

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

FRANK CRAIG, trading as FRANK : CIVIL ACTION  
CRAIG AUTO BODY :  
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v. :  
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JACK SALAMONE, MAYOR OF BOROUGH :  
OF NORRISTOWN : NO. 98-3685

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

April 8, 1999

Plaintiff Frank Craig ("Craig") filed an action against the defendant, Jack Salamone ("Salamone"), Mayor of the Borough of Norristown ("the Borough"), for allegedly breaching a 1994 exclusive towing contract, entered into by Craig and Salamone's predecessor. Craig initially filed his action only against Salamone<sup>1</sup> in 1994 in the Delaware County Court of Common Pleas, amended the complaint later that year, and then, on January 12, 1998, filed a separate complaint against the Borough. Craig's motion to consolidate the newly asserted claim against the Borough with the existing claim against Salamone was granted on April 16, 1998. On June 19, 1998, Craig was granted leave to file a second amended complaint in the consolidated action, in which he added a claim under 42 U.S.C. § 1983 and added the Borough as a defendant.<sup>2</sup> Salamone removed the amended action to

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<sup>1</sup>The initial complaint also named Salamone's attorney, Paul Vangrossi, as a defendant but he was subsequently dismissed.

<sup>2</sup>Craig had already filed a separate action against the Borough, but stated that his motion to amend the consolidated action to add the Borough as a defendant was done "out of an abundance of caution." (Pl.'s Br. Supp. Mot. to Consolidate at 3).

this court and subsequently filed a motion to dismiss.<sup>3</sup> During oral argument on the motion to dismiss, the court questioned the timeliness of removal and the possibility of remand. The removal was untimely but, absent a timely motion to remand, no remand was possible.

Craig timely filed a claim against Salamone; the newly asserted § 1983 claim relates back to the original claims, so the motion to dismiss the § 1983 claim against Salamone will be denied. Craig also states pendent state law claims for breach of contract, tortious interference with prospective contractual relations, and intentional infliction of emotional distress. Salamone's motion to dismiss will be denied as to the breach of contract and tortious interference claims, and granted as to the claim for intentional infliction of emotional distress. The original action was filed only against Salamone in his individual, rather than his official capacity. Therefore the Borough was not on notice of the 1983 claim against it until it was first named a defendant well after the statute of limitations had run. The § 1983 claim against the Borough will be dismissed, as will any pendent state law claims for lack of an independent basis of jurisdiction.

#### **BACKGROUND**

Craig does business as Frank Craig Auto Body, with his

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<sup>3</sup>Although the removal and motion to dismiss were filed by Salamone only, the same attorney represents both Salamone and the Borough and Salamone's motion to dismiss raises arguments on behalf of the Borough. Although the court would have preferred the motion papers be more clear, it will regard the motion to dismiss on behalf of both defendants.

principal place of business in Norristown, Pennsylvania. (Second Am. Compl. ¶ 1). In December, 1993, the Borough solicited bids for a two-year exclusive towing contract. (Id. ¶ 3). On review of the bids submitted Craig was found the only qualified, responsible bidder. (Id. ¶ 5). He was awarded the contract on January 1, 1994; (id. ¶ 6) the contract was executed that day. (Id. ¶ 7). Salamone was sworn in as the new mayor of the Borough on January 3, 1994 and repudiated the towing contract approximately ten days later. (Id. ¶¶ 9-10). Salamone thereafter entered into a new towing contract with a political supporter. (Id. ¶ 13).

## **DISCUSSION**

### **I. Standard**

In considering a motion to dismiss under Rule 12(b)(6), the court "must take all the well pleaded allegations as true, 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) (citations omitted), cert. denied, 489 U.S. 1065 (1989); see Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). The court must decide whether "relief could be granted on any set of facts which could be proved." Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988). A motion to dismiss may be granted only "if 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).

## II. The Federal Claim

This court’s federal question jurisdiction is invoked under 28 U.S.C. § 1331 because of Craig’s claim under 42 U.S.C. § 1983.<sup>4</sup> The motion to dismiss claims the § 1983 count is barred by the statute of limitations. If so, the court may decline to exercise jurisdiction over the state law issues. See 28 U.S.C. § 1367(c)(3).

