

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JERRY LEE ALSTON,	§
	§
Plaintiff Below-	§
Appellant,	§
	§ No. 413, 1999
v.	§
	§
HUDSON, JONES, JAYWORK,	§ Court Below— Superior Court
WILLIAMS and LIGUORI;	§ of the State of Delaware,
MORRIS, HITCHENS and	§ in and for Kent County
WILLIAMS; DELAWARE	§ C.A. No. 99C-05-010
STATES ATTORNEYS OFFICE;	§
OFFICE OF THE	§
PROTHONOTARY, KENT	§
COUNTY; OFFICE OF	§
DISCIPLINARY COUNSEL,	§
STATE OF DELAWARE;	§
WILLIAM HUDSON; JAMES	§
SEMPLÉ; DAVID PRYOR;	§
LAURA REDDING; MICHAEL J.	§
RICH; and UNEMPLOYMENT	§
INSURANCE APPEALS BOARD,	§
	§
Defendants Below-	§
Appellees.	§

Submitted: December 15, 1999

Decided: March 7, 2000

Before **VEASEY**, Chief Justice, **HARTNETT** and **BERGER**, Justices

ORDER

This 7th day of March 2000, upon consideration of appellant's opening brief, amended opening brief and the motion to affirm of appellees Hudson,

Jones, Jaywork, Fisher & Liguori; William Hudson; David Pryor; Laura Redding; Morris, James, Hitchens & Williams; and James Semple (“law firm appellees”);¹ and the answering brief of appellees Office of the Attorney General; Office of the Prothonotary, Kent County; Office of Disciplinary Counsel, State of Delaware; Michael J. Rich; and Unemployment Insurance Appeals Board (“State appellees”) and appellant’s reply brief filed December 15, 1999 in response to the answering brief of the State appellees, it appears to the Court that:

(1) The plaintiff-appellant, Jerry Lee Alston, filed this appeal from an order of the Superior Court dismissing his complaint.

(2) The Superior Court dismissed without prejudice Alston’s complaint against the law firm appellees for lack of personal jurisdiction due to improper service² and dismissed with prejudice the complaint against the

¹Appellant’s reply brief filed November 30, 1999 in response to the motion to affirm is hereby stricken as a non-conforming document. Supr. Ct. R. 25(a)(iii); Supr. Ct. R. 34.

²Super. Ct. Civ. R. 4(f); Super. Ct. Civ. R. 12(b).

State appellees on the ground that it failed to state a claim upon which relief may be granted.³ We review such dismissals de novo.⁴

(3) In this appeal, Alston claims the Superior Court abused its discretion in dismissing his complaint for the following reasons: a) the law firm appellees submitted themselves to the jurisdiction of the Superior Court when their counsel appeared and allegedly argued the merits of the case; b) he was prejudiced by an alleged ex parte discussion between the Superior Court and the attorney for the law firm appellees prior to the hearing on the motions to dismiss; c) summary judgment should have been entered in his favor because his affidavit in support of his claims was un rebutted; and d) his complaint should not have been dismissed because it properly stated claims for intentional tort, fraud, conspiracy, and civil rights violations. On these grounds, Alston asks this Court to reverse and remand the case to the Superior Court for a trial on the merits.

(4) This case stems from Alston's prior appeal of an Unemployment Insurance Appeals Board decision denying him unemployment insurance

³Super. Ct. Civ. R. 12(b) (6).

⁴*Ramunno v. Cawley*, Del. Supr., 705 A.2d 1029, 1034 (1998); *Elf Atochem North America, Inc. v. Jaffari*, Del. Supr., 727 A.2d 286, 287 (1999).

benefits. In that case,⁵ the Superior Court reversed the decision of the Board, finding there was no substantial evidence Alston engaged in willful or wanton misconduct or was discharged for just cause. Prior to the Superior Court's decision on the merits, the Employer unsuccessfully moved to dismiss Alston's appeal as untimely. Alston's complaint alleges that: the law firm appellees who represented the Employer in the prior case, filed the motion to dismiss on the basis of a document they knew to be fraudulent; the State appellees, and in particular the Prothonotary's Office, conspired to aid the law firm appellees in their tortious and fraudulent conduct; the State appellees failed in their duty to process a criminal complaint against the law firm appellees; and the law firm appellees and the State appellees obstructed the processing of his petition for a writ of mandamus in the United States Supreme Court. The complaint further alleges that the conduct of the law firm appellees and the State appellees violated his civil rights.

(5) The Superior Court concluded that it lacked personal jurisdiction over the law firm appellees due to ineffective service of process. The record reflects the sheriff's office served the law firm appellees by delivering the suit

⁵*Alston v. Diamond State Machining, et al.*, Del. Super., C.A. No. 97A-03-001 (February 13, 1998).

papers to receptionists at the law firms. The record further reflects the receptionists were not agents authorized to receive service of process on behalf of any of the law firm appellees. Alston does not dispute these underlying facts in this appeal and, in fact, takes no position with respect to the issue of sufficiency of service of process. Because Alston has failed to address, either factually or legally, the Superior Court's conclusion that service of process on the law firm appellees was ineffective, he has waived that claim on appeal.⁶

(6) Even if Alston had chosen to appeal the issue, it is meritless in any case. Service of process upon an individual is accomplished by “delivering a copy of the summons, complaint and affidavit, to that individual personally or by leaving copies thereof at that individual’s dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by delivering copies thereof to an agent authorized . . . to receive service of process.”⁷ Service of process upon a corporation, partnership or unincorporated association subject to suit under common name is accomplished by “delivering copies of the summons, complaint and

⁶*Murphy v. State*, Del. Supr., 632 A.2d 1150, 1152 (1993).

⁷Super. Ct. Civ. R. 4(f) (1) (I).

affidavit, if any, to an officer, a managing or general agent or to any other agent authorized by law to receive service of process”⁸ Thus, delivery of the suit papers to the receptionists at the law firms did not constitute effective service of process and the Superior Court properly so concluded.⁹

(7) Alston’s contention that the law firm appellees submitted themselves to the jurisdiction of the Superior Court when their counsel appeared and allegedly argued the merits of the case is unavailing. This argument was not presented to the Superior Court in the first instance and will not be considered by this Court for the first time on appeal.¹⁰ The claim is meritless in any case, since the law firm appellees made a timely and proper objection to the sufficiency of service of process prior to the hearing on the motions to dismiss.¹¹ There is no support in the record for Alston’s contention that the attorney for the law firm appellees argued the merits of the case at the hearing on the motions to dismiss. There is likewise no record support for Alston’s contention that an *ex parte* conference between the Superior Court

⁸Super. Ct. Civ. R. 4(f) (1) (III).

⁹The Superior Court noted that Alston had the right to move for an enlargement of time to make service, but had not done so. Super. Ct. Civ. R. 4(j).

¹⁰Supr. Ct. R. 8.

¹¹*Brewington-Carr v. Coleman*, Del. Supr., No. 531, 1998, Veasey, C.J., 1999 WL 734775 (Aug. 30, 1999) (ORDER).

and the attorney for the law firm appellees occurred prior to the hearing on the motions to dismiss.

(8) Also meritless is Alston's contention that he was entitled to summary judgment because he submitted an un rebutted affidavit attesting to the facts underlying his claims. There was no abuse of discretion on the part of the Superior Court in refusing to consider Alston's affidavit on the motions to dismiss. The Superior Court properly decided the law firm appellees' motion to dismiss based on lack of jurisdiction by considering the factual circumstances relating to service of process¹² and properly decided the State appellees' motion to dismiss for failure to state a claim by considering the allegations in the complaint.¹³

(9) Also without merit is Alston's final contention that his complaint properly stated claims against the State appellees for intentional tort, fraud, conspiracy and civil rights violations. Dismissal for failure to state a claim

¹²*See Dolan v. Williams*, Del. Supr., 707 A.2d 34, 35 (1998).

¹³*Ramunno v. Cawley*, 705 A.2d at 1034. It appears the Superior Court also considered Alston's pleadings filed June 15, 1999 entitled "Notice of Objection and Answers to Defendants' Motions" and "Objections and Answers to Defendants' Motion for a More Definite Statement Pursuant to Rule 12 (E)," which, among other things, clarified the claims made in the complaint in response to the law firm appellees' motion for a more definite statement.

upon which relief can be granted¹⁴ is appropriate where it appears with reasonable certainty that the plaintiff could not prove any set of facts that would entitle him to relief, accepting all well-pleaded allegations in the complaint as true and drawing all reasonable inferences in favor of the non-movant.¹⁵ A pro se complaint is held to a somewhat less stringent standard than formal pleadings drafted by lawyers.¹⁶ In this case, the standards for dismissal for failure to state a claim were met, and the Superior Court properly dismissed the claims against the State appellees.

(10) Alston's complaint fails to state claims for intentional tort, fraud and conspiracy against the Office of the Prothonotary, Kent County; the Office of Disciplinary Counsel, State of Delaware; and the Unemployment Insurance Appeals Board. To state a valid claim for intentional tort, a plaintiff must allege an intentional wrong committed by the defendant, which constitutes the legal or "proximate" cause of some legally cognizable harm.¹⁷

¹⁴Super. Ct. Civ. R. 12(b) (6).

¹⁵*Ramunno v. Cawley*, 705 A.2d at 1034.

¹⁶*Vick v. Haller*, Del. Supr., No. 149, 1986, Christie, C.J., 1987 WL 36716 (Mar.2, 1987) (ORDER).

¹⁷*Culver v. Bennett*, Del. Supr., 588 A.2d 1094, 1096-97 (1991) (citing W.KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 263 (5th ed. 1984)).

(11) To state a valid claim for fraud, a plaintiff must allege: a) a false representation, usually one of fact, made by the defendant; b) the defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth; c) an intent to induce the plaintiff to act or to refrain from acting; d) the plaintiff's action or inaction taken in justifiable reliance upon the representation; and e) damage to the plaintiff as a result of such reliance.¹⁸

(12) To state a valid claim for conspiracy, a plaintiff must allege: a) a confederation of two or more persons; b) an unlawful act done in furtherance of the conspiracy; and c) actual damage.¹⁹

(13) We have reviewed thoroughly Alston's complaint and have concluded that there is no basis for relief against these State appellees with respect to any of these claims.

(14) For the reasons stated above, Alston's complaint also fails to state claims for intentional tort, fraud and conspiracy against Michael J. Rich and the Attorney General's Office (designated by Alston as "Delaware States Attorneys Office"). Moreover, the sole basis for Alston's claims against Rich

¹⁸*Stephenson v. Capano*, Del. Supr., 462 A.2d 1069, 1074 (1983).

¹⁹*Nicolet, Inc. v. Nutt*, Del. Supr., 525 A.2d 146, 149-150 (1987).

and the Attorney General's Office is that Rich did not file a criminal complaint against the law firm appellees, a discretionary decision arising out of the performance of his official duties. Rich, as State Solicitor, and the Attorney General's Office enjoy absolute immunity for any alleged act or omission arising out of the performance of an official duty.²⁰

(15) To the extent Alston's complaint is construed to allege civil rights claims against the State appellees, all such claims must fail since State appellees are not "persons" within the meaning of the federal civil rights statute.²¹ To the extent Alston has alleged a violation of his civil rights by Rich in his individual capacity, any such claim also must fail. The sole allegation against Rich for a violation of Alston's civil rights is that Rich failed to file a criminal complaint against the law firm appellees. Immunity is conferred upon a state official performing a discretionary duty that did not violate a clearly established statutory or constitutional right of which a

²⁰10 Del. C. § 4001; *Weber v. Oberly*, Del. Supr., No. 179, 1989, Walsh, J., 1989 WL 160442 (Dec. 26, 1989) (ORDER) (citing *Vick v. Haller*, Del. Supr., No. 149, 1986, Christie, C.J., 1986 WL 17348 (Aug. 22, 1986) (ORDER)).

²¹42 U.S.C.A. § 1983; *Will v. Michigan Department of State Police*, 491 U.S. 58, 64, 71 (1989).

reasonable person would have known.²² Rich is entitled to immunity in this case because his decision not to prosecute the law firm appellees was a discretionary decision that did not violate a clearly established statutory or constitutional right of Alston.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is, AFFIRMED.

IT IS FURTHER ORDERED that appellant's "Motion Form of Order-1," "Motion Form of Order-2," and "Second Motion for a Summary Judgment" are hereby STRICKEN as non-conforming documents²³ and appellant's "Motion for Stay of Mandate" and "Motion for Oral Argument Pursuant to Rules 16(a), 30(c)" are hereby DISMISSED AS MOOT.

BY THE COURT:

/s/ Carolyn Berger
Justice

²²*Vargas-Badillo v. Diaz-Torres*, 114 F.3d 3, 5 (1st Cir. 1997).

²³Supr. Ct. R. 34.