

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

JAMES GEORGE DOURIS, et al. : CIVIL ACTION
:
v. :
:
JOHN F. DOUGHERTY, et al. :
: NO. 01-5757

MEMORANDUM

Giles, C.J.

January ____, 2003

I. INTRODUCTION

James George Douris (“plaintiff”) and Helene Douris (“plaintiff H. Douris”) filed a Second Amended Complaint against John F. Dougherty (“Dougherty”), Joseph Kissel (“Kissel”), William Doucette (“Doucette”), James Donnelly (“Donnelly”), Ruth Ann Enyon (“Enyon”), Bertha Skerle (“Skerle”) and the Borough of Doylestown (“the Borough”) (collectively “defendants”), seeking consequential, special and punitive damages for alleged violations of their First, Fourth and Fourteenth Amendment rights pursuant to 42 U.S.C. § 1983, conspiracy to violate civil rights pursuant to 42 U.S.C. § 1985 (improperly pled by plaintiff under §1983) and violations of the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101, et seq. They also asserted violations of the Pennsylvania Human Relations Act, 43 Pa.C.S. § 951 et seq., the State’s Regulatory Building Code Standards, 34 Pa. Code Ch. 60, § 60.1 et seq., the Pennsylvania Right to Know Law, 65 P.S. § 66.1 et seq. and wrongful use of process pursuant to 42 Pa.C.S. § 8351(b).

Defendants Kissel, Doucette, Donnelly, Enyon, Skerle and the Borough filed a motion for summary judgment pursuant to Fed. R. Civ. P. 56. Defendant John Dougherty filed a separate

motion for summary judgment. Following oral argument held January 10, 2003, this court severed and dismissed without prejudice the ADA and state law claims in an Order dated January 13, 2003, finding them unrelated to the matter presently before the court. The court dismissed with prejudice all claims against Defendants Skerle and Enyon, consistent with the prior ruling of the court as to the same claims asserted in the First Amended Complaint. See *Douris v. Dougherty*, 192 F. Supp.2d 358, 364-365 (E.D. Pa. 2002). Now before the court are the motions for summary judgment as to plaintiff's remaining claims in Counts I, II and III under 42 U.S.C. §1983 and 42 U.S. C. § 1985. For the reasons that follow both motions are granted.

II. FACTUAL BACKGROUND

Consistent with the review standards applicable to a motion for summary judgment, Fed. R. Civ. P. 56, the alleged facts, viewed in the light most favorable to the plaintiff, follow. James George Douris and his wife, Helene Douris, are residents of Bucks County. Defendant Donnelly is the Chief of Police of the Borough of Doylestown, Defendants Kissel and Doucette are Doylestown police officers. Defendant Dougherty is the Director of Emergency Management Services for Bucks County.

It is alleged that on November 18, 1999, Plaintiff James Douris entered a public building located at 50 Main Street in Doylestown Borough, which houses several state and federal emergency management agencies, including the offices of the Bucks County Department of Weights and Measures and the Federal Emergency Management Agency ("FEMA"). He was seeking various public records which he intended to use in defending a summary parking meter violation action as well as information pertaining to the amount of his disaster relief claim with FEMA. Since he was on crutches, plaintiff used the handicapped entrance at the back of the

building leading into the basement. The entrance door has a doorbell or buzzer with a sign above it that says “Ring for Assistance.” The buzzer must be pressed to gain entry to the building. On this day, however, the door was allegedly propped open with a rock when plaintiff entered.

Although the building’s front entrance has a sign directing all visitors to sign in at the registration desk, state their business and receive a visitor’s badge, no such sign is posted in the basement. Inside the building, there is a partition which acts as a barrier so that members of the public who use the handicapped entrance will not traverse the work stations of FEMA employees on their way to the elevators.

