

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

CHRISTOPHER F. DONAHUE

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CIVIL ACTION

v.

JAMES GAVIN, et al.

NO. 98-1602

O'Neill, J.

March , 1999

MEMORANDUM

This civil action asserts various federal and state claims arising out of the undercover investigation and criminal prosecution of the plaintiff, Christopher F. Donahue, by the Berks County District Attorney's office and its detectives, the Montgomery County District Attorney's office and its detectives, and the Pennsylvania State Police. The defendants in this suit --various participants in the investigation and subsequent prosecution-- now move to dismiss the complaint on various grounds including the doctrine of claim preclusion and the expiration of the applicable limitations period.

In October 1990 an undercover investigation into a suspected drug ring was commenced by the Berks County District Attorney's Office. As a result of the investigation, Donahue was arrested and charged on January 16, 1991 with two counts each of possession of a controlled substance, possession of a controlled substance with intent to deliver, corrupt organizations, and criminal conspiracy in connection with the sale of illicit drugs. At the conclusion of his trial in October of 1991, Donahue was convicted of two counts of possession of a controlled substance with intent to

deliver, two counts of criminal conspiracy, and two counts of corrupt organizations. On August 27, 1993, the Pennsylvania Superior Court vacated Donahue's sentence and remanded for a new trial. A nolle prosequi was entered in the matter on April 3, 1997.

In January 1992, Donahue filed a civil action in the Court of Common Pleas of Northampton County entitled Donahue v. The Morning Call, et al, No. 1992-C-6767, alleging numerous violations of Pennsylvania law, particularly the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. C.S.A. §§ 5701-5781.

On April 12, 1995, Donahue filed a civil action in this Court entitled Donahue v. Gavin, et al, Civil Action No. 95-2145. In that suit plaintiff alleged civil rights violations connected to the 1990 criminal investigation as well as violations of the Pennsylvania Wiretapping and Electronic Surveillance Control Act. The defendants in the 1995 suit --Berks County, Berks County District Attorneys James Gavin and George Yatron, and Pennsylvania State Police Officers Gregory Pease and James Girard-- have also been named as defendants in the present action. In the 1995 suit Pease and Girard moved for summary judgment under Rule 56; Gavin, Yatron, and Berks County moved for dismissal of the complaint under Rule 12(b)(6). In both motions defendants argued that plaintiff's claims were barred by the statute of limitations. The Court apparently agreed and granted both motions. Accordingly, judgment was entered in favor of Pease and Girard, and all claims against Gavin, Yatron, and Berks County were dismissed with prejudice on January 4, 1996.

The present action arises out of the same 1990 criminal investigation and 1991 prosecution. Specifically, plaintiff asserts claims under 42 U.S.C.A. § 1983 for the following violations of the Fourth and Fourteenth Amendments: (1) malicious prosecution against Berks County District Attorneys James Gavin and George Yatron, Pennsylvania State Police Officers James Girard and

Gregory Pease, and Berks County (Count I); and (2) illegal search and seizure against Gavin, Yatron, Girard, Pease, Pennsylvania State Police Officer John Shanahan, Pennsylvania Deputy Attorney General Richard Patton, First Savings Bank of Perkasie (First Savings), First Savings employee Robert Schwartz, and Berks County (Count II). Plaintiff also seeks monetary damages from First Savings and Schwartz for alleged violations of the Right to Financial Privacy Act, 12 U.S.C.A. §§ 3401-3422 (Count IV).¹ Finally, plaintiff alleges various violations of the Pennsylvania Wiretapping and Electronic Surveillance Control Act by Gavin, Yatron, Girard, Pease, Patton, Pennsylvania State Police Officer Jeffrey Hawbecker, and Montgomery County District Attorney Michael Marino (Counts V-VIII)

Presently before me are various motions to dismiss the complaint for failure to state a claim pursuant to Rule 12(b)(6) and a motion for judgment on the pleadings pursuant to Rule 12(c). For the reasons discussed below I will grant the motions as to Counts II and IV-VIII. Defendants' motion to dismiss Count I will be denied.

I.

