

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

ROBERT BROBSON : CIVIL ACTION
 :
 v. :
 :
 BOROUGH OF NEW HOPE, et al. : NO. 00-0003

MEMORANDUM AND ORDER

BECHTLE, J. NOVEMBER , 2000

Presently before the court are: plaintiff Robert Brobson's ("Plaintiff") Motion for Leave to Amend the Complaint; Plaintiff's Motion for Default Judgment; Plaintiff's Motion to Compel Discovery or for Extension of Time; Plaintiff's Supplemental Motion to Compel Discovery; and defendants the Borough of New Hope, et al.'s ("Defendants") Motion to Dismiss; Defendants' Motion to Stay Discovery; and the responses thereto. For the reasons set forth below, the court will: grant Plaintiff's motion to amend the complaint; deny Plaintiff's motion for default judgment; grant in part and deny in part Plaintiff's motion to compel discovery or for extension of time; deny Plaintiff's supplemental motion to compel discovery as moot; grant in part and deny in part Defendants' motion to dismiss; and deny Defendants' motion to stay discovery as moot.

I. BACKGROUND

Plaintiff was employed as the Borough of New Hope's Chief of Police from December 6, 1991 to January 4, 1999. (First Am. Compl. ¶ 1.) At a public council meeting on January 4, 1999, Plaintiff was terminated for alleged conduct unbecoming an

officer and for neglect and violation of duties. Id. ¶ 17. Two days later, Plaintiff appealed his termination and requested a hearing before the New Hope Borough Civil Service Commission ("Commission A"). Id. ¶ 18. On March 3, 1999, Defendants commenced litigation in the Court of Common Pleas, Bucks County, unsuccessfully seeking to enjoin Commission A from holding a hearing on Plaintiff's termination. Id. ¶¶ 20 & 21. Commission A commenced a hearing on March 15, 1999 and heard Plaintiff's testimony. Id. ¶¶ 22 & 28. On June 3, 1999, Commission A determined, by a two to one vote, that Plaintiff was entitled to Civil Service status and therefore was afforded the concomitant procedural rights and job protection. Id. ¶ 24. Plaintiff alleges that because Defendants "could not tolerate" Commission A's decision that he was entitled to Civil Service protection, Defendants replaced those members of Commission A who voted that Plaintiff was entitled to Civil Service protection, thereby forming a second New Hope Borough Civil Service Commission ("Commission B") on June 28, 1999. Id. ¶ 30 & 31; Pl.'s Mem. of Law in Opp'n to Defs.' Mot. to Dismiss at 14.

On August 2, 1999, Commission B reopened Plaintiff's appeal and incorporated the records and testimony that had been before Commission A. Id. ¶ 34. Plaintiff was not notified that the appeal of his discharge would be heard by Commission B and did not attend the August 2, 1999 hearing. Id. ¶ 33.

On August 16, 1999, Commission A notified Plaintiff that it would convene a hearing on September 2, 1999 to render its

decision on the merits of Plaintiff's termination. Id. ¶ 38. Also on August 16, 1999, Commission B notified Plaintiff that it would hold a hearing on August 30, 1999. Id. ¶ 39.

Plaintiff appeared before Commission B on August 30, 1999, objected to its incorporation of the record, and requested an opportunity to brief the issues pertaining to Commission A's decision that Plaintiff had Civil Service status. Id. ¶ 40. Commission B refused Plaintiff's request and voted, two to one, that Plaintiff did not have Civil Service status. Id.

Then, on September 2, 1999, Commission A held a hearing and overturned Plaintiff's termination because Defendants failed to pursue their case. Id. ¶ 41. However, on September 16, 1999, Commission B notified Plaintiff of its decision that Plaintiff was not entitled to Civil Service protection and that therefore, it had no jurisdiction to hear Plaintiff's appeal of his termination. Id. ¶ 42.

Plaintiff brings this action under 42 U.S.C. § 1983 alleging violations of the Equal Protection and Due Process clauses of the Fifth and Fourteenth Amendments to the Constitution.¹ (First Am.