Plaintiff admitted that he went beyond the aforementioned partition to inquire as to the status of his FEMA claim. FEMA employees advised plaintiff that the FEMA office in this building was set up to provide services to municipalities rather than to the general public and told him where to go for individual claims assistance. Plaintiff then demanded to know how FEMA money was being used by the county and whether FEMA was using federal disaster funds to pay the county for the use of its space in the building. FEMA employees advised him that he needed to speak to a county person about this and called Defendant Dougherty to assist him. They explained to Defendant Dougherty that a person believed to be an investigator was asking questions about the disposition of FEMA monies.

Defendant Dougherty arrived, identified himself as the person in charge of the building and asked plaintiff to identify himself and state his purpose for being on the premises. Plaintiff refused to identify himself, stating only that he was a resident of Bucks County and reiterating his demand for information regarding the use of FEMA funds. Defendant Dougherty informed plaintiff that he was in a restricted area of the Bucks County Emergency Management Offices

and told him that he would have to identify himself or leave. Plaintiff again refused and sat down in a chair. He also extracted a recording device from his pocket and began speaking into it rather than responding to Defendant Dougherty. Defendant Dougherty advised plaintiff that he would have to call County security. Plaintiff continued to speak into his recorder. Defendant Dougherty then called County security officers and waited for them to arrive before speaking further to plaintiff.

When Sergeant Laborski and Officer Whittaker arrived from the Security Division, they identified themselves and asked plaintiff if he would leave. Plaintiff stated that he did not have to leave and would not leave. The security guards explained that he was not supposed to be there and that he had been asked to leave because he was in a restricted area. After several requests, the guards asked plaintiff for identification. He refused to identify himself and, speaking into his tape recorder, stated that he did not have to identify himself. After several more attempts, Sergeant Laborski told plaintiff that he had no alternative but to call the Doylestown Borough Police Department.

Sergeant Laborski called the police and reported an unwanted person refusing to leave a restricted area. He told them that plaintiff appeared to be mentally unstable. Shortly thereafter, Sergeant Kissel and Corporal Doucette arrived and advised plaintiff that he was not permitted in the emergency management area and that he was trespassing. Plaintiff again refused to either leave or identify himself, continuing to speak into his tape recorder.

The officers explained to plaintiff that it was nearing closing time for the County offices and that if he refused to leave, they would have to place him under arrest and remove him from the building. When plaintiff again refused, Defendant Kissel placed him under arrest for defiant

trespass. Plaintiff was asked to get up from his chair using his crutches but he refused. When the two officers then lifted plaintiff under the arms, he went limp and slid to the floor. The officers began to drag plaintiff across the floor holding him under the arms. When he complained that his back was hurting, they stopped and called an ambulance.

When the ambulance arrived, plaintiff would not provide his name to the medics, allow them to examine him or sign a release. He stated that he would be alright, that this had happened before and that he knew how to put his back muscle into place. Plaintiff rolled onto his stomach, rubbed his lower back with his hand, then got up and sat in a chair once more. Officer Kissel told plaintiff that if he did not cooperate with the ambulance crew, the police would have to take him to the hospital and sign a petition to procure a mental health commitment. In response, plaintiff provided his name and signed the release. He then stood without assistance and walked out of the building on his crutches escorted by police and County security officers. Plaintiff went to his car and showed police his driver's license. Rather than take him before a magistrate, the officers allowed him to go home but told him that he would be receiving a citation by mail. Some time thereafter, criminal proceedings were commenced against plaintiff.

III. DISCUSSION

Summary judgment shall be granted where the evidence shows that there is “no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c); Hersh v. Allen Products Co., Inc., 789 F2d 230, 232 (3d Cir. 1986). An issue is genuine if a reasonable trier of fact could find in favor of the non-moving party. United States v. Premises Known as 717 S. Woodward St., Allentown, PA, 2 F.3d 529, 533 (3d Cir. 1993). A factual dispute is material if it “might affect the outcome of the suit under the

governing law.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The court must consider the evidence in the light most favorable to the non-moving party. Hines v. Consol. Rail Corp., 926 F.2d 262, 267 (3d Cir.1991) (citations omitted). The moving party has the initial burden of demonstrating the absence of any genuine issues of material fact. Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1362 (3d Cir.1992), cert. denied, 507 U.S. 912 (1993). The non-moving party must then go beyond the allegations set forth in its pleadings and counter with evidence that demonstrates there is a genuine issue of fact for trial. Id. at 1362-63. Summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

Pursuant to 42 U.S. C. §1983, any person who, under color of state law, subjects another “to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured” 42 USCA § 1983. Thus, §1983 does not create a cause of action but provides a vehicle for federal court review of alleged state and local violations of federal law.

