

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

JOHN McHENRY, individually and as : CIVIL ACTION  
the Natural Guardian of MICHAEL :  
McHENRY and NICOLE McHENRY, :  
Plaintiffs, :  
v. :  
COUNTY OF DELAWARE, et al., :  
Defendants. : No. 04-1011

MEMORANDUM AND ORDER

J. M. KELLY, J.

NOVEMBER , 2004

Presently before the Court is a Motion to Dismiss filed by Defendants Upper Darby Township and Officer Francis Devlin and a Motion to Dismiss filed by the County of Delaware, Officer Joseph Nigro and Joseph Swett (collectively, the "Defendants") requesting dismissal of certain claims in Plaintiffs John, Michael, and Nicole McHenry's ("Plaintiffs") Complaint. In response to both these motions, Plaintiffs filed a Consolidated Answer and Memorandum of Law ("Response").

The Defendants move for dismissal of all claims for punitive damages, which are asserted in each count of the Complaint, and of Counts V, VI, VII, VIII and IX. Counts V, VI, VII, VIII and IX seek relief under the state law theories of false arrest, false imprisonment, malicious prosecution, malicious abuse of process and invasion of privacy respectively. The Defendants do not argue that each Count must be dismissed as to all the defendants. We find that the parties are in agreement that Plaintiffs' claims for punitive damages and Counts V through IX

should be dismissed against the following five defendants: (1) the County of Delaware, (2) Upper Darby Township, (3) Officer Joseph Nigro in his official capacity, (4) Officer Joseph Swett in his official capacity, and (5) Francis Devlin in his official capacity.<sup>1</sup> The Court need not review the sufficiency of Plaintiffs' allegations to the extent that the parties agree to a dismissal of these claims limited to the aforementioned defendants.

Defendants Joseph Nigro, Joseph Swett and Francis Devlin do not move in their individual capacities for dismissal of Plaintiffs' claims for punitive damages, or Counts V and VI asserted against them. The Defendants, however, do request that "Count VII - Malicious Prosecution," "Count VIII - Malicious Abuse of Process," and "Count IX - Invasion of Privacy" also be dismissed against Defendants Joseph Nigro, Joseph Swett and Francis Devlin in their individual capacities. For the following reasons, the Defendants' Motions to Dismiss are **GRANTED IN PART** and **DENIED IN PART**.

#### I. BACKGROUND

Plaintiffs' Complaint alleges the following facts. On June

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<sup>1</sup> Plaintiffs concede that these defendants are shielded from the aforementioned claims pursuant to Pennsylvania's Political Subdivision Tort Claims Act. See 42 Pa. Cons. Stat. §§ 8541-8564.

16, 2002, Plaintiff John McHenry ("McHenry") was enjoying Father's Day at home with his minor son Michael and his adult daughter Nicole. This holiday was interrupted when the Defendants appeared at McHenry's home to execute a bench warrant.

The Defendants entered McHenry's home without consent and executed the bench warrant against McHenry claiming that he failed to pay child support. The Defendants' authority for arresting McHenry was a bench warrant issued for an individual by the name of John Prince, a/k/a John Hart, a/k/a, John Castranova. Both McHenry and McHenry's daughter Nicole specifically asked and were refused an opportunity to see the contents of the warrant.

Plaintiffs allege that Defendant Joseph Nigro, of the Domestic Relations Department of Delaware County, humiliated McHenry in front of his children by stating that, "this is the best part of my job, I love doing this, arresting dead beat dads on Father's Day." (Am. Compl. ¶ 22.) The Defendants' five police cars parked outside McHenry's residence caused neighbors to gather, and the Defendants caused McHenry further humiliation by verbally abusing him in the presence of neighbors and family members.

McHenry was taken to Delaware County Prison, where, upon processing, it was determined that McHenry was not the individual whose name appeared on the bench warrant. McHenry was thereafter taken to the Pennsylvania State Police Barracks where his

identity was confirmed. McHenry was detained approximately six hours before the Defendants released him. He was then taken home.

## II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12 provides that a party may move to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). When reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court must accept the non-movant's well-plead averments of fact as true and view all inferences in the light most favorable to the non-moving party. Angelastro v. Prudential-Bache Securities, Inc., 764 F.2d 939, 944 (3d Cir. 1985). In reviewing a motion to dismiss, the court must only consider the facts alleged in the pleadings and attachments thereto. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994); see also Douris v. Schweiker, 229 F. Supp. 2d 391, 396 (E.D. Pa. 2002). A motion to dismiss is appropriate only when the movant establishes that he is entitled to judgment as a matter of law and there exists "no set of facts in support of his [plaintiff's] claims which would entitle him to relief." Ford v. Schering-Plough Corp., 145 F.3d 601, 604 (3d Cir. 1998); Schrob v. Catterson, 948 F.2d 1402, 1408 (3d Cir. 1991).