### A. The Timeliness of Removal

This court questioned the timeliness of removal; if the federal claim was raised in the first amended complaint in 1994, then Salamone’s removal was untimely under 28 U.S.C. § 1446(b).

28 U.S.C. § 1446(b) provides:

The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through

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<sup>4</sup>42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof 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....

service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 U.S.C. § 1446(b).

Salamone did not remove this action until almost four years after he received notice of Craig's federal claim from the first amended complaint, well after the time for removal permitted under 28 U.S.C. § 1446.

Salamone places great emphasis on Ruiz v. Philadelphia Housing Auth., 1997 WL 28698 (E.D. Pa. Jan. 24, 1997), in which the court found that a civil cover sheet describing plaintiff's claim as "Miscellaneous - Civil Rights," served on defendants without accompanying complaint or summons, provided insufficient notice of a federal claim. Ruiz, 1997 WL 28698 at \*2. The Ruiz decision is distinguishable on its facts because the Ruiz defendants had no inkling of the underlying factual allegations and no way to know whether the asserted civil rights violations were federal. Id.

Other cases in which the court has declined to find sufficient notice of the right to remove have involved similarly ambiguous claims. See, e.g., Richstone v. Chubb Colonial Life Ins., 988 F. Supp. 401, 403 (S.D.N.Y. 1997)(claim to "recover monies arising out of nonpayment for services rendered did not enable defendant to "intelligently ascertain" removability); Akin

v. Big Three Industries, Inc., 851 F. Supp. 819, 825 (E.D. Tex. 1994)(allegation that plaintiffs were exposed to toxic fumes "while working for the United States Air Force at Tinker Air Force Base" was too ambiguous to notify defendant of federal claim); Pack v. AC and S, Inc., 838 F. Supp. 1099, 1102 (D. Md. 1993)(allegations of harm by exposure to asbestos did not trigger the removal period).

Here, in contrast, Salamone had the benefit of two complaints, the second of which described, albeit inelegantly, the federal nature of the claim against him. Craig's first amended complaint alleged that Salamone deprived him of his property rights, a claim that in this factual context was clearly predicated on the Constitution; the first amended complaint put Salamone on sufficient notice that he was being sued in a civil rights action and his right to removal was triggered by that notice.

However, Craig did not object to the untimely removal within thirty days. Since the Borough, made a party on January 12, 1998, never removed the action before Salamone did so on July 16, 1998 (after the second amended complaint was filed) removal by the Borough would also have been untimely. The court asked the parties to brief whether the court had the power sua sponte to remand if Salamone's removal was untimely. Craig and Salamone argued that absent a jurisdictional defect a court may not remand an improperly removed action more than thirty days after removal.

28 U.S.C. § 1447(c); Air-Shields, Inc. v. Fullam, 891 F.2d 63, 65 (3d Cir. 1989). The court is now without power to remand this action to state court sua sponte.

B. Statute of Limitations

Craig's initial complaint stated claims for breach of contract and tortious interference with contractual relations and prospective business relations. Several months later, Craig filed his first amended complaint, clarifying the allegations asserted in his initial complaint. Although Craig did not specifically cite 42 U.S.C. § 1983, it was reasonably clear from the allegations of the amended complaint that a § 1983 claim was made. Craig asserted that Salamone "embarked on a campaign of harassment and official intimidation of Plaintiff," (First Am. Compl. ¶ 34), and concluded his amended second count by claiming that Salamone "interfered with Plaintiff's contract and have unlawfully deprived him of property rights related thereto, said actions are outrageous, without justification, based in political vendetta and bias, and are in blatant disregard of Plaintiff's rights." (Id. ¶ 37).

The appropriate inquiry is whether the facts alleged in the complaint are sufficient to state a deprivation of a constitutional right. See Colburn, 838 F.2d at 667. Paragraph thirty-seven in the first amended complaint, although scarcely a model of the clear pleading standards contemplated by Federal Rule of Civil Procedure 8, was sufficient to notify Salamone that