A. Count I

1. First Amendment Claim - Freedom of Speech

Plaintiff asserts initially that his arrest, the use of “excessive force” upon his person, the “unreasonable search and seizure” by police, and the subsequent “malicious prosecution” were done in retaliation for the exercise of First Amendment free speech rights. (Compl. at ¶ 32.). Specifically, plaintiff argues that he was engaging in protected activity when he 1) sought public records regarding the use of FEMA funds, 2) appeared at a public facility and spoke to FEMA

personnel about his FEMA assistance claim, 3) “ma[de] charges” to State and Federal agencies for non-compliance with the ADA and other statutes, and 4) sought records from the Bucks County Weights and Measures Agency. (Id.).

Defendants move for summary judgment on the grounds that the action they took, which was lawful, was not a retaliation for plaintiff’s requests for public information, but rather, a reasonable response to plaintiff’s refusal to identify himself, state his purpose or leave after being informed that he was in a restricted area.

Claims of retaliation for engaging in protected free speech activity are analyzed under a three-step burden shifting process. Watters v. City of Philadelphia, 55 F.3d 886, *892 (3d Cir. 1995). Plaintiff must show that the activity in question was protected, id. (citing Holder v. City of Allentown, 987 F.2d 188, 194 (3d Cir.1993); Czurlanis v. Albanese, 721 F.2d 98, 103 (3d Cir.1983)), and that the activity was a substantial or motivating factor in the alleged retaliatory action. Id. (citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)). However, a defendant may rebut a claim by demonstrating by a preponderance of the evidence that the same action would have been taken even in the absence of the protected conduct. Id.

In this case, it is undisputed that plaintiff’s requests for public information constitute protected free speech activity. However, plaintiff cannot prove that defendants’ actions were retaliatory in nature. Plaintiff has admitted that he refused to identify himself or state his purpose for seeking access to a restricted area of the Emergency Management offices. If defendants did not know why he was there, a reasonable jury could not find that their motive was retaliatory. Moreover, plaintiff’s refusal to identify himself or leave a restricted area of the County offices at closing time is sufficient to rebut any claim of retaliation. Under the circumstances, a reasonable

jury would have to find that defendants would have arrested and removed plaintiff from the building even in the absence of the protected activity. The alternative would have been to close the building with him inside.

Plaintiff's challenge to the assertion that he was trespassing in a restricted area is unavailing. All members of the public are required to sign in, state their purpose for being in the building and receive a visitor's badge which allows them to move freely about the unrestricted areas. Although this information was not posted at the handicapped entrance, typically an individual using that entrance must ring a doorbell and wait to be allowed in by someone in authority. Assuming that plaintiff's claim that the door was propped is true, he was nevertheless informed that he needed to identify himself and state his business by Defendant Dougherty who is the Director of Emergency Services for the County and who told plaintiff that he was in a restricted area.

Plaintiff has failed to make a showing sufficient to establish a First Amendment retaliation claim. The evidence shows that it was plaintiff's refusal to comply with numerous requests by Defendant Dougherty, County security and Doylestown police that resulted in his arrest and subsequent prosecution for defiant trespass.

Next, Plaintiff H. Douris asserts that she was issued a series of parking citations in violation of her constitutional right to free association. She argues that the citations were not intended to enforce parking laws or to prosecute parking meter violations but were issued in furtherance of a conspiracy by and between defendants Donnelly, Kissel, Doucette, Skerle and Enyon to punish her for her association and marriage to plaintiff and to extort money from plaintiffs through fines and court costs in retaliation for plaintiff's protected activities. (Compl.

at ¶ 42-51.). In support thereof, plaintiff H. Douris asserts that she was charged with parking offenses when enforcement officers and defendant Donnelly were aware, or should have been, that she was not the violator. She further states that the charges were prosecuted after the 30-day statute of limitations period at the direction of Defendant Donnelly. (Compl. at ¶ 52-58.).