A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of the complaint. In considering a motion to dismiss, I must accept as true all well-pleaded factual allegations contained in the complaint and draw all reasonable inferences in plaintiff's favor. I may consider matters of public record, orders, exhibits attached to the complaint and items appearing in the record of the case without converting a Rule 12(b)(6) motion into a motion for summary judgment. See

¹ Plaintiff has withdrawn Count III of his complaint, which alleged claims for abuse of process. Since Evanko is named as a defendant only as to Count III, the Court need not consider his arguments to dismiss.

Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1385, n. 2 (3d Cir. 1994). I may grant defendants' motions only if I conclude that plaintiff would not be entitled to relief under any set of facts consistent with his allegations. See Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F. 3d 1250, 1261 (3d Cir. 1994).

A motion for judgment on the pleadings is subject to the same standards as a Rule 12(b)(6) motion to dismiss. Constitution Bank v. DiMarco, 815 F. Supp. 154, 157 (E.D. Pa. 1993).

II.

I will first consider defendants' motions to dismiss Counts I and II of plaintiff's complaint. Defendants Gavin, Yatron, Berks County, Patton, Girard, Pease, Shanahan, and Hawbecker argue that under the doctrine of claim preclusion, plaintiff's § 1983 claims for malicious prosecution (Count I) and for illegal search and seizure (Count II) are barred by this Court's judgment in the previous action brought by plaintiff, Donahue v. Gavin, et al, Civil Action No. 95-2145.²

Claim preclusion provides that when a court has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591, 597 (1948), quoting Cromwell v. County of Sac., 94 U.S. 351,

² Though defendants Gavin, Yatron, and Berks County have not filed a motion to dismiss, they do assert claim preclusion as an affirmative defense in their answer to plaintiff's complaint. Accordingly, I will include these defendants in my analysis.

I note that defendants Patton, Girard, Pease and Shanahan also move for the dismissal of any state law claims for malicious prosecution and illegal search and seizure. However, since plaintiff states in his response to the motion that he has not alleged any such claims, I will not address this portion of defendants' motion.

352 (1876). In other words, the assertion of a new legal theory in a subsequent lawsuit does not avoid claim preclusion if both the prior and the subsequent lawsuits are based upon the same cause of action. See Lubrizol Corp. v. Exxon Corp., 929 F.2d 960, 963 (3d Cir. 1991).

To assert claim preclusion as a bar to plaintiff's claims, defendants must show that there has been: (1) a final judgment on the merits in a prior suit (2) which was based on the same cause of action and (3) which involved the same parties or their privies. See Lubrizol, 929 F.2d at 963, citing United States v. Athlone Indus., Inc., 746 F.2d 977, 983 (3d Cir. 1984). As to the first element, it appears undisputed that this Court has entered a final judgment on the merits of a previous civil action brought by plaintiff.³

As to the second element, whether ~~to~~ lawsuits are based on the identical cause of action "turn[s] on the essential similarity of the underlying events giving rise to the various legal claims." Athlone Indus., Inc., 746 F.2d at 983, quoting Davis v. United States Steel Supply, 688 F.2d 166, 171 (3d Cir. 1982). Rather than applying this conceptual test mechanically, courts should focus on its underlying purpose: to require a plaintiff to present all claims arising out of the same occurrence

³ As stated previously, the Court granted defendants' separate Rule 12(b)(6) and Rule 56 motions on the grounds that the plaintiff's claims were barred by the applicable statute of limitations. A dismissal on statute of limitations grounds is treated as a judgment on the merits. See e.g. Fed. R. Civ. P. 41(b); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 228 (1995).

I note that neither party addresses the fact that the orders granting the defendants' motions were stamped with the following: "No timely brief, answer or response has been filed and the Court grants this motion as uncontested under Local Rule of Civil Procedure 7.1(c)". The Court of Appeals has held that a district court cannot grant a motion for summary judgment or a motion to dismiss for failure to state a claim without an analysis of the merits simply because the motion is unopposed. Stackhouse v. Mazurkiewicz, 951 F.2d 29, 30 (3d Cir. 1991). However, the order granting summary judgment does state that judgment is entered "upon consideration of defendants Pease's and Girard's [motion]," and the order dismissing plaintiff's claims asserts that they are "barred by the applicable statute of limitations." I therefore find it proper to conclude that the court did in fact undertake an analysis of the merits.

in a single suit. Athlone Indus., Inc., 746 F.2d at 983-84.

