

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TEODULO MENDOZA, individually and as : CIVIL ACTION
Administrator of the Estate of Jonathan :
S. Mendoza and DALIA MENDOZA, :
individually :
 :
 :
v. :
 :
 :
THE CITY OF PHILADELPHIA, et al. : NO. 00-142

MEMORANDUM AND ORDER

Fullam, Sr. J.

May , 2000

Plaintiffs' complaint alleges that plaintiffs' decedent, Jonathan Mendoza, died because the defendants did not timely respond to a "911" call for emergency assistance. Plaintiffs assert violations of their, and the decedent's, Constitutional rights, and also make various assertions of negligence and other violations of their rights arising under state law. The defendants have filed a motion to dismiss the complaint.

To the extent that plaintiffs alleged violations of the Fifth Amendment, dismissal is plainly warranted because they are not federal actors. Schweiker v. Wilson, 450 U.S. 221, 227 (1981); In re: Bankers Trust Co., 752 F.2d 874, 886 (3d Cir. 1984). Their claims under 42 U.S.C. §1983 must also be dismissed because there is no Constitutional right to governmental assistance in emergencies, even where necessary to secure life,

liberty or property interests. DeShaney v. Winnebago County Dep't of Social Services, 489 U.S. 189, 196 (1989). See also Archie v. City of Racine, 847 F.2d 1211 (7th Cir. 1998); Regalbuto v. City of Philadelphia, 937 F.Supp. 374 (E.D.Pa. 1995).

Plaintiffs' opposition to the motion to dismiss appears to be based upon the mistaken belief that defendants are seeking summary judgment under Fed.R.Civ.P. 56. Plaintiffs argue that, since there has not yet been much discovery, dismissal at this juncture is premature. But no amount of discovery could establish a violation of Constitutional rights in the circumstances alleged in the complaint. Nothing could change the nature of plaintiffs' claim, namely, that the decedent died because a "911" call for emergency assistance was not adequately responded to by the defendants. These circumstances may well give rise to liability under state law (an issue as to which I express no firm conclusion) but such claims should be pursued in the appropriate state tribunal. No cognizable federal claim is asserted in the complaint, and there is no diversity of citizenship. The complaint will therefore be dismissed, without prejudice to plaintiffs' right to pursue their state law claims in an appropriate forum.

An Order follows.

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ORDER

AND NOW, this day of May, 2000, upon consideration of
defendants' Motion to Dismiss, and plaintiffs' response, IT IS
ORDERED:

1. Defendants' Motion to Dismiss is GRANTED.
2. All claims asserted in the complaint, which are
based upon federal law, are DISMISSED WITH PREJUDICE.
3. All claims arising under state law are DISMISSED
WITHOUT PREJUDICE, for lack of jurisdiction.
4. The Clerk is directed to close the file.

John P. Fullam, Sr. J.