a § 1983 or other federal claim was being filed against him.<sup>5</sup>

Salamone has moved to dismiss the § 1983 claim. Craig alleges that the defendant Borough entered into a contract with plaintiff, breached the contract with improper motive, and deprived plaintiff of his protected property interest in the contract. None of the underlying facts are in dispute and, as a "contract with a state entity can give rise to a property right protected under the Fourteenth Amendment," Unger v. National Residents Matching Program, 928 F.2d 1392, 1397 (3d Cir. 1991), the facts alleged are sufficient to state a § 1983 claim. See, e.g., Blackwell v. Mayor and Commissioners of Delmar, 841 F. Supp. 151, 154-55 (D. Md. 1993) (recognizing the possibility for a due process claim for the breach of a public contract). Salamone first had notice of the § 1983 claim when Craig's first amended complaint was filed and served in May, 1994. This claim was brought within the statute of limitations; the motion to dismiss Craig's § 1983 claim will be denied.<sup>6</sup>

### C. The Borough as Defendant

In both a separate complaint and in his Second Amended

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<sup>5</sup>§ 1983 claims are not brought against private actors, but only those acting "under color of state law." Although a municipal official, such as Salamone, can be expected to have at least a passing familiarity with the type of liability to which his office exposes him, this court does not base its decision on this presumption as "the issue is not what the defendant knew, but what the relevant document said." Rowe v. Marder, 750 F. Supp. 718, 721 (W.D. Pa. 1990), aff'd, 935 F.2d 1282 (3d Cir. 1991).

<sup>6</sup>Moreover, as "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading," the claims in Craig's second amended complaint relate back to the filing of the first amended complaint. Fed. R. Civ. P. 15(c)(2).

Complaint, Craig added the Borough as a defendant, although the claims asserted against the Borough are not clear. Whatever the claims, whether they are barred by the statute of limitations depends on whether the claims relate back to the initial or the first amended complaint against Salamone. The Borough would have been on notice if Salamone were sued in his official capacity because such an action, as distinguished from an action against Salamone in his individual capacity, would have been in effect an action against the Borough itself. An official-capacity suit is the same as a suit against the office that the official represents; it seeks relief from the state or local entity. See Kentucky v. Graham, 473 U.S. 159, 165-66 (1985). An individual-capacity suit alleges wrongful conduct taken under color of state law and seeks relief from the defendant personally.

It is not stated in either the initial or first amended complaint whether Craig brought his action against Salamone in his individual or official capacity. When the complaint is unclear, a district court should "look to the complaints and the 'course of proceedings'" to determine in what capacity the defendant is being sued. Melo v. Hafer, 912 F.2d 628, 635 (3d Cir. 1990), aff'd, 502 U.S. 21 (1991)(quoting Graham, 473 U.S. at 167 n.14). Important factors to consider include the allegations in the complaint, the nature of the relief sought, and affirmative defenses raised. See Melo, 912 F.2d at 635-37; Gregory v. Chehi, 843 F.2d 111, 119-20 (3d Cir. 1988); Biggs v. Meadows, 66 F.3d 56, 61 (4th Cir. 1995).

The caption to the initial and first amended complaints names "Jack Salamone, Mayor of the Borough of Norristown." Some courts have looked to this statement of title as indication of an official capacity suit, see Davoll v. Webb, 943 F. Supp. 1289, 1295 (D. Colo. 1996)(a caption reading "Wellington Webb, in his capacity as the Mayor of the City," clearly stated an official-capacity claim), but the title merely reflects Salamone's position as one "under color of state law," a prerequisite to any § 1983 claim. See Melo, 912 F.2d at 636; Pieve-Marin, 967 F. Supp. at 671.

Craig makes no allegation in his initial or first amended complaint of any unconstitutional policy, custom, or practice made or implemented by Salamone. Municipal liability must be predicated on an official policy, practice, or custom of the municipality, not the doctrine of respondeat superior. See Monell v. Department of Soc. Servs. of New York, 436 U.S. 658, 691 (1978). In both Craig's initial complaint and first amended complaint, he alleged only that Salamone "acted by, through, pursuant and in concert with his attorney, Paul Vangrossi to nullify and void Plaintiff's contractual rights." (Compl. ¶ 15; First Am. Compl. ¶ 18).<sup>7</sup> This strongly suggests Craig did not

