

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

OZELL ALLEN, AS ADMINISTRATOR OF : CIVIL ACTION
THE ESTATE OF UDRAKA WITHERS, :
Plaintiff, :
 : NO. 95-5770
v. :
 :
CITY OF PHILADELPHIA; RICHARD :
NEAL, POLICE COMMISSIONER; and :
POLICE OFFICERS KNELL #2896, :
COLEMAN #6803, JACKSON #6060, :
SPELLMAN #9712, LEWIS #1212, :
FOX #6727, LT. MARTIN #367, :
CPL. HETZEL #8066, PELUSCO #6789, :
and SGT. BANGOLODEK, #8775, :
Defendants. :

M E M O R A N D U M

BUCKWALTER, J.

September 10, 1997

Currently before the Court is Defendant City of Philadelphia's timely¹ motion for summary judgment and dismissal of the civil rights complaint filed by the Estate of Udraka Withers. The Court will grant the motion and enter judgment for the City, thereby dismissing all claims as to all parties.

I. BACKGROUND

Udraka Withers ("Withers") died on February 2, 1995. An autopsy conducted by the Philadelphia Medical Examiner found internal head injuries, which Withers' family alleged were caused

1. Contrary to Plaintiff's contention, Defendants timely filed the instant motion.

when Philadelphia police officers attacked Withers on July 24, 1993. Hospital records from that date state that a "Drake Withers" was treated for head injuries caused by a glass bottle.

Withers' estate ("the Estate") filed a Writ of Summons in the Philadelphia Court of Common Pleas on July 21, 1995, naming as defendant the City of Philadelphia ("the City").² The Estate's first complaint contained Pennsylvania tort claims³ and claims under 42 U.S.C. section 1983, asserting that the City violated Withers' Equal Protection and Due Process rights by, inter alia, assault, excessive force, false imprisonment, discriminatory arrest and improper training.

The City then removed the action to this Court. Since that time, this litigation has been characterized by confusion over service and the identity of the defendants. After the Court dismissed the complaint without prejudice, the Estate filed an amended complaint naming Mayor Edward Rendell (who has since been dropped as a defendant), Police Commissioner Richard Neal, and ten Philadelphia police officers. The Estate again amended its

2. Although Withers died before the commencement of this litigation, pleadings have listed both him and Mr. Ozell G. Allen, the Administrator of his estate, as Plaintiff. The Court will refer to the Estate as the Plaintiff.

3. The City also argues that Plaintiff's Pennsylvania claims for assault, battery and negligence are barred by Pennsylvania's Political Subdivision Tort Claims Act. 42 Pa. C.S.A. section 8541 et seq. While the Estate has not opposed this assertion, the Court notes that these claims are absent from the amended complaints and appear to have been dropped. In any event, Plaintiff has proffered no evidence to support them, and they would not survive the entry of summary judgment.

complaint, and the Court again dismissed it without prejudice, due to the failure to serve the amended complaint on the Defendants. After more confusion over service, the Court again reinstated and again dismissed the amended complaint without prejudice.

By Order dated February 6, 1997, the Court reinstated the amended complaint and ordered the Estate to serve it upon the defendants within five days. The Court then directed the parties to complete all discovery by July 1, 1997 and to file any dispositive motions within five days of that date. The City now contends that the claims against the police officers are time-barred, and that without the officers, the entire complaint must fail. It further asserts that the Estate has failed to proffer sufficient evidence to create a genuine issue of material fact as to the section 1983 claims.

II. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if it might affect the outcome of the case under the governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A disputed factual matter

presents a genuine issue "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."

Id. In considering a summary judgment motion, the court is required to accept as true all evidence presented by the non-moving party, and to draw all justifiable inferences from such evidence in that party's favor. Id. at 255. The nonmoving party must produce evidence to support its position and may not rest upon mere allegations or denials. Fed. R. Civ. P. 56 (e).

III. DISCUSSION

Pennsylvania law establishes a two-year statute of limitations for the Estate's section 1983 claims. See Owens v. Okure, 488 U.S. 235 (1989); Wilson v. Garcia, 471 U.S. 261 (1985); 42 Pa. C.S.A. section 5524(7). The Estate alleges that the officers assaulted Withers on July 24, 1993. Although the Estate served a writ of summons on the City just before the expiration of the limitations period, the City claims that the claims against the police officer defendants are time-barred, because the officers were only added as defendants after that period.

The parties have done little to clarify the issue, and neither refers to Fed. R. Civ. P. 15 (c), which permits the addition of defendants by amendment. See, e.g., Urrutia v. Harrisburg County Police Dept., 91 F.3d 451 (3d Cir. 1996); Lundy v. Adamar of New Jersey, Inc., 34 F.3d 1173 (3d Cir. 1994);

Sendobry v. Michael, 160 F.R.D. 471 (M.D. Pa. 1995). Under Rule 15 (c)(2), the Estate's amendment "relates back" to the original complaint, provided that the amended matter "arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading," and that:

Within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Id. at (c)(3).

While the claims against the police officers clearly arise out of the same transaction as those against the City, it is unclear whether the police officer defendants had notice of the action within the 120-day period stipulated by Rules 4(m) and 15(c)(3), because, inter alia, it is unclear whether the Estate in fact served the amended complaint on all defendants. The City maintains that it did not, and has attached an affidavit to that effect. The Estate, which has advanced different positions on this question during the course of litigation, provides no documentation as to service. Instead, and unhelpfully, it points to the docket, which merely reflects service on the "City of Philadelphia, et al."

Even without proper service, the defendants may have received notice sufficient to satisfy Rule 15(c)(3), but the Court believes that it need not resolve the statute of limitations question because, even assuming that all Defendants are properly before it, the entry of summary judgment against the Estate is appropriate, as it has failed to support its claims.

While the Estate's allegations certainly state a claim under section 1983, more is needed on summary judgment. Despite repeated revival of its claims, it does not appear that the Estate has conducted any discovery beyond collecting inconclusive medical records and determining the names and badge numbers of certain police officers. Thus, the Estate has established only that Withers was treated for severe head injuries on July 24, 1993, and that he died in 1995. It has offered no evidence to support its allegation that Withers was attacked by any police officers, let alone the named police officer defendants.

Further, the Estate has failed to offer any evidence regarding section 1983 liability on the part of the City, such as a municipal plan or policy violative of Withers' constitutional rights, or of any actions taken by the officers which even suggests the existence of a custom which violated Withers' rights and which was known of and tacitly ratified by City officials. See, e.g., City of Canton v. Harris, 489 U.S. 378 (1989); Monell v. Department of Social Servs., 436 U.S. 658, 690 (1978).

Although the Estate alludes to today's headlines and halfheartedly asserts that such a policy is "implicit" in the complaint itself, its burden on summary judgment goes beyond insinuation or allegation, Fed. R. Civ. P. 56(e), and the City should not, at this late stage, be required to infer either facts or theories of causation.

Accordingly, in the absence of any evidence tending to support the existence of a genuine issue of material fact as to the Estate's section 1983 claims, the Court will enter summary judgment in favor of Defendants.

An Order follows.

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O R D E R

AND NOW, this 10th day of September, 1997, upon consideration of Defendant City of Philadelphia's motion for summary judgment and Plaintiff's response thereto, it is hereby ORDERED that said motion is GRANTED. Plaintiff's complaint against the City of Philadelphia and all other defendants, as amended, is DISMISSED WITH PREJUDICE.

BY THE COURT:

RONALD L. BUCKWALTER, J.