UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARBARA TILLMAN,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	
	:	
JOSEPH M. ALONSO,	:	
STEVEN SAN GIORGIO,	:	
LEON HUNTER,	:	
ANTHONY COLGAN,	:	
NEWTOWN TOWNSHIP,	:	
MARPLE TOWNSHIP,	:	
UPPER PROVIDENCE TOWNSHIP,	:	
AND JOHN DOE 1-10,	:	
Defendants	:	No. 04-4391

Gene E.K. Pratter, J. Memorandum and Order May 31, 2005

Defendants Newtown Township, Joseph Alonso, Stephen San Giorgio and Leon Hunter move for dismissal of the complaint in this Section 1983 civil rights case. For the reasons stated below, the motion will be granted in part and denied in part.

FACTS AND PROCEDURAL BACKGROUND

Plaintiff Barbara Tillman filed this civil rights action against several individual police officers and supervisors of the townships of Marple, Newtown and Upper Providence, as well as against the townships themselves. Ms. Tillman is a 71 year-old resident of Newtown Square, Pennsylvania. The defendants are several police officers and their supervisors,[1] as well as the townships for which they work.

This case arises out of an incident that occurred on September 28, 2002. On that date,

[1] The defendants include a number of "John Doe" police officers who remain unnamed.

defendants Joseph M. Alonso and Stephen San Giorgio, both Newtown Township police officers, came to Ms. Tillman's home in search of her grandson, David Haske. The parties differ as to the specific reason for the officers' search. Ms. Tillman asserts that the officers told her that her grandson was wanted in relation to a fight that had been reported. The officers, however, assert that they went to Ms. Tillman's home after discovering that Mr. Haske had assaulted his father, mother and sister, and understood that he was on his way to Ms. Tillman's house next.

When the officers arrived, Ms. Tillman advised them that her grandson was not in her home, and the officers left. Shortly thereafter, Mr. Haske entered Ms. Tillman's home through the back door, locked the doors to the house and hid under a bed in the back bedroom. Ms. Tillman alleges that within minutes thereafter, Officers Alonso and San Giorgio returned with Officer Anthony Colgan, a police officer for Marple Township, as well as with several other police officers, who "violently and with great force" kicked in the front door to her home. Ms. Tillman further alleges that she was unarmed and cooperative, that the officers acted "willfully, maliciously and without due regard for Plaintiff's rights," and that the officers had no probable cause to believe that she was committing a crime, presented a danger to the officers, or was herself in any danger of physical harm.

Ms. Tillman initially filed an eight-count complaint against the officer and township defendants on September 17, 2004, alleging both federal and state law claims. With respect to the federal claims, Ms. Tillman alleges that pursuant to 42 U.S.C. § 1983, she is entitled to redress for violations of her Fourth and Fourteenth Amendment rights.[2] Subsequent to the filing

[2] Although Ms.Tillman's Fourteenth Amendment rights are implicated in the complaint, none of the ensuing counts in her pleading sets forth how she was deprived of such rights.

of the Complaint, the parties stipulated to the dismissal of the sixth, seventh and eighth counts of the Complaint as against all defendants.[3]

The remaining counts of the complaint allege: (1) a violation of Ms. Tillman's Fourth Amendment rights by Officers Alonso, San Giorgio, Colgan and John Does 1-10; (2) a violation of Ms. Tillman's federal constitutional rights by Newtown, Marple, and Upper Providence Townships, by virtue of their policies, practices and customs to authorize and cover up the use of excessive force in the absence of probable cause; (3) that Officers Alonso, San Giorgio, Colgan and John Doe officers 1-10 intentionally violated Ms. Tillman's rights under the Pennsylvania Constitution; (4) a violation of Ms. Tillman's rights under the Pennsylvania Constitution against Newtown, Marple and Upper Providence Townships; and (5) assault and battery by Officers Alonso, San Giorgio, Colgan and John Doe Officers 1-10.

