

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

WILLIAM CHAPMAN, : CIVIL ACTION
 :
 v. :
 :
 ACME MARKETS, INC., :
 HERMAN SKIPP, JR., :
 NETHER PROVIDENCE POLICE :
 DEPT., :
 OFFICER WILLIAM KERSEY, :
 C.L. NELSON LOSS PREVENTION :
 SPECIALISTS, INC., and :
 C.L. NELSON : NO. 97-6642

M E M O R A N D U M

Padova, J.

April , 1998

Before the Court is the Motion of Defendants, C.L. Nelson Loss Prevention Specialists, Inc. and C.L. Nelson ("Defendants"), to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). For reasons that follow, the Motion will be granted.

I. BACKGROUND

Plaintiff brought this action pursuant to 42 U.S.C.A. § 1983 (West Supp. 1997) and state common law claims to recover damages allegedly suffered as a result of the following incident: On or about November 2, 1995, at about 2:45 p.m., Plaintiff was shopping at the Acme Market in Nether Providence Township, Delaware County, Pennsylvania. He picked up a packet of decongestant tablets, and reached in his pocket to make sure he had enough money to pay for it. His actions were recorded on a

store video tape, now believed to be in the custody and control of the Nether Providence Township Police Department. Later in his shopping, Plaintiff decided not to buy the tablets and left them on a counter in a different part of the store. He then picked up a Coca-Cola and got in line to pay for it.

Meanwhile, Defendant Herman Skipp, Jr., manager of the Acme store, had called the Nether Providence Police Department and reported Plaintiff as a shop-lifter. Officer Kersey arrived and, "after speaking to Defendant Herman Skipp, Jr., and in full view of all other Acme customers, [he] detained and questioned Plaintiff and performed a thorough search of his clothing and person." (Compl. at ¶ 19.) He found no product belonging to Acme Markets. The following day, Officer Kersey caused a summons to be filed with the district justice charging Plaintiff with retail theft. "Said summons was filed at the insistence of the Defendant Acme Markets." (Id. at ¶ 21.) At a hearing several days later, the charges against Plaintiff were dismissed.

Aside from the paragraphs identifying Defendants, there are only two other paragraphs of the Complaint that specifically refer to these Defendants:

25. On or about February 5, 1996, Defendant C.L. Nelson Loss Prevention Specialists, Inc., while acting within the course and scope of its engagement as a loss prevention consultant, contractor, or agent for Defendant Acme Markets, sent a letter to Plaintiff demanding One Hundred and Fifty Dollars (\$150.00) as civil restitution for damages done. . . .

26. Said letter caused the Plaintiff embarrassment and humiliation and forced him to expend attorney's fees to defend himself against said claims.

(Compl. at ¶¶ 25, 26.) In addition, Plaintiff alleges:

11. All the acts or omissions complained of herein which were performed or not performed by individuals, were performed or not performed by said individuals in their individual capacities and in their capacities as officers, agents, employees, or representatives of their respective employers and all of said acts and omissions were performed under color of state law.

(Id. at ¶ 11.)¹ Plaintiff claims that Defendants violated his rights under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, and he seeks compensatory and punitive damages, attorney's fees and costs.

II. LEGAL STANDARDS

A claim may be dismissed under Fed. R. Civ. P. 12(b)(6) only if the plaintiff can prove no set of facts in support of the claim that would entitle him to relief. ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994). The reviewing court must consider only those facts alleged in the complaint and accept all of the allegations as true. Id.; see also Rocks v. Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989) (holding that in deciding a motion to dismiss for failure to state a claim, the court must "accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the nonmoving party"). But a

¹In their Motion to Dismiss, Defendants state that C.L. Nelson is a fictitious name, but that is not significant for purposes of this Motion. The person who signed the letter from C.L. Nelson Loss Prevention Specialists, Inc. as an authorized representative can be considered to be one of the "individuals" mentioned in ¶ 11 of the Complaint.

court need not credit a complaint's "bald assertions" or "legal conclusions" when deciding a motion to dismiss. Morse v. Lower Merion School District, 132 F.3d 902, 906 (3d Cir. 1997) (citations omitted); see also Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (2d ed. 1997) (noting that courts, when examining 12(b)(6) motions, have rejected "sweeping legal conclusions cast in the form of factual allegations" (citation omitted)); Fernandez-Montes v. Allied Pilots Ass'n, 987 F.2d 278, 284 (5th Cir. 1993) (noting "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss").

