

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

EARL STRONG, :
 : C.A. No. K12C-07-005 WLW
Plaintiff, :
 :
v. :
 :
OFFICER BRENDON DUNNING, :
SMYRNA POLICE DEPARTMENT, :
and OFFICER WILLIAM DUNCAN, :
 :
Defendants. :

Submitted: March 20, 2013
Decided: June 27, 2013

ORDER

Upon Defendants' Motion for Summary Judgment.
Granted.

Earl Strong, *pro se*

Bruce C. Herron, Esquire of Losco & Marconi, P.A., Wilmington, Delaware; attorney
for Defendants.

WITHAM, R.J.

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Defendants' seek summary judgment in this case which the Plaintiff has opposed. The Court has reviewed the pleadings and this is the decision of the Court.

I. Issue

The issue before the Court is whether there are genuine issues of material fact that preclude entry of summary judgment pursuant to Superior Court Civil Rule 56(a) in Defendants' favor.

II. Relevant Factual and Procedural Background

Plaintiff Earl Strong (hereinafter "Strong") filed this action against Defendants Smyrna Police Department (hereinafter "the Police Department"), and Smyrna Police Officers Brandon Dunning (hereinafter "Dunning") and William Duncan (hereinafter "Duncan") on or about July 6, 2012.¹ In essence, Plaintiff's Complaint states claims for false arrest, wrongful imprisonment, malicious prosecution, defamation, and official misconduct arising out of his arrest on March 31, 2012.

The details of Plaintiff's arrest, as set forth in Dunning's affidavit, are as follows: At approximately 4:29 p.m. on Saturday, March 24, 2012, Eric Robinson (hereinafter "Robinson") arrived at the Smyrna Police station to lodge a complaint against Plaintiff. Robinson told Dunning that Plaintiff had approached and taunted him in a Wawa convenience store earlier that day. Robinson stated that he tried to

¹ The Court notes that the proper municipal defendant in this case is the Town of Smyrna, not the Police Department. *See Jones v. Crawford*, 2009 WL 2365675, at *6 n.50 (Del. Super. July 23, 2009), *rev'd on other grounds*, 1 A.3d 299 (Del. 2010). Given the liberal standard for construing *pro se* pleadings, the Court will treat Plaintiffs' claims against the Police Department as claims against the Town of Smyrna.

ignore Plaintiff, but Plaintiff continued to taunt him as he walked to the counter. Robinson then attempted to evade Plaintiff by exiting the store, but Plaintiff followed him and continued to make threatening statements. Robinson also told Dunning that Plaintiff had taken photographs of Robinson with his cell phone as the complainant walked to his truck.

Dunning later interviewed two witnesses, Katie Powell and Gabrielle Boroughs, who corroborated Robinson's story. Jessica Cohen, the cashier on duty at the time of the incident, told police that she overheard Plaintiff taunting Robinson. Officer Dunning also reviewed in-store surveillance on the date of the alleged incident. The video recorded the brief exchange between Plaintiff and Robinson and appeared to establish Plaintiff as the instigator.

Dunning thereafter applied for an arrest warrant for Plaintiff on a charge of harassment. After reviewing Dunning's application and affidavit of probable cause, a magistrate issued a warrant for Plaintiff's arrest on March 30, 2012. At approximately 3:15 p.m. the next day, Duncan drove to Plaintiff's residence and informed him of the outstanding warrant. Plaintiff was not handcuffed or transported to the police station, but rather followed Duncan there on his own accord. According to Duncan's affidavit, produced by Defendants in support of their summary judgment motion, Plaintiff remained at the police station for two hours, and was not restrained in any way. Plaintiff was arraigned and released on \$250 unsecured bond. The charge was later *nolle prossed*.

Plaintiff presents a different version of the events leading up to his arrest. In

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his Complaint, Plaintiff states that he and Robinson are neighbors and that a history of bad blood exists between them. Plaintiff claims that he has been the victim of a campaign of repeated harassment at the hands of Robinson and members of his household. On March 7, 2012, Robinson appeared in Justice of the Peace Court to answer to charges of terroristic threatening and disorderly conduct. Robinson was released on unsecured bail and ordered to obey certain conditions of the bail bond. Chief among those conditions was an order to avoid any contact with Plaintiff, or with the alleged victim's property, residence, place of employment, school, or church. Plaintiff contends that Robinson violated this order (hereinafter "the no-contact order") at the time of the altercation at the Wawa convenience store on March 24, 2012, by conversing with Plaintiff and remaining in his physical presence. In his complaint, Plaintiff contends that the very existence of the no-contact order negates the probable cause for his arrest for harassment.

Plaintiff also disputes Defendants' version of his arrest. In his Complaint, Plaintiff states that Duncan was disrespectful and forceful at the time of his arrest. Plaintiff claims that Duncan did not read him his Miranda rights prior to questioning him at the station. He also claims that he was locked in an interrogation room for an inordinate amount of time.