¹ The court assumes that Plaintiff's claims arise under the Fourteenth Amendment rather than under the Fifth Amendment. The Fourteenth Amendment to the Constitution provides in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(continued...)

Compl. ¶¶ 7, 58 & 59.) Plaintiff also alleges violations of the Pennsylvania Constitution, negligence and civil conspiracy. Id. ¶¶ 63-74. Defendants assert that Plaintiff has failed to state a claim upon which relief may be granted. (Defs.' Mem. of Law in Supp. of Mot. to Dismiss at 1.)

II. LEGAL STANDARD

For the purposes of a motion to dismiss, the court must accept as true all well-pleaded allegations of fact in a plaintiff's complaint, construe the complaint in the light most favorable to the plaintiff, and determine whether "under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 665-66 (3d Cir. 1988). The court may also consider "matters of public record, orders, exhibits attached to the Complaint and

¹(...continued)

U.S. Const. amend. XIV. In contrast, the Fifth Amendment provides that:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

This court has jurisdiction over Plaintiff's claims because they arise under federal law. 28 U.S.C. § 1331.

items appearing in the record of the case." Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 n.2 (3d Cir. 1994) (citations omitted). The court, however, need not accept as true legal conclusions or unwarranted factual inferences. Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997) (citations omitted). A complaint is properly dismissed only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

III. DISCUSSION

First, the court will discuss Defendants' motion to dismiss Plaintiff's Complaint and Defendants' motion to stay discovery. Next, the court will address, in turn, Plaintiff's motions to amend the Complaint, for default judgment, and to compel discovery or for extension of time.

A. Defendants' Motion to Dismiss

In his Complaint, Plaintiff alleges violations of the Equal Protection and Due Process clauses of the United States Constitution. (First Am. Compl. ¶¶ 7, 58 & 59.) Plaintiff also alleges violations of the Pennsylvania Constitution, negligence and civil conspiracy. Id. ¶¶ 63-74. Defendants assert that Plaintiff has failed to state a claim upon which relief may be granted. (Defs.' Mem. of Law in Supp. of Mot. to Dismiss at 1.) The court will address each of Plaintiff's Causes of Action in turn.

1. First Cause of Action: 42 U.S.C. § 1983

Plaintiff first alleges that Defendants' conduct violated equal protection and due process.² (First Am. Compl. ¶¶ 7, 58 & 59.) The court will first address Plaintiff's procedural due process claim, then his substantive due process claim, and finally his equal protection claim.

a. Procedural Due Process

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." To establish a cause of action for a violation of procedural due process, Plaintiff must prove that a person acting under color of state law deprived him of a protected interest and that the state procedure for challenging the deprivation does not satisfy the requirements for procedural due process. Homan v. City of Reading, 15 F. Supp. 2d 696, 699 (E.D. Pa. 1998) ("Homan II") (citing Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667, 680 (3d Cir. 1991)). A property interest protected by the due process clause results from a "legitimate claim of entitlement created by an independent

² Under 42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983.

source such as state law." Id. (citing Midnight Sessions, Ltd., 945 F.2d at 679). If such a property interest is deprived, due process requires notice and a meaningful opportunity to be heard. Id. (citing Midnight Sessions, Ltd., 945 F.2d at 680).

Plaintiff asserts that he was deprived of a meaningful opportunity to be heard when Defendants "reorganized" the Civil Service Commission in the midst of Plaintiff's appeal. (Pl.'s Mem. of Law in Opp'n to Mot. to Dismiss at 14 & n.1.) Plaintiff contends that Defendants, unhappy with the prospect that Plaintiff was entitled to Civil Service protection, interfered with the appeals process by replacing those members of the Commission who determined that Plaintiff had Civil Service status. Id. at 14-15. Plaintiff asserts that his due process rights were violated when Defendants dissolved Commission A and appointed Commission B, a "kangaroo court" that did not hear live testimony or allow Plaintiff a meaningful opportunity to be heard.³ Id.