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<sup>7</sup>Craig filed a separate action against the Borough in January, 1998 and, in his second amended complaint, added the Borough as a defendant. This bolsters the conclusion that Craig's earlier complaints were against Salamone in his individual capacity only; if Craig had previously intended to sue Salamone in his official capacity, the separate action and addition of the Borough would have been redundant. In his Motion for Leave to Amend the Complaint, Craig stated that he intended to sue Salamone in his official capacity, but wanted to add the Borough as a proper party anyway. (Pl's Mot. to Amend Compl. ¶¶ 4-8). Apparently, Craig retained new counsel shortly before adding the Borough and the new counsel recognized the previous

intend to sue Salamone in his official capacity. See Biggs, 66 F.3d at 61; Morton v. City of Little Rock, 934 F.2d 180, 183-84 (8th Cir. 1991); Hill v. Shelander, 924 F.2d 1370, 1373 (7th Cir. 1990); Pieve-Marín v. Combas-Sancho, 967 F. Supp. 667, 671 (D.P.R. 1997).

Craig sought punitive damages from Salamone. Punitive damages are not available if Salamone was sued in his official capacity because punitive damages are not recoverable against local governments. This claim for relief further supports the conclusion that Craig sued Salamone only in his individual capacity. See Kentucky v. Graham, 473 U.S. 159, 167 n.13 (1985); Chehi, 843 F.2d at 119-20; Shabazz v. Coughlin, 852 F.2d 697, 700 (2d Cir. 1988).

In his answer to the first amended complaint, Salamone asserted eighteen affirmative defenses. (Ans. ¶¶ 38-55). The last two of these claimed that "Mayor Salamone is immune from plaintiff's claims," (id. ¶ 54), and that "Mayor Salamone's actions and/or omissions were privileged." (Id. ¶ 55). Raising the defense of immunity suggests Salamone's awareness of a claim brought against him in his individual capacity, as the defense of qualified immunity is available only for officials acting in their individual capacity. See Brandon v. Holt, 469 U.S. 464, 472-73 (1985). The nature of the affirmative defenses, the

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oversight in pleading. (Pl.'s Br. Supp. Mot. Consolidate at 3). As regrettable as this previous oversight might have been, it does not change the fact that, by all discernable measures, Salamone was sued in only his individual capacity in Craig's original and first amended complaints.

allegations in the complaint, and the nature of the relief sought demonstrate that Craig filed suit against Salamone in his individual capacity only.

Therefore, the Borough did not become a defendant until Craig filed a separate action against it, after the statute of limitations had run. The Borough may only be added as a defendant if the claims against it relate back under Federal Rule of Civil Procedure 15(c):

An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, 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.

Fed. Rule Civ. P. 15(c).

The claim against the Borough arises out of the same conduct set forth in the earlier complaints, but the Borough would not have known that Craig intended to bring an action against it, and would be prejudiced by joinder more than four years after the expiration of the statute of limitations. Cf. Urrutia v. Harrisburg County Police Dep't, 91 F.3d 451, 457-58 (3d Cir.

1996)(permitting amendment to allow naming of individual police officers as defendants when the original complaint was filed against the police department only); Spell v. McDaniel, 591 F. Supp. 1090, 1098 (E.D.N.C. 1984) (granting leave to amend complaint to add a claim that city had policy of condoning police misconduct when city was already named as a defendant, was on notice of the allegations against it, and would not be prejudiced by the amendment).

The Borough was not named a defendant in the original or first amended complaint; it was not on notice of the § 1983 claim against it within the two year statute of limitations period.<sup>8</sup> "A failure of notice will prevent relation back." 6A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1497 (1990). As the claim against the Borough does not relate back to either the original or first amended complaints, the § 1983 claim against the Borough will be dismissed as untimely filed. All other claims against the Borough will be dismissed for lack of independent or supplemental jurisdiction over the state law claims. 28 U.S.C. § 1367.

