IN THE UNITED STAT ES DISTRICT COURT
FOR THE NORTHERN DI STRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE NO.

1:17-CV-5052-SCJ

ORDER

This matter appears before the Court on Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint (Doc . No. [19]). Defendant's motion is

I. BACKGROUND

In this case, Plaintiffs, who are each minors and United States citizens, seek to recover damages under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et al.*, based on an alleged unlawful detention by Immigration and Customs Enforcement ("ICE") agents as a part of an Enforcement and Removal Operation, entitled "Operation Border Resolve." Doc. No. [18], pp. 2–4.[2] Plaintiffs assert the following causes of action: (1) False Imprisonment; (2) Trespass; (3) Negligence; (4) Intentional Infliction of Emotional Distress; and (5) Negligent Infliction of

Georgia. Doc. No. [18], ¶ 24. His exte

warrant to enter his home." Doc. No. [18], ¶ 42. "At the entry to the home—and

be arrested." Doc. No. [18], ¶ 52. Upon the female agent's arrival, she explained that they were there to arrest Rosa Vargas Morales, Juan Mijangos Vargas, Juneidy Mijangos Vargas, and D.M.V. for Rosa Vargas's missing an immigration court date. Id. ¶ 53. "At one point, J.A.M. offered one of his toys to an ICE agent and the agent aggressively directed him to return it to his mother. J.A.M. cried inconsolably throughout the raid." Id. ¶ 55. Since the raids, J.A.M. is frightened and nervous around law enforcement and overeating. Id. ¶ 58. When he sees police, he hides and warns his mother that the police are coming to take her. Id.

Plaintiffs Y.S.G.R. and J.I.G.R allege that they were living with their mother and guardian, Johanna Gutierrez, and her husband, Salvador Alfaro at the time of the raid. Id. ¶ 63. "Ms. Gutierrez's niece, Ana Lizeth Mejia Gutierrez, and her son, W.G.M. (age 10), were present and asleep in the home." Id. ¶ 65.

"At approximately 5:00 AM, on Saturday, January 2, 2016, Johana

officers held up a photo through the window and shined their flashlights on it. It was a picture of an African American man. They indicated that the man was a criminal suspect and they had been told that the person in the photo was in the Gutierrez home." Doc. No. [18], ¶¶ 67–68. "Salvador Alfaro opened the door and, without asking for permission to enter, approximately five or six officers pushed past Mr. Alfaro and Ms. Gutierrez and immediately entered the house," with guns on their hips. Id. ¶¶ 69–70. The officers searched the entire house and woke up everyone, including Y.S.G.R. and J.I.G.R. Id. at ¶ 72. Y.S.G.R. and J.I.G.R were brought to the living room in their pajamas and detained from thirty minutes to one hour. Id. "Everyone was scared and confused. The children were crying." Id. Ms. Gutierrez tried to make a phone call and was told not to move.

to a classmate that she was thinking about harming herself. She was reported to a school counselor who referred her to a psychologist. She met with the psychologist and later her pastor to work through the mental anguish and pain as a result of the raid." Doc. No. [18], ¶ 81. "Y.S.G.R. intermittently cries without consolation, telling her mother that she no longer wants to live in the United States." Id. ¶ 82.

"After the raid, J.I.G.R. received counseling from the family's pastor. J.I.G.R. continues to suffer significant emotional pain and distress as a result of the raid." Id. ¶ 84. He no longer participates in swimming classes and sporting activities and has become insular, experiencing difficulty talking to strangers and preferring to stay home. Id.

On September 18, 2018, Defendant filed a Motion to Dismiss Plaintiff's First Amended Complaint. Doc. No. [19]. The matter has been fully briefed and is now ripe for review.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 8(a) requires a complaint to contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Pleadings do not require any particular technical

viable legal theory." Fin. Sec. Assur., Inc. v. Stephens, Inc., 500 F.3d 1276, 1282–83 (11th Cir. 2007) (quotations omitted).

As stated above, Plaintiffs bring this civil action under the Federal Tort Claims Act (FTCA). "The FTCA provides a limited waiver of the United States' sovereign immunity 'for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.'" Bloodworth v. United States, No. 5:13-CV-112 MTT, 2014 WL 1813374, at *7 (M.D. Ga. May 7, 2014), *aff'd*, 623 F. App'x 976 (11th Cir. 2015)(citing 28 U.S.C. § 1346(b)(1)). "The FTCA permits claims against the United States 'under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.'" Id.

