

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

REYNALDO LOPEZ,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	NO. 07-1382
	:	
OFFICER PATRICK MACZKO,	:	
et al.,	:	
Defendants.	:	

MEMORANDUM AND ORDER

Stengel, J.

August 16, 2007

On April 5, 2007, plaintiff Reynaldo Lopez filed a fifteen-count complaint against the City of Bethlehem and several members of the Bethlehem Police Department¹ raising federal civil rights and state law claims. On June 19, 2007, the defendants filed a motion to dismiss portions of the plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). For the following reasons, I will grant the motion in part and deny it in part.

I. BACKGROUND²

Plaintiff Reynaldo Lopez is paralyzed in one leg and requires the use of a wheelchair for ambulation. On April 5, 2005, the plaintiff was driving near his home when he was observed by defendant Officer Maczko. Officer Maczko knew the plaintiff from an earlier traffic stop and, as a result, he knew the plaintiff's driver's license had

¹The plaintiff filed suit against the following individuals, both in their individual capacities and in their official capacities as members of the Bethlehem Police Department: Officer Patrick Maczko, Officer Freed, Officer Landi [sic], Sergeant Ripper, and Commissioner Francis Donchez (collectively "the Individual Defendants").

²I accepted as true all factual allegations in the complaint.

been suspended. Officer Maczko activated his lights and sirens in an attempt to stop the plaintiff. In response, the plaintiff pulled his car into the parking lot at his residence.

Once parked, the plaintiff exited his vehicle into his wheelchair and turned to face Officer Maczko. Officer Maczko screamed at the plaintiff to get back into his car. The plaintiff replied that the officer should just give him a ticket. Without warning, Officer Maczko grabbed plaintiff's wheelchair and pushed him out of the chair onto the ground. Officer Maczko jumped on top of the plaintiff and another officer (believed to be Officer Freed) began beating him with a large flashlight. Officer Landi and Officer Ripper were on the scene at this time, but neither of them intervened to stop the other officers' conduct.

The plaintiff was eventually handcuffed and Officer Maczko grabbed him by the throat and attempted to force him to walk. Officer Maczko proceeded to drag the plaintiff fifty feet to the patrol car, despite the contentions of several bystanders that the plaintiff could not walk. Officer Maczko threw the plaintiff into the back seat of the patrol car for transportation to the Bethlehem Police Station.

Subsequently, the plaintiff was charged with aggravated assault, simple assault, terroristic threats, harassment, resisting arrest, disorderly conduct, and driving with a suspended license. After a preliminary hearing, all the charges, with the exception of aggravated assault, were bound over to the Court of Common Pleas. In the Court of Common Pleas, the plaintiff pled guilty to disorderly conduct and driving with a suspended license. The other charges were withdrawn.

As a result of the foregoing events, the plaintiff filed a complaint with this court alleging the following fifteen causes of action against the defendants:

- Count I: 42 U.S.C. § 1983 - Against all the defendants;³
- Count II: 42 U.S.C. § 1983 - Unlawful seizure (arrest) against all the defendants;
- Count III: 42 U.S.C. § 1983 - Excessive force and physical brutality against the Individual Defendants;
- Count IV: 42 U.S.C. § 1983 - Malicious Prosecution against the Individual Defendants;
- Count V: 42 U.S.C. § 1983 - False Imprisonment against the Individual Defendants;
- Count VI: 42 U.S.C. § 1983 - Supervisory Liability against the Individual Defendants;
- Count VII: 42 U.S.C. § 1983 - Failure to Intervene Non-Supervisory against the Individual Defendants;
- Count VIII: 42 U.S.C. § 1983 - Conspiracy against the Individual Defendants;
- Count IX: 42 U.S.C. § 1983 - Municipal Liability against the City of Bethlehem;

³ Section 1983 provides in pertinent part: “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 . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress” 42 U.S.C. § 1983. Section 1983 does not by itself confer substantive rights, but instead provides a remedy for redress when a constitutionally protected right has been violated under the color of state law. Oklahoma City v. Tuttle, 471 U.S. 808, 816 (1985); Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906-07 (3d Cir. 1997). In order to succeed on a claim under 42 U.S.C. § 1983, a plaintiff must demonstrate: (1) the violation of a right secured by the Constitution, and (2) that the constitutional deprivation was committed by a person acting under the color of state law. West v. Atkins, 487 U.S. 42, 48 (1988). There is no dispute that each of the Individual Defendants, as Bethlehem police officers, acted under the color of state law at all relevant times.