Under this standard of review, we will now evaluate the

sufficiency of Plaintiffs' allegations with regard to "Count VII - Malicious Prosecution," "Count VIII - Malicious Abuse of Process," and "Count IX - Invasion of Privacy" as each Count remains against Defendants Joseph Nigro, Joseph Swett and Francis Devlin in their individual capacities.

### **III. DISCUSSION**

#### **A. Count VII - Malicious Prosecution**

The Defendants move for dismissal of Plaintiffs' claim in Count VII of the Complaint, which seeks relief under a theory of malicious prosecution. Pennsylvania law requires that a plaintiff bringing a malicious prosecution claim must demonstrate each of the following:

- (1) the defendant initiated criminal proceedings;
- (2) the criminal proceedings ended in Plaintiffs' favor;
- (3) the proceedings were initiated without probable cause; and
- (4) the defendant acted maliciously or for a purpose other than bringing the plaintiff to justice.

Bradley v. General Accident Ins., 778 A.2d 707, 710 (Pa. Super. 2001). The Defendants argue that Plaintiffs' claim must fail because there was no initiation of a criminal proceeding. Plaintiffs respond that the Defendants initiated a criminal proceeding when they arrested McHenry. We disagree and find criminal proceedings were not initiated in this case.

Section 654 of the Restatement (Second) Torts defines "the

institution of criminal proceedings" as follows:

(1) The term "criminal proceedings" includes any proceeding in which a government seeks to prosecute the person for an offense and to impose upon him a penalty of a criminal character.

(2) Criminal proceedings are instituted when:

(a) Process is issued for the purpose of bringing the person accused of a criminal offense before an official or tribunal whose function is to determine whether he is guilty of the offense charged, or whether he shall be held for later determination of his guilt or innocence; or

(b) Without the issuance of process an indictment is returned or any information filed against him; or

(c) He is lawfully arrested on a criminal charge.

Restatement (Second) of Torts, § 654. Comment c. to § 654

further explains the issuance of process necessary to institute a criminal proceeding:

Issuance of process. "Criminal proceedings" are usually instituted by the issuance of some form of process, generally a warrant for arrest . . . the issuance of the process constitutes the institution of the criminal proceedings. Not infrequently, however, an indictment is found by a grand jury or an information filed by a prosecuting officer without previous issuance of a warrant or other process. In these cases the return of the indictment or the filing of the information marks the institution of the proceedings. In all of these cases official action has been taken that constitutes a formal charge of criminal misconduct against the person accused.

Id., Comment c. No facts alleged by Plaintiffs amount to the filing of a formal charge of criminal misconduct. McHenry's arrest was not legally authorized by formal process. No warrant was ever issued for his arrest. No formal criminal proceedings

were ever initiated against McHenry. He was never indicted nor was a criminal information returned against him. No evidence was presented to the grand jury for the express purpose of securing an indictment or information. Plaintiffs, therefore, have not sufficiently alleged that any defendant initiated criminal proceedings to establish the tort of malicious prosecution. Plaintiffs' claim for malicious prosecution in Count VII, which by the parties agreement remains only against Joseph Nigro, Joseph Swett and Francis Devlin in their individual capacities, is dismissed.<sup>2</sup>

#### **B. Count VIII - Malicious Abuse of Process**

The Defendants move for dismissal of Plaintiffs' claim in Count VIII of the Complaint that remains against Joseph Nigro, Joseph Swett and Francis Devlin in their individual capacities. Count VIII seeks relief under a theory of "malicious abuse of process." These defendants would typically be shielded from this abuse of process claim by governmental immunity under

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<sup>2</sup> The Defendants' motions to dismiss contend that Plaintiffs additionally allege a violation of due process in Count VII of the Complaint. Plaintiffs, however, only specifically argue due process violations in a section of their Response that is separate from their Count VII - Malicious Prosecution argument. In this due process argument section, Plaintiffs present a wandering argument that seems to address Counts I through IV without ever referencing Count VII. It follows, Plaintiffs do not allege a separate due process violation in Count VII.