"The clear mandate . . . of the FTCA requires the courts to look to the law of the state where the act or omission occurred in determining liability." Daniels v. United States, 704 F.2d 587, 591 (11th Cir. 1983); see also 28 U.S.C. § 1346(b)(1). To this regard, the Court applies the law of the State of Georgia, as stated by Defendant and Plaintiffs in their briefing. Doc. Nos. [19], p. 7, [20], p. 4 (citing 28

U.S.C. § 1346(b)(1) (requiring courts to apply the "law of the place where the act or omission occurred" to determine liability).

III. ANALYSIS

The Court will now consider Defendant's failure to state a claim arguments as to each of Plaintiffs' five causes of action.

A. Failure to State a Claim

arguments. Said statute grants ICE agents the power to "without warrant" to

Y.S.G.R. and J.I.G.R.—who, as United States citizens, could not have been subject to removal." Doc. No. [20], p. 7. Plaintiffs state that the Government's argument under § 1357(a) as "valid legal process" are futile, because § 1357(a) authorizes warrantless arrests only where there are exigent circumstances. Id. at p. 8.

"False imprisonment is the unlawful detention of the person of another, for any length of time, whereby such person is deprived of his personal liberty." O.C.GA. § 51-7-20. "The restraint used to create the detention must be against the plaintiff's will and be accomplished by either force or fear." Miraliakbari v. Pennicooke, 254 Ga. App. 156, 160, 565 S.E.2d 483, 488 (2002). "The restraint constituting a false imprisonment may arise out of words, acts, gestures or the like, which induce a reasonable apprehension that force will be used if plaintiff does not submit; and it is sufficient if they operate upon the will of the person threatened, and result in a reasonable fear of personal difficulty or personal injuries." Id. at p. 161 (citations omitted). "In an action to recover damages for illegal arrest or false imprisonment the only essential elements are the arrest or detention and the unlawfulness thereof." Miller v. Grand

process, or under no process at all, and [cannot] be maintained where the process is valid, no matter how corrupt may be the motives of the person suing out the process or how unfounded the imprisonment may be." Miller, 250 Ga. App. at 754, 552 S.E.2d at 494 (citations omitted); see also Franklin v. Consol. Gov't of Columbus, Ga., 236 Ga. App. 468, 470, 512 S.E.2d 352, 355 (1999) ("[w]hen the detention is predicated upon procedurally valid process, false imprisonment is not an available remedy, regardless of the motives upon which the process was secured, because detention effectuated pursuant to procedurally valid process, such as an arrest warrant, is not 'unlawful.'") (citations and quotations omitted) and Perry v. Brooks, 175 Ga. App. 77, 77, 332 S.E.2d 375, 376 (1985) ("If a warrant or process is valid, . . . an action for false imprisonment will not lie.") (citations omitted).

Without more, Defendant's arguments do not establish valid legal process,

> the consent of the owner or other person in control of the site to be inspected.

8 C.F.R. § 287.8(f)(2) (emphasis added).[5]

The Court's own independent research has also revealed a district court

the case. In addition, Defendant's § 1357(a) arguments and citations of authority, do not conclusively establish that the agents had authority to enter a residence, in the absence of a warrant, consent, or by the plain language of § 1357, a belief that the alien "is likely to escape before a warrant can be obtained for arrest"—which Plaintiffs essentially allege in their Complaint, were not present at the time of entry into their residences.[8] Accordingly, the Court finds that a dismissal for failure to state a claim is not appropriate at this time, as Plaintiffs have alleged facts that state a plausible claim for a false imprisonment cause of action.

2. *Trespass*

Defendant asserts that "Plaintiffs' claims for trespass fail to state a claim, as Plaintiffs fail to identify any property for which Plaintiffs J.A.M., Y.S.G.R., and J.I.G.R., all minor children, had any possessory interest." Doc. No. [19], p. 10.[9]

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[8] The Court also notes that subsection (a)(3) of § 1357 grants agents "access to private land, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States." 8 U.SC. § 1357(a)(3) (emphasis added).

