UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Abdel Elnashar,

Plaintiff,

v.

Civ. No. 03-5110 (JNE/JSM)
ORDER

United States Department of Justice, Federal Bureau of Investigation-Minneapolis Office, Myron Umbel, and Other Unknown FBI Agents,

Defendants.

Jon Erik Kingstad, Esq., Kingstad Law Office, appeared for Plaintiff Abdel Elnashar.

Marcia Tierksy, Esq., United States Department of Justice, appeared for Defendants United States Department of Justice, Federal Bureau of Investigation-Minneapolis Office, and Myron Umbel.

This is an action by Abdel Elnashar against the United States Department of Justice (DOJ), the Federal Bureau of Investigation-Minneapolis Office (FBI), and Myron Umbel. Elnashar asserts claims against the DOJ and the FBI for alleged violations of the Foreign Intelligence Service Act (FISA), 50 U.S.C. §§ 1801-1862 (2000), the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2000), the Privacy Act, 5 U.S.C. § 552a (2000), Federal Rule of Criminal Procedure 41, and of Elnashar's rights under the First, Fourth, and Fifth Amendments to the United States Constitution. Elnashar asserts claims against Umbel for alleged violations of the FISA and of Elnashar's rights under the First, Fourth, and Fifth Amendments to the United States Constitution. The case is before the Court on Umbel's Motion for Judgment on the Pleadings on Grounds of Qualified Immunity and on the DOJ and the FBI's Motion for Judgment on the Pleadings or, in the alternative, for Summary Judgment. For the reasons set forth below, the Court grants the motions.

I. BACKGROUND

On September 14, 2001, the DOJ and the FBI announced the PENTBOMB investigation, which is an investigation into the terrorist attacks of September 11, 2001. As part of the investigation, the FBI solicited information from the public. At some time after the attacks, a citizen informed the FBI that Elnashar was an agent of Al Qaida, a terrorist, or associated with the attacks of September 11. In April 2002, Umbel and another FBI agent interviewed Elnashar at his home because of the citizen report. Records containing information from that interview are now part of the PENTBOMB investigation.

In 2002, Elnashar filed an employment discrimination complaint against his former employer, Speedway SuperAmerica, with the St. Paul Department of Human Rights. As part of its investigation, the St. Paul Department of Human Rights asked Elnashar to execute a release authorizing the St. Paul Department of Human Rights to obtain documents from the FBI pertaining to him. After Elnashar executed the release, the St. Paul Department of Human Rights submitted a document request to the FBI. The FBI replied to the request, stating that it had responsive documents that could not be disclosed and that the documents were part of the PENTBOMB investigation. The St. Paul Department of Human Rights ultimately dismissed his claim of employment discrimination.

On February 26, 2003, Elnashar submitted a document request to the FBI. The FBI treated the request as one made under the FOIA and the Privacy Act. On February 28, 2003, the FBI denied Elnashar's request. Several months later, Elnashar brought this action.

II. DISCUSSION

Matters outside the pleadings have been presented to the Court as part of the briefing of the motions. The Court excludes the materials outside the pleadings and will analyze the

motions as motions for judgment on the pleadings. *See* Fed. R. Civ. P. 12(c). Accordingly, the Court will limit its analysis to the pleadings themselves, matters of public record, materials embraced by the pleadings, and exhibits attached to the complaint. *See Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999). Judgment on the pleadings is appropriate where no material issue of fact remains to be resolved and the moving party is entitled to judgment as a matter of law. *Faibisch v. Univ. of Minn.*, 304 F.3d 797, 803 (8th Cir. 2002); *Potthoff v. Morin*, 245 F.3d 710, 715 (8th Cir. 2001). A court must accept as true all facts pleaded by the non-moving party and grant all reasonable inferences from the pleadings in favor of the non-moving party. *Faibisch*, 304 F.3d at 803; *Potthoff*, 245 F.3d at 715. The court is, however, "free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations." *Wiles v. Capitol Indem. Corp.*, 280 F.3d 868, 870 (8th Cir. 2002); *see Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990).