- Count X: Pennsylvania Constitutional Violations against Individual Defendants;
- Count XI: Assault and Battery against Individual Defendants;
- Count XII: False Arrest and Illegal Imprisonment against Individual Defendants;
- Count XIII: Malicious Prosecution against Individual Defendants;
- Count XIV: Intentional Infliction of Emotional Distress against Individual Defendants; and
- Count XV: Negligent Infliction of Emotional Distress against Individual Defendants.

Pursuant to Federal Rule of Civil Procedure 12(b)(6), the defendants moved to dismiss: (1) Counts II, IV, V, VIII, X, XII, XIII, and XV in their entirety; (2) Counts XI and XIV in part; and (3) the claims against Commissioner Donchez in his official capacity.

II. MOTION TO DISMISS STANDARD

When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the court must accept the complaint's allegations as true and draw all reasonable inferences in the plaintiff's favor. Zimmerman v. HBO Affiliate Group, 834 F.2d 1163, 1164-65 (3d Cir. 1987). Courts are not obligated, however, to credit the complaint's "bald assertions" or "legal conclusions." In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1429 (3d Cir. 1997) (citation omitted).

Under Rule 12(b)(6), a defendant may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." The rule is designed to screen out cases where "a complaint states a claim based upon a wrong for which there is clearly no

remedy, or a claim which the plaintiff is without right or power to assert and for which no relief could possibly be granted.” Port Auth. v. Arcadian Corp., 189 F.3d 305, 311-12 (3d Cir. 1999). Under Rule 12(b)(6), a complaint should not be dismissed for failure to state a claim “unless it 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). The issue, therefore, is not whether the plaintiff will ultimately prevail, but whether the plaintiff is entitled to offer evidence to support his claims. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); See also Maio v. Aetna, Inc., 221 F.3d 472, 482 (3d Cir. 2000).

III. DISCUSSION

A. Federal and State False Arrest and False Imprisonment Claims

The defendants move to dismiss the federal and state law claims for false arrest and false imprisonment against them. In his brief in opposition to the motion to dismiss, the plaintiff withdraws “any claims based on false arrest” due to the plaintiff’s guilty plea on the disorderly conduct charge. See Pl.’s Mem. Law Opp’n at 4 n.3. Accordingly, I will dismiss Count II (§ 1983 false arrest), Count V (§ 1983 false imprisonment), and count XII (state law false arrest and false imprisonment) against the defendants with prejudice.⁴

⁴In the false imprisonment claims, the complaint alleges that the plaintiff’s detention was unlawful because the arrest lacked probable cause. See Compl. ¶¶ 74-79. Therefore, the false imprisonment claims are being dismissed because they rest on the illegality of the plaintiff’s arrest. See also Groman v. Twp. of Manalapan, 47 F.3d 628, 636 (3d Cir. 1995) (“[W]here the police lack probable cause to make an arrest, the arrestee has a claim under § 1983 for false imprisonment based on a detention pursuant to that arrest.”). In any event, the plaintiff clarifies his position in his brief’s conclusion where he stipulates to withdrawing any claim based upon false arrest or false imprisonment. See Pl.’s Mem. Law Opp’n at 12.

B. Federal and State False Malicious Prosecution Claims

1. Federal § 1983 Malicious Prosecution Claim

The defendants argue that the plaintiff's complaint fails to set forth allegations that establish the essential elements of a federal Fourth Amendment malicious prosecution claim.⁵ The plaintiff responds that the malicious prosecution claim should proceed with respect to the aggravated assault charge that was brought against him because that charge was terminated in the plaintiff's favor and the plaintiff was seized because of that charge.

In order to successfully plead a § 1983 Fourth Amendment malicious prosecution claim a plaintiff must allege that: "(1) the defendant initiated a criminal proceeding; (2) the criminal proceeding ended in his favor; (3) the defendant initiated the proceeding without probable cause; (4) the defendant acted maliciously or for a purpose other than bringing the plaintiff to justice; and (5) the plaintiff suffered deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding." Johnson v. Knorr, 477 F.3d 75, 82 (3d Cir. 2007).

