

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

SHELTON REVELLE

v.

DARBY BOROUGH POLICE OFFICER
TRIGG et al.

CIVIL ACTION
NO. 95-5885

M E M O R A N D U M

Broderick, J.

January 19, 1999

Plaintiff, an inmate, filed a pro se 42 U.S.C. § 1983 civil rights complaint and motion to proceed in forma pauperis on September 18, 1995 against the Darby Borough Police Department ("the Department") and Officers Trigg, Gibney, Regan, Galli, and Silberstien ("the Officer Defendants") of the Darby Borough Police Department. This Court dismissed Plaintiff's claims against the Darby Borough Police Department by Order dated September 27, 1995 as legally frivolous because the Department is not a "person" within the meaning of § 1983. Plaintiff's complaint alleges that the Officer Defendants used excessive force during his arrest on December 7, 1994. Plaintiff's complaint also alleges that the Officer Defendants used racial epithets against him while unlawfully beating him during this arrest. This Court, by Order of December 5, 1997, denied Defendants' motion for summary judgment. Thereafter, this Court, by Order of February 26, 1998, granted Plaintiff's motion for appointment of counsel. Kimberly Kaplan, Esquire was appointed

to represent Plaintiff by this Court's Order of May 5, 1998 and trial in this matter was scheduled for September 9, 1998. However, by Order of June 15, 1998, this Court granted Ms. Kaplan's motion to withdraw as counsel due to a conflict of interest. Trial was continued until new counsel could be appointed for Plaintiff. By Order dated September 16, 1998, Lynanne Wescott, Esquire of Saul, Ewing, Remick & Saul was appointed to represent Plaintiff in this matter.

Presently before the Court is Plaintiff's motion for leave to amend his complaint. This motion was filed on November 18, 1998. Plaintiff seeks to amend his complaint, through counsel, to add Darby Borough ("the Borough") as an additional defendant, to add a conspiracy claim under 42 U.S.C. § 1985 against all defendants, to seek punitive damages against the Officer Defendants, to clarify the nature of his § 1983 claims, and to add a claim for common law assault and battery. Counsel for Defendants has filed a response objecting thereto and Plaintiff has filed a reply. For the reasons stated below, this Court will grant Plaintiff's motion to amend his complaint to add Darby Borough as a Defendant under a claim for municipal liability pursuant to City of Canton v. Harris, 489 U.S. 378 (1989) and deny Plaintiff's motion in all other respects.

Amendments to the pleadings are generally governed by Rule 15 of the Federal Rules of Civil Procedure. Rule 15(a) provides,

in relevant part, that a party may amend his complaint as a matter of course prior to the answer or other responsive pleading being filed, "[o]therwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party." Fed. R. Civ. P 15(a). Since it has been several years since the answer was filed in this action and since Defendants contest Plaintiff's attempt to amend the complaint, Plaintiff may amend the complaint only with leave of Court. The rules provide that leave to amend the complaint "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The United States Supreme Court has made clear that this "mandate is to be heeded" and the amendment should be permitted "[i]n the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc." Foman v. Davis, 83 S.Ct. 227, 230 (1962). There is a general presumption in favor of allowing a party to amend pleadings, including amendments to state additional causes of action. See Boileau v. Bethlehem Steel Corp., 730 F.2d 929, 938 (3d Cir. 1984) (finding it was abuse of discretion for trial court not to permit plaintiff to amend complaint where no prejudice to defendant was alleged or proved).

It is undisputed by the parties that the two-year Pennsylvania statute of limitation for personal injury actions, 42 Pa. Cons. Stat. Ann. § 5524(2), governs Plaintiff's § 1983 action. See, e.g. Bougher v. Univ. of Pittsburgh, 882 F.2d 74, 78 (3d Cir. 1989). It is also undisputed that the statute of limitations on Plaintiff's claims began to run on December 7, 1994. See Bohus v. Beloff, 950 F.2d 919, 924 (3d Cir. 1991) (noting that generally, under Pennsylvania law, the statute of limitations begins to run when the cause of action accrues, that is, when the injury is sustained). The statute of limitations of Plaintiff's claims ran in December, 1996. Therefore, Plaintiff's proposed amended complaint, which was not filed until November, 1998, is not within the time allowed by the statute of limitations.

Plaintiff's proposed amended complaint seeks to add both new causes of action against the Officer Defendants and a new defendant, Darby Borough. The Court will address these proposed amendments separately. The Court will begin by addressing the proposed amendment to add the Borough as a defendant.

