeing after being removed from the floor fits the description of Lt. Bolesta. (Paper 19, at 10). However, Mrs. Njoroge could not see any of the officer's faces until *after* her handcuffs were removed which did not occur until the raid was over. (Paper 1, ¶¶ 21-23). Mrs. Njoroge states that 2-3 minutes after her handcuffs were removed saw "an officer," purportedly Lt. Bolesta. (Paper 19, Njoroge Decl. ¶ 7). Mrs. Njoroge, states that "an officer . . . told [her] that he didn't know where to start and that a mistake had been made and that the officers had entered the wrong apartment." (*Id.* ¶ 9). Plaintiffs allege that the handcuffs were not removed until approximately thirty minutes after the raid began. (Paper 1, ¶ 23). Thus, based on Plaintiffs' complaint and Mrs. Njoroge's declaration, the first time she noticed Lt. Bolesta was approximately 32-33 minutes after the warrant was mistakenly executed. This is consistent with Lt. Bolesta's affidavit stating that he did not participate in the execution of the warrant and arrived only after he learned that there had been a mistake. Thus, there is no genuine issue of material fact regarding Lt. Bolesta's participation in the execution of the warrant prior to, or during the raid.

Further, Plaintiffs' request for discovery regarding Lt. Bolesta will be denied. Generally speaking, "summary judgment must

be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Anderson*, 477 U.S. at 250 n.5; Fed.R.Civ.P. 56(f). "Sufficient time for discovery is considered especially important when the relevant facts are exclusively in the control of the opposing party[,]" and "when a case involves complex factual questions about intent and motive." *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 247 (4th Cir. 2002)(quoting 10A Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, Federal Practice & Procedure § 2741 at 241 (3d Ed. 1998)(internal quotations omitted)).

A party opposing summary judgment may not merely assert in the opposition that discovery is necessary. Rather, the party must file an affidavit that "particularly specifies legitimate needs." *Nguyen v. CNA Corp.*, 44 F.3d 234, 242 (4th Cir. 1995). Moreover, a request for discovery will not be granted if the party merely wishes to conduct a "fishing expedition" in search of evidence that may be helpful. *Morrow v. Farrell*, 187 F.Supp.2d 548, 551 (D.Md. 2002). In addition to the specificity requirement, a party must present reasons why it cannot put forth the necessary opposing evidence, *Pine Ridge Coal Co. v. Local 8377, United Mine Workers of America*, 187 F.3d 415, 421-22 (4th Cir. 1999), and must establish that the desired evidence could be sufficient to create a genuine issue of material fact. *McLaughlin v. Murphy*, 372 F.Supp.2d 465, 470 (D.Md. 2004). If a party meets this burden, "the court may

refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is just." Fed.R.Civ.P. 56(f).

Plaintiffs filed a Rule 56(f) affidavit stating that "[d]isovery will allow Plaintiffs to establish the extent of Lt. Bolesta's participation in the unlawful raid. Lt. Bolesta does not dispute that he was at the Njoroge's home at the time of the unlawful search. He simply states that he arrived late and did not participate in the search." (Paper 19, Lave Aff., ¶ 8). As noted above, there is no genuine issue of material fact regarding Lt. Bolesta's participation. The complaint, Mrs. Njoroge's declaration, and Lt. Bolesta's affidavit describe Lt. Bolesta's arrival as occurring after the warrant was executed. Thus, further discovery is unnecessary. Accordingly, Lt. Bolesta's motion for summary judgment will be granted on Counts I, II, III, IV, VI, VII, VII, and IX, all of which are related to Lt. Bolesta's alleged participation in execution of the warrant.

b. State Law Tort Claims

Plaintiffs assert state law claims against Lt. Bolesta for false imprisonment, intentional infliction of emotional distress, trespass, and battery in Counts XI-XIV of the complaint. Defendants argue that Lt. Bolesta cannot be liable for any of the state tort claims because he was not present on the scene and did

not participate in any of the actions leading to the entry of Apartment 202. Defendants further argue that assuming, *arguendo*, that Lt. Bolesta did participate, Plaintiff's allegations cannot overcome public official immunity.