Plaintiff filed the instant suit on July 6, 2012. On March 4, 2013, Defendants moved for summary judgment on all claims. In support of their summary judgment motion, Defendants submitted various exhibits and affidavits, including: (1) the affidavit of Dunning; (2) the affidavit of Duncan; (3) the warrant authorizing

Plaintiff's arrest for harassment; and (4) the affidavit of probable cause supporting this warrant prepared by Dunning. Plaintiff filed a memorandum in opposition to Defendants' Motion for Summary Judgment on March 18, 2013. In support of his opposition motion, Plaintiff submitted only his own affidavit and that of his wife in which the pair set forth their own version of the March 24, 2012 altercation. Plaintiff also submitted a copy of the no-contact order issued on March 7, 2012.

III. Discussion

A. Standard of Review

Summary judgment is appropriate where admissible evidence fails to demonstrate a genuine issue of material fact and the moving party is entitled to judgment as a matter of law.² Rule 56 requires summary judgment where a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."³ In considering a motion for summary judgment, a court does not resolve factual disputes or make credibility determinations, and must view facts and inferences in a light most favorable to the non-moving party.⁴

B. Tort Claims

² Super. Ct. Civ. R. 56(e).

³ *Burkhart v. Davis*, 602 A.2d 56, 59 (Del. 1991) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986)).

⁴ *Miller v. State Dep't of Pub. Safety*, 2011 WL 1312286, at *12 (Del. Super. Apr. 6, 2011) (citing *Maynard v. Goodwill Indus. of Del.*, 678 F. Supp. 2d 243, 250-51 (D. Del. 2010)).

Plaintiff's Complaint appears to allege claims for false arrest, malicious prosecution, defamation, and wrongful imprisonment. Defendants move for summary judgment on all of these tort claims, alleging: (1) that Defendants are insulated from tort liability under the Delaware County and Municipal Tort Claims Act, 10 *Del. C.* § 4010 *et seq.* (hereinafter "the CMTCA" or "the Act"); and (2) to the extent that Plaintiff brings his claim pursuant to 42 U.S.C. § 1983 (hereinafter "Section 1983"), municipal liability under that statute is limited to deprivations of federally protected rights caused by action taken pursuant to official municipal policy, custom or practice, and Plaintiff has not identified any such policy or custom.

Unfortunately, perhaps because Plaintiff is acting *pro se*, the legal bases of his claims remain unclear. It appears as if Plaintiff is advancing claims under 42 U.S.C. § 1983 or the Delaware County and Municipal Tort Claims Act, 10 *Del. C.* § 4010 *et seq.* Even so, the outcome is the same under either statute: Defendants are insulated from liability and, therefore, are entitled to judgment as a matter of law with respect to all tort claims asserted in Plaintiff's Complaint.

1. Liability of Defendants Under The CMTCA

Defendants contend that, assuming Plaintiff premises his various tort claims upon the CMTCA, the Defendants are immune from suit by virtue of Section 4011(a) of the Act. Section 4011(a) of the Act reads, in pertinent part: "[e]xcept as otherwise expressly provided by statute, all governmental entities and their employees shall be immune from suit on any and all tort claims seeking recover of damages...."⁵ As the

⁵ 10 *Del. C.* § 4011(a).

law enforcement arm of the Town of Smyrna, the Smyrna Police Department (hereinafter “the Defendant Police Department) is unquestionably a “governmental entity” as defined in the Act.⁶ Similarly, Dunning and Duncan (hereinafter “the Defendant Officers”) are “employees” as defined by the Act.⁷ These facts establish that both the defendant police department and the defendant officers are entitled to immunity under the Act “[e]xcept as otherwise expressly provided” by some other statute.⁸

Although 10 *Del. C.* § 4012 sets forth several exceptions to immunity, none are relevant under the facts alleged in the Complaint. Section 4012 provides that a governmental entity is subject to liability for injuries caused by such entity’s negligence in: (1) the ownership, maintenance or use of motor vehicles; (2) the construction, operation or maintenance of public buildings; or (3) the sudden and accidental discharge of pollutants.⁹ The instant case clearly does not involve governmental negligence in the operation of motor vehicles, public buildings or the discharge of pollutants. Therefore, the exceptions set forth in Section 4012 have no

⁶ *See id.* § 4010(2) (governmental entity “means any municipality, town, county, administrative entity or instrumentality created pursuant to Chapter 8 of Title 22”). *See also Jones v. Crawford*, 1 A.3d 299, 302 (Del. 2010) (municipal police department is a governmental entity for the purposes of the CMTCA).

⁷ *See 10 Del. C.* § 4010(1) (defining employee as “a person acting on behalf of a governmental entity in any official capacity....”).

⁸ *See id.* § 4011(a).

⁹ *Id.* § 4012(1)-(3).

applicability in the instant case.

Section 4011(c) sets forth another limited exception to the immunity provided by section 4011(a).¹⁰ This provision acts as a waiver of immunity as to employees of governmental entities, but such waiver is only for specific kinds of injuries brought about by specific kinds of conduct.¹¹ In the instant case, Plaintiff does not allege that he suffered “property damage, bodily injury, or death” as a result of his arrest and imprisonment. Therefore, Plaintiff cannot use Section 4011(c) to strip the Defendant Officers of their immunity because he does not seek recovery for the kinds of injuries covered by this statute.

