

information. A series of events eventually led to litigation in the state court, Architects v. Gavin Lentz, Esq., et al. (Philadelphia Court of Common Pleas, February Term 1996, No. L-0193). In that lawsuit, Architects were represented by the law firm LaBrum & Doak, and specifically by associates Stephen J. Springer and Pamela Tobin (collectively "Attorney Defendants"). On March 29, 1996, in furtherance of the state lawsuit, Attorney Defendants issued and served a subpoena *duces tecum* upon UVB ordering it to produce documents relating to financial transactions between plaintiffs and UVB with respect to the loans and construction of the building and renovation at 1524 Locust. Plaintiffs informed UVB that they objected to its compliance with the subpoena and, shortly thereafter, filed a motion for a protective order. Attorney Defendants opposed the motion for a protective order. On April 26, 1996, the Court of Common Pleas heard argument on the motion and denied the protective order and ordered compliance with the subpoena. In its order, the court limited review of the UVB documents to Attorney Defendants and one expert and the court ordered that the documents be kept confidential and under seal until otherwise ordered by the court.¹ Thereafter, UVB complied with the subpoena.

On a related matter, acting on behalf of Architects, Attorney Defendants filed a motion for reconsideration in the Court of Common Pleas on June 13, 1996. Attorney Defendants requested that the court reconsider its May 21, 1996 order dismissing an amendment

¹ The order of the Court of Common Pleas states:

AND NOW, on this 26 day of April, 1996, upon consideration of Defendants' Emergency Motion For Protective Order, Claimant, John Ciccone Architects, P.C.'s response and argument, it is hereby ORDERED and DECREED that said Motion is DENIED.

AND IT IS FURTHER ORDERED and DECREED that Claimant's counsel and one expert will be permitted to review the document and both agree to keep confidential all financial information obtained from United Valley Bank and not to disclose it to anyone until otherwise ordered by the court, and that pursuant to that stipulation, United Valley Bank shall comply with plaintiff, John Ciccone Architects, P.C.'s, subpoena *duces tecum* numbered 95-0078995, and bring all documents requested in the said subpoena to the offices of LaBrum & Doak, 1818 Market Street, Suite 2900, Philadelphia, Pennsylvania, on April 29, 1996, at 10:00 A.M. These documents shall be kept under seal and not disclosed under any circumstances except with permission of the trial court.

to the mechanics' lien claim and to further allow the Attorney Defendants to amend the mechanics' lien claim. In their motion for reconsideration, the Attorney Defendants attached several UVB documents as exhibits. These UVB documents were submitted without prior court permission or further court order, thus publicly disclosing these confidential documents.

On December 2, 1996, plaintiffs commenced this present lawsuit in the United States District Court in the Eastern District of Pennsylvania alleging breaches of privacy under federal and state law.

II. LEGAL STANDARD

In deciding a motion to dismiss, a court must take all well-pleaded factual allegations in the complaint as true; dismissal is only appropriate if the plaintiff could prove no set of facts that would entitle him or her to the relief requested. See Miree v. DeKalb, 433 U.S. 25, 27 (1977); Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In addition, the plaintiff must be given the benefit of all reasonable inferences that can be drawn from those allegations. Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993).

III. DISCUSSION

A. Federal Breach of Privacy - Section 1983

To establish a Section 1983 cause of action, plaintiff has the burden of establishing two elements: (1) the violation of a federally protected constitutional or statutory right; (2) by state action or action under color of law. 42 U.S.C. § 1983; Jordan v. Fox, Rothschild, Frankel & O'Brien, 20 F.3d 1250, 1264 (3d Cir. 1994). I will begin with the state action prong of the analysis.

1. State Action

"Although a private [party] may cause a deprivation of . . . a right, [it] may be subjected to liability under § 1983 only when [it] does so under color of law." Mark v. Borough of Hatboro, 51 F.3d 1137, 1141 (3d Cir.) (quoting Flagg Bros., Inc. v. Brooks, 436 U.S. 129, 156 (1978)), cert. denied, 116 S. Ct. 165 (1994). The Supreme Court in Lugar v. Edmondson Oil

Co. articulated a two-part test which must be satisfied before an act of a private party may be "fairly attributable to the State," rendering a private actor subject to Section 1983:

First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

The complaint herein refers to three acts conducted by Attorney Defendants and Architects that allegedly violated Section 1983. They are: (1) the March 29, 1996 Subpoena on UVB for plaintiffs' financial documents; (2) the April 26, 1996 court order requiring compliance with the subpoena; and (3) the June 13, 1996 Motion for Reconsideration. See Complaint ¶¶ 10, 30, 37, 41, 51. Plaintiffs contend that this conduct of Attorney Defendants and Architects are reasonably attributable to the state, and thus involve state action subjecting them to Section 1983 liability. In their complaint, plaintiffs combine both the subpoena and court order into Count I, alleging that Attorney Defendants and Architects "caus[ed] UVB to be compelled by the Pennsylvania Court of Common Pleas to produce the subject documents contrary to UVB's rightful objection" Complaint ¶ 45. Plaintiffs refer to the motion for reconsideration in Count III, alleging that "[w]hen defendants disclosed and published the subject documents in the Reconsideration Motion, filed as it was in the Pennsylvania Court of Common Pleas, Philadelphia County, they disclosed and published documents that contained highly personal financial information in which plaintiffs entertained and perpetually maintain a reasonable expectation of privacy." Complaint ¶ 56.

The parties have cited, *inter alia*, three leading cases on this issue, the precedent of which this Court is bound: Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982); Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614 (1991); Jordan v. Fox, Rothschild, Frankel & O'Brien,

20 F.3d 1250 (3d Cir. 1994). Because whether the particular conduct of a private party can be fairly attributed to the state is a fact-specific determination, I will briefly discuss the underlying facts and holdings of these cases. I will also discuss another case, Angelico v. Lehigh Valley Hosp., Inc., et al., 1996 WL 524112, CIV. NO. 96-2681 (E.D. Pa. Sept. 13, 1996). Although not cited by the parties, Angelico is factually similar to the case at bar. While this case is not binding on this Court, I employ it here as persuasive authority.

a. Lugar v. Edmondson Oil Co.

The Supreme Court in Lugar enunciated the two-part test outlined earlier for determining whether a private party's actions involve sufficient contribution from the state to constitute state action. In that case, a lessee-operator of a truckstop in Virginia was indebted to his supplier, an oil company. Lugar, 457 U.S. at 924. The supplier sued on the debt and sought prejudgment attachment of the lessee's property. Id. Under Virginia law, the prejudgment attachment procedure required only that the creditor allege in an *ex parte* petition a belief that the debtor was disposing of or might dispose of his property in order to defeat his creditors. Id. Acting upon the petition of the supplier, the clerk of the state court issued a writ of attachment, which was then executed by the county sheriff, thereby sequestering lessee's property. Id. The Supreme Court held that where a state has created a procedure whereby state officials, acting on the *ex parte* petition of a private party, may attach disputed property, state action exists. Id. at 941-42.

b. Edmonson v. Leesville Concrete Co., Inc.

In Edmonson, a black construction worker was injured on the job and sued his employer in federal district court. Edmonson, 500 U.S. at 616. During *voir dire*, the employer used two peremptory challenges to remove black persons from the prospective jury. Id. The district court denied the worker's request to articulate a race-neutral explanation for striking the two jurors. Id. at 617. The Supreme Court noted that state action could be found when "private parties make extensive use of state procedures with 'the overt, significant assistance of state

officials." Id. at 622 (quoting Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478, 485 (1988)). After a full description of the jury selection process and of the judge's role in peremptory challenges, that being that the judge advises the juror when he or she has been excused, the Supreme Court concluded that "a private party could not exercise its peremptory challenges absent the overt, significant assistance of the court." Id. at 624. The Supreme Court recognized that while a litigant through his or her attorney invokes the formal authority of the court, it is the judge who actually discharges the prospective juror. Id. "Without the direct and indispensable participation of the judge, who beyond all question is a state actor, the peremptory challenge system would serve no purpose." Id. The Supreme Court ultimately concluded that the judge's role in this process involves the state in a significant way. Id.

c. Jordan v. Fox, Rothschild, Frankel & O'Brien

Jordan involved a dispute regarding the payment of rents between a commercial landlord and one of his tenants. In the course of the dispute, the attorneys for the landlord invoked a confession of judgment clause in the lease and caused the prothonotary of the Philadelphia Court of Common Pleas to enter judgment against the tenants. Jordan, 20 F.3d at 1253. To initiate this process, the Pennsylvania Rules of Civil Procedure ("Rules"), allow a plaintiff to file a complaint that includes several written instruments verifying the defendant's authorization of a judgment by confession. Id. at 1262. Upon the entry of judgment, the Rules allow the prothonotary to prepare a writ of execution on the judgment to be carried out by the Sheriff of Philadelphia. Id. Following these Rules at the defendant's request, the Sheriff in Jordan, under this writ, garnished the checking account of the tenant without prior notice or hearing. Id. at 1253.