With the exception of the aggravated assault charge, the plaintiff does not aver that the criminal proceedings related to the criminal charges brought against him terminated in his favor. See Donahue v. Gavin, 280 F.3d 371, 383 (3d Cir. 2002) ("One element that

⁵The Third Circuit has indicated that § 1983 malicious prosecution claims may be grounded in "police conduct that violates the Fourth Amendment, the procedural due process clause or other explicit text of the Constitution." Torres v. McLaughlin, 163 F.3d 169, 172-73 (3d Cir. 1998). The plaintiff's complaint and brief in opposition to the motion to dismiss reveal that the plaintiff is pursuing his federal malicious prosecution claim based on a violation of the Fourth Amendment.

must be alleged and proved in a malicious prosecution action is the termination of the prior criminal proceeding in favor of the accused.”). Rather, the complaint states that the plaintiff entered a guilty plea with respect to two charges (disorderly conduct and driving with a suspended license) and the balance of the charges were withdrawn. See id. (citing RESTATEMENT (SECOND) OF TORTS § 659 (1976)) (holding that entry of a *nolle prosequi* only counts as a favorable termination when the circumstances of the entry indicate the plaintiff’s innocence). Therefore, with respect to the simple assault, terroristic threats, harassment, resisting arrest, disorderly conduct, and driving with a suspended license charges, the plaintiff fails to plead the second element of a federal malicious prosecution claim.⁶

As to all the criminal charges, the plaintiff does not allege any facts that support he was seized as a consequence of a legal proceeding and, as a result, he fails to satisfy the fifth element of a federal malicious prosecution claim. See Risich v. Bensalem Twp., No. 04-5305, 2005 U.S. Dist. LEXIS 2596, at *7-11 (E.D. Pa. Feb. 17, 2005) (discussing the seizure requirement for a Fourth Amendment malicious prosecution claim); Godshalk v. Borough of Bangor, No. 03-1465, 2004 U.S. Dist. LEXIS 7962, at *35-39 (E.D. Pa. May 5, 2004) (same). The legal proceedings were allegedly initiated by the defendants when

⁶As for the aggravated assault charge, the complaint alleges that it was dismissed by the district justice at the preliminary hearing. When a charge is disposed of in such a manner, it qualifies as the criminal proceedings ending in the plaintiff’s favor. See Donahue, 280 F.3d at 383 (turning to the Restatement (Second) of Torts § 659 for a determination of when criminal proceedings are terminated in favor of the accused, which includes “a discharge by a magistrate at a preliminary hearing”).

they filed the police complaint, but the plaintiff's complaint does not contend that the defendants imposed any restrictions upon the plaintiffs' liberty after that point or after any arraignment or preliminary hearing. The only seizure alleged is the plaintiff's arrest and that occurred *prior* to the initiation of any criminal proceedings. See Nudelman v. Borough of Dickson City Police Dep't, No. 05-1362, 2006 U.S. Dist. LEXIS 22154, at *11-12 (M.D. Pa. Apr. 12, 2006) (citing Singer v. Fulton County Sheriff, 63 F.3d 110, 117 (2d Cir. 1995)) (dismissing § 1983 malicious prosecution claim because plaintiff did not plead the requisite connection between the criminal citation and his seizure).

The plaintiff attempts to satisfy the "seizure as a consequence of a legal proceeding" element of his federal malicious prosecution claim by arguing new facts in his opposition brief. He claims that an arrest warrant was issued for him and he was released on \$10,000 bail. See Pl.'s Mem. Law Opp'n at 7. He also attaches a copy of the arrest warrant, bail release conditions, and bail bond to his brief. See Pl.'s Mem. Law Opp'n Ex. B.⁷ Even if this court considers the new facts contained in these additional documents, they fail to establish a "seizure" of the plaintiff as a consequence of a legal proceeding.

In Gallo v. City of Phila., 161 F.3d 217 (3d Cir. 1998), the Third Circuit discussed the fifth element of a Fourth Amendment malicious prosecution claim. In that case, after

⁷Since these documents are public records, I will consider them in ruling on the pending motion to dismiss. See Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993) ("To decide a motion to dismiss, courts generally consider only the allegations contained in the complaint, exhibits attached to the complaint and matters of public record.").

being indicted, the plaintiff had to "post a \$ 10,000 bond," "attend all court hearings including his trial and arraignment," communicate with pretrial services "on a weekly basis," and "was prohibited from traveling outside New Jersey and Pennsylvania." See id. at 222. Based on the totality of these restrictions, in particular the travel restrictions and the mandatory court appearances, the Third Circuit found a seizure for the purpose of the malicious prosecution claim; however, it noted that the decision was a "close call." See id. at 222-25; Murphy v. Lynn, 118 F.3d 938, 945-46 (2d Cir. 1997).

Here, the plaintiff apparently was required to post \$10,000 bail, attend proceedings related to the charges, and communicate with pretrial services. Neither the scope of pretrial services' involvement nor the number or type of proceedings the plaintiff had to attend is indicated in the complaint or the plaintiff's papers. Regardless, the plaintiff did not have any travel restraints placed on him and the criminal proceedings that followed the charges being filed against him did not include a trial. If Gallo's holding was a close call, the absence in this case of two factors that contributed to Gallo's conclusion can only result in a finding that a seizure did not occur in this case after the legal proceedings were initiated. See Bristow v. Clevenger, 80 F. Supp. 2d 421, 429-30 (M.D. Pa. 2000).