Defendants contend that Plaintiff received notice and an opportunity to be heard regarding the charges that led to his dismissal on January 4, 1999. (Defs.' Mem. of Law in Supp. of Mot. to Dismiss at 7.) Defendants also assert that Plaintiff had notice and an opportunity to be heard before the Civil Service Commission regarding his appeal of his termination. Id.

³ Commission B simply incorporated the record that had been before Commission A and reached the opposite result. (Pl.'s Mem. of Law in Opp'n to Mot. to Dismiss at 14-15.)

However, Defendants do not address Plaintiff's assertion that he was denied a meaningful opportunity to be heard when Commission A, the Commission that heard Plaintiff's testimony, was replaced by Commission B. Thus, the court will deny Defendants' motion insofar as it seeks to dismiss Plaintiff's procedural due process claim.⁴

b. Substantive Due Process

"Substantive due process refers to and protects federal rights." Nicholas v. Pennsylvania State Univ., 227 F.3d 133, 141 (3d Cir. 2000) (citations omitted). To prevail on his substantive due process claim, Plaintiff must first establish that he has "a protected property interest to which the Fourteenth Amendment's due process protection applies." Id. at 139 (citations omitted). Although it is settled that state-created property interests, including some contract rights, are entitled to protection under procedural due process, "not all

⁴ Defendants also assert that Plaintiff has not alleged an "official municipal policy of some nature [which] caused a constitutional tort." Defs.' Mem. of Law in Supp. of Mot. to Dismiss at 11 (quoting Monell v. New York City Dept. of Social Servs., 436 U.S. 658, 691 (1978)). Plaintiff asserts that Defendants' resolution, which changed the make-up of the Civil Service Commission, constitutes such a policy. A plaintiff establishes a government "policy" if it proves that a "'decisionmaker possess[ing] final authority to establish municipal policy with respect to the action' issues an official proclamation, policy, or edict." Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir. 1990) (quoting Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986)). Monell defined a municipal policy as a "statement, ordinance, regulation, or decision officially adopted and promulgated by [a local governing] body's officers." Monell, 436 U.S. at 690. Viewing the evidence in the light most favorable to Plaintiff, the court finds that Plaintiff has identified such a decision.

property interests worthy of procedural due process protection are protected by the concept of substantive due process." Id. (internal quotations and citations omitted). Accordingly, to state a substantive due process claim, a plaintiff must have been deprived of "a particular quality of property interest." Id. (internal quotations and citations omitted). "[W]hether a certain property interest embodies this particular quality . . . depends on whether that interest is fundamental under the United States Constitution." Id. (internal quotations and citations omitted).

In Nicholas, the Third Circuit joined the great majority of the courts of appeals in holding that public employment is not a fundamental property interest entitled to substantive due process protection. Id. at 142-43 (listing cases). The court determined that "it cannot be reasonably maintained that public employment is a property interest that is deeply rooted in the Nation's history and traditions. Nor does public employment approach the interests implicit in the concept of ordered liberty like personal choice in matters of marriage and family." Id. at 143 (internal quotations and citations omitted). Thus, Plaintiff does not have a fundamental interest worthy of substantive due process protection in his employment capacity as the chief of police.

Plaintiff also seems to assert that Defendants violated his substantive due process rights when the government "abuse[d]" its power by replacing two members of the Civil Service Commission.

See Pl.'s Mem. of Law in Opp'n to Mot. to Dismiss at 15-16 (stating that Plaintiff had "a fundamental right to procedural due process"). However, it is clear that "[t]he categories of substance and procedure are distinct" and that "'property' cannot be defined by the procedures provided for its deprivation." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985); see also Bennett v. City of Boston, Civ.A.No. 87-1047-MA, 1988 WL 73433, at *4 (D. Mass. May 31, 1988), aff'd, 869 F. 2d 19 (1st Cir. 1989) (stating that "[m]erely because . . . the state has provided some procedure does not permit the plaintiff to argue that in doing so, the state was also creating a more significant substantive right" and that "procedural protections . . . may or may not satisfy constitutional minima, but that inquiry is distinct from the issue of whether a right has been conferred at all"). The court finds that Plaintiff has not stated a protected property interest worthy of substantive due process protection. Accordingly, the court will grant Defendants' motion insofar as it seeks to dismiss Plaintiff's substantive due process claim.