### **III. The State Law Claims**

Craig contends that this court may not consider Salamone's motion to dismiss the state law claims because the arguments raised by Salamone were already rejected by the state court judge

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<sup>8</sup>Craig suggests that a longer statute of limitations might apply given the underlying contractual nature of the § 1983 claim, but the Court of Appeals has already rejected this argument as "plainly frivolous." Kost v. Kozakiewicz, 1 F.3d 176, 190 (3d Cir. 1993).

when he dismissed Salamone's preliminary objections to Craig's first amended complaint and are the "law of the case." (See Pl.'s Br. Opp'n Def,'s Mot. to Dismiss at 5-7). But dismissal of preliminary objections without opinion does not constitute "law of the case" and does not preclude later determination of the same issues in the same litigation. See, e.g., City of Philadelphia v. Glim, 613 A.2d 613, 619 (Pa. Commw. 1992); Williams v. City of Philadelphia, 569 A.2d 419, 421 (Pa. Commw. 1990); Farber v. Engle, 525 A.2d 864, 866-67 (Pa. Commw. 1987); Solar Constr. Co., Inc. v. Department of Gen. Servs., 525 A.2d 28, 30 (Pa. Commw. 1987); see also Frazier v. Southeastern Pennsylvania Transp. Auth., 868 F. Supp. 757, 761 (E.D. Pa. 1994)(applying Pennsylvania law).

A. Breach of Contract

Craig's first claim against Salamone is for breach of contract arising from Salamone's repudiation of the towing contract. In determining whether a municipal contract will bind successive administrations, Pennsylvania law distinguishes contracts involving governmental and proprietary functions. See Commonwealth ex rel. Fortney v. Bartol, 20 A.2d 313, 314 (Pa. 1941); Moore v. Luzerne County, 105 A. 94, 96 (Pa. 1918). Governmental functions are "performed for public purposes exclusively, and belong[] to the corporate body in its public, political or municipal character" in contrast to proprietary functions, that are "for the purpose of private advantage, but the public may derive a common benefit therefrom." Falls

Township v. Scally, 539 A.2d 912, 914 (Pa. Commw. 1988). Only contracts for executing proprietary functions will bind successive municipal administrations. See id. at 913-14.

The distinction between governmental and proprietary contracts is not always clear, but as a general rule those functions that have been traditionally reserved to governmental bodies alone are deemed governmental and those historically performed by private entities are considered proprietary. See Janice C. Griffith, Local Governmental Contracts: Escaping from the Governmental/Proprietary Maze, 75 Iowa L. Rev. 277, 305-16 (1990). Factors suggesting the proprietary nature of a municipal contract include the absence of a statute compelling the municipality to perform the function in question, traditional performance of the function by private individuals, and the revenue-raising nature of the function. See Associated Pennsylvania Constructors v. City of Pittsburgh, 579 A.2d 461, 540 (Pa. Commw. 1990), appeal denied, 590 A.2d 759 (Pa. 1991)(holding that "the sale of asphalt by the City to other municipalities is a proprietary act. . .").

Towing services are a proprietary function, just as the sale of asphalt was a proprietary function in Associated Pennsylvania. No statute compels the Borough to tow illegally parked vehicles<sup>9</sup>

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<sup>9</sup>Salamone points to the Borough's power, under 53 Pa. Cons. Stat. Ann. § 46202 (1966 & Supp. 1998) to remove "public nuisances" such as illegally parked vehicles. (Def.'s Mot. to Dismiss at 12). § 46202 enumerates a partial list of the powers that a Borough has ranging from the ability of the Borough to prohibit the keeping of hogs, id. at (12), to the ability to contract for police and fire protection. Id. at (35). § 46202 is a broadly worded provision describing some of the Borough's powers, not a statutory

and towing services are routinely performed by private entities. Although the towing services contract with Craig was not revenue-raising, the Borough would have saved money because the contract provided free towing services for municipal vehicles. (See Pl.'s Mot. in Opp'n to Def.'s Mot. to Dismiss at 11). Two state courts considering the issue have concluded that a municipal towing contract serves a proprietary rather than governmental function. See Thomas v. Hilburn, 654 So.2d 898, 902 (Miss. 1995); Daly v. Stokell, 63 So.2d 644, 645 (Fla. 1953)(en banc).

Salamone argues that even if the towing contract is deemed proprietary, it is still not enforceable against Salamone as it is in contravention of the Borough's Home Charter. (Def.'s Mot. to Dismiss at 13-14). Interpretation and application of the Borough's Home Charter are not appropriately decided on a motion to dismiss. Taking Craig's allegations as true, it is not clear the contract was invalid. The motion to dismiss the breach of contract claim will be denied.<sup>10</sup>

B. Tortious Interference with Prospective Contractual Relations

Craig alleges that Salamone, by breaching the exclusive towing contract, tortiously interfered with the numerous prospective contracts Craig would have made with the individuals whose vehicles he would have towed. Tortious interference with prospective contractual relations has been long been actionable.

