

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

SAMUEL A. LITZENBERGER,

Plaintiff,

v.

TROOPER KIRK R. VANIM,
CORONEL PAUL J. EVANKO, PA
State Police Commissioner, and
LIEUTENANT JAMES J. LILL,

Defendants.

CIVIL ACTION

NO. 01-5454

MEMORANDUM

ROBERT F. KELLY, Sr. J.

FEBRUARY 5, 2002

Presently before this Court is the Motion to Dismiss the Amended Complaint filed by the Defendants Pennsylvania State Trooper Kirk R. Vanim (“Vanim”), Pennsylvania State Police Commissioner Coronel Paul J. Evanko (“Evanko”), and Lieutenant James J. Lill (“Lill”). On December 17, 2001, the Plaintiff Samuel A. Litzenberger (“Litzenberger”) filed a Complaint with this Court alleging that the Defendants violated 42 U.S.C. §§ 1983 and 1988 and the Fourth and Fourteenth Amendments. Litzenberger also includes state law claims for intentional infliction of emotional distress, and possibly for false arrest, false imprisonment, malicious prosecution and abuse of process. For the reasons that follow, this Motion will be granted in part and denied in part.

I. FACTS

In his Amended Complaint, Litzenberger alleges that on October 29, 1999, he attempted to legally pass a slow moving pick-up truck. Litzenberger later discovered that the

driver of the truck was Vanim. While Litzenberger attempted to pass, Vanim increased the speed of the truck and drove to the left of the center of the highway in order to hinder Litzenberger's passage. Despite these actions, Litzenberger was eventually able to pass Vanim. Vanim then followed Litzenberger closely and began to chase him. Eventually Litzenberger drove onto his own driveway and parked. Vanim then parked his truck across Litzenberger's driveway, blocking Litzenberger from leaving in his car. Vanim, who was off duty and out of uniform, exited the truck and approached Litzenberger. Vanim then showed Litzenberger his badge and, without probable cause, "effected an arrest of [Litzenberger] by his words and conduct." (Am. Compl., ¶ 22). Litzenberger, an attorney, told Vanim that he had no right to stop his vehicle while out of uniform. Vanim asked to see Litzenberger's driver's licence, registration card, and insurance card, which Litzenberger refused to produce. Vanim then left and stated that he had Litzenberger's licence plate number and would go "back to his station, look[] at the Vehicle Code, and fil[e] as many charges against [Litzenberger] as he could." (*Id.* ¶ 24). According to Litzenberger, Vanim then interviewed other drivers in the area and suggested to the drivers that Litzenberger was driving while intoxicated.

On November 4, 1999, Vanim filed ten allegedly improper motor vehicle citations against Litzenberger. On February 9, 2000, a hearing was held on the ten citations. At the hearing, all of the charges were dismissed. Litzenberger alleges that Vanim made false allegations against him in the citations and during the hearing. According to Litzenberger, the Defendants then engaged the District Attorney to file an appeal from the hearing result, knowing that the appeal was frivolous and improper as there was no allowable appeal available.

Litzenberger also alleges that, based on past experiences, Evanko and Lill knew or

should have known that Vanim was capable of such behavior and that Vanim was not properly hired, trained, or supervised. Litzenberger further alleges that instead of disciplining Vanim, Evanko and Lill condoned the filing of the ten motor vehicle citations. Litzenberger also states that Evanko and Lill, while acting under the color of state law, and pursuant to the policies and customs of the Pennsylvania State Police, allowed Vanim to pursue the course of improper conduct and filed the improper appeal in order to injure Litzenberger. Litzenberger further states that Evanko and Lill acted pursuant to a policy or custom of, *inter alia*, allowing off-duty, non-uniformed officers to make motor vehicle arrests, failing to train against such behavior, and failing to investigate such incidents or punish such conduct.

In his Amended Complaint, Litzenberger alleges that his 42 U.S.C. § 1983 Fourth Amendment claim is based on allegations of false arrest, false imprisonment, malicious prosecution and abuse of process. While the Amended Complaint is unclear, it also appears that Litzenberger is seeking to bring these four allegations as state law claims along with intentional infliction of emotional distress.

II. STANDARD

A motion to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6), tests the legal sufficiency of the complaint. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). A court must determine whether the party making the claim would be entitled to relief under any set of facts that could be established in support of his or her claim. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)(citing Conley, 355 U.S. at 45-46); see also Wisniewski v. Johns-Manville Corp., 759 F.2d 271, 273 (3d Cir. 1985). In considering a Motion to Dismiss, all allegations in the complaint must be accepted as true and viewed in the light most favorable to the non-moving

party. Rocks v. City of Phila., 868 F.2d 644, 645 (3d Cir. 1989)(citations omitted).