Defendants Newtown Township, Joseph Alonso, Stephen San Giorgio and Leon Hunter (who is the police chief of Newtown Township) (collectively, the "Newtown Defendants") filed the present motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).[4] In their motion, the Newtown Defendants assert that Ms. Tillman has failed to present sufficient allegations to state a claim on any of the remaining counts.

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[3] The sixth, seventh and eighth counts asserted claims grounded on respondeat superior liability, state created danger and denial of medical treatment. Ms. Tillman has also withdrawn her claim for punitive damages against the municipal defendants.

[4] Defendant Upper Providence Township had filed a motion to dismiss the sixth and seventh counts of the complaint, which became moot when Ms. Tillman withdrew these counts against all defendants. Defendants Marple Township and Officer Colgan filed an answer to the complaint on March 23, 2005.

LEGAL ANALYSIS

I. Standard of Review

When deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court may look only to the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1251, 1261 (3d Cir. 1994). The Court must accept as true all well-pleaded allegations in the complaint and view them in the light most favorable to the plaintiff. Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 944 (3d Cir. 1985). A Rule 12(b)(6) motion will be granted only when it is certain that no relief could be granted under any set of facts that could be proved by the plaintiff. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

II. Inappropriate Use of Excessive Force

To establish a claim under Section 1983, a plaintiff must demonstrate that: (1) the injurious conduct was committed by a person acting under color of state law; and (2) the conduct deprived the plaintiff of rights conferred by the Constitution or federal law. Sameric Corp. of Delaware v. City of Phila., 142 F.3d 582, 590 (3d Cir. 1998). Officers Alonso and San Giorgio (the "Officers") argue that Ms. Tillman has failed to allege a claim under Section 1983 because the Complaint does not allege facts sufficient to establish a claim that her Fourth Amendment rights have been violated.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, homes, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." U.S.

CONST. amend. IV. Absent exigent circumstances or the need to conduct an inventory search incident to a lawful arrest, a warrantless search of a person's home is presumptively unreasonable under the Fourth Amendment. Parkhurst v. Trapp, 77 F.3d 707, 711 (3d Cir. 1996). The burden rests upon the state to show that exigent circumstances existed in support of a warrantless search. Parkhurst, 77 F.3d at 711.

To state a claim for excessive force in violation of the Fourth Amendment, a plaintiff must show that: (1) a "seizure" occurred and (2) the seizure was unreasonable. Estate of Smith v. Marasco, 318 F.3d 497, 515 (3d Cir. 2003). The test for whether a seizure was reasonable is whether the actions taken were "objectively reasonable in light of the facts and circumstances confronting" the officers, regardless of their intent or motivation in acting. Estate of Smith, 318 F.3d at 515. Factors to consider with respect to whether a seizure was reasonable include "the severity of the crime at issue," and "whether the suspect poses an immediate threat to the safety of the officers or others." Id. The issue of reasonableness is generally a question of fact. Id.

Officers Alonso and San Giorgio argue that dismissal of the claim of excessive force is appropriate because there were exigent circumstances that warranted the use of force to enter Ms. Tillman's home. The Officers further argue that dismissal is also appropriate because the Officers reasonably believed, in light of the facts they knew, that Ms. Tillman was in danger. In response, Ms. Tillman argues that the facts alleged in the complaint, which is all the information a court may consider on a motion to dismiss, do not assert that there were exigent circumstances and support the allegation that the Officers' behavior was unreasonable.

After considering the parties' arguments as presented in their submissions and at oral argument, the Court finds that dismissal of Ms. Tillman's claim of excessive force would be

premature at this stage of the case. The Court recognizes that the allegation that Ms. Tillman's grandson "entered her home through the back door, locked the doors to the house and hid under a bed in the back bedroom," could imply that Ms. Tillman's grandson was a fleeing felon. Complaint at ¶ 17. However, the Complaint also includes allegations that the Officers used excessive force in kicking in Ms. Tillman's door as she was attempting to let them into her home. Complaint at ¶ 18. Because the existence of exigence and the determination of whether the Officers' conduct was reasonable are questions of fact which cannot be resolved from only the allegations in the complaint, dismissal of the first count of the complaint is not appropriate.