The Court of Appeals for the Third Circuit held that the proceedings for entry of judgment by confession did not involve sufficient state action to render the attorneys state actors. Id. at 1266. The Court of Appeals agreed with the district court that a "[a] state procedure permitting private parties to file a complaint and confess judgment essentially involves

acquiescence by the state, not compulsion.'" Id. (quoting opinion of district court). However, the Court of Appeals further held that the writ of execution on the judgment, through which the Sheriff garnished the tenant's checking account, "plainly involve[s] actions by state officials," and thus a private judgment creditor using this procedure is converted into a state actor. Id.

d. Angelico v. Lehigh Valley Hospital, et al.

This case is the most factually similar to the present case. Plaintiff, a cardiothoracic surgeon, sued various hospitals and health providers for refusing him staff privileges, thus effectively foreclosing his ability to practice medicine. Angelico, 1996 WL 524112 at *1. Defendants' lawyer issued subpoenas to compel the production of plaintiff's personnel records from one of the hospitals and to compel the deposition of employees of the hospital who had worked with the plaintiff. Id. Senior Judge E. Mac Troutman concluded that the attorney's use of the subpoena power was analogous to the entry of judgment by confession in Jordan and not the execution on that judgment. Id. at *2. On this basis, Judge Troutman held that the attorney could not be considered a state actor. Id. at *3.²

e. Application

Upon examination of the Pennsylvania subpoena procedure, I recognize that there are some compelling reasons to view issuance of a subpoena as state action. The subpoena, on its face, states:

NOTICE

If you fail to attend or to produce the documents or things required by this subpoena, you may be subject to the sanctions authorized by Rule 234.5 of the Pennsylvania Rules of Civil Procedure, including but not limited to costs, attorney fees and imprisonment.

Pls. Exh. B.

As defined by the Pennsylvania Rules of Civil Procedure, a subpoena is "an order

² Another court has also held that attorneys' use of the subpoena does not implicate state action. See Barnard v. Young, 720 F.2d 1188, 1188 (10th Cir. 1983).

of the court commanding a person to attend and testify at a particular time and place. It may also require the person to produce documents or things which are under the possession, custody or control of that person." Pa. R. Civ. P. 234.1. Upon request of a party, the prothonotary will issue a subpoena signed and under seal of the court. Pa. R. Civ. P. 234.2. The party requesting the subpoena fills in the blank portions of subpoena specifying the witness(es) or document(s) requested. Failure to comply with a subpoena may be adjudged as contempt of court, subjecting the violator to appropriate sanctions. Pa. R. Civ. P. 234.5. Returning to the present case, plaintiffs argue that without the intercession of the state through the subpoena power, the requested documents would be otherwise unobtainable. It follows, according to plaintiffs, that the issuance of a subpoena by a private party can be fairly attributed to the state, and thus state action exists. I disagree.

While the subpoena power may, at first glance, appear to involve sufficient state action, closer examination reveals that state action is implicated only as a consequence of failure to comply with a subpoena. The subpoena itself involves no immediate seizure or deprivation of property under the force of law. It is this subtle distinction that saves the issuance of subpoena from being deemed state action. I agree with the sound reasoning of Senior Judge Troutman in Angelico:

Although plaintiff notes that there are potential legal consequences attached to failure to obey a subpoena which might ultimately involve invoking the assistance of state officials, such possibility serves only to highlight the difference between resorting to an available state procedure and actually using state officials to enforce or carry out that procedure.

Angelico, 1996 WL 524112 at *2. Thus, I conclude that a private party is not converted to a state actor when the assistance of state officials to enforce or carry out a subpoena is merely a potential consequence or threat. See Jordan, 20 F.3d at 1266 n.17.

In Jordan, the Third Circuit Court of Appeals opined that "the state must *significantly* contribute to the constitutional deprivation, *e.g.*, authorizing its own officers to

invoke the force of law in aid of the private persons' request." Jordan, 20 F.3d at 1266 (emphasis added). Unlike the sheriff in Jordan who executed the confession judgment, unlike the sheriff in Lugar who attached the property, and unlike the judge in Edmonson who discharged the two jurors, I cannot find any equivalent action by a state official in the case at bar. Plaintiffs do not allege in their complaint that state officers actually seized the documents or otherwise acted to enforce the subpoena. The mere issuance of a subpoena does not rise to the level of a significant contribution of the state. It is one step removed. It is not the direct and immediate seizure of the requested information. Rather, it is a mechanism or procedure for obtaining that information. In the present case, non-state officials, that being Attorney Defendants, carried out that task. Borrowing language from the district court in Jordan, I find that the invocation of the subpoena power, without immediate execution or enforcement by a state officer, through Pennsylvania Rules of Civil Procedure entails "acquiescence of the state, not compulsion."³

The other two acts of Attorney Defendants and Architects that plaintiffs refer to in their complaint--the court order of April 26, 1996 and the motion for reconsideration--are likewise not fairly attributable to the state. While the court order mandating compliance with the subpoena present in our case is not present in Angelico, I find that this additional layering of legal process still does not elevate the conduct of the private Attorney Defendants to state action. The court order does not enforce, execute or carry out the subpoena in any way -- that is, neither the judge nor any other state official, physically obtained the financial documents from UVB. Therefore, I conclude that the court order, without more, entails acquiescence of the state, and not compulsion.