c. Equal Protection

A plaintiff who asserts an equal protection claim based on selective enforcement must show that: (1) the plaintiff, compared with others similarly situated, was selectively treated; and (2) the selective treatment was motivated by an intent to discriminate on the basis of impermissible considerations, such as race or religion, to punish or inhibit the exercise of constitutional rights, or by a malicious or bad faith intent to

injure the person. Homan II, 15 F. Supp. 2d at 702 (citations omitted). Each prong of the test is to be applied separately and "failure to satisfy either inquiry [is] fatal to the plaintiff's claim." Id. (citations omitted).

Plaintiff alleges that Defendants' replacement of two members of the Civil Service Commission resulted in "selective enforcement," and "compared with others similarly situated, he was selectively treated." (Pl.'s Mem. of Law in Opp'n to Defs.' Mot. to Dismiss at 17.) Plaintiff's Complaint, however, does not allege that any other similarly situated person was treated differently.

The case Plaintiff cites in support of his selective enforcement theory is not helpful to him. See id. (citing Homan v. City of Reading, 963 F. Supp. 485 (E.D. Pa. 1997) ("Homan I")). In Homan, the plaintiffs were an African-American man and Caucasian woman who lived together as common law husband and wife. Homan I, 963 F. Supp. at 490; Homan II, 15 F. Supp. 2d at 697. The couple alleged that race was the underlying improper motive that resulted in the defendants' selective application of the law. Homan I, 963 F. Supp. at 490; Homan II, 15 F. Supp. 2d at 702. The plaintiffs in Homan not only gave a reason, namely, race, to show why they were improperly singled out under their selective enforcement theory but also alleged that a number of similarly situated individuals were treated differently. Homan II, 15 F. Supp. 2d at 702 (stating that plaintiffs were treated differently than, inter alia, the white owners of American Chain

and Cable); Homan I, 963 F. Supp. at 490 (same). In contrast to the case he relies upon, Plaintiff in the instant case fails to name anyone who was similarly situated but was treated differently. Thus, Plaintiff has failed to satisfy the first prong of his selective enforcement theory.

Likewise, Plaintiff fails to assert any reason behind the alleged selective treatment under the second prong. Unlike the plaintiffs in Homan, Plaintiff does not allege that he is a member of a suspect class. Likewise, he does not assert that Defendants' conduct punished him for exercising a constitutional right. Rather, Plaintiff merely asserts that, in injuring him, Defendants acted "maliciously."⁵ (Pl.'s Mem. of Law in Opp'n to Defs.' Mot. to Dismiss at 15-16; First Am. Compl. ¶ 49.)

Plaintiff cites no law to support the proposition that a mere assertion of a malicious intent to injure satisfies the second prong of his selective enforcement theory. As discussed supra, Homan, the case upon which Plaintiff relies, is inapposite. Although the court will construe the Complaint in the light most favorable to Plaintiff, it need not accept as true legal conclusions or unwarranted factual inferences. Morse, 132 F.3d at 906 (citations omitted).

⁵ In an effort to support this assertion, Plaintiff challenges the timing of Defendants' discovery that two of the three members of the Civil Service Commission were not properly appointed. First Am. Compl. ¶ 48 (asserting that timing of decision was "more than mere coincidence"). But cf. Pl.'s Mem. of Law in Opp'n to Defs.' Mot. to Dismiss at 15-16 (stating that Defendants' replacement of Commission A with Commission B "may appear rational").