It is undisputed that the first suit involved the same investigation, the same electronic surveillance, the same search of plaintiff's home, the same seizures from his bank, and the same arrest and prosecution that are at issue in Counts I and II. Plaintiff argues, however, that he could not have brought those claims as part of the first suit. He contends that under Heck v. Humphrey, 512 U.S. 477 (1994), he did not have a cognizable cause of action under § 1983 for either malicious prosecution or illegal search and seizure until the entry of nolle prosequi in April 1997.

In Heck the Court addressed whether an inmate may recover damages under § 1983 for unconstitutional conviction or imprisonment. Noting that § 1983 creates a species of tort liability, the Court first looked to the common law of torts and found that malicious prosecution provided the closest analogy to the plaintiff's claims. Id. at 483-84. In a malicious prosecution action, one element which must be alleged and proved is termination of the prior criminal proceeding in favor of the accused. Id. at 484. The Court recognized that the rationale behind this requirement --a desire both to avoid parallel litigation over issues of criminal culpability and to prevent civil tort actions from being used as vehicles for collateral attacks on criminal convictions-- also applied to § 1983 damages actions in which the plaintiff, to prevail, must necessarily prove the unlawfulness of his conviction or confinement. Id. at 486. The Court therefore held that to recover damages for allegedly unconstitutional conviction or for other harm caused by actions whose unlawfulness would render a conviction invalid, a § 1983 plaintiff must prove that the conviction has been reversed, expunged, or otherwise declared invalid by a tribunal authorized to make such a finding. Id. at 486-87. Accordingly, a § 1983 cause of action for such damages does not accrue until the criminal proceedings have terminated in the plaintiff's favor. Id. at 489-90.

Under Heck, therefore, plaintiff did not possess a cognizable claim for malicious prosecution until entry of the nolle prosequi. Moreover, plaintiff did not assert a malicious prosecution claim in the first suit. Since Count I neither was nor could have been brought as part of the first suit, it is not barred by the prior judgment.

Count II, however, simply restates claims for illegal searches and seizures which were asserted in the first suit and dismissed with prejudice. Thus, whether or not these claims were premature under Heck when they were asserted in the first suit, they were in fact the subject of a final judgment on the merits.⁴ The claim preclusive effect of that judgment is not altered by the fact that the judgment may have been wrong. Federated Dep't. Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981). The proper place for arguing the merits of a prior judgment is before the Court of Appeals; such arguments will not be considered here.

As to Count II then, I now turn to the final element of claim preclusion: the presence in both the prior and the subsequent lawsuits of either the same parties or their privies. Of the defendants named in the present action, Gavin, Yatron, Berks County, Girard, and Pease were parties to the first suit. Plaintiff is clearly barred by the doctrine of claim preclusion from asserting Count II against those defendants.

Though defendants Shanahan and Patton contend that they are in privity with the defendants in the first suit and thus share in the claim preclusive effects of the previous judgment, they offer little support for this contention. Defendants simply point to a doctrine first enunciated by the Court of Appeals in Bruszewski v. United States, 181 F.2d 419 (3d Cir. 1950), under which claim

⁴ As set forth below, however, I conclude that these claims were not premature under Heck.

preclusion may be invoked against a plaintiff who has previously asserted essentially the same claim against different defendants where there is a close or significant relationship between successive defendants. Id. at 422-23; see also Gambocz v. Yelencsics, 468 F.2d 837, 840-42 (3d Cir. 1972); Lubrizol, 929 F.2d at 966.⁵ However, the only “close or significant relationship” pointed to by defendants is their joint participation in the 1990 investigation and 1991 prosecution. This “relationship” is not of the type envisioned in Bruszewski or its progeny. See e.g. Bruszewski, 181 F.2d at 420-23 (relationship between agent and principal); Gambocz, 468 F.2d at 842 (relationship between alleged co-conspirators); Lubrizol, 929 F.2d at 966 (relationship between parent company and its wholly-owned affiliate). Accordingly, defendants Shanahan and Patton cannot share in the claim preclusive effects of the previous judgment.⁶