Section 5-507 of the Maryland Code, Courts and Judicial Proceedings Article provides:

> An official of a municipal corporation, while acting in a discretionary capacity, without malice, and within the scope of the official's employment or authority shall be immune as an official or individual from any civil liability for the performance of the action.

Md.Code.Ann., Cts. & Jud. Proc. § 5-507(b)(1). "Police [officers] . . . in the line of duty, act with discretionary authority." *Mora v. City of Gaithersburg*, 462 F.Supp.2d 675, 697, *aff'd as modified by*, 519 F.3d 216 (4th Cir. 2008)(citing *Richardson v. McGriff*, 361 Md. 437 (2000)). "To prove malice, there must be an appropriate showing of ill will, improper motivation, or evil purpose." *Davis v. Muse*, 51 Md.App. 93, 99 n.3 (1982).

The parties do not dispute that Lt. Bolesta was acting in the line of duty when he was present at the Njoroge's home. As such, Lt. Bolesta is shielded from liability for alleged intentional torts committed while performing his duties unless he acted with actual malice. Plaintiffs fail to provide evidence that Lt. Bolesta actually participated in the commission of most of the torts against them. Further, Plaintiffs fail to allege any facts to show that Lt. Bolesta acted with actual malice. Indeed,

Plaintiffs allege that the police officer who spoke to Mrs. Njoroge after the incident, purportedly Lt. Bolesta, "explained the police's mistaken entry and fruitless search, apologized, and promised he would talk to the property manager about fixing the doors as soon as possible at the County's expense." (Paper 1, ¶ 25). Plaintiffs do not respond to Defendants' argument related to public official immunity, but note that "[t]here is plainly a factual controversy as to whether Lt. Bolesta trespassed when he entered and remained in the Njoroge's home for 20 minutes without any authority to be there." (Paper 19, at 14). As noted above, there is no genuine issue of material fact regarding Lt. Bolesta's participation in the raid, and that he only arrived on the scene after the mistake had been realized,[2] and Plaintiffs have not come forward with any facts to show actual malice. Accordingly, the motion for summary judgment as to the state law claims in Counts XI, XII, XIII, and XIV related to Lt. Bolesta will be granted.

3. Unnamed Defendants - Officers John Doe #1-12

Dismissal of Lt. Bolesta from the case leaves only unnamed, unserved police officers as individual defendants in this action. Plaintiffs identify the officers who executed the warrant as "Officers John Doe #1-12." (Paper 1). Plaintiffs never filed a

[2] Plaintiffs produced evidence that Lt. Bolesta entered the apartment. Although his declaration is vague on that point, and he might be asserting that he spoke to Plaintiffs from the hallway, that perspective would only produce a dispute of fact as to whether he entered the apartment without permission.

timely amendment to the complaint to include the real names of the officers, nor does it appear from the record that Plaintiffs made any effort to discover the names. Plaintiffs submit that they have "asked defense counsel for discovery of documents that would allow Plaintiffs to determine the extent of Lt. Bolesta's participation in the raid." (Paper 19, at 10).

The applicable statute of limitations for the state civil claims alleged by Plaintiff is three years in Maryland, the location of the alleged injury.[3] Because the federal civil rights statutes invoked by Plaintiffs lack their own limitations periods, here 42 U.S.C. § 1983, the statute borrows the limitations period from Maryland's three-year general limitations period. *See, e.g.*, *Bridges v. Dep't of Md. State Police*, 441 F.3d 197, 210 (4th Cir. 2006)("Actions brought under 42 U.S.C. § 1983 are governed by state statutes of limitations."). Even if Plaintiffs now amend the complaint to replace the "John Doe" names with the officers' real names under Rule 15(c)(3), the statute of limitations on Plaintiffs claims may have expired. The United States Court of Appeals for the Fourth Circuit recently examined Rule 15(c)(3)(A) and (B) in the context of the applicable statute of limitations:

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[3] Maryland's general statute of limitations for state civil claims is generally three years. *See* Md. Code Ann., Cts. & Jud. Proc. § 5-101; *Ford v. Douglas*, 144 Md.App. 620, 623-24 (2002)(noting that statute of limitations for battery is three years).