Thus, the court will grant Defendants' motion insofar as it seeks to dismiss Plaintiff's equal protection claim.⁶

2. Second Cause of Action: 42 U.S.C. § 1988

Plaintiff's Complaint asserts a Second Cause of Action under 42 U.S.C. § 1988. Section 1988 is a mechanism for authorizing the assessment of damages for fees and costs if a plaintiff prevails under § 1983. 42 U.S.C. § 1988. It is not a separate cause of action by which liability may be imposed against a defendant. See Moor v. County of Alameda, 411 U.S. 693, 702 (1973) (Section 1988 does not create independent federal cause of action; it merely complements various acts that do create federal causes of action for violation of federal civil rights). Thus, the court will grant Defendants' motion insofar as it seeks to dismiss Plaintiff's Second Cause of Action.

3. Third Cause of Action: Article 1, Section 3 of the Pennsylvania Constitution

Article 1, section 3 of the Pennsylvania Constitution, entitled "Religious freedom," guarantees a citizen's right to worship freely and prevents government interference with

⁶ Finally, Defendants contend that the individual defendants are shielded by qualified immunity. (Defs.' Mem. of Law in Supp. of Mot. to Dismiss at 12.) Whether an official is protected by qualified immunity "generally turns on the 'objective legal reasonableness' of the action." Callahan v. Lancaster-Lebanon Intermediate Unit, 880 F. Supp. 319, 326 (E.D. Pa. 1994) (quoting Anderson v. Creighton, 483 U.S. 635, 639 (1987)). At this stage, viewing the evidence in the light most favorable to Plaintiff, it cannot be said as a matter of law that the individual defendants will be shielded by qualified immunity.

religious exercise and expression.⁷ 1 Pa. Cons. Stat. Ann. § 3. No religious rights are implicated in Plaintiff's Complaint. (Pl.'s Mem. of Law in Opp'n to Mot. to Dismiss at 21.) Because no religious rights are implicated, the court will grant Defendants' motion insofar as it seeks to dismiss Plaintiff's Third Cause of Action.

4. Fourth Cause of Action: Article 1 Section 1 of the Pennsylvania Constitution

Article 1, section 1 of the Pennsylvania Constitution provides that:

All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

1 Pa. Cons. Stat. Ann. § 1. Neither party has cited any authority suggesting that Plaintiff's claims for substantive due process, procedural due process or equal protection are treated differently under the Pennsylvania Constitution than they are under the Constitution of the United States. Thus, for the reasons stated supra, the court finds that although Plaintiff has not stated a claim for substantive due process or equal protection, he has stated a claim for a violation of procedural due process under the Pennsylvania Constitution.

⁷ Because the court has jurisdiction over Plaintiff's First Cause of Action, which alleges a procedural due process claim, it has jurisdiction over Plaintiff's remaining state law claims. 28 U.S.C. § 1367(a) (supplemental jurisdiction).

Plaintiff also asserts an injury to his reputation under Article 1, section 1. The Pennsylvania Constitution includes "reputation" as a fundamental right that may not be abridged by state action without compliance with the constitutional standards of due process and equal protection. R. v. Commonwealth Dept. of Pub. Welfare, 636 A.2d 142, 149 (Pa. 1994). Plaintiff alleges that, as a result of Defendants' violation of his procedural due process rights, he was stigmatized and his reputation was damaged. (First Am. Compl. ¶ 54.) He alleges that his firing and the subsequent appeals process was the subject of articles in various newspapers. Id. ¶ 43. Viewing the record in the light most favorable to Plaintiff, the court will deny Defendants' motion to the extent that it seeks to dismiss Plaintiff's claim for reputational injury.

In sum, the court will grant Defendants' motion to the extent that it seeks to dismiss Plaintiff's claims of substantive due process and equal protection under the Pennsylvania Constitution, and deny Defendants' motion to the extent that it seeks to dismiss Plaintiff's claims of procedural due process and reputational injury.⁸

5. Fifth and Sixth Causes of Action: Negligence and Civil Conspiracy

Plaintiff's Fifth and Sixth Causes of Action assert claims

⁸ Likewise, the court will deny Defendants' motion to dismiss Plaintiff's Fourth Cause of Action as to the individual defendants Karen Doughty and Joseph Knox, the two Commission members who were appointed, forming Commission B. (First Am. Compl. ¶ 5.)