As to Count II alone, all the defendants named in that count also contend that it is barred by the applicable statute of limitations. Civil rights claims under § 1983 are governed by state statutes of limitations for personal injury actions. Wilson v. Garcia, 471 U.S. 261, 276-79 (1985). Thus,

⁵ The term “privity” simply expresses a conclusion that in this particular instance claim preclusion is proper. As Judge Goodrich noted in his concurring opinion, privity “is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the [claim preclusion].” Bruszewski, 181 F.2d at 423.

⁶ As noted previously, alleged co-conspirators do share the type of “close or significant relationship” which will allow new defendants to benefit from claim preclusion. Gambocz, 468 F.2d at 842; see also Neal v. Summers, No. CIV.A.93-2822, 1993 WL 381444, at *1 (E.D. Pa. Sept. 28, 1998) (alleged co-conspirators are by definition in privity).

Though plaintiff does allege, in conclusory fashion, that Gavin, Yatron, Berks County, Girard, Pease, Shanahan, and Patton “all conspired unlawfully . . . to look into, disclose and otherwise invade plaintiff’s personal records and effects without due process,” Complaint ¶164, he neither asserts a claim for civil conspiracy nor makes any further allegations of any conspiracy or plan concerning the civil rights violations alleged in Count II. Although the question is not free from doubt, I conclude that a generous reading of the complaint under the lenient standards of Rule 12 requires me to discount that single conclusory allegation of conspiracy and consider defendants as mere joint tortfeasors.

because Pennsylvania's statute of limitations for personal injury is two years, see 42 Pa. C.S.A. § 5524, plaintiff's § 1983 claims are subject to a two-year limitations period. See Sameric Corp. of Delaware v. City of Philadelphia, 142 F.3d 582, 599 (3d Cir. 1998).

For Count II the statute of limitations would ordinarily begin to run at the time plaintiff knew or should have known that defendants had committed actions which violated his Fourth Amendment rights. See Genty v. Resolution Trust Corp., 937 F.2d 899, 919 (3d Cir. 1991). Based on the allegations contained in plaintiff's complaint, the searches and seizures conducted by the defendants occurred in November of 1990. Plaintiff does not assert that he was unaware of these alleged violations at the time they occurred or, at the latest, at the time of his trial in 1991. Since he did not file suit until March 26, 1998, the statute of limitations would ordinarily bar his complaint.

Plaintiff contends, however, that Heck postponed the accrual of his claim for illegal search and seizure until the entry of the nolle prosequi on April 3, 1997. I do not agree. In Heck the Supreme Court observed that concerns for the proper boundary between the criminal and the civil sides of the legal system do not apply to civil claims which, even if successful, do not necessarily imply that a conviction is invalid. The Court held that when analyzing whether a § 1983 claim is cognizable, a district court must first consider if a judgment in the plaintiff's favor would necessarily demonstrate the invalidity of the plaintiff's underlying conviction. Heck, 512 U.S. at 487. If a judgment for the plaintiff would not necessarily imply that the conviction is invalid, then the claim should be allowed to proceed. Id. As an example of claims under § 1983 which would not necessarily imply the invalidity of a plaintiff's underlying conviction, the Court pointed to claims for illegal search and seizure. The Court stated that:

. . . a suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiff's still-outstanding conviction. Because of doctrines like independent source and inevitable discovery, . . . , and especially harmless error, . . . , such a § 1983 action, even if successful, would not necessarily imply that the plaintiff's conviction was unlawful. In order to recover compensatory damages, however, the § 1983 plaintiff must prove not only that the search was unlawful, but that it caused him actual, compensable injury, . . . , which, we hold today, does not encompass the "injury" of being convicted and imprisoned (until his conviction has been overturned).

Id. at 487 n.7 (citations omitted).