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mandate.

<sup>10</sup>This denial is without prejudice to a subsequent motion for summary judgment pursuant to Federal Rule of Civil Procedure 56.

See Garrett v. Taylor, 79 Eng. Rep. 485 (1621).

Under Pennsylvania law, this claim requires proof of the following four elements: "(1) a prospective contractual relation; (2) a purpose or intent to harm the plaintiff by preventing the relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual damage resulting from the defendant's conduct." Nathanson v. Med. College of Pennsylvania, 926 F.2d 1368, 1392 (3d Cir. 1991); Thompson Coal Co. v. Pike Coal Co., 412 A.2d 466, 471 (Pa. 1979).<sup>11</sup>

Craig bases his claim for tortious interference with prospective business relations on the series of contracts that he would have entered into with the individuals whose vehicles he would have towed under the municipal contract. (See Second Am. Compl. ¶ 25). The Pennsylvania "economic loss doctrine" forecloses an action in tort for economic loss resulting from a breach of contract. See Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 618-19 (3d Cir. 1995). As such, "[t]here is no cause of action for tortious interference where the plaintiff's business relationships with third parties are adversely affected [merely] as a consequence of the defendant's breach of contractual obligations to the plaintiff." Valley

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<sup>11</sup>Although courts have often blurred the distinction between tortious interference with existing and prospective contractual relations, Pennsylvania law clearly distinguishes claims of tortious interference with an existing contract and applies different standards to each. See Thompson Coal, 412 A.2d at 470-71. Craig states only a claim for tortious interference with prospective contractual relations.

Forge Convention & Visitors Bureau v. Visitors's Servs., Inc., 28 F. Supp. 2d 947, 951 (E.D. Pa. 1998)(defendant's breach of contract to mail promotional material to prospective tourists and conventioners did not support claim for tortious interference with prospective contractual relations); Glazer v. Chandler, 200 A.2d 416, 418 (Pa. 1964)(no tortious interference claim when interference with third-party contracts was only an "incidental consequence" of breach of contract).

In order to assert a tortious interference claim in addition to a breach of contract claim, a plaintiff must show defendant's intent to interfere with plaintiff's other contracts. See Valley Forge, 28 F. Supp. 2d at 951 ("Conduct by which a defendant breaches a contract . . . may also support a tortious interference claim if it is undertaken with the intention of injuring the plaintiff's business relationships.")(citations omitted).

Craig has alleged facts suggesting Salamone's intent to interfere with his business and prospective towing work, but the prospective towing jobs to be performed under the contract were not themselves contracts. Craig entered into an exclusive contract with the Borough to tow all vehicles in the Borough at the Borough's direction. The individuals whose vehicles would have been towed would not have contracted with Craig; their vehicles would have been towed without their agreement. See Restatement (Second) Contracts § 17(1)(1981) ("[F]ormation of a contract requires a bargain in which there is a manifestation of

mutual assent to the exchange and a consideration." ). The only contract Craig had with respect to this prospective towing work was with the Borough, and the Borough could not have tortiously interfered with its own contract.

However, Craig also asserts that Salamone interfered with the prospective contracts that might have been entered into with individuals whose vehicles had been towed for subsequent towing services. "[A]nything that is prospective in nature is unnecessarily uncertain . . . [there] must be something more than a mere hope or the innate optimism of a salesman." Glenn v. Point Park College, 272 A.2d 895, 898-99 (Pa. 1971). Craig cannot identify or enumerate the individuals who would have subsequently contracted for his towing services, but he alleged that his prior experience towing for the Borough resulted in "ancillary work derived from the towing jobs." (Second Am. Compl. ¶ 26).