of negligence and civil conspiracy.⁹ At this stage in the proceedings, a complaint is properly dismissed only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley, 355 U.S. at 45-46. It is not clear, however, that Plaintiff has stated all of the elements for the claims upon which he seeks relief. In that regard, Plaintiff's Opposition to Defendants' Motion to Dismiss requested leave of the court to file an amended complaint setting forth more specific allegations. (Pl.'s Opp'n to Defs.' Mot. to Dismiss at 22-23.) Accordingly, the court will deny Defendants' motion insofar as it seeks to dismiss Plaintiff's Fifth and Sixth Causes of Action and Plaintiff shall have 10 days from the date of this Order to file a second amended complaint setting forth more specific allegations as to these claims.

B. Defendants' Motion to Stay Discovery

On August 18, 2000, Defendants filed a motion to stay discovery pending the court's decision regarding its motion to dismiss. The court will deny the motion as moot.

⁹ To state a cause of action for civil conspiracy, a plaintiff must show: (1) that two or more persons combined or agreed with an intent to do an unlawful act or to do an otherwise lawful act by unlawful means; and (2) proof of malice, or an intent to injure. Skipworth by Williams v. Lead Indus. Ass'n, Inc., 690 A.2d 169, 174 (Pa. 1997) (internal quotations and citations omitted). To prevail on a negligence cause of action, Plaintiff must show "that the defendant owed a duty of care to the plaintiff, the defendant breached that duty, the breach resulted in injury to the plaintiff, and the plaintiff suffered an actual loss or damage." Martin v. Evans, 711 A.2d 458, 461 (1998) (citations omitted).

C. Plaintiff's Motion for Leave to Amend the Complaint

On August 10, 2000, Plaintiff filed a motion for leave to amend his Complaint, seeking to add one paragraph that was inadvertently omitted from the original Complaint.

Rule 15(a) provides that a party may amend its pleadings by leave of the court. Fed. R. Civ. P. 15(a). Leave to amend "shall be freely given when justice so requires." Id. Plaintiff asserts that Defendants will not be prejudiced by the proposed amendment, which does not add or change any cause of action or add or substitute any party. (Pl.'s Mem. of Law in Supp. of Mot. for Leave to Amend Compl. ¶¶ 5-7.) Defendants have not filed opposition to Plaintiff's motion. Thus, the court will grant Plaintiff's motion to amend the Complaint.

D. Plaintiff's Motion for Default Judgment

Under Rule 55, a default judgment may be entered where a party "has failed to plead or otherwise defend" in an action. Fed. R. Civ. P. 55(a).

Defendants were first represented by the law firm of Marshall, Dennehey, Warner, Coleman & Goggin ("Marshall Dennehey"). Marshall Dennehey secured from Plaintiff's counsel a ten-day extension of time, until April 27, 2000, in which to clear a potential conflict of interest and respond to the Complaint. (Pl.'s Mot. for J. by Default Ex. G.) Marshall Dennehey was unable to resolve the conflict, and Defendants retained Spector, Gadon & Rosen, P.C. on April 26, 2000. On April 27, 2000, Defendants filed a motion for extension of time

in which to respond to the Complaint. That motion was unopposed. See Pl.'s Mot. for J. by Default, Ex. L (stating that Defendants' "application for an extension of time of thirty (30) days . . . [is] uncontested"). However, Defendants' motion was denied on procedural grounds as the motion did not include a proposed order for signature. (Order dated May 24, 2000.)

Before the court denied Defendants' motion for an extension of time in which to respond to the Complaint, Defendants filed the instant motion to dismiss on May 18, 2000.¹⁰ Under the Federal Rules of Civil Procedure, the timely filing of a motion to dismiss tolls the time allowed for filing an answer to the complaint. Fed. R. Civ. P. 12(a)(4). Here, Defendants filed a motion to dismiss within the time agreed to by Plaintiff, who did not contest Defendants' motion for extension of time, and before the court's denial, on procedural grounds, of the motion for extension of time. Thus, the court will deny Plaintiff's motion for default judgment.