Therefore, without the requisite constitutional violation, the plaintiff's § 1983 Fourth Amendment malicious prosecution claim (Count IV) fails.⁸

⁸The plaintiff cannot salvage the malicious prosecution claim by narrowing its application to the aggravated assault charge. See Johnson, 477 F.3d at 81-85 (requiring district court in that malicious prosecution suit to analyze probable cause with respect to each charge that was brought against the plaintiff). If anything, such a measure would further weaken his attempt to satisfy the fifth element of a §

2. *State Law Malicious Prosecution Claim*

The defendants and plaintiff put forward similar arguments regarding the dismissal of the state malicious prosecution claim that they did for the federal malicious prosecution claim. The plaintiff's state law claim of malicious prosecution will be dismissed because the defendants did not lack probable cause in prosecuting the plaintiff's case.⁹

Under Pennsylvania law, in order to properly plead the tort of malicious prosecution, a plaintiff must allege: “(1) the defendants initiated a criminal proceeding; (2) the criminal proceeding ended in plaintiff's favor; (3) the proceeding was initiated without probable cause; and (4) the defendants acted maliciously or for a purpose other than bringing the plaintiff to justice.” *Donahue*, 280 F.3d at 379; see *Gatter v. Zappile*, 67 F. Supp. 2d 515, 519 (E.D. Pa. 1999) (addressing the lack of probable cause as an element in state law claims for malicious prosecution). Pennsylvania follows the Restatement of Torts § 667(1) position that probable cause is conclusively established where there is a guilty plea or conviction, even if later overturned. See *McGriff v. Vidovich*, 699 A.2d 797, 800 (Pa. Commw. Ct. 1997) (“[W]e now agree with the Superior Court that under the present state of Pennsylvania law, probable cause is conclusively established to exist at the

1983 Fourth Amendment malicious prosecution claim — seizure as a consequence of a legal proceeding. That is because the plaintiff does not allege that the prosecution of the aggravated assault charge resulted in an additional burden on his liberty beyond those attributable to the prosecution of the charges that did not end favorably to the plaintiff. *Id.* at 85, 85 n.14.

⁹In addition, as noted above, for all charges except aggravated assault the criminal proceedings did not end favorably for the plaintiff. See *supra* Part III.B.1; *Haefner v. Burkey*, 626 A.2d 519, 521 (Pa. 1993) (relying on the Restatement (Second) of Torts to determine what constitutes termination in favor of the accused).

time the arrest was made when there is a guilty plea or conviction.”); Cosmos v. Bloomingdales Bros., Inc., 660 A.2d 83, 86 (Pa. Super. Ct. 1995) (holding in a malicious prosecution case that a conviction “is conclusive proof of the existence of probable cause”).

In this case, the plaintiff pled guilty to disorderly conduct and driving with a suspended license. The guilty plea conclusively establishes that the defendants had probable cause to initiate the criminal proceedings against the plaintiff.¹⁰ The existence of probable cause to prosecute the plaintiff eliminates any liability on the part of the defendants under the state law claim of malicious prosecution.

Accordingly, I will dismiss with prejudice Count XIII (malicious prosecution) of the complaint for failing to state a valid claim.

C. § 1983 Conspiracy Claim

The defendants argue that the plaintiff’s § 1983 conspiracy claim (Count VIII) must be dismissed because it is premised on an intra-agency conspiracy. The plaintiff contends

¹⁰The plaintiff cannot save his state law claim of malicious prosecution in the context of the aggravated assault charge. The existence of probable cause with respect to one offense for which the plaintiff was charged similarly disposes of her malicious prosecution claim with respect to all of the charges brought against her. See, e.g., Odom v. Borough of Taylor, No. 05-0341, 2006 U.S. Dist. LEXIS 77203, at *40-41 (M.D. Pa. Oct. 24, 2006). See also Wright v. City of Phila., 409 F.3d 595, 604 (3d Cir. 2005) (holding the same in the context of a § 1983 malicious prosecution claim, which requires proof of all four common-law malicious prosecution elements plus a specific constitutional violation); Johnson, 477 F.3d at 82 (noting the precedential status of Wright where “the circumstances leading to the arrest and prosecution were totally intertwined” as alleged in the complaint in this case); Warren v. Twp. of Derry, No. 04-2798, 2007 U.S. Dist. LEXIS 19537, at *27-28 (M.D. Pa. Mar. 20, 2007) (holding that a federal and state law claims of malicious prosecution fail because “court’s conclusion that defendants possessed probable cause to effect plaintiffs’ arrest forecloses plaintiffs’ malicious prosecution claim as a matter of law”).

that the conspiracy claim is viable because it is premised on the actions of the Individual Defendants in their personal capacity.