Like the Seventh Circuit, I read this language to hold that a claim based on an unlawful search or seizure may be brought immediately, since a violation of the Fourth Amendment does not necessarily impugn the validity of a conviction. See Gonzalez v. Entress, 133 F.3d 551, 553 (7th Cir. 1998); Simpson v. Rowan, 73 F.3d 134, 136 (7th Cir. 1995); see also Datz v. Kilgore, 51 F.3d 252, 253 n.1 (11th Cir. 1995) (As to civil action for illegal search and seizure brought before the commencement of criminal proceedings, "Heck v. Humphrey is no bar . . . because, even if the pertinent search did violate the Constitution, [plaintiff's] conviction might still be valid considering such doctrines as inevitable discovery, independent source, and harmless error."); Gregory v. Hasara, No. CIV.A. 90-2289, 1995 WL 156050, at *1 (E.D. Pa. Mar. 21, 1995) (some constitutional violations, such as an unreasonable search and seizure in violation of the Fourth Amendment, would support a damage recovery irrespective of the outcome of the criminal proceeding.) But see Schilling v. White, 58 F.3d 1081 (6th Cir. 1995) (holding that a § 1983 action alleging an unconstitutional search or seizure is premature, and must be dismissed without prejudice, if brought while the plaintiff still faces criminal punishment). It is possible for an individual to be properly convicted even though he was unlawfully arrested or his property unlawfully searched. As Judge

Easterbrook points out, “this does not mean that damages are unavailable for the invasion of privacy, the broken door, and so on.” Gonzalez, 133 F.3d at 554. Accordingly, a § 1983 claim for illegal search and seizure accrues at the time of the alleged Fourth Amendment violation. Id. at 553; Simpson, 73 F.3d at 136. Heck merely eliminates one element of damages, the injury from wrongful conviction, while that conviction stands. Id. at 554. See also Trimble v. City of Santa Rosa, 49 F.3d 583, 585 (9th Cir. 1995) (“To bring an action for damages for unreasonable search prior to the invalidation of his conviction, [plaintiff] must allege some ‘actual, compensable injury . . . which . . . does not encompass the injury of being convicted and imprisoned.’”) Accordingly, neither Heck nor its reasoning postpones the accrual of plaintiff’s claims for illegal search and seizure.

Though not invoked by plaintiff, the doctrine of equitable tolling will not save this claim. Equitable tolling is designed to shelter a plaintiff from the statute of limitations in cases where strict application would be unfair. Miller v. New Jersey State Dep’t. of Corrections, 145 F.3d 616, 618 (3d Cir. 1998). Plaintiff clearly has a strong argument that a strict application of the statute of limitations would lead to an inequitable result.⁷ However, “where the plaintiff’s failure to file timely cannot be attributed to any inequitable conduct on the part of the defendant, an automatic extension of the statute of limitations by the length of the tolling period does not make sense as a matter of equity.” Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1390 (3d Cir. 1994); see also

⁷ As set forth previously, a claim for illegal search and seizure accrues at the time of the alleged Fourth Amendment violation; Heck merely knocks out one element of damages --the injury from wrongful conviction and imprisonment-- while that conviction stands. In the present action the statute of limitations for Count II would ordinarily have expired no later than 1993. However, a nolle prosequi was not entered in plaintiff’s criminal proceedings until 1997. Thus, a strict application of the statute of limitations would mean that plaintiff could never have recovered damages for wrongful conviction and imprisonment attributable to the alleged illegal searches and seizures.

Cada v. Baxter Healthcare Corp., 920 F.2d 446, 451-53 (7th Cir. 1990). The purpose of equitable tolling in such circumstances is achieved if the time for filing is extended by a reasonable period after the justification for delay has ended. Phillips v. Heine, 984 F.2d 489, 491-92 (D.C. Cir. 1993). Here, the justification for delay-- namely, Heck's bar to the recovery of damages for wrongful conviction until that conviction has been overturned-- ceased when the nolle prosequi was entered on April of 1997. Whatever a reasonable extension of the statutory period might be, it does not encompass the full eleven and one-half months that passed before plaintiff filed suit in March of 1998. See Heine, 984 F.2d at 492 (reasonable extension of limitations period for purposes of equitable tolling does not span nine and one-half months). Accordingly, the statute of limitations bars plaintiff from asserting Count II.

III.