III. **Municipal Liability**

Newtown Township (the "Township") argues that Ms. Tillman has failed to state a claim for municipal liability for two reasons. The Township first argues that because Ms. Tillman's constitutional claim is defeated by the presence of exigent circumstances, no liability may lie as to the Township. However, because Ms. Tillman appears to have sufficiently stated a claim for the use of excessive force and the consequential violation of her rights under the Fourth Amendment, this argument cannot prevail at present.

The Township next argues that because Ms. Tillman's claim does not focus on a specific policy or custom of the Township, but rather points directly to the Officers' supervisors, the claim is essentially grounded on a theory of respondeat superior, which is impermissible under Section 1983. In support of this argument, the Township cites to Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir. 1990), in which the court set forth the ways in which a municipality may be held liable under Section 1983. Under Andrews, a municipality may only be held liable under Section 1983 when the "execution of a government's policy or custom . . .

inflicts the injury." Andrews, 895 F.2d at 1480. While a government policy is established by a "decisionmaker possessing final authority," a custom arises from a "course of conduct . . . so permanent and well settled as to virtually constitute law." Andrews, 895 F.2d at 1480 (citing Monell v. Dep't of Social Services of the City of New York, 436 U.S. 658 (1978)).

In stating a claim for relief against a municipality under Section 1983, a plaintiff must (1) identify the challenged policy; (2) attribute it to the municipality; and (3) show a causal link between execution of the policy and the injury suffered. Losch v. Borough of Parkesburg, 736 F.2d 903, 910 (3d Cir. 1984). To succeed on such a claim, the municipality must be the "moving force" behind the alleged constitutional injury. Board of County Commissioners of Bryan County v. Brown, 520 U.S. 397, 404 (1997). Thus, to avoid dismissal of her claim against the Township, Ms. Tillman must have sufficiently alleged that the Township had a policy of allowing or encouraging the use of excessive force, and that the Township's policy was the authority or premise underlying the actions taken by the Officers when they entered her home.

To meet this criteria, the law does not require that Ms. Tillman plead these allegations with specificity. In Leatherman v. Tarrant County Narcotics and Intelligence Coordination Unit, 507 U.S. 163, 168 (1993), the Court held that allegations of municipal liability under Section 1983 need only be pleaded to meet Federal Rule of Civil Procedure 8(a)(2), which requires that allegations be stated by "a short and plain statement of the claim."

In applying Leatherman, courts within the Third Circuit have closely examined the allegations in the complaint and have only allowed for dismissal of a claim where the allegations are too conclusory, vague and ambiguous to properly state a claim. Compare Carlton v. City of Phila., No. 03-1620, 2004 WL 633279 at * 7, (E.D. Pa. March 30, 2004) (dismissing claim where

it was "impossible to determine what policy or custom is being called into question and who is allegedly responsible for instituting it") with Lesher v. Colwyn Borough, No. 02-1333 at *5, 2002 WL 31012959 (E.D. Pa. Sept. 6, 2002) (finding that allegation of failure to discipline and train officers, combined with allegation an "an instance of an official use of excessive force" were sufficient to state claim of municipal liability). In this context, a court's consideration for a motion to dismiss must focus only on the sufficiency of the complaint's allegations, and not whether the claim, after further discovery, would be able to withstand a motion for summary judgment. See, e.g., Serena H. v. Kovarie, 209 F. Supp.2d 453, 457 (E.D. Pa. 2002) (denying motion to dismiss but noting that issue may arise again at a later stage in the case).

The Court finds that, considering the allegations in a light most favorable to Ms. Tillman, the Complaint sufficiently states a claim for municipal liability. Ms. Tillman alleges that the parties who supervised the Officers "encouraged and tolerated the policies and practices" that resulted in the alleged exercise of excessive force. Complaint at ¶¶ 36, 37. Ms. Tillman also alleges that it was the "policy, practice and custom" of the Township to authorize certain officers, including those who are defendants in this case, to "engage in and cover up the use of excessive force despite the lack of probable cause." Complaint at ¶ 35.