A conspiracy claim is properly pled pursuant to 42 U.S.C. §1985 rather than 42 U.S.C. §1983. Moreover, plaintiff H. Douris’s claim is completely unsupported by the record. Although plaintiff G. Douris was using his wife’s vehicle on at least some of the occasions when the parking citations were issued, under Pennsylvania law, proof of 1) the existence of an illegally parked vehicle and 2) registration in the name of the defendant establishes makes out a “prima facie case for imposing responsibility for the violation upon the vehicle's owner.” Com. v. Rudinski, 555 A.2d 931, 934 (Pa. Super. 1989). This is because “[t]he inconvenience of keeping watch over parked vehicles to ascertain who in fact operates them would be impracticable, if not impossible, at a time when many vehicles are parked...” Id. at 933 (quoting Commonwealth v. Ober, 189 N.E. 601, 603 (Mass. 1934)). Thus, defendants Skerle and Enyon, who have been dismissed previously from this action, properly issued the citations to Helene Douris. The court finds that the assertions of conspiracy against defendants Donnelly, Kissel and Doucette are frivolous.

2. Fourth Amendment Claim - Unreasonable Search and Seizure

Plaintiff asserts that Defendants Kissel and Doucette lacked a reasonable basis, probable cause or authority of law to arrest him and that they used excessive force. Defendants request summary judgment in their favor arguing that the arrest and the amount of force used were reasonable under the circumstances.

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures.” United States Constitution, Amend. IV. “Broadly stated, the Fourth Amendment prohibits a police officer from arresting a citizen except upon probable cause.” Orsatti v. New Jersey State Police, 71 F.3d 480, 482 ((3d Cir. 1995). To establish a Fourth Amendment violation, a plaintiff must show that the actions of defendants 1) constituted a search and seizure within the meaning of the Fourth Amendment and 2) were unreasonable in light of the surrounding circumstances. Brower v. County of Inyo, 489 U.S. 593 (1989). Since it is admitted that Doylestown police officers placed plaintiff under arrest, the only question before the court is whether the arrest was unreasonable.

Probable cause to arrest exists when “the facts and circumstances within the arresting officer's knowledge are sufficient in themselves to warrant a reasonable person to believe that an offense has been or is being committed by the person to be arrested.” Orsatti, 71 F.3d at 482. Generally, “the question of probable cause in a section 1983 damage suit is one for the jury.” Montgomery v. De Simone, 159 F.3d 120, 124 (3d Cir.1998); see also Sharrar v. Felsing, 128 F.3d 810, 818 (3d Cir.1997); Deary v. Three Un-Named Police Officers, 746 F.2d 185, 190-92 (3d Cir.1984). This is particularly true where the probable cause determination rests on credibility conflicts. See Sharrar, 128 F.3d at 818; Deary, 746 F.2d at 192. However, a district court may conclude “that probable cause exists as a matter of law if the evidence, viewed most favorably to Plaintiff, reasonably would not support a contrary factual finding,” and may enter summary judgment accordingly. Sherwood v. Mulvihill, 113 F.3d 396, 401 (3d Cir.1997).

Defendants Doucette and Kissel of the Doylestown Police Department went to a County building, in response to a call from a County security personnel who stated that 1) there was a

person trespassing in a restricted area, 2) he was refusing to identify himself or leave, 3) they thought he was mentally unstable, and 4) they wanted him removed. Defendants Kissel and Doucette had a right to rely upon the statements of the County officers regarding plaintiff. Moreover, upon arrival, they encountered plaintiff sitting in a chair in a restricted area and refusing to explain who he was or why he was there. The court notes that defendants did not arrest plaintiff immediately but tried repeatedly to persuade him to state his purpose or leave. Plaintiff has admitted that he was informed that he was in a restricted area and that he refused to leave or to respond in any way to the Director of Bucks County Emergency Management Services, two County security officers and two Doylestown Borough police officers. The Pennsylvania Criminal Code defines the offense of defiant trespass as follows:

A person commits an offense if knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice against trespass is given by:

* * *

(i) actual communication to the actor

18 Pa. C.S.A. §3503(b)(1)(i).

The facts and circumstances known to Defendants Doucette and Kissel at the time, were sufficient in themselves to warrant a reasonable person to believe that the offense of defiant trespass was being committed by plaintiff. When it was time to close the building and plaintiff still refused to leave, police were left with no alternative but to arrest plaintiff and remove him from the premises.

Plaintiff's allegations of excessive force are similarly without merit. "Application of force by police officers . . . exceeding that which is reasonable and necessary under the circumstances states a claim under §1983" for violation of the Fourth Amendment. Davidson v.

O'Lone, 752 F.2d 817, 827 (3d Cir. 1984) (internal citations omitted). However, “the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. Abraham v. Raso, 183 F.3d 279, 289 (3c Cir. 1999) (citing Terry v. Ohio, 392 U.S. 1, 22-27 (1968)). The determination of reasonableness is “based on the ‘totality of the circumstances,’ including whether the suspect posed an immediate threat to the safety of the officer or others, whether the suspect was actively resisting arrest, and the severity of the crime at issue.” Curley v. Klem, 298 F.3d 271, 279 (3d Cir. 2002).

Viewed in the light most favorable to plaintiff, the evidence establishes that 1) police lifted plaintiff from his chair holding him under the arms, 2) plaintiff went limp and dropped or was dropped to the floor, 3) police began to drag him across the floor still holding him under the arms, and 4) when plaintiff indicated that he was hurt, police stopped, called an ambulance and waited for medics to arrive. This merely describes standard police procedures for arresting individuals who are passively resistant. No reasonable jury could find for plaintiff on these facts.

Plaintiff’s reliance upon Barnes v. Gorman, 536 U.S. 181 (2002) for the proposition that police should have employed other than standard procedure due to plaintiff’s handicap is misplaced. Barnes was not an excessive force case. In Barnes, a wheelchair-bound arrestee with a severe spinal cord injury was further injured while being transported in a police van which was not equipped with wheelchair restraints. Id. The plaintiff brought suit for violations of the Rehabilitation Act, 29 U.S.C. § 794, and of the ADA. The eighth circuit held that pursuant to the ADA, making “reasonable accommodation” meant making modifications to the department's practices for transporting an arrestee so that he would be transported in manner that was safe and appropriate consistent with his disability. Gorman v. Easley, 257 F.3d 738, 751 (8th Cir. 2001),

judgment reversed on other grounds, Barnes v. Gorman, 536 U.S. 181 (2002) . The court noted that “police cannot reasonably accommodate a disabled detainee by placing him in a position where, by virtue of his disability, he is left helpless.” Id.

Assuming the reasoning in Barnes is applicable in the context of a §1983 suit premised on a Fourth Amendment excessive force claim, this case is easily distinguishable. Plaintiff stated that he was using crutches to help him get around because of “physical impairments to his back, knees and hands” which “limit his ability to sleep and walk and care for himself.” (See Compl. at ¶ 83). While police may need special training to safely transport a wheelchair-bound paraplegic in a motor vehicle, there is nothing so exceptional about plaintiff’s situation that police would need special training to arrest him.

Moreover, there is no objective evidence beyond plaintiff’s own statements, that he suffered an injury. He refused medical attention from the ambulance crew and he did not see a doctor until three months later. Plaintiff can not make out a claim for excessive force on these facts.

3. Fourteenth Amendment Claim - Equal Protection and Substantive Due Process

Plaintiff argues that defendants Kissel and Doucette knew that they lacked probable cause to arrest him, thereby depriving plaintiff of his equal protection and substantive due process rights under the Fourteenth Amendment. Moreover, plaintiff argues that defendant Dougherty’s request for assistance from County security officers and, in turn, their request for assistance from Doylestown police, constituted a conspiracy to falsely arrest plaintiff in violation of due process.