“In order to prevail on a conspiracy claim under § 1983, a plaintiff must prove that persons acting under color of state law conspired to deprive him of a federally protected right.” Ridgewood Bd. of Educ. v. N.E. ex rel. M.E., 172 F.3d 238, 254 (3d Cir. 1999). The intracorporate conspiracy doctrine, however, presents a limitation in establishing a conspiracy,¹¹ and this theory has been applied to governmental authorities in Pennsylvania. See Heffernan v. Hunter, 189 F.3d 405, 412 n.5 (3d Cir. 1999). See, e.g., Poli v. SEPTA, No. 97-6766, 1998 U.S. Dist. LEXIS 9935, at *42-45 (E.D. Pa. July 7, 1998). “Under the intracorporate immunity doctrine, a corporation's employees, acting as agents of the corporation, are deemed incapable of conspiring among themselves or with the corporation.” Jackson v. T & N Van Service, No. 99-1267, 2000 U.S. Dist. LEXIS 6210, at *16 (E.D. Pa. May 9, 2000) (quotation and citation omitted). But individual defendants, who are employees of a government authority, can conspire with one another in their individual capacities. See Novotny v. Great Am. Fed. Sav. & Loan Assoc., 584 F.2d 1235, 1238 (3d Cir. 1978), vacated on other grounds, 442 U.S. 366 (1979); Poli v. SEPTA, 1998 U.S. Dist. LEXIS 9935. In addition, a “conspiracy between a corporation and one of

¹¹Although the Third Circuit discusses the intracorporate immunity doctrine in the context of § 1985(3) conspiracy claims, I assume for purposes of this motion that the intracorporate immunity principles apply to a § 1983 conspiracy claim as well. See Gregory v. Chehi, 843 F.2d 111, 118 n.4 (3d Cir. 1988); Buschi v. Kirven, 775 F.2d 1240, 1251-53 (4th Cir. 1985); Tarlecki v. Mercy Fitzgerald Hosp., No. 01-1347, 2002 U.S. Dist. LEXIS 12937, at *18-20 (E.D. Pa. July 15, 2002). The intracorporate immunity doctrine’s application in this case is of little significance, though, because the plaintiff’s conspiracy claim is not precluded by the doctrine.

its officers may be maintained if the officer is acting in a personal, as opposed to official, capacity, or if independent third parties are alleged to have joined the conspiracy.”

Robison v. Canterbury Vill., Inc., 848 F.2d 424, 430-31 (3d Cir. 1988); see also Heffernan, 189 F.3d at 412 (noting that courts allow an exception to the intracorporate conspiracy doctrine when the employees have acted for their sole personal benefit and thus outside the course and scope of their employment).

Here, the plaintiff’s complaint is brought against each of the Individual Defendants in their official capacities and in their individual capacities. See Compl. at 1. The § 1983 conspiracy count is leveled against only the Individual Defendants and not the city of Bethlehem. Id. at 19. In the conspiracy claim, the plaintiff alleges that all of the Individual Defendants participated in a conspiracy to assault him and then “file false charges against him in an effort to conceal their own wrongful acts and omissions.” Id. at 20. The complaint also states that the conspiracy was an express or implied agreement between the Individual Defendants and others to deprive the plaintiff of his constitutional rights, including his First and Fourth Amendment rights. Id.

The plaintiff does not indicate in what capacity he is attempting to hold the Individual Defendants liable on the conspiracy claim. The Individual Defendants, all employees of the Bethlehem Police Department, can conspire with one another in their individual capacities for purposes of section 1983 and the complaint appears to allege as much. This conclusion is supported by the plaintiff’s allegation that the conspiracy was

motivated by the personal interests of the Individual Defendants to hide their wrongdoing, as opposed to a desire to perform their official duties.

The conspiracy claim under section 1983, however, is subject to dismissal to the extent that liability is asserted against the police officers acting in their official capacities.¹² “In a § 1983 claim, employees of a municipal police department, acting in their official capacities, are part of the same entity and therefore cannot be charged with civil conspiracy because an entity cannot conspire with itself.” Tarlecki v. Mercy Fitzgerald Hosp., No. 01-1347, 2002 U.S. Dist. LEXIS 12937, at *20 (E.D. Pa. July 15, 2002) (citation and quotations omitted); see Wichard v. Cheltenham Twp., No. 95-3969, 1995 U.S. Dist. LEXIS 18195, at *5 (E.D. Pa. Dec. 6, 1995) (claims against police officers in their official capacities are, in effect, suits against the governmental entity).