Although the Township points out that the allegations suggest that the allegedly injurious policies were encouraged by the defendant supervisors, and not the Township, a liberal reading of the complaint suggests that Ms. Tillman asserts that the supervisors were acting in reliance on a policy or custom of the Township. Although after the period allowed for discovery the claim might not withstand the additional scrutiny required for a summary judgment motion, the Court concludes that the allegations in the Complaint are presently sufficient to avoid dismissal, and

the motion to dismiss the second count of the Complaint will be denied.

IV. **Rights Under the Pennsylvania Constitution**

Counts three and four of the Complaint allege that the Officers (count three) and the Townships (count four) violated Ms. Tillman's rights under Article 1, Section 8 of the Pennsylvania Constitution.[5] The Defendants argue that these counts must be dismissed because Ms. Tillman has failed to state a cause of action for violations of the Pennsylvania Constitution.

The Supreme Court of Pennsylvania has not ruled on the issue of whether there is a private cause of action for damages under the Pennsylvania Constitution. See Douris v. Schweiker, 229 F. Supp. 2d 391, 405 (E.D. Pa. 2002) (citing to various federal cases in which courts have observed lack of state law with respect to this issue). Federal courts within the Third Circuit confronting the issue have consistently noted that Pennsylvania does not have a statute "akin to 42 U.S.C. § 1983." Dooley v. City of Philadelphia, 153 F. Supp. 2d 628, 663 (E.D. Pa. 2001). Several federal courts have considered the issue and concluded that it is not clear whether a personal lawsuit based upon an alleged violation of Article 1 of the Pennsylvania Constitution is authorized. While many of these courts have concluded that there is no private cause of action for rights conferred by the Pennsylvania Constitution, see, e.g., Douris v. Schweiker, 229 F. Supp. 2d 391, 405 (E.D. Pa. 2002), at least one court has declined to exercise jurisdiction over such claims because they represented a novel issue of state law left best for state courts to decide.

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[5] This provision states that "[t]he People shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant." PA. CONST. art. 1, § 8.

See Mulgrew v. Fumo, No. 03-5039, 2004 WL 1699368 (E.D. Pa. July 29, 2004).[6]

In responding to this argument, Ms. Tillman urges the Court to consider the reasoning set forth in Jones v. City of Philadelphia, October Term 2001, No. 3641 (July 30, 2004), a case recently decided in the Court of Common Pleas of Philadelphia County, in which that court concluded that a plaintiff may pursue a private claim against a municipality pursuant Article 1, Section 8 of the Pennsylvania Constitution. In Jones, the court, after noting that it was addressing a "constitutional issue of first impression," concluded that a municipality was not immune from suit for alleged violations of this provision of the Pennsylvania Constitution. In drawing this conclusion, the Jones court reasoned, in part, that Article 1, Section 8 was designed to provide broader protections than those conferred by the United States Constitution. Jones at 17-18.[7]

Given the current uncertain state of the law in Pennsylvania, the Court declines to

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[6] Of the various cases in which federal courts have declared that there is no private cause of action under the Pennsylvania Constitution, none of them addressed the issue in the context of Article 1, Section 8. With the exception of Douris v. Schweiker, 229 F. Supp. 2d 391 (E.D. Pa. 2002), in which the plaintiff asserted malicious prosecution and retaliation claims, and possibly Kelleher v. City of Reading, No. 01-3386, 2001 WL 1132401 (E.D. Pa. Sep. 24, 2001), which cites to Article 1, *Section 7* of the Pennsylvania Constitution to support a right to *privacy*, every other case cited by the Defendants with respect to the finding that there is no private cause of action under the Commonwealth's constitution addressed claims brought under Article 1, Section 7, which addresses freedom of the press and speech. In one case in which Article 1, Section 8 claims were presented, the claims were dismissed based on the doctrine of sovereign immunity. Kidd v. Pennsylvania, No. 97-5577, 1999 WL 391496 (E.D. Pa. 1999).