[9] Defendant's argument is essentially a statutory standing argument. Cf. Leyse v. Bank of Am. Nat. Ass'n, 804 F.3d 316, 320 (3d Cir2015) ("Statutory standing goes to whether [the legislature] has accorded a particular plaintiff the right to sue under a statute, but it does not limit the power of the court to adjudicate the case. As a result, '[a] dismissal for lack of statutory standing is effectively the same as a dismissal for failure to state a claim,' and a motion to dismiss on this ground is brought pursuant to Rule 12(b)(6) . . . .").

Defendant also asserts that "ICE agents were acting within their official capacity when they entered the subject residences and arrested and detained Plaintiffs' family members subject to orders of removal." Doc. No. [19], p. 11.

In opposition, Plaintiffs assert that Georgia law does not require that Plaintiffs have an ownership interest in the homes that ICE agents unlawfully entered and that Defendant has not addressed the standing of non-owner possessors of real property in a trespass action. Doc. No. [20], pp. 9, 11. Plaintiffs state that "[t]enants with a possessory interest in the property have standing to sue for trespass." Doc. No. [20], p. 10.

Georgia's trespass statute states in relevant part: "[t]he right of enjoyment of private property being an absolute right of every citizen, every act of another which unlawfully interferes with such enjoyment is a tort for which an action shall lie." O.C.G.A. § 51-9-1. "Thus, the cause of action for trespass to property requires an unlawful interference. Under Georgia law, a state officer does not commit trespass when he acts within the scope of his official duties." Lavassani v. City of Canton, Ga., 760 F. Supp. 2d 1346, 1371 (N.D. Ga. 2010) (citing Morton v. McCoy, 204 Ga. App. 595, 420 S.E.2d 40 (1992)).

"To maintain an action for trespass or injury to realty, it is essential that the plaintiff show either that he was the true owner [with legal title] or was in possession at the time of the trespass." Brown Inv. Grp., LLC v. Mayor & Aldermen of City of Savannah, 303 Ga. App. 885, 886, 695 S.E.2d 331, 331 (2010), *aff'd*, 289 Ga. 67, 709 S.E.2d 214 (2011) (citations omitted); see also S. Union Mut. Ins. Co. v. Mingledorff, 211 Ga. 514, 514, 87 S.E.2d 54, 55 (1955) ("[I]t is essential for the plaintiff to allege title in himself or actual possession of the land at the time the alleged cause of action arose."), 28 P land aiff7413.9sJ -0n Mut.

that they, *as minor children*, had a present right to deal with the property at pleasure and to exclude others from meddling with it, in accordance with the above-stated case-law. Accordingly, Plaintiffs have not asserted a possessory interest in the homes at issue sufficient to provide a basis to demonstrate standing to sue for trespass. The Court recognizes Plaintiffs' arguments and citations of authority to the contrary; however, they are not determinative as they fail to address standing as to a plaintiff/tenant who is minor. [11] Defendant's motion to dismiss is granted as to the trespass cause of action.

3. *Negligence*

Defendant asserts that "[b]ecause Plaintiffs fail to allege a state law duty owed to them, their negligence claim fails as a matter of law." Doc. No. [19], p. 13. Defendant states that instead of identifying a duty owed to them under state law, Plaintiffs have cited to purpor

Cir. 2015) ("the fact that a federal employee has failed to perform duties imposed by federal law is insufficient by itself to render the federal government liable under the FTCA. Instead, a state tort cause of action is a *sine qua non* of FTCA jurisdiction, and we have dismissed FTCA suits that have pleaded breaches of federal duties without identifying a valid state tort cause of action.") (citations omitted).

In opposition, Plaintiffs assert that their "allegations sufficiently allege that the agents breached their duty to exercise ordinary care, and the agents' breach caused Plaintiffs' harm." Doc. No. [20], p. 16. Plaintiffs also state that "[t]he Government additionally conflates every law enforcement officer's ordinary duty—whether local, state or federal—to adhere to the [Fourth] Amendment with the creation of a constitutional tort." Id.

"It is well established that to recover for injuries caused by another's negligence, a plaintiff must show four elements: a duty, a breach of that duty, causation and damages. Thus, in order to recover for any injuries resulting from the breach of a duty, there must be evidence that the injuries were proximately caused by the breach of the duty." Goldstein, Garber & Salama, LLC v. J.B., 300 Ga. 840, 841, 797 S.E.2d 87, 89 (2017) (citations and quotations omitted).