This allegation is sufficient to withstand a motion to dismiss. See KBT Corp., Inc. v. Ceridian Corp., 966 F. Supp. 369, 376 (E.D. Pa. 1997) (denying motion to dismiss when plaintiff had "alleged the existence of a mechanism that would bring in new business on a regular basis"); see also Ebeling & Reuss, Ltd. v. Swarovski Int'l Trading Corp., 1992 WL 211554, \*7 (E.D. Pa. Aug. 24, 1992) (Shapiro, J.) ("Plaintiff must prove a reasonable probability that the contract would have been executed."). Craig's claim for tortious interference with prospective contractual relations, as it relates to the prospective contracts

that Craig would have later entered into with individuals whose vehicles he towed by contract with the Borough, survives the motion to dismiss.<sup>12</sup>

C. Intentional Infliction of Emotional Distress

Craig claims that Salamone, by intentionally and publicly repudiating the towing contract with Craig, caused him to suffer emotional distress. The tort of intentional infliction of emotional distress is available when a defendant engages in conduct that is deliberate or reckless, extreme and outrageous, and that causes severe emotional distress. See Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1988); Bedford v. Southeastern Pa. Trans. Auth., 867 F. Supp. 288, 297 (E.D. Pa. 1994). The conduct complained of must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Clark v. Township of Falls, 890 F.2d 611, 623 (3d Cir. 1989). The allegations of Craig's complaints do not satisfy this stringent standard and this claim will be dismissed.

This dismissal is without prejudice to awarding possible emotional distress damages arising from Craig's claim for tortious interference with plaintiff's prospective business relations, see Shiner v. Moriarty, 706 A.2d 1228, 1238-39 (Pa.

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<sup>12</sup>To recover damages for tortious interference with these prospective contracts, Craig will have to establish the approximate number and value of lost contracts by proof of his experience under prior towing contracts.

Super. 1998),<sup>13</sup> or from Craig's § 1983 claim. See Gravely v. City of Philadelphia, 1998 WL 47289, \*5 (E.D. Pa. Feb. 8, 1998) ("Compensatory damages are available to an individual under 42 U.S.C. S 1983 for emotional distress caused by a violation of plaintiff's legal rights.")(Shapiro, J.).

#### CONCLUSION

Craig has filed three complaints against Salamone for breach of an exclusive towing contract with the Borough. In his first amended complaint, Craig stated a timely § 1983 claim against Salamone, in his individual capacity only. Salamone did not remove this action until Craig filed his second amended complaint. This removal was untimely, but Craig did not timely move to remand so this action remains in this court.

The first amended complaint stated a claim against Salamone in his individual capacity; the motion to dismiss the § 1983 claim will be denied. The claims for breach of contract and tortious interference with business relations survive the motion to dismiss; the claim for intentional infliction of emotional distress will be dismissed without prejudice to emotional distress damages on the other tort claims.

The Borough was not put on notice of any claim against it until it was made a defendant in a separate action later consolidated with this action. Because the claims in the initial

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<sup>13</sup>This stands in contrast to a straightforward breach of contract action because a plaintiff may not ordinarily recover emotional distress damages arising from a breach of contract. See Rodgers v. Nationwide Mut. Ins. Co., 496 A.2d 811, 814 (Pa. Super. 1985).

and first amended complaint were against Salamone in his individual capacity only, the § 1983 claim against the Borough will be dismissed as barred by the statute of limitations. The state claims against the Borough, lacking an independent basis for jurisdiction, will also be dismissed.

An appropriate order follows.

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

FRANK CRAIG, trading as FRANK : CIVIL ACTION  
CRAIG AUTO BODY :  
 :  
v. :  
 :  
 :  
JACK SALAMONE, MAYOR OF BOROUGH :  
OF NORRISTOWN : NO. 98-3685

ORDER

AND NOW this 8th day of April, 1999, upon consideration of Defendants' Motion to Dismiss, Plaintiff's Response in Opposition, Defendants' Reply, Defendants' and Plaintiff's Briefs on the Issue of Remand, and in accordance with the attached Memorandum, it is **ORDERED** that defendants' motion to dismiss is **GRANTED IN PART** and **DENIED IN PART**:

1. The motion to dismiss the § 1983 claim against defendant Jack Salamone is **DENIED**.

2. The motion to dismiss the breach of contract claim against defendant Jack Salamone is **DENIED**.

3. The motion to dismiss the claim of tortious interference with prospective contractual relations against defendant Jack Salamone is **DENIED**.

4. The motion to dismiss the claim of intentional infliction of emotional distress against defendant Jack Salamone is **GRANTED**.

5. All claims against defendant the Borough of Norristown are dismissed.

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Norma L. Shapiro, S.J.