A. Umbel's motion

Umbel asserts that he is entitled to qualified immunity as to all claims asserted against him. Qualified immunity shields government officers from liability for civil damages if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Behrens v. Pelletier*, 516 U.S. 299, 305 (1996). If applicable, qualified immunity is an immunity from suit rather than a mere defense to liability. *Id.* at 306. When faced with an assertion of qualified immunity in a suit against an officer for an alleged violation of a constitutional right, a court must first consider whether the facts, taken in the light most favorable to the party asserting the injury, show the officer's conduct violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001). Only if a constitutional

violation could be established should the court then consider whether the right was clearly established. *Id.* "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202.

Elnashar's claims against Umbel are based on a search and seizure that allegedly occurred on April 9, 2002, and searches that allegedly occurred at some other time. With regard to the allegations of searches that allegedly occurred at some time other than April 9, 2002, Elnashar fails to state a claim because the allegations are conclusory. *See Strand v. Diversified Collection Serv., Inc.*, 380 F.3d 316, 317 (8th Cir. 2004). The Court turns to the claims based on the events of April 9, 2002.

1. First Amendment

Elnashar's political and religious beliefs are the foundation of his First Amendment against Umbel. The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. An individual may seek redress for the government's investigation of the individual in retaliation for the individual's exercise of First Amendment rights. *Raz v. Lee*, 343 F.3d 936, 938 (8th Cir. 2003) (per curiam). In this case, there is no allegation that Umbel knew of Elnashar's political or religious beliefs before the interview on April 9, 2002. Instead, the Amended Complaint alleges that the FBI received a tip about Elnashar's potential involvement in terrorist activities and that Umbel interviewed Elnashar as a result of that tip. Without more, the allegations of the Amended Complaint do not reveal that Umbel violated Elnashar's First Amendment rights. The Court therefore concludes

that Umbel is entitled to qualified immunity insofar as Elnashar claims that Umbel violated Elnashar's rights under the First Amendment.

2. Fourth Amendment

The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Elnashar alleges that on April 9, 2002, Umbel and another unknown FBI agent "physically searched, intruded and broke into a secured area . . . outside of Elnashar's apartment where Elnashar had a reasonable expectation of privacy," that Umbel and the other agent "without notice or announcement of their purpose or authority, unlawfully seized and detained Elnashar," and that "as a result of the shock, confusion, fear and embarrassment at the intrusion upon his privacy and detention, Elnashar involuntarily consented to a physical search of his residence" by Umbel and the other agent.

The Court first addresses Elnashar's contention with respect to the alleged search of the area outside of his apartment. To challenge the constitutionality of a search, a plaintiff must demonstrate that he had a legitimate expectation of privacy in the particular area searched. *United States v. McCaster*, 193 F.3d 930, 933 (8th Cir. 1999). Several factors are relevant to this inquiry: whether the plaintiff has a possessory interest in the place searched; whether the plaintiff can exclude others from the place; whether the plaintiff took precautions to maintain the privacy; and whether the plaintiff had a key to the premises. *Id.* In this case, Elnashar fails to allege any facts to support his contention that he had a reasonable expectation of privacy in the area outside his apartment. His alleged expectation of privacy is an unsupported legal

conclusion cast in the form of a factual allegation. *See Wiles*, 280 F.3d at 870. Moreover, the Eighth Circuit Court of Appeals has long "rejected the notion of a generalized expectation of privacy in the common areas of an apartment building." *McCaster*, 193 F.3d at 933; *see United States v. McGrane*, 746 F.2d 632, 634 (8th Cir. 1984); *United States v. Eisler*, 567 F.2d 814, 816 (8th Cir. 1977). Accordingly, Elnashar cannot challenge the constitutionality of the alleged search in the area outside of his apartment. The Court therefore grants Umbel's motion insofar as the Fourth Amendment claim is based on the search of the area outside of Elnashar's apartment.

The Court next considers the alleged seizure and detention of Elnashar. To determine whether a person has been seized within the meaning of the Fourth Amendment, a court asks "whether, in view of the totality of the circumstances surrounding the incident, a reasonable person would have believed he was free to leave." *United States v. Johnson*, 326 F.3d 1018, 1021 (8th Cir. 2003). Although resolution of this inquiry proceeds on a case-by-case basis, several factors inform the determination of whether a seizure took place: "officers positioning themselves in a manner that limits the person's freedom of movement; the presence of several officers, the display of weapons by officers, physical touching, the use of language or intonation indicating compliance is necessary, the officer's retention of the person's property, or an officer's indication that the person is the focus of a particular investigation." *Id.* at 1021-22 (citations omitted). In this case, the Amended Complaint alleges no facts from which the Court could reasonably infer that Elnashar was seized. Elnashar's allegation that he was unlawfully seized and detained is an unsupported legal conclusion cast in the form of a factual allegation. *See Wiles*, 280 F.3d at 870. Because the Amended Complaint fails to allege that Elnashar was

unreasonably seized, Umbel is entitled to qualified immunity insofar as the Fourth Amendment claim is based on the alleged seizure and detention of Elnashar on April 9, 2002.