Federal Rule of Civil Procedure 15(c) governs amendments which seek to add a party or change a party after the applicable statute of limitations has run. The amendment is permitted when it "relates back" to the date of filing of the original complaint within the meaning of Rule 15(c), provided that the amendment is

in the interest of justice under Federal Rule of Civil Procedure 15(a) and Foman v. Davis, 83 S.Ct. 227 (1962). See, e.g., Wine v. EMSA Ltd. Partnership, 167 F.R.D. 34 (E.D.Pa. 1996) (finding that the proposed amendment to add defendants related back but denying the amendment as not in the interest of justice because of Plaintiff's delay in bringing the motion). Rule 15(c) provides:

An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Fed. R. Civ. P. 15(c). Where, as here, Plaintiff seeks to add a new party after the statute of limitations has run, Pennsylvania law does not provide any more leniency concerning relation back than federal practice does. See, e.g. Nelson v. County of Allegheny, 60 F.3d 1010, 1014 n.4 (3d Cir. 1995); Zercher v. Coca-Cola U.S.A., 651 A.2d 1133, 1134 (Pa. Super. 1994) (citing Hoare v. Bell Tel. Co., 500 A.2d 1112 (Pa. 1985)).

Although a literal reading of Rule 15(c)(3) suggests that it may only apply to misnamed parties, the Rule is "widely understood to allow the addition of new parties that were never originally named or described." Heinly v. Queen, 146 F.R.D. 102, 107 (E.D.Pa. 1993); see also Wine v. EMSA Ltd. Partnership, 167 F.R.D. 34, 38 n.7 (E.D.Pa. 1996). The purpose of the rule is to ameliorate the harsh effect of the statute of limitations where the plaintiff sued the wrong party but the right party received adequate notice of the action. Bloomfield Mechanical Contracting, Inc. v. Occupational Safety and Health Review Commission, 519 F.2d 1257 (3d Cir. 1975). In order for an amendment adding a party to relate back to the date of filing the original complaint the following four requirements must be met:

- (1) the basic claim must have arisen out of the conduct set forth in the original pleading;
- (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense;
- (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and
- (4) the second and third requirements must have been fulfilled within the prescribed limitations period.

Schiavone v. Fortune, 106 S.Ct. 2379, 2384 (1986). Subsequent to the decision in Schiavone, in 1991, Congress changed the fourth requirement by amending Rule 15(c)(3) to provide that the party sought to be added must receive notice within the statute of limitations plus the 120 days provided for service under Rule 4(m). In this case, the 120 day amendment to Rule 15(c)(3) is

not relevant because Darby Borough, the defendant sought to be added, received notice within the period of the statute of limitations. Plaintiff's original complaint was both filed and served well within the applicable limitations period. The Court will now address each of the Schiavone requirements.

First, the claim against the party to be added must arise out of the same conduct described in the original complaint. Plaintiff's original complaint alleges that he was beaten by the Officer Defendants during his arrest. The claim that Plaintiff seeks to add against Darby Borough alleges that the Borough knew that the Officer Defendants engaged in a pattern and practice of using excessive force during arrests and approved of or acquiesced in this practice or were deliberately indifferent as to whether or not excessive force was being used. Under City of Canton, Ohio v. Harris, 489 U.S. 378 (1989), a Plaintiff bringing a municipal liability claim must show that the decision-makers within the municipality knew of the unlawful conduct of the police and did nothing to stop it or were deliberately indifferent to the rights of citizens who would come into contact with police who were engaging in such unlawful conduct. Since the gravamen of Plaintiff's original complaint is the use of excessive force and the gravamen of the claims sought to be added against the Borough also arise out of the use of excessive force by the Officer Defendants, the Court finds that the claims arise

out of the same conduct. Therefore, the first Schiavone requirement is met.