Accordingly, I will dismiss the § 1983 conspiracy count (Count VIII) against the Individual Defendants in their official capacities. The conspiracy claim against the

¹²The plaintiff argues that he adequately pleads an exception to the intracorporate immunity doctrine acknowledged in Robison, i.e., a conspiracy between an entity, its officers, and an independent third party. While the complaint alleges that the Individual Defendants conspired with “others” to deprive the plaintiff of his constitutional rights, this portion of the conspiracy count does not satisfy this Circuit’s requirement that a conspiracy be pled with particularity. See Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1166 (3d Cir. 1989) (“To plead conspiracy adequately, a plaintiff must set forth allegations that address the period of the conspiracy, the object of the conspiracy, and the certain actions of the alleged conspirators taken to achieve that purpose.”). In his brief, the plaintiff relies on the factual allegations contained in a suit filed by defendant Officer Landi to argue that the third party involved is the Fraternal Order of Police. See Lande v. City of Bethlehem, No. 07-2902 (E.D. Pa.). In considering a motion to dismiss, a court can only consider the factual allegations contained in the complaint filed in the case before it. In any event, the plaintiff does not explain what role or actions the Fraternal Order of the Police took in the alleged conspiracy. See Shearin, 885 F.2d at 1166. Therefore, the § 1983 conspiracy claim against the Individual Defendants in their official capacities cannot be maintained on the basis of a third party conspirator.

Individual Defendants in their personal capacities, however, will be permitted to go forward.

D. Monetary Damages against Defendants Under the Pennsylvania Constitution

Lopez brings Count X of his complaint against all Individual Defendants for violations of Article I, Section 1¹³ and Article I, Section 8¹⁴ of the Commonwealth of Pennsylvania's Constitution. The defendants argue that this claim must be dismissed to the extent it seeks monetary damages because there is no cause of action for monetary damages for violating the state constitution.

When considering whether a plaintiff had the right to receive money damages for an alleged use of excessive force by police officers, the Pennsylvania Commonwealth Court refused to create a new cause of action for monetary damages for an alleged unreasonable seizure in violation of Article I, Section 8 of the Pennsylvania Constitution. Jones v. City of Phila., 890 A.2d 1188, 1216 (Pa. Commw. Ct.), appeal denied, 909 A.2d 1291 (Pa. 2006). The court noted, however, that declaratory and injunctive remedies are available under the state constitution. Id. at 1216. Federal courts in this district have followed the Jones decision and adopted its reasoning, both in the context of Article I, § 1

¹³“All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.” PA. CONST. art. I, § 1.

¹⁴ “The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures” PA. CONST. art. I, § 8.

violations and Article I, § 8 violations.¹⁵

I similarly adopt the Jones decision. I predict that the Pennsylvania Supreme Court would agree that Jones equally applies in this case to any Article I, Section 1 and Article I, Section 8 violations. The plaintiff's claim for monetary damages under the Pennsylvania Constitution therefore fails.¹⁶

While Lopez is permitted to seek injunctive and declaratory relief under the state constitution, Lopez only seeks injunctive relief on his section 1983 claims. See Compl. at 27. Therefore, I will dismiss Count X (Pennsylvania Constitution violations) in its entirety.

E. Plaintiff's Claims Against Defendant Commissioner Donchez in His Official Capacity

The defendants request that this court dismiss all § 1983 claims against defendant

¹⁵ See K.S. v. Sch. Dist. of Phila., No. 05-4916, 2007 U.S. Dist. LEXIS 23557, at *25 (E.D. Pa. Mar. 28, 2007); Mazzeo v. Mittman, No. 05-692, 2007 U.S. Dist. LEXIS 17450, at *8-9 (E.D. Pa. Mar. 8, 2007); Small v. City of Phila., No. 05-5291, 2007 U.S. Dist. LEXIS 14323, at *36 (E.D. Pa. Mar. 1, 2007); Morales v. Taveras, No. 05-4032, 2007 U.S. Dist. LEXIS 4081, *56 (E.D. Pa. Jan. 18, 2007); Rauso v. Zimmerman, No. 97-1841, 2006 U.S. Dist. LEXIS 90343, at *26 n. 23 (M.D. Pa. Dec. 14, 2006); Jones v. Middletown Twp., No. 05-3719, 2006 U.S. Dist. LEXIS 44723, at *12 n.8 (E.D. Pa. June 24, 2006); Klump v. Nazareth Area Sch. Dist., 425 F. Supp. 2d 622, 642 (E.D. Pa. 2006). No reported decisions distinguish Jones or refuse to follow the decision.