Next, I turn to defendants' motions to dismiss Counts V-VIII, which set forth various claims under the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. C.S.A. §§ 5701-5781. Defendants contend that the applicable statute of limitations bars these claims.⁸

Plaintiff's wiretapping claims are subject to a six-year statute of limitations. Boettger v. Miklich, 142 Pa. Commw. 136, 142, 599 A.2d 713, 716 (1991), rev'd on other grounds, 534 Pa. 581, 633 A.2d 1146 (1993). Under Pennsylvania law, a claim accrues and the statute of limitations begins to run at the time the plaintiff has the right to institute and maintain a suit, which is generally at the time of the initial injury. Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc., 503 Pa. 80, 84-85, 468

⁸ Defendants Gavin, Yatron, and Berks County also assert a statute of limitations defense to these claims in their answer. Accordingly, I will include these defendants in my analysis even though they have not filed a motion to dismiss.

A.2d 468, 471 (1983).

The allegedly illegal wiretaps occurred during 1990; evidence obtained from the surveillance was disclosed at trial in 1991. Plaintiff does not allege that he was unaware of the injury caused by these acts at the time of his trial in October of 1991, when the nature and extent of this surveillance would have been revealed. Moreover, in January, 1992 plaintiff filed his state court action with the Court of Common Pleas of Northampton County asserting essentially the same allegations as those contained in Counts V-VIII.⁹ Since plaintiff was clearly aware of his alleged injury by January 1992, the limitations period for plaintiff's wiretapping claims expired no later than January 1998, more than two months before this action was filed on March 26, 1998.¹⁰ Accordingly, Counts V-VIII will be dismissed as untimely.

IV.

Finally, I turn to defendants' motion for judgment on the pleadings with respect to Count IV of plaintiff's complaint. In this count plaintiff alleges violations of the Right to Financial Privacy Act (RFPA), 12 U.S.C. §§ 3401-3422. The RFPA prohibits financial institutions from providing access to their customers' financial records to any "governmental authority," except in accordance with the provisions of the Act. 12 U.S.C. § 3402. The RFPA also provides a private cause of action

⁹ I note that the commencement of an action in state court does not toll the running of the statute of limitations against subsequent actions in federal court. Falsetti v. Local Union No. 2026, United Mine Workers of America, 355 F.2d 658, 662 (3d Cir. 1966); Hatchard v. Dipalma, No. CIV.A.96-3020, 1997 WL 164238, at *4 (E.D. Pa. Mar. 27, 1997).

¹⁰ Heck is irrelevant to plaintiff's wiretapping claims since their accrual is governed by state law. Moreover, as discussed previously, Heck recognizes that claims for illegal search and seizure do not necessarily imply that a civil plaintiff's underlying conviction is invalid. Heck, 512 U.S. at 486-87.

against financial institutions which violate this prohibition. 12 U.S.C. § 3417(a). However, the term “governmental authority” is defined as “any agency or department *of the United States*, or any officer, employee, or agent thereof.” 12 U.S.C. § 3401(3) (emphasis added). Thus, the RFPA does not restrict state authorities’ access to financial information. See United States v. Zimmerman, 957 F. Supp. 94, 95-6 (N.D. W. Va. 1997).

Since plaintiff does not allege that federal authorities had any role in the events giving rise to his RFPA claims, he has failed to state a cause of action pursuant to that Act. Accordingly, defendants First Savings and Schwartz are entitled to judgment in their favor with respect to Count IV.

An appropriate order follows.

IN THE UNITES STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHRISTOPHER F. DONAHUE

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CIVIL ACTION

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JAMES GAVIN, et al.

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NO. 98-1602

ORDER

AND NOW this day of March, 1999, upon consideration of defendants' motions and plaintiff's responses thereto, it is hereby ORDERED that the motions are GRANTED IN PART and DENIED IN PART:

- (1) Count II and Counts IV-VIII of plaintiff's complaint are DISMISSED;
- (2) Count III of plaintiff's complaint is DISMISSED because it has been withdrawn; and
- (3) defendants' motions to dismiss Count I of plaintiff's complaint are DENIED.

THOMAS N. O'NEILL, JR. J.