The Court next turns to the alleged search of Elnashar's apartment. The Fourth Amendment's general prohibition of warrantless searches does not apply where officers obtain voluntary consent from the person whose property is searched. *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990); *United States v. Rodriguez*, 367 F.3d 1019, 1027 (8th Cir. 2004). Whether consent to search is voluntary "is a question of fact to be determined from the totality of all the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973); *see United States v. Contreras*, 372 F.3d 974, 977 (8th Cir. 2004).

Elnashar contends that the issue of whether he gave voluntary consent to the search is an affirmative defense that is not properly considered as part of the qualified-immunity analysis. The Court disagrees. A court may address whether a person gave voluntary consent to a warrantless search as part of an analysis of an assertion of qualified immunity. *See Trulock v. Freeh*, 275 F.3d 391, 401-02 (4th Cir. 2001). In this case, the Amended Complaint alleges no facts from which the Court can reasonably infer that Elnashar's consent to the search of his apartment was involuntary. *See United States v. Mancias*, 350 F.3d 800, 805 (8th Cir. 2003) (listing factors that may be relevant to a determination of whether consent to search is voluntary). Elnashar's conclusory allegation that he involuntarily consented to the search is insufficient to allege that Umbel unreasonably searched Elnashar's apartment. The Court therefore grants Umbel's motion on this claim.

In the alternative, assuming that Elnashar's allegation regarding his "shock, confusion, fear and embarrassment" provides a sufficient factual foundation for the assertion that his consent was not voluntary, the Amended Complaint does not allege any facts from which the

Court could reasonably infer that Umbel would have known that the search of Elnashar's apartment was unreasonable. The Amended Complaint does not allege that Elnashar communicated his "shock, confusion, fear and embarrassment" to Umbel. Nor does the Amended Complaint allege that Elnashar objected to the search in any way. Accordingly, the Court concludes that Umbel is entitled to qualified immunity insofar as Elnashar asserts that Umbel unreasonably searched the apartment.

3. Fifth Amendment

The Fifth Amendment provides in relevant part that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The gravamen of Elnashar's Fifth Amendment claim is his allegation that he was unlawfully seized. A seizure that satisfies the Fourth Amendment also satisfies the requirements of the due process clause. *Case v. Milewski*, 327 F.3d 564, 568 (7th Cir. 2003). As already discussed, Umbel is entitled to qualified immunity on Elnashar's Fourth Amendment claim. Accordingly, the Court concludes that Umbel is entitled to qualified immunity insofar as Elnashar claims that Umbel violated Elnashar's rights under the Fifth Amendment.

4. FISA

Elnashar argues that Umbel violated that FISA because Umbel "subjected [Elnashar] to a warrantless and humiliating search, detention and interrogation in his home solely because of his race . . . and his . . . religion for purposes ostensibly to acquire 'foreign intelligence' about Al Qaida or other terrorist organizations." Elnashar bases the claim on 50 U.S.C. § 1828, which provides in part:

> An aggrieved person, other than a foreign power or an agent of a foreign power, . . . , whose premises, property, information, or material has been subjected to a physical search within the United States or about whom information obtained by such a physical search has been disclosed or used in

> violation of section 1827 of this title shall have a cause of action against any person who committed such violation . . . .

Section 1827 prohibits two activities:

> A person is guilty of an offense if he intentionally—
>
> (1) under color of law for the purpose of obtaining foreign intelligence information, executes a physical search within the United States except as authorized by statute; or
>
> (2) discloses or uses information obtained under color of law by physical search within the United States, knowing or having reason to know that the information was obtained through physical search not authorized by statute, for the purpose of obtaining intelligence information.