¹⁶ The plaintiff also alleges that the defendants violated his rights under the Pennsylvania Constitution “to exercise the fundamental freedoms of speech and association.” These rights are better recognized under Article I, Sections 7 and 20 of the Pennsylvania Constitution. See PA. CONST. art. I, § 7 (“The free communication of thought and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty.”); id. § 20 (“The citizens have a right in a peaceable manner to assemble together for their common good . . .”). Regardless, I adopt the reasoning of my colleagues and decline to find a private cause of action for damages under either section 7 or section 20 of the Pennsylvania Constitution. See Dooley v. City of Phila., 153 F. Supp. 2d 628, 663 (E.D. Pa. 2001); Sabatini v. Reinstein, No. 99-2393, 1999 U.S. Dist. LEXIS 12820, at *6-7 (E.D. Pa. Aug. 18, 1999); Holder v. City of Allentown, No. 91-240, 1994 U.S. Dist. LEXIS 7220, at *11 (E.D. Pa. May 19, 1994).

Commissioner Donchez in his official capacity. The defendants contend that to sue Commissioner Donchez in his official capacity is the equivalent of suing the City of Bethlehem and since the City of Bethlehem is also a named defendant in this suit, such official capacity claims are duplicative. I agree.

The Supreme Court has held that suing a police officer in his official capacity is in reality a suit against the government entity that the officer represents. Kentucky v. Graham, 473 U.S. 159, 165 (1985). A plaintiff who prevails in such a suit must recover from the governmental body, not the individual defendant. Id. at 166. “Courts have held that when a plaintiff names the municipality as a defendant, it is redundant, and possibly confusing to the jury, to also include the employee in his or her official capacity, because the two are really one defendant.” Crane v. Cumberland County, No. 99-1798, 2000 U.S. Dist. LEXIS 22489, at *8-10 (M.D. Pa. June 16, 2000); Satterfield v. Borough of Schuylkill Haven, 12 F. Supp. 2d 423, 431-32 (E.D. Pa. 1998).

In this case, the plaintiff has named as defendants both Commissioner Donchez in his official capacity and the City of Bethlehem. Because they are in fact one defendant, the defendants’ motion to dismiss the claims against Commissioner Donchez in his official capacity will be granted. See McTernan v. City of York, No. 07-88, 2007 U.S. Dist. LEXIS 37238, at *6 (M.D. Pa. May 22, 2007) (“Courts within the Third Circuit have ruled that claims against an official in his or her official capacity are redundant with the claims against a municipality that employs the official and should therefore be dismissed.”).

The plaintiff argues that his official capacity suit against Commissioner Donchez should be maintained to the extent he is seeking equitable relief. Lopez relies on the Supreme Court holding in Ex parte Young, 209 U.S. 123 (1908). The plaintiff’s argument is entirely misplaced. Ex parte Young applies to suits against *state officials*. Its holding allows a plaintiff to seek prospective relief against state officials in their official capacities. The doctrine developed due to the inability of a plaintiff to sue a state directly unless the state waived its Eleventh Amendment immunity or Congress overrode the state’s immunity. This case is against a city and its officials; it is not against a state. Municipalities are considered “persons” under section 1983 and, thus, can be sued directly for damages and prospective relief. See Will v. Mich. Dep’t of State Police, 491 U.S. 58, 70-71 (1989); Monell v. Dep’t of Soc. Servs. of New York, 436 U.S. 658, 694 (1978).¹⁷

Accordingly, the § 1983 official capacity claims against defendant Commissioner Donchez will be dismissed with prejudice.

F. Negligent Infliction of Emotional Distress Claim

The defendants move to dismiss Count XV’s negligent infliction of emotional distress claim in its entirety under the Pennsylvania Political Subdivision Tort Claims Act

¹⁷As the Supreme Court explained in Kentucky v. Graham:
There is no longer a need to bring official-capacity actions against local government officials, for under Monell local government units can be sued directly for damages and injunctive or declaratory relief. Unless a State has waived its Eleventh Amendment immunity or Congress has overridden it, however, a State cannot be sued directly in its own name regardless of the relief sought. Thus, implementation of state policy or custom may be reached in federal court only because official-capacity actions for prospective relief are not treated as actions against the State. See Ex parte Young, 209 U.S. 123 (1908). 473 U.S. at 167 n.14 (citations omitted).