It is well settled that the actions of an attorney in representing a private client, including the use of process, do not constitute state action. Henderson v. Fisher, et al., 631 F.2d 1115, 1119 (3d Cir. 1980); Arment v. Commonwealth Nat'l Bank, 505 F. Supp. 911, 913 (E.D.

³ Had the plaintiffs refused to comply with the subpoena and subsequently been found in contempt or monetarily sanctioned, or had state officials themselves actually seized the financial documents from UVB, I recognize that the state action status may have turned out differently.

Pa. 1981). Thus, the mere unilateral action of filing a motion for reconsideration by the Attorney Defendants and Architects does not constitute state action. The Attorney Defendants and Architects made use of state civil procedure and, as concluded above, this kind of conduct involves acquiescence by the state, not compulsion.

Therefore, I conclude that, even when viewing the allegations of the complaint in the light most favorable to plaintiffs, plaintiffs have failed to allege conduct by Attorney Defendants and Architects that can be fairly attributable to the state, and thus Section 1983 does not serve as a basis for liability.

2. Constitutional or Statutory Deprivation

Because I have concluded that plaintiffs have failed to allege the necessary state action under Section 1983, I need not address the other prong of the Lugar test consisting of constitutional deprivation. I will briefly note, however, that it is far from certain whether disclosure of financial documents constitutes a constitutionally or statutorily protected right to privacy. While failing to abide by the confidentiality mandate of the court order may be grounds for modest sanctions, if any, its ultimate characterization as a constitutional or statutory deprivation is unclear. See United States v. Miller, 425 U.S. 435 (1976) (holding that bank customers have no reasonable expectation of privacy under the Fourth Amendment in bank records of their accounts).

B. Pennsylvania Breach of Privacy

As discussed above, I will dismiss plaintiffs' Section 1983 claims in Counts I and III. Consequently, the remaining claims of plaintiffs are grounded in state law breach of privacy.

Supplemental jurisdiction is a doctrine of discretion, not of plaintiffs' right. Borough of West Mifflin v. Lancaster, 45 F.3d 780, 788 (3d Cir. 1995) (citing United Mine Workers v. Gibbs, 383 U.S. 715, 726-27 (1966)). If the claims over which a district court has original jurisdiction are dismissed, the district court has the option of declining to exercise supplemental jurisdiction over the remaining state law claims. 28 U.S.C.

§ 1367(c)(3). In determining whether to dismiss the state law claims, the district court should consider judicial economy, convenience and fairness to the parties, the stage of the litigation, whether either party will be prejudiced by the dismissal of the state law claims, and whether state law claims involve issues of federal policy. Growth Horizons, Inc. v. Delaware County, 983 F.2d 1277, 1284 (3d Cir. 1993); Glaziers & Glassworkers Local 252 Annuity Fund, et al. v. Newbridge Sec., Inc., 823 F. Supp. 1191, 1197 (E.D. Pa. 1993). In the instant action, the litigation is still in an early stage and no federal policies are implicated by the remaining state law claims. In addition, because Pennsylvania law provides that matters dismissed by a federal court for lack of subject matter jurisdiction may be refiled in the appropriate state court without regard to the limitations period, plaintiffs will not be prejudice if they refile their complaint. See 42 Pa. Cons. Stat. Ann. § 5103(b); Fulkerson v. City of Lancaster, 801 F. Supp. 1476, 1486 n.3 (E.D. Pa. 1992), aff'd, 993 F.2d 876 (3d Cir. 1993). Accordingly, I will dismiss without prejudice the remaining state law claims.

CONCLUSION

In light of the foregoing, I conclude that plaintiffs have not alleged in their complaint state action involving sufficient force of law under the Lugar test. Accordingly, I will dismiss with prejudice the Section 1983 claims from the complaint.⁴ I will exercise my discretion to dismiss without prejudice the remaining state law claims.

⁴ I need not address the alternative argument presented by Attorney Defendants and Architects to abstain from deciding this matter given the pending state court proceedings.