Second, the party sought to be added by the amendment must have received such notice of the complaint that it will not be prejudiced in defending the action. It is well established that this requirement is fulfilled when the defendant sought to be added had constructive, rather than actual notice of the pending lawsuit. See, e.g., Wine v. EMSA Ltd. Partnership, 167 F.R.D. 34, 38 (E.D.Pa. 1996); Sendobry v. Michael, 160 F.R.D. 471, 473 (M.D.Pa. 1995); Heinly v. Queen, 146 F.R.D. 102, 106 (E.D.Pa. 1993); Mitchell v. Hendricks, 68 F.R.D. 564, 567 (E.D.Pa. 1975). Notice does not have to be formal to be effective. See, e.g., Varlack v. SWC Caribbean Inc., 550 F.2d 171, 175 (3d Cir. 1977); Kinnally v. Bell of Pa., 748 F. Supp. 1136, 1141 (E.D.Pa. 1990); Wallace v. Marks, Civ. A. No. 82-0034, 1986 WL 4836 at *2 (E.D.Pa. April 17, 1986) (Pollak, J.). An employer can receive notice through notice received by its employee. See, e.g., Prendergast v. Baldino, No. Civ. A. 98-269, 1998 WL 800322 at *1 (E.D.Pa. Nov. 16, 1998); Esnouf v. Matty, 635 F. Supp. 211, 214 (E.D.Pa. 1986). The necessary constructive notice can be established by the fact that the same attorney represents both the original defendants and those sought to be added by the amended complaint. See, e.g., Prendergast, 1998 WL 800322 at *1; Heinly v. Queen, 146 F.R.D. 102, 106-7 (E.D.Pa. 1993); Hodgin v.

One Unknown Correctional Officer, Civ. A. No. 85-7150, 1986 WL 8113 at *1 (E.D.Pa. July 18, 1986); Wallace, 1986 WL 4836 at *2; Taliferro v. Costello, 467 F. Supp. 33, 35 (E.D.Pa. 1979) (Pollak, J.).

Plaintiff's original complaint was served on the Officer Defendants by the United States Marshal Service in December 1995 at the Darby Borough Police Department. At the time service was made, the Police Department itself had already been dismissed as a defendant by this Court. Darby Borough Police Chief Robert Smythe, in a deposition provided to the Court by Plaintiff, testified that when he received Plaintiff's complaint he informed the borough manager. Smythe Deposition at 51. Chief Smythe also testified that it his practice when he receives a complaint to send it to the borough manager and, sometimes, to send it to the attorneys for the Borough. Smythe Deposition at 51. Therefore, the Borough received notice of Plaintiff's complaint in December 1995, shortly after service was made. Counsel for the Borough, who represents the Officer Defendants, entered an appearance on behalf of the Officer Defendants on January 4, 1996. The statute of limitations on Plaintiff's claims did not run until December, 1996, almost a full year after the Borough received notice of Plaintiff's complaint which contained allegations against the "Darby Borough Police."

The second Schiavone element also encompasses a requirement

that the added defendant not be prejudiced in defending the action. The mere passage of time, in and of itself, is not sufficiently prejudicial. See, e.g. Wallace, 1986 WL 4836 at *2 (denying summary judgement on amended complaint adding additional defendant more than four years after the incident giving rise to the action occurred). As previously noted, the counsel representing the Officer Defendants is the same counsel who represents the Borough in opposing this motion. The Court has every reason to believe that the Borough will continue to be represented by this same counsel. Even if the Borough, for some reason, chooses to get new counsel the legal issues in this case are not difficult and discovery has been substantially completed, so it should not take counsel long to prepare this case for trial. If the Borough chooses to continue with the same counsel, then the trial preparation should be substantially completed and the Borough should be in a position comparable to the other defendants.

Although the Court recognizes that the scheduled trial date in this case is imminent, the Court notes that Plaintiff's motion for a continuance is pending before this Court. The Court also recognizes that allowing this amendment adds only one narrow issue to those which the parties must prepare for trial. Further, Defendants, including the Borough, have had notice of Plaintiff's intention to amend the complaint for almost two

months now. The Borough has had notice of Plaintiff's claims generally for over three years.

In this case the Court finds that there is nothing to suggest that the Borough "has been hindered in its ability to obtain relevant evidence needed to mount its defense." Taliferro v. Costello, 467 F. Supp. 33, 35 (E.D.Pa. 1979) (Pollak, J.). In Taliferro itself, Judge Pollak allowed the plaintiff in a § 1983 action to amend his complaint to bring a claim for municipal liability against the City of Philadelphia after the statute of limitations had run, even though the plaintiff had neither named nor attempted to name the City as a defendant in his original complaint. 467 F.Supp. at 34-36. There, the plaintiff's original complaint named only a deputy sheriff as a defendant, but Judge Pollak permitted amendment because the City had notice of the action against the deputy sheriff, the City should have known that it was a likely party to the action, and there was no prejudice to the City in doing so.

Neither Darby Borough nor the Officer Defendants have alleged any grounds for prejudice, other than the late date of this motion. Therefore, the Court finds that the Borough received notice of this action and will not be prejudiced in maintaining its defense so the second Schiavone requirement is met.

Third, the party sought to be added knew or should have

known that, if not for a mistake by the plaintiff, it would have been originally named as a defendant. This element uses a reasonableness test to determine whether the party "should have known" he was the one intended to be sued. See, e.g., Kemper v. URECO, Civ. A. No. 88-9618, 1991 WL 125178 at *1 (E.D.Pa. June 28, 1991); Wallace, 1986 WL 4836 at *3. Courts have generally found this condition satisfied when the "original party and the added party have a close identity of interests." Johnson v. Goldstein, 850 F. Supp. 327, 330 (E.D.Pa. 1994) (citation omitted); see also Wine, 167 F.R.D. at 39.

Plaintiff's original complaint, filed pro se, named the Darby Borough Police Department as a defendant. The Borough received notice of this complaint, which itself states that Plaintiff wants to "bring charges against the Darby Borough Police." When the Borough received a copy of Plaintiff's pro se, hand-written complaint, it should have been obvious to the Borough that Plaintiff was seeking to bring allegations against the authority responsible for the conduct of the police officers. Plaintiff, unfamiliar with the law, assumed that to sue the authority responsible for the conduct of the police officers, whom he also named as defendants, he should sue the Police Department when, in fact, Plaintiff's proper recourse was to sue the Borough itself. Plaintiff's failure to sue the Borough "reflected a narrow view of the causes of action set forth in

[his] pro se complaint which would probably not have been taken had a lawyer familiar with the legal terrain drawn [his] first pleading." Taliferro, 467 F. Supp. at 36. Based upon the foregoing, the Court finds that the Borough, when faced with a complaint that named the Darby Borough Police Department as a defendant, knew or should have known that, but for Plaintiff's mistake in naming the proper party, the Borough itself would have been named as a defendant in this lawsuit. Therefore, the Court finds that the third Schiavone requirement has been met.

Fourth, the party sought to be added must have received notice of the action and known that it was the proper party within the statute of limitations plus the 120-day period provided for service of the complaint under Federal Rule of Civil Procedure 4(m). Plaintiff's initial complaint, which listed the Darby Borough Police Department as a defendant, was filed and served well before the statute of limitations had run. Based upon the deposition testimony of Police Chief Smythe and the fact that counsel for the Borough entered an appearance on behalf of the Officer Defendants in January, 1996, it is clear that the Borough received notice of this action soon after the complaint was served in December, 1995. The statute of limitations on Plaintiff's claims did not run until December, 1996. Plaintiff's mistake in not naming the Borough as a proper party should have been known to the Borough at the time it received notice of

Plaintiff's action, long before the statute of limitations on Plaintiff's claims had run. Therefore, this Court finds that the fourth requirement of Schiavone is satisfied.

Since the Court has found that all of the requirements of Schiavone and Federal Rule of Civil Procedure 15(c) are satisfied, the Court finds that Plaintiff's proposed amendment to add Darby Borough as an additional defendant and to add a claim for municipal liability against it based on a pattern and practice of approval, acquiescence or deliberate indifference to use of excessive force by police officers pursuant to City of Canton v. Harris, 489 U.S. 378 (1989), relates back to the date of filing of Plaintiff's initial complaint and should be permitted. The Court finds that, based upon the notice provided to the Borough when this action was instituted and the lack of bad faith or dilatory conduct by Plaintiff in bringing this motion, it is in the interest of justice to permit this amendment. Therefore, Plaintiff will be permitted to file an amended complaint which brings a claim, substantially in the form of Count I of Plaintiff's Proposed Amended Complaint, against Darby Borough for municipal liability pursuant to City of Canton.

Plaintiff's amended complaint also seeks to add several new causes of action. Plaintiff's proposed amended complaint seeks to add a claim under 42 U.S.C. § 1985 that the Defendant Officers conspired with each other and with Borough officials to deprive

him of his civil rights. Plaintiff's amended complaint also seeks to add claims against the Officer Defendants for punitive damages and for common law assault and battery, as well as to amplify the bases of § 1983 liability. For the reasons stated below, the Court will deny these proposed amendments as time barred because the Court finds that it is not in the interest of justice to allow the addition of entirely new causes of action at this late date against the Officer Defendants who have been defending this action for more than three years.

Generally, whether to grant or deny leave to amend the complaint is within the discretion of the trial court. Lewis v. Curtis, 671 F.2d 779 (3d Cir.), cert. denied, 459 U.S. 880 (1982). The primary consideration is deciding whether or not to permit an amendment is prejudice to the opposing party. Evans Products Co. v. West American Ins., Co., 736 F.2d 920 (3d Cir. 1984). As previously discussed, Foman v. Davis requires that the Court permit an amendment to the complaint when justice so requires, but sets forth undue delay and unfair prejudice as proper grounds for a Court's refusal to do so. 83 S.Ct. at 230. In determining whether or not "justice so requires" that an amendment be permitted, the Court must be guided by the touchstone of prejudice to the opposing party. Johnston v. City of Philadelphia, 158 F.R.D. 352 (E.D.Pa. 1994) (denying leave to amend to add new discrimination claim when discovery had closed,

summary judgement motion had been ruled on, and case was on the eve of trial).

Plaintiff's original pro se complaint alleges that the Officer Defendants beat him excessively during the course of his arrest in December, 1994 and that they peppered him with racial slurs while they did so. In order to state a claim under 42 U.S.C. § 1985(3) Plaintiff would have to allege, at a minimum, "(1) a conspiracy; (2) motivated by racial or class based discriminatory animus designed to deprive, directly or indirectly, any person or class of persons to the equal protection of the laws; (3) an act in furtherance of the conspiracy; and (4) an injury to the person or property or the deprivation of any right or privilege of a citizen of the United States." Lake v. Arnold, 112 F.3d 682, 684 (3d Cir. 1997). Even reading Plaintiff's original pro se complaint liberally, the Court cannot find that Plaintiff's original complaint sets forth, or attempts to set forth a conspiracy claim under § 1985. The Court finds that the Officer Defendants were not put on notice of the claim by Plaintiff's original complaint and would be unduly prejudiced by allowing Plaintiff to bring an entirely new cause of action against them on the eve of trial, more than three years after this action was instituted.

Similarly, as to Plaintiff's other proposed amendments, the Court finds that Plaintiff's original complaint merely states a

claim for the use of excessive force under § 1983. Nowhere in Plaintiff's original complaint does he set forth any other cause of action. Therefore, the Court will not permit the Plaintiff, at this late date, to amend his complaint to bring in additional causes of action not contemplated by his original complaint. The Court finds that to permit Plaintiff to do so would be prejudicial to Defendants and would not be in the interest of justice.

Based upon the foregoing, the Court will permit Plaintiff to amend his complaint to add Darby Borough as a defendant and to state a cause of action for municipal liability against the Borough under City of Canton. The Court, however, will not permit Plaintiff to make any other amendments to his complaint. The Court finds that permitting the addition of new causes of action at this time is not in the interest of justice.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
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v.

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DARBY BOROUGH POLICE

OFFICER TRIGG, et al.

ORDER

AND NOW, this 19th day of January, 1999; Plaintiff having filed a motion for leave to amend his complaint; Defendant having filed a response objecting thereto; Plaintiff having filed a reply; for the reasons stated in this Court's Memorandum of January 19, 1999, the Court having determined that Defendant

Darby Borough ("the Borough") had notice of this action within the statute of limitations so that an amendment of the complaint to add a claim against the Borough is appropriate; this Court also having determined that it is not in the interest of justice to allow Plaintiff, at this late date, to add new causes of action against the original Police Officer Defendants;

IT IS ORDERED that Plaintiff's motion for leave to amend his complaint (Document No. 49) is **GRANTED IN PART and DENIED IN PART;**

IT IS FURTHER ORDERED that the motion is **GRANTED** as to Plaintiff's motion to add Darby Borough as a defendant in this action and to bring a claim for municipal liability against Darby Borough pursuant to City of Canton, Ohio v. Harris, 489 U.S. 378 (1989) and Monell v. Department of Social Services, 436 U.S. 658 (1978);

IT IS FURTHER ORDERED that the motion is **DENIED** in all other respects;

IT IS FURTHER ORDERED that Plaintiff shall execute and file an amended complaint, on or before **January 29, 1999**, which shall contain only a claim against Darby Borough alleging that Darby Borough had a pattern and practice or custom or was deliberately indifferent to its officers using excessive force in making arrests in violation of the Eighth and Fourteenth Amendments under 42 U.S.C. § 1983 as set forth in City of Canton v. Harris, 489 U.S. 378 (1989), and incorporating Plaintiff's initial complaint;

IT IS FURTHER ORDERED that Plaintiff shall make service of the amended complaint on all Defendants within 10 days of the filing of the amended complaint.

RAYMOND J. BRODERICK, J.