50 U.S.C. § 1827(a). FISA defines "physical search" as follows:

> "Physical search" means any physical intrusion within the United States into premises or property (including examination of the interior of property by technical means) that is intended to result in a seizure, reproduction, inspection, or alteration of information, material, or property, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes . . . .

50 U.S.C. § 1821(5). In this case, Elnashar's consent to the search obviated the need for a warrant. *See Rodriguez*, 367 F.3d at 1027. Consequently, Umbel's search of Elnashar's apartment did not violated section 1827. In the alternative, even if the Amended Complaint sufficiently alleges that Elnashar's consent was not voluntary, the Amended Complaint does not allege any facts from which the Court could reasonably infer that Umbel would have known that the search of Elnashar's apartment would have required a warrant. Accordingly, the Court concludes that Umbel is entitled to qualified immunity insofar as Elnashar asserts that Umbel violated the FISA.

B. DOJ and FBI's motion

1. FISA

The DOJ and the FBI assert that they are entitled to judgment on the pleadings on

Elnashar's FISA claim because they are not "persons" against whom FISA's civil liability provision provides a cause of action. *See* 50 U.S.C. § 1828. The FISA defines "person" as "any individual, including any officer or employee of the Federal Government, or any group, entity, association, corporation, or foreign power." 50 U.S.C. §§ 1801, 1821. Absent affirmative evidence of statutory intent to include the sovereign, courts presume that the word "person" in a statute does not include the sovereign. *See Collins v. Nat'l Transp. Safety Bd.*, 351 F.3d 1246, 1249 (D.C. Cir. 2003). Elnashar contends that affirmative evidence of an intent to include the sovereign within FISA's definition of "person" is found in 50 U.S.C. §§ 1827(a)(2), 1828, and 50 U.S.C. § 414(e)(1). As to sections 1827 and 1828, the Court discerns no affirmative intent to depart from the presumed definition of "person" in those sections' creation of liability for certain disclosures or uses of information. As to section 414(e)(1), the Court finds Elnashar's reliance on it misplaced because it defines "intelligence agency" as used in section 414. In short, the Court finds no indication in FISA of an intent to include federal agencies such as the DOJ and the FBI within the statutory definition of "person." Accordingly, the Court grants the DOJ and the FBI's motion on Elnashar's FISA claim.

2. FOIA

Elnashar alleges that the DOJ and the FBI violated the FOIA by improperly denying his request for access to his records in the PENTBOMB investigation. In response, the DOJ and the FBI argue that they are entitled to judgment on the pleadings on Elnashar's FOIA claim because he did not exhaust his administrative remedies. *See* 5 U.S.C. § 552(a)(6)(A)(ii). Exhaustion of administrative remedies is a prerequisite to suit under the FOIA. *Brumley v. United States Dep't of Labor*, 767 F.2d 444, 445 (8th Cir. 1985) (per curiam). In this case, Elnashar made a request for records in a letter dated February 26, 2003. Two days later, the FBI and the DOJ denied his

request. Elnashar did not appeal the denial. Accordingly, he failed to exhaust his administrative remedies.[1] The Court therefore grants the DOJ and the FBI's motion on this claim.

3. Privacy Act

Elnashar first alleges that the FBI and the DOJ violated the Privacy Act by denying his request for access to his records in the PENTBOMB investigation. The FBI and the DOJ argue that they are entitled to judgment on the pleadings because Elnashar failed to exhaust his administrative remedies. Under the Privacy Act, a party whose request for access to records has been denied must appeal the adverse determination within 60 days of the denial. *See* 28 C.F.R. § 16.45. In this case, the FBI and the DOJ denied Elnashar's request by letter of February 28, 2003. Elnashar did not appeal the denial. He has therefore failed to exhaust his administrative remedies.[2] Elnashar contends that the Court should waive the exhaustion requirement. A court may excuse a plaintiff's failure to exhaust administrative remedies in "extraordinary circumstances." *Taylor v. United States Treasury Dep't*, 127 F.3d 470, 477 (5th Cir. 1997). Elnashar offers no explanation for his failure to exhaust his administrative remedies and the Court discerns no extraordinary circumstances that would warrant the waiver of the exhaustion requirement. Accordingly, the Court grants the DOJ and the FBI's motion on his access claim. *See id.*

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[1] By Order dated May 15, 2003, the magistrate judge denied Elnashar's motion to compel discovery from the FBI and Umbel in Elnashar's case against Speedway SuperAmerica. In denying the motion, the magistrate judge recounted Elnashar's failure to exhaust his administrative remedies under the FOIA. The Court's reliance on the May 15 Order does not require treating the FBI and the DOJ's motion as one for summary judgment. *See Porous Media Corp.,* 186 F.3d at 1079.