> [W]hen a person would reasonably believe that the time for filing suit had expired, without having been given notice that it should have been named in an existing action, that person is entitled to repose. *See* Fed.R.Civ.P. 15(c)(3)(B). On the other hand, when a person is provided notice within the applicable limitations period that he would have been named in the timely filed action but for a mistake, the good fortune of a mistake should not save him. *Id.* This is not to say that a plaintiff may name any party within the limitations period with the hope of amending later, perhaps after discovery. Rather, it is to say that the "mistake" language is not the vehicle to address those concerns. In the cases of concern, most notably the cases of "Doe" substitutions, the notice and prejudice requirements of Rule 15(c)(3)(A) and (B) adequately police this strategic joinder practice. The Rule's emphasis on notice, rather than on the type of "mistake" that has occurred, saves the courts not only from an unguided and therefore undisciplined sifting of reasons for an amendment but also from prejudicing would-be defendants who rightfully have come to rely on the statute of limitations for repose. The disagreement among courts over which mistakes are forgiven under Rule 15(c) and which mistakes result in dismissal illustrates the peril of the approach.
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> The mandate remains that a plaintiff has the burden of locating and suing the proper defendant within the applicable limitations period. The Federal Rules do not demand a perfect effort at the outset, but they do demand that when an amendment seeks to correct an imperfect effort by changing parties, the new party must have received adequate notice within the limitations period and suffer no prejudice in its defense.

Goodman v. Praxair, Inc., 494 F.3d 458, 472-73 (4th Cir. 2007)(en banc).

The alleged unlawful conduct by Defendant Officers John Doe #1-12 occurred on October 6, 2005. Therefore, the statute of limitations period to file a claim against the properly identified officers apparently expired on October 6, 2008, over four months ago. The complaint was filed on June 20, 2008. Even if Plaintiffs determine the names of these officers, and seek to add them as parties, they would have to show that the unnamed, unserved defendants had been put on notice of this action and will not suffer prejudice if this case is allowed to proceed.

4. Montgomery County

Count X of the complaint alleges that Defendant Montgomery County is liable under the doctrine of *respondeat superior* for violation of Plaintiffs' state constitutional right to be free of unlawful search and seizure. (Paper 1, ¶ 62). Plaintiffs further allege that Montgomery County is liable for violations committed by their agents and employees who, within the scope of their employment, wrongfully entered the Njoroge residence, forcibly seized the family, and recklessly searched their home. (*Id.*). Defendants argue that Plaintiffs cannot impose liability on Montgomery County under the doctrine of *respondeat superior* based on the alleged actions of unidentified officers.

Under Maryland law, a municipality may be held liable under the doctrine of *respondeat superior* for violations of the state constitution. *See DiPino*, 354 Md. at 372. In light of the finding

that there is no genuine issue of material fact regarding Lt. Bolesta's participation in the raid, Plaintiffs' claims against Montgomery County under *respondeat superior* related to Lt. Bolesta must fail. Until the fate of the currently unnamed Officers John Doe #1-12 is resolved, the court will not determine Montgomery County's liability, if any, regarding the remaining officers.

IV. Conclusion

For the foregoing reasons, Defendant Montgomery County's motion to dismiss Count V will be granted and Defendants Lt. Bolesta and Montgomery County's motion to dismiss, or in the alternative for summary judgment will be granted in part and denied in part. A separate Order will follow.

/s/
DEBORAH K. CHASANOW
United States District Judge