[7] The Jones court also addressed the absence of legislative direction with respect to private constitutional remedies available, noting that in addressing other sections of the state constitution, courts had held that certain provisions were "self-executing," and therefore did not require such direction. Jones at 19. The court observed the reluctance of federal courts to extend a private right under Article 1, Section 8, noting that this reluctance was understandable, given that federal courts "rarely dare to create state law, since that is the province of the state courts." Jones at 23. An appeal of Jones is currently pending before the Commonwealth Court.

exercise jurisdiction over these counts of the Complaint. The Court is authorized to exercise jurisdiction over pendent state law claims that are so related to the federal claims in an action that they "form part of the same case or controversy." 28 U.S.C. § 1367(a). However, a court may decline to exercise jurisdiction if "the claim raises a novel or complex issue of State law." 28 U.S.C. § 1367(c)(1). Because the issue appears to remain in a state of fundamental flux and presents a novel issue of state law, counts three and four of the Complaint will be dismissed without prejudice.

V. **Assault and Battery**

The Defendants next argue that Ms. Tillman's allegations of assault and battery must be dismissed because the elements of an assault and battery claim require that the offender intentionally attempt to injury the victim. The Defendants assert that because the facts stated in the Complaint do not allege that the Officers entered the house intending to injure Ms. Tillman, the claim must be dismissed. In response, Ms. Tillman argues that she has sufficiently alleged a claim for assault and battery because her claims allege that the officers acted unreasonably in exercising excessive force against her.

Under Pennsylvania law, assault is "an intentional attempt by force to do an injury to the person of another, and a battery is committed whenever the violence menaced in an assault is actually done, though in ever so small a degree, upon the person." Renk v. City of Pittsburgh, 641 A.2d 289, 293 (Pa. 1994). In exercising authority or performing his or her duty, a police officer's use of force will not be considered assault and battery unless a jury determines that the force used was excessive or unnecessary. Renk, 641 A.2d at 293.

Ms. Tillman alleges that the Officers acted with excessive violence, without justification

or provocation. Complaint at ¶¶ 46-48. Ms. Tillman further argues that the actions taken by the Officers were not a "reasonable" use of force. Memorandum Opposing Dismissal at 20. Because an assessment of the reasonableness of the Officers' force is a question of fact that has yet to be determined, the Court concludes that the allegations in the Complaint are presently sufficient to support such a claim to be resolved by a fact finder. The fifth count of the Complaint will not be dismissed.

CONCLUSION

For the reasons discussed above, the Defendants' Motion to Dismiss the Complaint will be granted in part and denied in part. The Motion is granted with respect to the Third and Fourth Counts of the Complaint, which will be dismissed without prejudice. The Motion is denied with respect to Counts One and Two of the Complaint. An appropriate Order follows.

/S/_____
Gene E.K. Pratter
United States District Judge

May 31, 2005

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BARBARA TILLMAN,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	
	:	
JOSEPH M. ALONSO,	:	
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NEWTOWN TOWNSHIP,	:	
MARPLE TOWNSHIP,	:	
UPPER PROVIDENCE TOWNSHIP,	:	
AND JOHN DOE 1-10,	:	
Defendants	:	NO. 04-4391

O R D E R

AND NOW, this ___ day of May, 2005, upon consideration of the Motion to Dismiss Plaintiff's Complaint filed by Joseph M. Alonso, Stephen San Giorgio, Leon Hunter, and Newtown Township (Docket No. 10), the response thereto (Docket No. 12), and after oral argument on the Motion, it is hereby ORDERED that the Motion is GRANTED in part and DENIED in part. The Motion is GRANTED as to Counts III and IV of the Complaint, and those counts will be dismissed without prejudice. The Motion is DENIED as to the remaining counts of the Complaint. The Defendants are further ORDERED to file an answer to the Complaint within 20 days of the date of this Order.

BY THE COURT:

/S/_____
GENE E.K. PRATTER
United States District Judge