E. Plaintiff's Motion to Compel Discovery or for Extension of Time and Supplemental Motion to Compel Discovery

On July 13, 2000, Plaintiff filed its Motion to Compel Discovery, or, in the Alternative, for Extension of the Deadline for Completion of Discovery ("Motion to Compel Discovery").¹¹ Plaintiff's motion asserts that he sought to depose four of the

¹⁰ Defendants filed an Answer on July 25, 2000.

¹¹ Pursuant to this court's Orders, discovery was to have been completed in this case by September 1, 2000. (Order dated May 8, 2000.)

defendants on June 26, 2000 and June 29, 2000 and that Defendants' counsel informed him that the defendants would not appear. (Pl.'s Mot. to Compel Disc. ¶¶ 28 & 29.)

The court notes that under the provisions of Section 4:01(b) of the Civil Justice Expense and Delay Reduction Plan (the "Plan"), no party may take discovery from any source before making the disclosures required by the Plan, nor may they seek discovery from another party before the date such disclosures are due from the other party. Defendants' self-executing disclosures were not timely served until July 5, 2000. (Defs.' Mem. of Law in Opp'n to Pl.'s Mot. to Compel at 1.) Thus, Plaintiff was not entitled to proceed with the discovery he sought from Defendants until after that date.

On August 14, 2000, Plaintiff filed a supplemental motion seeking an Order compelling certain defendants to appear for depositions on August 16 and August 17, 2000. (Pl.'s Supp. Mot. to Compel Disc. at unnumbered p. 4.) The court will deny this motion as moot.

Insofar as Plaintiff's Motion to Compel Discovery seeks an extension of the discovery deadline, the court will grant it. Accordingly, the court will allow 45 days from the date of this Order for the parties to complete discovery.

IV. CONCLUSION

For the foregoing reasons, the court will: grant Plaintiff's motion to amend the complaint; deny Plaintiff's

motion for default judgment; grant in part and deny in part Plaintiff's motion to compel discovery or for extension of time; deny Plaintiff's supplemental motion to compel discovery as moot; grant it in part and deny in part Defendants' motion to dismiss; and deny Defendants' motion to stay discovery as moot.

An appropriate Order follows.

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

ROBERT BROBSON : CIVIL ACTION
 :
 v. :
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 BOROUGH OF NEW HOPE, et al. : NO. 00-0003

ORDER

AND NOW, TO WIT this day of November, 2000, upon consideration of the following motions and the responses thereto, IT IS ORDERED that:

1. plaintiff Robert Brobson's ("Plaintiff") Motion for Leave to Amend the Complaint (Doc. # 18) is GRANTED, and the court hereby incorporates Plaintiff's Amended Complaint;

2. Plaintiff's Motion for Default Judgment (Doc. # 12) is DENIED;

3. Plaintiff's Motion to Compel Discovery or for Extension of Time (Doc. # 11) is GRANTED IN PART and DENIED IN PART. The motion is granted insofar as it seeks to extend discovery and the parties shall have 45 days from the date of this Order to complete discovery, and it is denied in all other respects;

4. Plaintiff's Supplemental Motion to Compel Discovery (Doc. # 19) is DENIED AS MOOT;

5. defendants the Borough of New Hope, et al.'s ("Defendants") Motion to Dismiss (Doc. # 7) is GRANTED IN PART and DENIED IN PART. Defendants's motion is granted insofar as it seeks to dismiss Plaintiff's substantive due process and equal protection claims under the United States Constitution and the Pennsylvania Constitution, and insofar as it seeks to dismiss

Plaintiff's Second and Third Causes of Action; and it is denied in all other respects. Accordingly, Plaintiff's Second and Third Causes of Action are DISMISSED; and

6. Defendants' Motion to Stay Discovery (Doc. # 22) is DENIED AS MOOT.

IT IS FURTHER ORDERED that: Plaintiff shall have ten days from the date of this Order in which to file a second amended complaint; and the parties shall have 30 days following the completion of discovery in which to file motions for summary judgment.

LOUIS C. BECHTLE, J.