

Robert J. Magee, Esquire
Worth, Magee & Fisher, P.C.
Attorney for Plaintiffs
55 Broadway
Jim Thorpe, PA 18229
570-325-4607
rmagee@fast.net
I.D. #: 30911

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

Richard Banks, Judy Banks, Roger McCarren and Larry Meyer, Plaintiffs	:	Civil Action No. 3:08-cv-1110 (A. Richard Caputo, J)
	:	
v.	:	JURY TRIAL DEMANDED
	:	
Karen Gallagher, Anthony Mariano, William Stadnitski, and Dickson City, Defendants	:	

**PLAINTIFFS' BRIEF IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS**

I. **Introduction.** The Plaintiffs accept the recitation of the facts offered by the Defendants for purposes of this Motion only, and only insofar as the recited facts accurately recite the contents and allegations of the underlying Complaint.

The Defendants' had a three-pronged attack upon the Complaint, as follows:

A. That the first Count IV of the Complaint should be dismissed against Chief William Stadnitski, because it is duplicative of Count III of the Complaint against the Municipality, Dickson City;

B. That Count V of the Complaint against Gallagher and Mariano must be dismissed because the underlying theory as recited in the Complaint is under §1985 and §1986, which requires an allegation of a particular animus, which allegation is absent from the Complaint and;

C. The claim for punitive damages should be dismissed because the Complaint is lacking sufficient allegations relating to both the Defendants' state of mind and sufficiently egregious conduct to warrant the claim for punitive damages.

These claims will be dealt with seriatim.

II. The claim against Chief Stadnitski. The Defendants' first argument is that the claims against the Chief of Police, William Stadnitski, should be dismissed because they are duplicative of the claims against the Municipality, Dickson City. It is acknowledged that official capacity claims against individuals are redundant, if the same lawsuit names the municipality. ***Kentucky v. Graham, 473 U.S.159(1985), Boria v. Bowers, 2007 U.S. Dist. LEXIS, 68794 (2007).***

Insofar as the allegations against the Defendant, Stadnitski can be read as "official capacity" claims, the Plaintiffs agree that the claims should be dismissed.. However, that does not answer the question, since this supervisory defendant, acting as supervisory capacity, can be sued in his personal or individual capacity, if he acted under color of State Law to deprive a citizen of a federal right. ***Baker v. Monroe Township, 50 F.3d 1186 (3d Cir. 1995).*** As observed in that case:

“In order to render [an individual supervisory defendant] personally liable under §1983, the Bakers must show that he participated in violating their rights, or that he directed others to violate them, or that he, as the person in charge of the raid, had knowledge of and acquiesced in his subordinates’ violations. *Id.*, at 1190-1191.

As noted, the Defendants’ only objection regarding this Count of the Complaint is that it is duplicative of the claim against Dickson City. The Defendants do not raise an objection to this pleading as being insufficient under F.R.C.P. 8, under F.R.C.P. 9, or under the recent Supreme Court decisions regarding the required specificity of pleadings.

With that said, this Court need look no further than ¶ 34 of the Complaint in which it is alleged that: “...The Defendant acquiesced in, adopted and ratified the improper and illegal activities of the individual defendants...”. For an individual supervisory liability claim, the case law requires the supervisor to have, *inter alia*, acquiesced in the behavior, the Plaintiffs’ Complaint at ¶ 34 alleges such acquiescence (and then some), and, therefore, the Plaintiffs have pled all that is required to hold the Chief in on an individual basis. If this Court feels it would be more orderly, the Plaintiff will happily file an Amended Complaint, specifically alleging that the claim against the Chief is an individual/personal capacity claim, rather than an official capacity claim.

III. The civil conspiracy claim under §§1985 and 1986. Given the inadvertent inclusion of references to §§1985 and 1986 in the Complaint at ¶ 39 and 40, the Defendant’s objection is well taken. However, rather than dismissing this Court, the Plaintiffs request this Court to grant them leave to file an Amended Complaint

to more appropriately allege a civil conspiracy under §1983. It is well established that a civil conspiracy claim is permitted under §1983. In order to prevail on such a claim, the Plaintiffs must allege and eventually prove only that persons acting under color of state law conspired to deprive him of a federally protected right. **Lake v. Arnold, 112 F.3d 682(3d. Cir. 1997)**. Unlike a conspiracy claim under §1985 (3), a §1983 conspiracy claim does not require that the conspiracy be motivated by invidious discrimination. **Ridgewood Board of Education v. N.E. ex rel M.E., 172 F.3d 238, 254 (3d. Cir. 1999)**. In this case, the Plaintiffs have alleged the underlying civil rights violations and, although prefaced with citations to the incorrect sections of Title 42, have otherwise properly alleged a conspiracy between Defendants Gallagher and Mariano to deprive the Plaintiffs of those civil rights.