Defendants assert that plaintiff’s equal protection claim is insufficient because he has not alleged that he is a member of a protected class. They also assert that officers Kissel and

Doucette had probable cause to arrest plaintiff.

Although plaintiff has not specifically alleged that he is a member of any protected class, the court assumes that plaintiff's equal protection claim is one for discrimination on the basis of disability. The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. Amend. XIV. This is "essentially a direction that all persons similarly situated should be treated alike." Congregation Kol Ami v. Abington Township, 309 F.3d 120, 133 (3d Cir. 2002) (internal citations omitted). To make out an equal protection claim, a plaintiff must allege facts sufficient to establish intent to discriminate on the basis of some statutorily or constitutionally protected characteristic. City of Cleburne v. Cleburne Living Ctr, Inc., 473 U.S. 432, 439 (1985).

Since the court has already found that the arrest of plaintiff was pursuant to probable cause, plaintiff can not show that it was motivated by his status as a disabled person. The equal protection claim is dismissed with prejudice.

Similarly, turning to plaintiff's due process claim, the court notes that "the existence of probable cause is the threshold issue." Dowling v. City of Philadelphia, 855 F.2d 136, 141 (3d Cir. 1988); see also Abraham v. Raso, 183 F.3d 279, 288 (3d Cir, 1999) ("[E]xcessive force in the course of an arrest is properly analyzed under the Fourth Amendment, not under substantive due process.") (citing Graham v. Connor, 490 U.S. 386, 393-94(1989)). Plaintiff has failed to make a showing that his "arrest was not premised upon the officers' reasonable belief that [he] had violated the law, but, rather, was part of a policy and conspiracy to violate [his] constitutional rights." See Dowling, 855 F.2d at 142. Since the arrest was pursuant to probable cause, the due process claim is also dismissed with prejudice.

B. Count II: Section 1983 Claim against the Borough of Doylestown

Plaintiffs' § 1983 claim against the Borough is premised on its alleged policy, custom or practice "regarding arrests, prosecution, parking violations enforcement though (sic) the use of state court, and/or its and/or Defendant Donnelly's failure to properly train and/or supervise Defendants Kissel, Doucette, Skerle and/or Enyon in areas of arrest for trespass, arrest of the disabled, prosecutions of parking enforcement offense and the limitation periods to commence prosecutions." (Compl. at 71.).

A municipality can be liable when the alleged constitutional violation implements or executes a policy, regulation or decision officially adopted by the governing body or informally adopted by custom. Monell v. Dep't. of Social Services, 436 U.S. 658 (1978). A plaintiff must show that the government unit itself supported a violation of his constitutional rights. Bielevich v. Dubinon, 915 F.2d 845, 850 (3d Cir. 1990). The third circuit has held that the inadequacy of training may itself serve as the basis for municipal liability where it amounts to "deliberate indifference" to a known risk of constitutional injury. See Reitz v. County of Bucks, 125 F.3d 139, 145 (3d Cir.1997). "Deliberate indifference can be shown where the need for more or different training is so obvious, and the inadequacy is so likely to result in the violation of constitutional rights, that the policymaker can reasonably be said to have been indifferent to the need." Canton v. Harris, 489 U.S. 378, 390 (1989). However, absent a finding that plaintiff has suffered a "deprivation of any rights, privileges, or immunities secured by the Constitution and laws," 42 U.S.C. §1983, there is no basis for liability. Since the court has found, supra, that plaintiffs' First, Fourth and Fourteenth Amendment claims are without merit, the claim against the Borough is dismissed with prejudice.

C. Count III: 42 U.S.C. § 1985 Conspiracy Claim (incorrectly pled under §1983)

The conspiracy argument under Count III is identical to the argument under Count I except that in addition, plaintiff asserts that defendants Kissel Doucette and Dougherty conspired to effectuate an unlawful arrest for trespassing when they knew that no trespass had occurred.