Pennsylvania's Political Subdivision Tort Claims Act. See 42 Pa. Cons. Stat. §§ 8541-8564. The Political Subdivision Tort Claims Act (the "Act"), creates a shield of governmental immunity against damages resulting from injuries to a person or property caused by a local agency or an employee of a local agency. Mascaro v. Youth Study Ctr., 523 A.2d 1118, 1120 (Pa. 1987). Local agency employees have official immunity from suits "to the same extent as [their] employing local agency." 42 Pa. Cons. Stat. § 8545. This official immunity, however, does not extend to acts that constitute "willful misconduct." Id. § 8550. Willful misconduct is defined by section 8550 of the Act as "synonymous with the term 'intentional tort.'" Kuzel v. Krause, 658 A.2d 856, 859 (Pa. Commw. Ct. 1995). Official immunity under the Act does not extend to Plaintiffs' claims against Joseph Nigro, Joseph Swett and Francis Devlin for malicious abuse of process as this claim is an intentional tort amounting to "actual malice" or "willful misconduct." Id. at 859. Therefore, the Court must look to the sufficiency of Plaintiffs' allegations.

In order to state a claim for abuse of process, a plaintiff must demonstrate that the defendant: (1) used a legal process against the plaintiff, (2) primarily to accomplish a purpose for which the process was not designated, and (3) harm has been caused to the plaintiff. Douris, 229 F.Supp.2d at 404. Moreover, Plaintiffs must allege that the Defendants committed

“some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process.” See DiSante v. Russ Financial Co., 380 A.2d 439, 441 (Pa. Super. 1977) (internal citations omitted).

Here, Plaintiffs allege that the legal process used against McHenry was a bench warrant. The perversion of this legal process allegedly occurred when Defendants Joseph Nigro, Joseph Swett and Francis Devlin used this bench warrant to arrest McHenry, who was not named on the warrant. McHenry claims he suffered harm because this unlawful arrest allegedly resulted in both humiliation and physical detention. At this procedural juncture, Plaintiffs sufficiently state an abuse of process claim against Defendants Joseph Nigro, Joseph Swett and Francis Devlin in their individual capacities.

**C. Count IX - Invasion of Privacy.**

The Defendants move to dismiss Count IX of Plaintiffs' Complaint against Joseph Nigro, Joseph Swett and Francis Devlin in their individual capacities. Count IX seeks relief under a theory of invasion of privacy. Plaintiffs do not contest the Defendants' representation that the one-year limitation period for invasion of privacy claims under 42 Pa. C.S.A. § 5523(1) bars Count IX. Count IX, therefore, is further dismissed against Joseph Nigro, Joseph Swett and Francis Devlin in their individual capacities because the claim is time-barred.

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COUNTY OF DELAWARE, et al., :  
Defendants. : No. 04-1011

O R D E R

**AND NOW**, this day of November 2004, in consideration of the Motions to Dismiss (Doc. Nos. 13 & 14) filed by Defendants Upper Darby Township, Officer Francis Devlin, the County of Delaware, Officer Joseph Nigro and Joseph Swett (collectively, the "Defendants"), the Response (Doc. No. 15) thereto filed by Plaintiffs John McHenry, individually and as the Natural Guardian of Michael McHenry and Nicole McHenry, **IT IS ORDERED** that the Defendants' Motions to Dismiss (Doc. Nos. 13 & 14) are **GRANTED IN PART** and **DENIED IN PART**, as follows:

1. The Defendants' request to dismiss the punitive damages claims contained in each count of the Complaint, "Count V - False Arrest," and "Count VI - False Imprisonment" is **GRANTED** as uncontested as to the following:
  - a. County of Delaware;
  - b. Upper Darby Township;
  - c. Officer Joseph Nigro in his official capacity;
  - d. Officer Joseph Swett in his official capacity; and
  - e. Francis Devlin in his official capacity;

2. The Defendants' request for dismissal of "Count VII - Malicious Prosecution" is **GRANTED** as to all defendants;
3. The Defendants' request for dismissal of "Count VIII - Malicious Abuse of Process" is **GRANTED IN PART** and **DENIED IN PART** as follows:
  - a. Dismissal of Count VIII is **GRANTED** as uncontested as to the following defendants:
    - i. County of Delaware;
    - ii. Upper Darby Township;
    - iii. Officer Joseph Nigro in his official capacity;
    - iv. Officer Joseph Swett in his official capacity; and
    - v. Francis Devlin in his official capacity;
  - b. Dismissal of Count VIII is **DENIED** as to the following defendants:
    - i. Joseph Nigro in his individual capacity;
    - ii. Joseph Swett in his individual capacity; and
    - iii. Francis Devlin in his individual capacity;and
4. The Defendants' request for dismissal of "Count IX - Invasion of Privacy" is **GRANTED** as to all defendants.

BY THE COURT:

/s/James McGirr Kelly, J.

JAMES MCGIRR KELLY, J.