IV. The claim for punitive damages against the line officer defendants.

Given the nature of this objection, and the procedural posture of this case, the Court need look no further than the Complaint. In determining whether to grant the Rule 12(b)(6) Motion, the Court must presume all factual allegations of the Complaint to be true and all reasonable inferences are to be made in favor of the Plaintiff. **Jordan v. Fox, Rothchild, O'Brien and Frankel, 20 F. 3rd 1250, 1261 (3rd Circ, 1994)**. "In determining whether a claim should be dismissed under 12(b)(6), a Court looks only to the facts alleged in the Complaint, and its attachments without reference to other parts of the record". **Id.** Under 12(b)(6), the Defendants bear the burden of demonstrating that the Plaintiffs have not stated a claim upon which relief can be granted. **Moleski v. Cheltham**

Township, et al., 2002 U.S. Dist. LEXIS 12311 (2002); See, Gould Elecs. v.

United States, 220 F.3rd 169, 178 (3d Cir. 2000). To phrase the issue

differently:

"When a Federal Court reviews the sufficiency of a Complaint before the reception of any evidence either by affidavit or admissions, its task is necessary a limited one. The issue is not whether a Plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims".

Scheure v. Rhodes 416 U.S. 232, 236, 40 L.E.d(2) 90, 94 Supreme Court 1683 (1974).

A little over a year ago, the United States Supreme Court visited the particularity requirements of a Complaint under F.R.C.P. 12(b)(6) and F.R.C.P. 8.

See, **Bell Atlantic Corporation v. Twombly, 127 Supreme Court. 1955, 167**

L.E.d.(2) 929. The Supreme Court, while disclaiming any attempt to impose a heightened pleading requirement, nonetheless abrogated the long-standing "no

set of facts" standard first announced in **Conley v. Gibson, 355 U.S. 41, 78**

Supreme Court 99, 2 L.E.d(2) 80 (1957). To make the abrogation clear, Justice

Souter proclaimed that the "no set of facts" test for pleading sufficiency was

"...best forgotten as an incomplete negative loss on an accepted pleading

standard", 167 L.E.d.(2)@ _____.

It should be observed at this point that, separate and apart from any new pleading standard imposed by recent pronouncements from the United States Supreme Court, § 1983 actions have no heightened pleading requirements. See

Leatherman v. Tarrant County, Narcotics Intelligence and Coordination

Unit, 507 U.S. 163, 113 Supreme Court 1160, 122 L.E.d.(2) 517 (1993). In

Leatherman, the Court went on to observe that while F.R.C.P.9(b) does impose

a heightened pleading requirement in certain types of cases, §1983 claims are not among the enumerated types of actions requiring more particularity. Indeed, it has even been held that §1983 claims are sufficient to survive a motion to dismiss even if the claim is based on nothing more than a bare allegation that the individual officer's conduct conformed to official policy, custom or practice. See, e.g. **C, EG, SHAH v. County of Los Angeles, 797-F(2) 743 (9th Circ., 1986)**.

With that background, let us now turn to the specific allegations of the Defendants' 12(b)(6) Motion, the Plaintiffs' Complaint and measure both of them against the standards set forth above.

The Defendants acknowledge in their Brief (as they must) that punitive damages are available in §1983 actions, including police misconduct cases. However, in an apparent confusion between State and Federal pleading Rules, or a completely unwarranted expansion of the modified pleading standard arguably set forth in **Twombly**, supra, Defendants assert that the claim for punitive damages should be dismissed because:

43. Plaintiffs have failed to plead the culpable state of mind that is required for a punitive damages claim.

44. Plaintiffs' Complaint has failed to allege any facts whatsoever to support the allegations that Officers Gallagher and Mariano were reckless and/or callous and/or acted with reckless indifference. Defendants' Motion, ¶¶ 43, 44.

The first contention is easily disposed of. In order to survive a Motion to Dismiss, a Complaint is sufficient if it complies with Rule F.C.R.P.8(a)(2), which

requires only "a short and plain statement of the claim showing that the pleader is entitled to relief". **Bell Atlantic Corporation v. Twombly**, **500 U.S. ____**, **127 S. Ct. 1955, 167 L.E.d. 2d 929 (2007)**. The only exception to this Rule is found in F.C.R.P. 9, which relates to the pleading of special matters and the one that applies specifically to the Defendants' contention in this case is F.R.C.P.9(b). That Rule tells us exactly what type of specificity is required when the actor's state of mind is relevant. Specifically, that Rule states:

(b) Fraud or Mistake; Conditions of Mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent and knowledge and other conditions of a person's mind may be alleged generally". F.C.R.P.9(b)(emphasis added).