("PSTCA"). See 42 PA. CONS. STAT. § 8541 et seq. The plaintiff acknowledges that Count XV fails to state a claim upon which relief can be granted and withdraws the negligent infliction of emotional distress claim. See Pl.'s Mem. Law Opp'n at 4 n.3, 12. Accordingly, I will grant the defendants' motion with respect to Count XV and dismiss the negligent infliction of emotional distress claim against the Individual Defendants with prejudice.

G. Individual Defendants' Immunity from State Law Claims

The defendants argue that the state law claims against the Individual Defendants in their official capacities are barred under the PSTCA.¹⁸ The plaintiff does not raise any decipherable objections to the defendants' motion on this point.

The PSTCA grants municipalities, such as the City of Bethlehem, immunity from liability for all state law tort claims except for very specific types of tortious conduct. See 42 PA. CONS. STAT. §§ 8541-42.¹⁹ None of the narrow exceptions apply in this case and the plaintiff does not argue otherwise. In addition, "suits against municipal employees in their official capacities are treated as claims against the municipal entities that employ these individuals. This is because, in a suit against a municipal official in his official

¹⁸As I have already dismissed the state law claims of false arrest, false imprisonment, malicious prosecution, and negligent infliction of emotional distress against the Individual Defendants, this discussion is limited to the remaining state law claims of assault and battery (Count XI) and intentional infliction of emotional distress (Count XIV).

¹⁹PSTCA provides that "no local agency [i.e. municipality] shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person" -- unless the conduct of the municipality or its employee fits into one of a few narrow categories enumerated in the PSTCA. 42 PA. CONS. STAT. §§ 8541-42.

capacity, the real party in interest is the municipal entity and not the named official.”
Lakits v. York, 258 F. Supp. 2d 401, 405 (E.D. Pa. 2003) (citations and quotations omitted).

Thus, the remaining state law tort claims (assault and battery and intentional infliction of emotion distress) against the Individual Defendants in their official capacities are treated as claims against their municipal employer, the City of Bethlehem. Under the PSTCA, the City of Bethlehem is immune from the plaintiff's state law claims as a matter of law. Accordingly, the remaining state law claims against the Individual Defendants in their official capacities are barred. See Smith v. School Dist. of Phila., 112 F. Supp. 2d 417, 424-25 (E.D. Pa. 2000).

I will grant the defendants’ motion to dismiss the state law claims against the Individual Defendants in their official capacities.

IV. CONCLUSION

Based on the foregoing, I will grant the defendants’ motion to dismiss in part, as follows: (1) dismiss Count II (§ 1983 false arrest), Count IV (§ 1983 malicious prosecution), Count V (§ 1983 false imprisonment), Count X (Pennsylvania Constitution claim), Count XII (state law false arrest and false imprisonment), Count XIII (state law malicious prosecution), and Count XV (negligent infliction of emotional distress) in their entirety; (2) dismiss Count VIII (§ 1983 conspiracy claim), Count XI (state law assault and battery), and Count XIV (intentional infliction of emotion distress) in part, to the extent

the counts are brought against the Individual Defendants in their official capacities; (3) dismiss the § 1983 claims against defendant Commissioner Francis Donchez in his official capacity.

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

REYNALDO LOPEZ,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	NO. 07-1382
	:	
OFFICER PATRICK MACZKO,	:	
et al.,	:	
Defendants.	:	

ORDER

AND NOW, this 16th day of August, 2007, upon consideration of defendants' Motion to Dismiss Portions of Plaintiff's Complaint (Docket No. 6), and the response thereto, it is hereby **ORDERED** that the motion is **GRANTED in part**, as follows:

- 1) I will dismiss Count II (§ 1983 false arrest), Count IV (§ 1983 malicious prosecution), Count V (§ 1983 false imprisonment), Count X (Pennsylvania Constitution claim), Count XII (state law false arrest and false imprisonment), Count XIII (state law malicious prosecution), and Count XV (negligent infliction of emotional distress) in their entirety.
- 2) I will dismiss Count VIII (§ 1983 conspiracy claim), Count XI (state law assault and battery), and Count XIV (intentional infliction of emotion distress) in part, to the extent the counts are brought against the Individual Defendants in their official capacities.
- 3) I will dismiss the § 1983 claims against defendant Commissioner Francis Donchez in his official capacity.

The parties should proceed with discovery as specified in this court's July 17, 2007 Scheduling Order. See Docket No. 8.

BY THE COURT:

/s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, J.