[2] The magistrate judge's Order of May 15, 2003, details Elnashar's failure to exhaust his administrative remedies under the Privacy Act.

Elnashar next alleges that the FBI and the DOJ violated the Privacy Act by intentionally and willfully disclosing to the St. Paul Department of Human Rights the fact that Elnashar's records were part of the PENTBOMB investigation. The FBI and the DOJ assert that they are entitled to judgment on the pleadings because Elnashar authorized the release of documents pertaining to him. The Privacy Act provides in relevant part that "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains." 5 U.S.C. § 552a(b). In this case, Elnashar signed an Information Release that authorized representatives of the St. Paul Department of Human Rights "to obtain and examine copies of all documents and records" contained by the FBI and pertaining to him.[3] Having executed this release, Elnashar cannot maintain a claim based on the disclosure of the fact that his records were part of the PENTBOMB investigation.

Elnashar also alleges that FBI and the DOJ violated the Privacy Act by falsely portraying him as a suspected terrorist in their response to the document request from the St. Paul Department of Human Rights.[4] *See* 5 U.S.C. § 552a(g)(1)(C). By disclosing to the St. Paul Department of Human Rights the fact that his records were part of the PENTBOMB investigation, the FBI and the DOJ allegedly portrayed Elnashar as a suspected terrorist. The Court does not read in the letter a portrayal of Elnashar as a suspected terrorist. Without more, the Court rejects Elnashar's allegations regarding the FBI and the DOJ's false portrayal of him as an unwarranted inference. Accordingly, the Court grants the FBI and the DOJ's motion his disclosure claims.

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[3] The Information Release is an exhibit attached to Elnashar's Complaint.

[4] The FBI and the DOJ's letter to the St. Paul Department of Human Rights is part of Exhibit B to Elnashar's Amended Complaint.

Elnashar next alleges that the DOJ and the FBI violated the Privacy Act by maintaining a record describing how he exercised his rights under the First Amendment, in violation of 5 U.S.C. § 552a(e)(7). That section provides in relevant part that a government agency shall "maintain no record describing how any individual exercises rights guaranteed by the First Amendment . . . unless pertinent to and within the authorized scope of an authorized law enforcement activity." In this case, the Amended Complaint alleges that the FBI received a tip about Elnashar's potential involvement in terrorist activities and that the FBI investigated Elnashar as a result of that tip. The Court's review of the Amended Complaint reveals that Elnashar failed to allege a violation of section 552a(e)(7). Accordingly, the Court grants the FBI and the DOJ's motion on this claim.

Finally, Elnashar seeks to expunge his records from the PENTBOMB investigation. The Privacy Act specifies a procedure by which an individual can ask an agency to amend a record pertaining to him. *See* 5 U.S.C. § 552a(d). Elnashar has not alleged that he exhausted the procedures set forth in section 552a(d). Because Elnashar did not exhaust his administrative remedies, the Court grants the FBI and the DOJ's motion on his claim to expunge his records.

4. Constitutional claims

Elnashar alleges that the FBI and the DOJ violated his rights under the First, Fourth, and Fifth Amendments. He bases the claims on the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706 (2000). It is undisputed that Elnashar does not seek monetary damages for his constitutional claims. *See id.* § 702 (waiving sovereign immunity as to claims for declaratory and injunctive relief). The FBI and the DOJ assert that they are entitled to judgment on the pleadings on Elnashar's constitutional claims because he lacks standing to seek declaratory or

injunctive relief. Elnashar contends that he has alleged a constitutional claim for the expungement of his records. He does not respond to the FBI and the DOJ's standing argument.