The Plaintiffs are not alleging fraud or mistake, and while the recklessness and callous indifference are not specifically mentioned in this Rule one way or the other, the functional equivalent is – malice and knowledge (that the actions violated the Plaintiffs' Constitutional rights) are – and all the Rule requires is that those elements be pled generally. This is not the stage of the proceedings where the Plaintiffs are required to offer proof of the allegations, nor are they required to plead the evidence they have in support of the contention. Accordingly, it is respectfully submitted that such recklessness, callousness or evil intent, as plead in the Complaint, is sufficient under F.C.R.P.9, which makes it sufficient under F.C.R.P.8(a)(2) and, therefore, sufficient under F.C.R.P.12(b)(6).

It is likewise submitted that the Defendants' second issue, that the Plaintiffs failed to allege any facts to support the proposition that the individual officers were reckless and/or callous and/or acted with reckless indifference,

must fail as well. Frankly, the undersigned is at a loss to understand how these allegations, that the Plaintiffs have failed to plead sufficient facts, can even be made in good faith. The allegations in multiple paragraphs of the Complaint detail the conduct of the individual Defendants about which the Plaintiffs are complaining, and, it is alleged, all of this conduct was without legal justification: Ordering the Plaintiffs to report to a different section of the restaurant for "investigation", ¶13; detaining them in this separate area of the restaurant, refusing to allow them to leave and demanding that they produce identification, ¶14; arresting, frisking, and handcuffing Plaintiff, Richard Banks, seizing his personal property and placing him in the back seat of the police car, ¶15; forcing two of the Plaintiffs to produce identification, under threat of arrest, ¶ 16; further detaining the Plaintiff, Roger McCarren and subjecting him to a search of his person, ¶ 17; refusing to return to the Plaintiff, Richard Banks, his personal property, ¶20 and :ordering the Plaintiff, Judy Banks, to stop videotaping the encounter which was occurring in a public place, under threat of arrest for violation of the Federal Wiretapping Act, ¶ 26.

It is submitted that the above facts, recited in the Complaint, constitute the "short and plain statement of the claim showing that the pleader is entitled to relief" , F.C.R.P.8(a)(2), is sufficient "...to give the Defendant fair notice of what the claim is and the grounds upon which it rests", **Core Construction & Remediation, Inc., et al. vs. Village of Spring Valley, et al. 2007 U.S. Dist. LEXIS 73069**, satisfies any additional fact pleading that is arguably required by **Bell Atlantic v. Twombly, supra**, . and satisfies the "flexible plausibility"

standard adopted in this District in **Sershen v. Cholish, et al, Case # 3-07-cv-1011 (Caputo, J., October 26, 2007).**

V. Conclusion. In light of the foregoing, it is respectfully submitted that the Defendants' motion to dismiss the count against the Chief should be dismissed, since the Plaintiffs' claims against the Chief are in his individual capacity. Furthermore, the Plaintiffs should be granted leave to file an Amended Complaint to more clearly allege a civil conspiracy under §1983, and the Defendants' Motion to Dismiss the punitive damage claim against the defendants Gallagher and Mariano should be dismissed.

/s/ Robert J. Magee, Esquire
Robert J. Magee, Esquire
Worth, Magee & Fisher, P.C.
Attorney for Plaintiff
55 Broadway
Jim Thorpe, PA 18229
570-325-4607
rmagee@fast.net
I.D. #30911

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Order

And Now, this _____ day of August, 2008, upon consideration of the Defendants' Partial Motion to dismiss Plaintiffs' Complaint, and the Plaintiffs' response thereto, it is hereby ordered that:

- a. The Defendants' objection to the first numbered Count IV of the Complaint, seeking the dismissal of Chief William Stadnitski is dismissed;
- b. The Defendants' objection to the Plaintiffs' claim for punitive damages against the individual officers, Gallagher and Mariano is dismissed;
- c. The Defendants' Motion to dismiss Counts V of the Complaint, alleging a civil conspiracy under §1985 and 1986 is granted. If the Plaintiffs wish to allege a civil conspiracy under § 1983 they shall an amended complaint within _____ days of the date of this order

BY THE COURT

Caputo, J.

CERTIFICATE OF SERVICE

I, Robert J. Magee, Esquire, hereby certify that the within Brief in Opposition to the Defendant's Partial Motion to Dismiss the Complaint and Proposed Order has been filed electronically and is available for viewing and downloading from the ECF system. I further certify that service of the within documents upon the individual identified below was effected by electronic service by virtue of such filing pursuant to LR 5.7.

Louis Isaacsohn, Esq
Enrico Tulfano, Esq
Wilson Elser Moskowitz Edelman & Dicker LLP
The Curtis Center, Suite 1130 East, Independence Square West
Philadelphia, Pennsylvania 19106-3308

8-18-08
Date

/s/ Robert J. Magee, Esquire
Robert J. Magee, Esquire
Worth, Magee & Fisher, P.C.
Attorney for Plaintiffs
55 Broadway
Jim Thorpe, PA 18229
570-325-4607
rmagee@fast.net
I.D. # 30911