

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

MANUEL DIAS	:	CIVIL ACTION
	:	
Plaintiff	:	
	:	
v.	:	NO. 05-CV-00369
	:	
DEPARTMENT OF LICENSES AND INSPECTIONS, CITY OF PHILADELPHIA, et al.	:	
	:	
Defendants	:	

Stengel, J.

October 4, 2005

MEMORANDUM AND ORDER

This civil rights action involves the alleged violation of a street newsstand owner's constitutional rights by defendants City of Philadelphia (the "City") and CVS 29272 Philadelphia, LLC ("CVS") (collectively "Defendants"). Manuel Dias contends that his constitutional rights were violated when CVS erected a fence around his newsstand during the construction of a pharmacy building. The City moved to dismiss Dias's First Amended Complaint pursuant to Federal Rule 12(b)(6). Dias has failed to plead facts necessary to recover against a municipality under 42 U.S.C. § 1983. Accordingly, I will grant the City's motion and dismiss Dias's federal claims without prejudice. I also decline to exercise supplemental jurisdiction over Plaintiff's state constitutional claims pursuant to 28 U.S.C. § 1367(c)(1). I will, however, grant Dias leave to amend his complaint pursuant to Rule 15 of the Federal Rules of Civil Procedure.

I. BACKGROUND

Plaintiff's First Amended Complaint (the "Complaint") alleges the following facts: On March 2, 1999, Plaintiff Manuel Dias purchased a street newsstand located at 1400 West Girard Avenue in Philadelphia, Pennsylvania. Am. Comp. ¶ 8. The newsstand was located on public property controlled by the City. Id. at ¶ 9. On April 15, 2003, the City's Department of Licenses and Inspections (the "Licenses Department") granted Plaintiff a license to operate his newsstand at the same location after he paid a license fee and posted a \$1,500.00 bond. Id. at ¶ 9.

In approximately May of 2003, CVS purchased several properties surrounding the street corner on which Plaintiff's newsstand and several other businesses were located. Id. at ¶ 16. CVS purchased these properties with the purpose of building a pharmacy outlet building on them, and obtained all of the necessary construction permits and licenses from the City. Id. at ¶ 17. In exchange, the City agreed to "assist and facilitate" the construction of CVS's pharmacy outlet building. Id. at ¶ 17.

CVS notified the other businesses in the area of its property purchase and compensated the owners for any harm to their businesses resulting from the construction process. See id. at ¶¶ 19-20. All of the compensated businesses were owned by persons of Asian and Middle-Eastern descent. Id. at ¶ 19. CVS did not notify or offer to compensate Plaintiff in the same manner as the other Girard street business owners. Id. at ¶ 20. Instead, the City and CVS agreed that the City would permit CVS to "shut down

and eliminate" Plaintiff's newsstand. Am. Compl. at ¶ 22. CVS eventually erected a fence around Plaintiff's newsstand pursuant to its agreement with the City, leaving Plaintiff unable to enter his newsstand. Id. at ¶ 25.

On September 10, 2003, the City notified Plaintiff that his newsstand had fallen into a state of disrepair in violation of applicable city regulations. Id. at ¶ 29. The City's notice also stated that Plaintiff had 10 days to repair the newsstand, but Plaintiff did not receive the City's notice until after the 10-day repair period had already run. Id. at ¶¶ 29, 32. Plaintiff appealed the alleged regulatory violation to the Licences Department, but remained unable to access his newsstand due to the CVS fencing. Id. at ¶ 33. At some point thereafter, CVS "razed Plaintiff[s] . . . newsstand to the ground" in violation of his constitutional rights. Id. at ¶ 36.

Plaintiff originally filed this lawsuit in the Court of Common Pleas of Philadelphia County, Pennsylvania on December 30, 2004. On January 26, 2004, Defendants removed the case to this Court pursuant to 28 U.S.C. § 1441. The Complaint seeks \$150,000.00 in damages and alleges claims for: (1) violation of Plaintiff's procedural due process rights under the 14th Amendment of the United States Constitution and 42 U.S.C. § 1983 (Count I), (2) violation of Plaintiff's equal protection rights under the 14th Amendment of the United States Constitution and 42 U.S.C. § 1983 (Count II), (3) violation of Article I,

Section 8 of the Pennsylvania Constitution (Count III), and (4) violation of Article I, Section 26 of the Pennsylvania Constitution (Count IV).¹ The City filed its Motion to Dismiss on July 19, 2005.