After review, the Court upholds Defendant's arguments and citations of authority, as Plaintiffs appear to be relying "on a duty owed by Georgia governmental entities, rather than a priv

In reply, Defendant states: "Plaintiffs' characterization makes clear that their presence was incidental to the conduct at issue. Put another way, Plaintiffs make no allegations to suggest the actions of the ICE agents would have been any different had Plaintiffs been absent." Doc. No. [21], p. 11.

"The elements of a cause of action for intentional infliction of emotional distress are: (1) intentional or reckle

"Whether a claim rises to the requisite level of outrageousness and egregiousness to sustain a claim for intentional infliction of emotional distress is a question of law." Yarbray v. S. Bell Tel. & Tel. Co., 261 Ga. 703, 706, 409 S.E.2d

S.E.2d 347, 351 (1999). Accordingly, in the absence of sufficient allegations of conduct directed at Plaintiffs, the Court finds that Plaintiffs have failed to state a claim. The Court is unable to uphold Plaintiffs' citation of authority and arguments to the contrary.[12]

5. *Negligent infliction of emotional distress*

Defendant asserts that because the Plaintiffs "do not allege that the United States "caused plaintiff[s] any physical injury, a negligent infliction of emotional distress claim necessarily fails." Doc. No. [19], p. 18 (citing Bullard v. MRA Holding, LLC, 890 F. Supp. 2d 1323, 1330 (N.D. Ga. 2012)).

In response, Plaintiffs assert that"allegations that the Defendant's conduct is malicious, willful, or wanton and directed at a group of people, not just the public in general, render allegations of physical impact unnecessary." Doc. No. [20], p. 21.

The Georgia Court of Appeals has stated: "[a] party claiming negligent infliction of emotional distress must . . . show a physical impact resulting in

[12] More specifically, the arguments/allegations regarding J.A.M. offering one of his toys to an ICE agent and the agent "aggressively" directing him to return his toy to his mother (Doc. No. [18], ¶ 55), while concerning, is also not sufficient to establish a claim for intentional infliction of emotional distress. As the conduct analysis is determinative, the Court makes no ruling on the sufficiency of the harm allegations.

physical injury. On the other hand, where the defendant's conduct is malicious, wilful, or wanton, recovery can be had without the necessity of an impact."

wanton act was directed toward her, she cannot recover for intentional infliction of emotional distress.") and Hall v. Carney, 236 Ga. App. 172, 174, 511 S.E.2d 271, 274 (1999) (discussing negligent infliction of emotional distress in a separate paragraph, then stating: "Intentional infliction of emotional distress: While recovery can be had without the necessity of an impact when the conduct is malicious, wilful or wanton, such conduct 'will not warrant a recovery for the infliction of emotional distress if the conduct was not directed toward the plaintiff.'").

B. Available Claims under the FTCA

Defendant asserts that punitive damages, attorneys' fees, and declaratory relief are not available under the FTCA. Doc. No. [19], pp. 18–19 (citing 28 U.S.C. § 2674 (no punitive damages); 28 U.S.C§ 2678 (attorney fees); Douglas, 796 F. Supp. 2d at 1363 (government not liable for punitive damages); Moher v. United States, 875 F. Supp. 2d 739, 754-55 (W.D. Mich. 2012) (money damages is exclusive FTCA remedy; declaratory/injunctive relief claim dismissed).

The plain language of the FTCA states that the United States "shall not be liable for interest prior to judgment or for punitive damages." 28 U.S.C. § 2674. In addition, the authority cited by Defendant shows that an attorney's fee award (as a separate item of recovery) and declaratory judgment relief are not available to Plaintiffs in this civil action. Accordingly, the Court upholds Defendant's arguments and grants its motion as to interest and punitive damages, as well as attorney's fees, to the extent that they are being sought as a separate item of recovery.

IV. CONCLUSION

Defendant's Motion to Dismiss Plaintiffs' First Amended Complaint (Doc. No. [19]) is GRANTED in part and DENIED in part. More specifically, Defendant's motion is granted as to Plaintiffs' claims for trespass, negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress, as well as the claims for punitive damages, attorney's fees, and declaratory relief. The motion is denied as to Plaintiffs' claim for false imprisonment. Defendant shall file its answer in accordance with the requirements of Federal Rule of Civil Procedure 12 and applicable law.

IT IS SO ORDERED this 28th day of August, 2019.

s/Steve C. Jones
HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE