

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR KENT COUNTY

JERRY LEE ALSTON,	:	
	:	
Plaintiff,	:	C.A. No. 01C-09-030 WLW
	:	
v.	:	
	:	
STATE OF DELAWARE;	:	
ATTORNEY GENERAL M. JANE	:	
BRADY; DELAWARE STATE	:	
POLICE AS AN ENTITY; NICOLE	:	
C. PARTON (00220) OF TROOP 3	:	
STATE POLICE,	:	
	:	
Defendants.	:	

**ORDER**

This 28<sup>th</sup> day of January, 2002, after consideration of the motion to dismiss submitted by Defendant, Attorney General M. Jane Brady ("Defendant") and Plaintiff's answer thereto in the above-captioned matter, as well as oral arguments on the motion, it appears that:

*Complaint*

1. Plaintiff filed this suit on September 20, 2001, apparently as a class action. On October 1, 2001, this Court determined that the Complaint in this action did not substantially comply with the Delaware Superior Court Civil Rules. The Court stayed the action to allow Plaintiff the opportunity to file an amended complaint that would substantially comply with the rules of pleading, so as to do justice to all concerned.

2. Plaintiff filed an amended complaint on October 29, 2001. The amended complaint still does not substantially comply with the rules of pleading. For example,

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it certainly contains redundant material and does not contain concise assertions of the elements of the claims advanced as well as making conclusory arguments in the pleadings. The Court may, however, interpret a *pro se* Plaintiff's filings and pleadings if this can be done reasonably, in order to alleviate the technical inaccuracies typical in many *pro se* legal arguments. While procedural requirements are not relaxed for any type of litigant (barring extraordinary circumstances or to prevent substantial injustice), the Court may grant *pro se* litigants some accommodations that do not affect the substantive rights of those parties involved in the case at bar. The Court may construe the pleading in a way to do justice to all concerned.<sup>1</sup>

*Rule 12(b) Motion With Affidavit*

3. The present Defendant has not objected to the pleadings in this matter, but has instead moved to dismiss the action under Delaware Superior Court Civil Rule 12(b) for the reason that Plaintiff's complaint fails to state a claim upon which relief can be granted. Moreover, the Defendant has submitted the affidavit of M. Jane Brady which states that (1) she "has been the Attorney General of the State of Delaware since January, 1995;" (2) she "has no supervisory or policy-making authority for the Delaware State Police or any other Police Agency;" and (3) she "does not have any personal knowledge of nor did [she] participate in or supervise the investigation of any facts cited in the complaint."

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<sup>1</sup> *McGonigle v. Unemployment Ins. Appeal Bd.*, Del. Super., C.A. No. 00A-09-001, Gebelein, J. (September 4, 2001).

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4. Under Delaware Superior Court Rule 12(b):

If, on a motion asserting the defense numbers (6) to dismiss for failure of the pleadings to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

5. For this reason, the Court will consider the pleadings in this matter under the Rule 12(b)(6) and Rule 56 standards, and will construe the complaint so as to do substantial justice under Rule 8(f). First, however, the Court must address the issue of initial class action certification mandated by the class action designation on Plaintiff's complaint. Then the Court will address Plaintiff's claims under the Rule 56 standard.

*Class Action Status*

6. Plaintiff has identified this matter as a class action in his complaint. Plaintiff has not, however, moved this Court for class certification, nor has he averred facts showing that the prerequisites for certification are met (as required under Superior Court Civil Rule 23(a)); therefore, as of this date, Plaintiff's action has not been certified as a class action.

7. The Court can, at any time, make the determination regarding class certification, preemptively, and the Court is required to do so in a prompt manner. The Court is not subject to any party making the motion. It can make the class certification decision in its discretion.

8. In order for a class action to be conditionally certified under Delaware Superior Court Civil Rule 23(a),<sup>2</sup> certain criteria must be satisfied before the action may be pursued on behalf of a class. One or more members of a class may sue, or be sued, as representatives on behalf of all of the designated class if: (1) the class is so numerous that joinder of all members is impractical; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties fairly and adequately represent the class; and (4) the focus of the analysis here, the plaintiff must show that his representation will fairly and adequately protect the interests of the class.<sup>3</sup>

9. The Court finds that to certify the proposed class all certification requirements must be met (that is, the representative must also comply with those requirements). The four prerequisites are required to certify the class, and the representative of the class must, of course, be a member of the class.

10. In this case, the Court will examine the representative parties - will the representative parties fairly and adequately represent the class? The focus is going to be on the adequacy of protection. Under Super. Ct. Civ. R. 23(a)(4), the plaintiff must show that his representation will fairly and adequately protect the interests of the class. The Court does not need to examine the other remaining prerequisites,

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<sup>2</sup> The circumstances for maintaining a class certification are covered in Delaware Super. Ct. Civ. R. 23(b). The Court must determine whether a class action can be maintained as soon as practicable.

<sup>3</sup> Delaware Super. Ct. Civ. R. 23(a).

under Super. Ct. Civ. R. 23(a), if one of the prerequisites cannot be maintained.

11. When determining the adequacy of representation, the Court will consider the quality of the plaintiff's case as well as the caliber of legal representation and the issues of nonfeasance by the plaintiff.<sup>4</sup> Class actions are very complicated matters. In view of the fact that the plaintiff has filed this action *in forma pauperis*, and has difficulty in meeting procedural requirements even after the Court has allowed him to file an amended complaint, the Court cannot find that Plaintiff has the resources and legal expertise to fairly and adequately protect the interest of the class.<sup>5</sup> The Court has allowed Plaintiff to pay his current court costs by making payments on a monthly basis. Plaintiff will incur substantial additional expense in order to have this matter certified, and to keep this matter certified.

12. Class action litigation, by definition, is legally demanding on the part of an attorney as well as the class representative. In this case, we have the class representative acting as his own attorney. If the Plaintiff were going to maintain this as a class action, Plaintiff would have to properly identify all members of the class. It is unlikely that Plaintiff will be able to accomplish this requirement.

13. Plaintiff would not only have to identify the class members, but would have to communicate with them. He would have to establish procedures under which he would be able to obtain acceptance as well as exclusion from the proceeding, as

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<sup>4</sup> *L.C. Parker Realtors, Inc. v. Dutch Village, Inc.*, Del. Super., 174 A.2d 320 (1961).

<sup>5</sup> The Plaintiff has filed a response to the motion to dismiss which is unsigned, very confusing, and exceeds the four page limit allowed under our Civil Case Management Plan.

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may be deemed appropriate, and determine what would be acceptable in resolving the controversy. This will be expensive in both time and monetary cost.<sup>6</sup> A person proceeding *in forma pauperis*, by definition alone, is not going to have the funds to support a class action.

14. The Plaintiff has not set forth sufficient facts to allow this Court to appoint him or certify him as the class representative. For the foregoing reasons, under Super. Ct. Civ. R. 23(a)(4), this Court will not conditionally certify this as a class action; therefore, this case will not proceed as a class action. The Court will only address Plaintiff's individual claims in this matter under the Rule 56 standard, as we previously explained.

#### *Rule 56 Standard*

15. Upon Defendant's motion, the Court will consider Plaintiff's complaint under Superior Court Civil Rule 56 standards. This provides that judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine

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<sup>6</sup> The class representative must perform vigorous, tenacious prosecution throughout. *Gonzales v. Cassidy*, 5<sup>th</sup> Cir., 474 F.2d 67 (1973). The representative must be fully qualified to handle the case. Legal ability and training are important. *Id.* Considerations include the ability of the representative to bear costs, as the plaintiff must bear the substantial costs of notice to the class. For example, due process requires that notice be made in the best method possible under the circumstances, which can include costly personal notice to all members instead of notice by publication. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *Oppenheimer Fund v. Sanders*, 437 U.S. 340 (1978).

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issue as to any material fact and that the moving party is entitled to judgment as a matter of law."<sup>7</sup> The burden is on the moving party to show, with reasonable certainty, that no genuine issue of material fact exists and judgment as a matter of law is permitted.<sup>8</sup> When considering a motion for summary judgment, the facts must be construed in the light most favorable to the non-moving party.<sup>9</sup> Further, if the record indicates that a material fact is disputed, or if further inquiry into the facts is necessary, summary judgment is not appropriate.

16. Although there appear to be facts in dispute in this case, the material facts regarding this Defendant are not, and she is entitled to judgment as a matter of law as to the credible causes of action<sup>10</sup> in Plaintiff's amended complaint (which incorporates the original complaint by reference).

17. Taking all facts in the light most favorable to the Plaintiff, the complaint alleges violations of 42 U.S.C.A. § § 1981, 1983; a violation of the 4<sup>th</sup> Amendment to the United States Constitution by a search of Plaintiff's home without probable

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<sup>7</sup> Super. Ct. Civ. R. 56.

<sup>8</sup> See *Celotex Corp. v. Cattret*, 477 U.S. 317 (1986); *Martin v. Nealis Motors, Inc.*, Del. Supr., 247 A.2d 831 (1968).

<sup>9</sup> *McCall v. Villa Pizza, Inc.*, Del. Supr., 636 A.2d 912 (1994).

<sup>10</sup> It is noted that Plaintiff makes reference to other potential causes of action; however, they are not sufficiently well-pleaded to provide notice of the charge. For example, Plaintiff notes that "the Delaware State Constitution . . . was invoked," without citing the specific violation of the same giving him the right to seek damages. He states the right of enjoying and defending liberty were specifically invoked as well. The Court cannot determine a cause of action from this language without impermissible guessing.

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cause; a violation of the equal protection clause; a violation of the 8<sup>th</sup> Amendment prohibition against cruel and unusual punishment (allegedly manifested by the search of Plaintiff's home); and negligent infliction of emotional distress.

18. Plaintiff's pleadings only reference the Defendant in the following statements:<sup>11</sup>

The actors<sup>12</sup> are State officers, conducting themselves in the course of official State duties; that is to say, said conduct by the officers bears a sufficiently close nexus to the State as an entity that the actions and activities are to be treated as though they were perpetrated against Plaintiff by the State.

\* \* \*

That is to explain the State actors, to include the Attorneys General's office, demonstrate a fundamental and basic disrespect for persons of color. A core issue before the Court is State complicity.

19. These averments, which are conclusory at best, do not establish liability for the Defendant to the purported causes of action in Plaintiff's complaint. They simply imply liability based on the position of the Defendant acting in her official capacity as Attorney General.

20. Regarding the 42 U.S.C. § 1981, 1983 actions, as the Defendant has pointed out, it is undisputed that, "[a] suit against a state officer in official capacity is a suit against the state."<sup>13</sup> And, "[a] state is not a 'person' within the meaning of 42

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<sup>11</sup> Original Complaint at 10-11.

<sup>12</sup> Presumably, Plaintiff is referring to the defendants in this action.

<sup>13</sup> *Citing Hafer v. Melo*, 502 U.S. 211 (1991).



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U.S.C. § 1981, or 1983;"<sup>14</sup> therefore "this Court is without subject matter jurisdiction" as to these claims. Moreover, "[a] plaintiff suing under 42 U.S.C. § 1983 has the burden of alleging fact to show that the named defendant played an affirmative role in the alleged deprivation of his rights."<sup>15</sup>

21. As to the negligent infliction of emotional distress claim, the Defendant is immune from civil liability under 10 *Del. C.* § 4001, and Plaintiff has not averred any facts to show otherwise.

22. Finally, Plaintiff has not alleged facts which show that Defendant was involved in any manner in the transactions or occurrences which allegedly violated Plaintiff's constitutional rights. Defendant has no knowledge of the actions pleaded in the complaint, let alone authority or responsibility for the same. Without personal involvement or authority, she cannot be held liable. There is no nexus between the Defendant and the alleged violations in Plaintiff's complaint.

23. Under Rule 12(b), the Plaintiff may submit evidence that Defendant had authority or responsibility for the transactions and occurrences alleged by Plaintiff. Since Plaintiff has not submitted such evidence, the Court must **grant** the Motion to Dismiss of Defendant Attorney General M. Jane Brady.

IT IS SO ORDERED.

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<sup>14</sup> *Citing Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989).

<sup>15</sup> *Citing Colburn v. Upper Darby Township*, 3<sup>rd</sup> Cir., 838 F.2d 663, 666 (1988); *cert. denied*, 489 U.S. 1065 (1989).

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/s/ William L. Witham, Jr.  
J.

dmh

oc: Prothonotary

xc: Mr. Jerry Lee Alston

Rosemary K. Killian, Esquire