III. DISCUSSION

The Defendants contend that Litzenberger's 42 U.S.C. § 1983 claims must be dismissed because he cannot show a suitable seizure which would trigger the Fourth Amendment's protections. Litzenberger may maintain a 42 U.S.C. § 1983 Fourth Amendment claim based upon allegations of false arrest, false imprisonment, malicious prosecution and abuse of process. See e.g. Russoli v. Salisbury Township, 126 F. Supp.2d 821, 852-854 (E.D. Pa. 2000); Palma v. Atlantic County, 53 F. Supp.2d 743, 755 (D.N.J. 1999). However, in order to maintain his 42 U.S.C. § 1983 action, Litzenberger must show a seizure which would trigger the Fourth Amendment in addition to the common law elements of these crimes. Taylor v. City of Phila., No. 96-740, 1998 WL 151802 at *8 (E.D. Pa. April 1, 1998).

The Defendants claim that neither the traffic stop nor the court hearing were sufficient to satisfy the Fourth Amendment's definition of a seizure. However, Litzenberger alleges that he was arrested by Vanim during the traffic stop. An arrest is a sufficient seizure to trigger the Fourth Amendment. Id. Furthermore, an arrest "includes either a formal arrest or its functional equivalent, a custodial detention." Com. v. Kiner, 697 A.2d 262, 265 (Pa. Super. 1997). Moreover, "[w]hether an arrest has been made is viewed in light of the reasonable impression conveyed to the person subjected to the seizure rather than in terms of the subjective views of the police officer making the arrest." Id. (quoting Com. v. Carter, 643 A.2d 61, 67 (Pa. 1994)). At this stage of the litigation, we cannot determine if there truly was an arrest or not. Therefore, the portion of the Defendants' Motion regarding this issue must be denied and the 42 U.S.C. § 1983 claims must move forward.

The Defendants further contend that Litzenberger's state law claims must be dismissed because all of the Defendants have sovereign immunity under 1 Pa. S.C.A. § 2310 and 42 Pa. S.C.A. § 8522. These statutes bar state law actions against the Commonwealth except for negligence actions involving nine narrow exceptions, none of which apply to this case. 1 Pa. S.C.A. § 2310; 42 Pa. S.C.A. § 8522; see also Moore v. Com., Dept. of Justice, 538 A.2d 111, 113 (Pa. Commw. Ct. 1988)(stating that the exceptions to sovereign immunity are to be narrowly interpreted). Furthermore, Commonwealth officials acting within the scope of their duties enjoy the same immunity as the Commonwealth itself. LaFankie v. Miklich, 618 A.2d 1145, 1148-49 (Pa. Commw. Ct. 1992).

Litzenberger concedes any state law claims against Evanko and Lill in his Response to the Motion to Dismiss. Therefore, the portion of the Defendants' Motion regarding the state law claims against Evanko and Lill will be granted and the claims will be dismissed. Specifically, Litzenberger states that, "[t]here are no state law claims made against Lill nor Evanko, but only against Vanim" and that "[t]he conduct of the Defendants Lill and Evanko is limited to failure to train, supervise, or punish." (Resp. Mot. to Dismiss, 11). Furthermore, Litzenberger alleges that both Evanko and Lill were acting within the course and scope of their employment at all times. Thus, they are immune to the state law intentional tort claims under 1 Pa. S.C.A. § 2310 and 42 Pa. S.C.A. § 8522.

Litzenberger does not, however, concede the state law claims against Vanim and states only that Vanim "purported" to act within the course and scope of his employment. At this time, a question remains regarding whether Vanim was acting within the scope of his employment while off-duty and out of uniform. Furthermore, whether a Commonwealth official

was acting within the scope of their employment is a question of fact usually reserved for the jury. Nelson v. City of Phila., 613 A.2d 674, 679 (Pa. Commw. Ct. 1992); Urbano v. Meneses, 431 A.2d 308, 312 (Pa. Super. 1981). Therefore, at this stage of the litigation, we cannot determine whether Vanim is immune to the state law claims, and thus, the portion of the Defendants' Motion dealing with Vanim's immunity to the state law claims must be denied.

An appropriate Order follows.

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ORDER

AND NOW, this 5th day of February, 2002, it is hereby ORDERED that the Defendants' Motion to Dismiss the Amended Complaint (Dkt. No. 4) is GRANTED in part and DENIED in part. It is hereby further ORDERED that all state law claims against Defendants Coronel Paul J. Evanko and Lieutenant James J. Lill are DISMISSED with prejudice; the remainder of the Motion is DENIED.

BY THE COURT:

Robert F. Kelly,

Sr. J.