The Supreme Court has held that § 1985 (3) protects persons from conspiracies motivated by “some racial, or perhaps otherwise class-based, invidiously discriminatory animus.” Griffin v. Breckenridge, 403 U.S. 88, 102 (1971); see also Pratt v. Thornburgh, 807 F.2d 355, 357 (3d Cir.1986), cert. denied, 484 U.S. 839 (1987). In order to state a claim under 42 U.S.C. § 1985, the plaintiff must allege “(1) a conspiracy; (2) motivated by a racial or class based discriminatory animus designed to deprive, directly or indirectly, any person or class of persons ... [of] the equal protection of the laws; (3) an act in furtherance of the conspiracy; and (4) an injury to person or property or the deprivation of any right or privilege of a citizen of the United States.” Ridgewood, 172 F.3d at 254 (quoting Lake v. Arnold, 112 F.3d 682, 685 (3d Cir. 1997)).

Here again, although he has failed to allege that he is a member of any protected class, the court assumes that plaintiff’s claim is based upon his disability. In Lake, the court held that the mentally retarded are a class protected by § 1985(3), but expressly declined to make a determination with respect to physically handicapped persons. Lake, 112 F.3d at 685-86 & n.5. The court need not address the issue here since it has already determined that the conduct of the police officers was objectively reasonable and that plaintiff has not suffered any injury, constitutional or otherwise. Plaintiff was not arrested because he was handicapped but rather, because police had probable cause to believe that he was trespassing. The conspiracy claim in Count III is dismissed with prejudice.

D. Qualified Immunity

Government officials engaged in discretionary functions are entitled to qualified immunity from suits brought against them for damages under section 1983 as long as their conduct “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Forbes v. Township of Lower Merion 313 F.3d 144 (3d Cir. 2002) (citing Anderson v. Creighton, 483 U.S. 635 (1987)). In Saucier v. Katz, 533 U.S. 194 (2001), the Supreme Court recently clarified that the analysis to be undertaken by district courts considering claims of qualified immunity in cases alleging excessive use of force. Bennett v. Murphy, 274 F.3d 133 (3d Cir. 2002) (citing Saucier, 533 U.S. at 194). The Court explained that “the ruling on qualified immunity requires an analysis not susceptible of fusion with the question whether unreasonable force was used” Saucier, 533 U.S. at 197. “Unless the qualified immunity inquiry is undertaken separately from the constitutional inquiry, it will ‘become superfluous or duplicative when excessive force is alleged.’” Id. at 204.

After Saucier, district courts must undertake a two-step process which asks “[f]irst, whether the facts, taken in the light most favorable to the plaintiff, show a constitutional violation.” Bennett, 274 F.3d at 136. “If the plaintiff fails to make out a constitutional violation, the qualified immunity inquiry is at an end; the officer is entitled to immunity.” Id. Where a plaintiff’s factual allegations establish a constitutional violation, the court must ask whether the constitutional right was clearly established, such that a reasonable officer would have understood that his actions were not pursuant to law. Id. The doctrine of qualified immunity “gives ample room for mistakes of judgment in protecting all but the plainly incompetent or those who

knowingly violate the law.” Hunter v. Bryant, 502 U.S. 224, 229 (1991). Thus, if an official could have reasonably believed that his or her actions were lawful, the official receives immunity even if in fact the actions were not lawful.

Since this court has found that plaintiff’s allegations are insufficient to establish any constitutional deprivation, the analysis need not go further. Defendants are entitled to qualified immunity.

The court notes that even if plaintiff had sufficiently alleged a constitutional violation, the second Saucier prong would require that the court examine the state of the law at the time of the incident to see if the law was settled. Based on the Pennsylvania Criminal Code’s straightforward definition of defiant trespass, see supra 18 Pa. C.S.A. §3503(b)(1)(i), a reasonable officer in defendants’ position would not have understood that he was acting unlawfully. Thus, defendants would still be entitled to qualified immunity.

IV. CONCLUSION

For the foregoing reasons, the court finds that there is no genuine issue of material fact and that the defendants are entitled to judgment as a matter of law. The motions for summary judgment are granted.

An appropriate order follows.