As to Elnashar's contention that he may pursue a constitutional claim for expungement, a district court has a "narrow power to expunge criminal records, which is infrequently exercised and reserved for unusual or extreme cases." *United States v. Bagley*, 899 F.2d 707, 708 (8th Cir. 1990) (citations omitted). Absent extraordinary circumstances, the Eighth Circuit has declined to order expungement where a statutory scheme does authorize such a remedy. *United States v. Doe*, 859 F.2d 1334, 1335-36 (8th Cir.1988); *United States v. McMains*, 540 F.2d 387, 390 (8th Cir. 1976). In this case, the Privacy Act sets forth specific procedures by which Elnashar may seek the expungement of his records. As set forth above, Elnashar has not exhausted his administrative remedies under the Privacy Act. To permit Elnashar to maintain an expungement claim outside of the Privacy Act would undermine the Act's administrative procedures. The Court discerns no extraordinary circumstances that would warrant doing so. Accordingly, the Court dismisses Elnashar's constitutional claims insofar as they seek expungement of his records.

Turning to the FBI and the DOJ's standing argument, a plaintiff must demonstrate that he suffered an injury in fact, that the injury was caused by the defendant, and that it is likely that the injury will be redressed by a favorable ruling. *Park v. Forest Serv. of the United States*, 205 F.3d 1034, 1037 (8th Cir. 2000). In a case seeking that seeks injunctive relief, the injury-in-fact requirement mandates a showing that the plaintiff faces a threat of ongoing or future harm. *Id.* The same is true in a case seeking declaratory relief. *See Martin v. Sargent*, 780 F.2d 1334, 1337 (8th Cir. 1985). To maintain standing for an alleged violation of a constitutional right, the plaintiff must present more than allegations of a subjective chill. *Eckles v. City of Corydon*, 341

F.3d 762, 767 (8th Cir. 2003). The plaintiff must allege a specific present objective harm or a threat of a specific future harm. *Id.* In this case, Elnashar alleges at most that he is aggrieved by the threat of "future secret actions" by the FBI and the DOJ. This allegation falls short of establishing a threat of a specific future harm. Because Elnashar has not alleged that he is threatened by future unreasonable searches and seizures, he lacks standing to pursue his Fourth and Fifth Amendment claims. Similarly, Elnashar's failure to allege the threat that the FBI and the DOJ will target him in the future because of his religious or political beliefs indicates that he does not have standing to pursue his First Amendment claim against the FBI and the DOJ.

5. Federal Rule of Criminal Procedure 41

The FBI and the DOJ assert that they are entitled to judgment on the pleadings on Elnashar's claim under Federal Rule of Criminal Procedure 41 because that rule allows, at most, an aggrieved party to bring a civil action for the return of property seized in the course of an unlawful search. Rule 41 provides in relevant part: "A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property's return." Fed. R. Crim. P. 41(g). According to the FBI and the DOJ, Elnashar did not allege that any property was seized in the course of the search and failed to identify any property that he seeks to have returned to him. Elnashar does not dispute the arguments raised by the FBI and the DOJ. No allegations relating to the return of unlawfully seized property appear in the Amended Compliant. Accordingly, the FBI and the DOJ are entitled to judgment on the pleadings on Elnashar's Rule 41 claim.

C. Unidentified FBI agents

Elnashar brought several claims against several FBI agents other than Umbel. Rule 4 of the Federal Rules of Civil Procedure provides in part:

> If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

Fed. R. Civ. P. 4(m). In this case, more than 120 days have passed since the filing of the Complaint and it does not appear from the record that the FBI agents other than Umbel have been served. If Elnashar does not establish within ten days of the date of this Order good cause for his failure to serve the other FBI agents, the Court will dismiss the action as to those defendants.

III. CONCLUSION

Based on the files, records, and proceedings herein, and for the reasons stated above, IT IS ORDERED THAT:

1. Umbel's Motion for Judgment on the Pleadings on Grounds of Qualified Immunity [Docket No. 32] is GRANTED.

2. The DOJ and the FBI's Motion for Judgment on the Pleadings or, in the alternative, for Summary Judgment [Docket No. 35] is GRANTED.

3. The Amended Complaint is DISMISSED as to Umbel.

4. The Amended Complaint is DISMISSED WITHOUT PREJUDICE as to the FBI and the DOJ insofar as Elnashar failed to exhaust his administrative remedies or lacks standing. The Amended Complaint is otherwise DISMISSED as to the FBI and the DOJ.

5. Within ten (10) days of the date of this Order, Elnashar shall show good cause for his failure to serve the FBI agents other than Umbel.

Dated: September 30, 2004

S/ Joan N. Ericksen
JOAN N. ERICKSEN
United States District Judge