In order to state a claim pursuant to 42 U.S.C.A. § 1983, Plaintiff must allege (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived the plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States. Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922 (1982).

III. DISCUSSION

Defendants contend that Plaintiff has not adequately alleged that they acted under color of state law and not simply as private citizens. The Court agrees. Plaintiff bases his claim that Defendants acted under color of state law on Defendants' letter to Plaintiff demanding \$150,000 "as civil

restitution for damages done." (Compl. at ¶ 25.) The letter further stated, in capital letters:

PLEASE BE ADVISED THAT THE STORE'S CLAIM IS BASED UPON
A STATE LAW ALLOWING FOR CIVIL DAMAGES AND IS NOT
RELATED IN ANY WAY TO ANY CRIMINAL PROCEEDING.

Plaintiff, in his Response to Defendants' Motion to Dismiss, states that Defendants "sent a threatening letter to Plaintiff, alleging that he owed them One Hundred and Fifty Dollars (\$150.00) and that their letter was being sent pursuant to state law." He goes on to say, "It is unique that they now claim that they were not acting under color of state law when it was clearly contained in their letter." (Pl.'s Resp. at 2.)

Plaintiff appears to have understood "pursuant to state law" to mean the same as "under color of state law." In that he is mistaken. "Pursuant to state law" simply indicates that state law authorizes Defendants to seek civil damages, here as private citizens. As indicated by the cases from which Plaintiff quotes, "under color of state law" refers to an official or governmental position conferred by the state, not simply the right to sue as a private party. See McClendon v. Turner, 765 F. Supp. 251 (W.D. Pa. 1991) (quoting Hicks v. Feeney 770 F.2d 375, 378 (3d Cir. 1985) (The "under color of state law" requirement "is satisfied by a showing of . . . misuse of official power possessed by virtue of state law." (emphasis added))); Wess v. Atkins, 487 U.S. 42 (1988) ("It is firmly established that a defendant in a 1983 suit acts under color of state law when he abuses the position given to him by the state." (emphasis added)); Barna v.

City of Perth Amboy, 42 F.3d 809, 816 (3d Cir. 1994) (“[O]ne who is without actual authority but who purports to act according to official power may also act under color of state law.” (emphasis added)). Private parties who are making a claim pursuant to state law are not considered to be acting “under color of state law,” even when they avail themselves of some state authority such as garnishment procedures. Flagg Bros. v. Brooks, 436 U.S. 149, 160 (1978) (Warehouseman's sale, pursuant to self-help provision of New York Uniform Commercial Code, of private goods entrusted to him for storage not “state action” under § 1983 because an “exclusive prerogative of the sovereign” was not delegated to warehouseman). Plaintiff misreads Defendants' letter when he takes it to be claiming that they are acting in some official or governmental capacity. Plaintiff himself is suing Defendants pursuant to 42 U.S.C.A. § 1983, but that does not mean he is acting in an official or governmental capacity under federal law.

Plaintiff does allege that Defendants were acting “under color of state law,” but that is a “bald assertion” or a “legal conclusion.” Morse, 132 F.3d 902. It is a conclusory allegation masquerading as a fact, and as such, it is insufficient to defeat a Motion to Dismiss. Id.; Fernandez-Montes, 987 F.2d at 284.

IV. CONCLUSION

Plaintiff has alleged no facts in support of his claim that Defendants acted under color of state law. He has therefore failed to allege one of the elements of a section 1983 action, and thus this Court does not have jurisdiction under that statute. In the absence of federal jurisdiction, the Court declines to exercise its jurisdiction over Plaintiff's state law claims, and the Complaint will be dismissed as to these Defendants.

An appropriate Order follows.