II. Standard for a Motion to Dismiss

A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted examines the legal sufficiency of the complaint. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). A federal court may grant a motion to dismiss only where "it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Carino v. Stefan, 376 F.3d 156, 159 (3d Cir. 2004) (quoting Conley, 355 U.S. at 45-46). In determining whether to grant a motion to dismiss, a federal court must construe the complaint liberally, accept all factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. Id. See also D.P. Enters. v. Bucks County Cmty. Coll., 725 F.2d 943, 944 (3d Cir. 1984).

The Federal Rules of Civil Procedure do not require a plaintiff to plead in detail all of the facts upon which he bases his claim. Conley, 355 U.S. at 47. Rather, the Rules require a "short and plain statement" of the claim that will give the defendant fair notice of the plaintiff's claim and the grounds upon which it rests. Id. A plaintiff, however,

¹On July 20, 2005, CVS filed a third-party complaint against Suburban Group Development, LLC, Sterling Penndevco, LLC, and Builders Incorporated alleging claims for: (1) contribution, (2) indemnification, and (3) breach of contract.

must plead specific factual allegations. Neither "bald assertions" nor "vague and conclusory allegations" are accepted as true. See Morse v. Lower Merion School Dist., 132 F.3d 902, 906 (3d Cir. 1997); Sterling v. Southeastern Pennsylvania Transp. Auth., 897 F. Supp. 893 (E.D. Pa. 1995). Accordingly, "a court should not grant a motion to dismiss 'unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Conley, 355 U.S. at 45-46; Graves v. Lowery, 117 F.3d 723, 726 (3d Cir. 1997).

III. DISCUSSION

A. Plaintiff's 42 U.S.C. § 1983 Claim

A private party may bring a civil cause of action against any person who deprives the party of his or her constitutional rights while acting under color of state law pursuant to 42 U.S.C. § 1983. To prevail on a section 1983 claim, a plaintiff generally must show: (1) that the defendant acted under color of state law, (2) that the defendant deprived the plaintiff of a right protected by federal law, and (3) damages. Samerik v. City of Phila., 142 F.3d 582, 590 (3d Cir. 1998). The constitutional rights that Plaintiff invokes here are both grounded in the 14th Amendment.

The City's Motion to Dismiss does not contest Plaintiff's allegations that Defendants acted under color of state law or that Plaintiff has a federally protected right to operate his newsstand. Rather, the City argues that it may not be found liable under section 1983 because of the doctrine espoused in Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978). Defs. Mot. to Dismiss pp. 5.

In Monell, the Supreme Court held that municipalities may not be found liable on a theory of respondeat superior under section 1983. Monell, 436 U.S. at 691.

Municipalities and their officials may only be found liable for a violation of section 1983 when a municipal employee or official deprives the plaintiff of his or her federally protected rights pursuant to a municipal policy or custom. Monell, 436 U.S. at 691.

Thus, in order to recover from a municipality under section 1983, a plaintiff must:

(1) identify a policy or custom that deprived him or her of a federally protected right, (2) demonstrate that the municipality, by its deliberate conduct, acted as the "moving force" behind the alleged deprivation, and (3) establish a direct causal link between the policy or custom and the plaintiff's injury. Bd. of the County Comm'rs v. Brown, 520 U.S. 397, 404 (1997).

A municipal policy, for purposes of section 1983, is a "statement, ordinance, regulation, or decision officially adopted and promulgated by [a government] body's officers." Monell, 436 U.S. at 690. Such a policy "generally implies a course of action

consciously chosen from among various alternatives." Oklahoma City v. Tuttle, 471 U.S. 808, 823 (1985). A municipal custom, by contrast, is a "persistent and widespread" practice of municipal action that is "so permanent and well settled as to constitute a custom or usage with the force of law." Monell 436 U.S. at 691.

In this case, Plaintiff has not pled that the City's officials or employees enforced a policy or custom when the City violated his constitutional rights. The Complaint does not allege any facts demonstrating or inferring that the City or its officials adopted or promulgated a municipal policy, or that the City had such a practice of municipal action as to constitute a custom under the Monell definition.

Plaintiff has also failed to allege that the City was the "moving force" behind the violation of his 14th Amendment rights. Specifically, the Complaint does not allege any facts stating or inferring that the City instigated or even suggested the alleged agreement between the Defendants.² Thus, while Plaintiff may have alleged facts sufficient to support a section 1983 claim for the violation of his constitutional rights by defendant CVS, he has not pled facts sufficient to bring such a claim against the City. Plaintiff's section 1983 claim against the City therefore fails to state a claim upon which relief can

²By contrast, the Complaint appears to infer that CVS, and not the City, was the "moving force" behind the alleged constitutional violations. See, e.g., Am. Compl. ¶ 17 (alleging that *defendant CVS* notified the Asian and middle-eastern business owners), 20 (alleging that "*Defendant CVS* did not provide Plaintiff Dias with any notice . . .") (emphasis added), 25 (alleging that "*Defendant CVS* erected a fence around the Plaintiff's newsstand") (emphasis added).

be granted in light of the Monell doctrine and will be dismissed. However, Plaintiff may yet be able to plead facts sufficient to allege a section 1983 claim against the City, and I will grant Plaintiff leave to amend the Complaint.³

B. Plaintiff's Claims Under the Pennsylvania Constitution

The City argues that Plaintiff's state constitutional claims should be dismissed because the Pennsylvania Constitution does not provide a private cause of action for damages. Defs. Mot. to Dismiss pp. 7. The Supreme Court of Pennsylvania has not yet ruled on whether a private cause of action for damages exists under the Pennsylvania Constitution. See Douris v. Schweiker, 229 F. Supp. 2d 391, 405 (E.D. Pa. 2002); Dooley v. City of Phila., 153 F. Supp. 2d 628, 663 (E.D. Pa. 2001). Furthermore, the Eastern District of Pennsylvania has stated that there is no statutory cause of action similar to section 1983 under Pennsylvania law. Dooley, 153 F. Supp. 2d at 663.

Federal courts may decline to exercise supplemental jurisdiction over uncertain state law issues pursuant to 28 U.S.C. § 1367. Section 1367(c)(1) provides in pertinent part: "district courts may decline to exercise supplemental jurisdiction over a claim . . . if . . . the claim raises a novel or complex issue of [s]tate law." 28 U.S.C. § 1367(c)(1). In light of the complexity and uncertainty surrounding Plaintiff's claims for damages under the Pennsylvania Constitution, I decline to exercise supplemental jurisdiction under section 1367(c)(1) and dismiss these claims without prejudice.

³The Federal Rules of Civil Procedure and the relevant case law encourage district courts to freely grant a plaintiff leave to amend his complaint. See FED. R. CIV. PRO. 15; Forman v. Davis, 371 U.S. 178, 181 (1962).

IV. CONCLUSION

For the reasons described above, I dismiss Plaintiff's section 1983 claims without prejudice and decline to exercise supplemental jurisdiction over the state constitutional claims pursuant to 28 U.S.C. § 1367(c)(1). I will, however, grant Plaintiff 20 days to amend the Complaint. An appropriate order follows.

ORDER

AND NOW, this day of October, 2005, upon consideration of the City of Philadelphia's Motion to Dismiss (Doc. No. 18) and all responses thereto, it is hereby **ORDERED** that the motion is **GRANTED** and Plaintiff's First Amended Complaint is dismissed without prejudice to Plaintiff's ability to correct the deficiencies identified in the First Amended Complaint, if possible.

It is also **ORDERED** that Plaintiff is granted 20 days from the date of this Order to further amend the First Amended Complaint. Failure to amend within 20 days shall result in a dismissal of all of Plaintiff's claims with prejudice, on motion by the Defendants.

BY THE COURT:

LAWRENCE F. STENGEL, J.