Additionally, Plaintiff does not allege that the Defendant Officers acted outside of the “scope of employment” or that any of their particular acts “were performed with wanton negligence or willful and malicious conduct.” Such allegations are necessary in order to assert a claim under Section 4011(c). All that can be inferred from the record is that Dunning, in his capacity as an employee of the Smyrna Police Department, attempted to enforce the criminal laws of this state. There is no allegation that he did so in a manner evidencing wanton negligence or willful or

¹⁰ 10 *Del. C.* § 4011(c) provides:

(c) An employee may be personally liable for acts or omissions causing property damage, bodily injury or death in instances in which his or her governmental entity is immune under this section, but only for those acts which were not within the scope of employment or which were performed with wanton negligence or willful and malicious conduct.

¹¹ See *Carr v. Town of Dewey Beach*, 730 F. Supp. 591, 601-02 (D. Del. 1990) (finding the exception inapplicable when the plaintiff merely sought money damages).

malicious conduct. Plaintiff's conclusory allegation that he was "maliciously prosecuted" as a result of the Defendant Officers' conduct does not satisfy his burden under Section 4011(c). Therefore, Plaintiff has failed to allege the type of conduct which, under Section 4011(c), would strip Defendants of their immunity.

In sum, Defendants enjoy absolute immunity from any tort liability arising out of the actions of Dunning and Duncan effecting Plaintiff's arrest. The Court must now determine whether there is sufficient evidence in the record to preclude summary judgment on Plaintiff's Section 1983 claims.

2. Liability of Defendants Under 42 U.S.C. § 1983

Plaintiff also appears to assert a civil rights action under 42 U.S.C. § 1983 (hereinafter "Section 1983") for alleged violations of his federal constitutional rights.¹² Section 1983 "imposes civil liability upon any person who, acting under the color of state law, deprives another individual of any rights, privileges, or immunities secured by the Constitution or laws of the United States."¹³ To prevail on his Section 1983 claims, Plaintiff must establish that: (1) he was deprived of a federal right, and (2) the Defendant Officers were acting under the color of state law.¹⁴

¹² Section 1983 creates a civil cause of action "where there has been injury, under color of state law, to the person or to the constitutional or federal statutory rights which emanate from or are guaranteed to the person." *Gunzl v. Spayd*, 1995 WL 160352, at *4 (Del. Super. Mar. 28, 1995) (quoting *Wilson v. Garcia*, 471 U.S. 261, 278, 105 S.Ct. 1938, 1948, L.Ed.2d 85 L.Ed.2d 254 (1985)).

¹³ *Hunt ex rel. DeSombre v. Delaware et al.*, 2013 WL 3193549, at *2 (June 25, 2013) (citing *Hazel v. Del. Supermarkets, Inc.*, 953 A.2d 705, 708-09 (Del. 2008)).

¹⁴ *Id.*

Although it is unclear from his Complaint, Plaintiff appears to state (1) a Section 1983 claim against the Defendant Officers premised on malicious prosecution and/or false arrest; and (2) a municipal liability claim under Section 1983 premised on a theory of inaction. Defendants now move for summary judgment on all of Plaintiff's purported Section 1983 claims, arguing that: (1) Plaintiff fails to demonstrate that there is a municipal or official capacity liability as required by *Monell v. Department of Social Services*;¹⁵ and (2) the individual officers are entitled to qualified immunity. The Court will now consider the liability of each defendant in turn.

a. Liability of The Defendant Police Department

At the outset, the Court must consider the propriety of Plaintiff's claims against the Defendant Police Department. Because the summary judgment motion is that of Defendants, Plaintiff's version of events must be accepted for the purposes of deciding the Police Department's liability.

In *Monell*, the United States Supreme Court held that municipalities are "persons" within the meaning of Section 1983 and may be sued under the statute.¹⁶ However, a municipality cannot be liable for the constitutional torts of its employees;

¹⁵ *Monell v. Dept. of Soc. Servs. of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

¹⁶ See *Carr v. Town of Dewey Beach*, 730 F.Supp. 591, 605 (D. Del. 1990) (citing *Monell*, 436 U.S. at 695-701, 98 S.Ct. at 2038-41). For the purposes of section 1983 claims, municipalities and their police departments are treated as a single entity. See *Bonenberger v. Plymouth Twp.*, 132 F.3d 20, 25 (3d Cir. 1997).

that is, it cannot be liable on a *respondeat superior* theory.¹⁷ Rather, liability will attach only where the plaintiff establishes that the municipality engaged in a “policy or custom” that was the “moving force” behind the deprivation of the plaintiff’s rights.¹⁸

As the moving party, Defendants must point to the absence of evidence of a Department-wide policy, custom, or practice sufficient to impose municipal liability. Defendants have met their burden by demonstrating that Plaintiff’s Complaint makes no allegations of any policy or custom that led to the alleged violation of Plaintiff’s constitutional rights.

To defeat Defendants’ motion for summary judgment, Plaintiff must present evidence from which a reasonable trier of fact could find the existence of a department-wide policy, practice or custom responsible for the alleged deprivation of constitutional rights.¹⁹ Plaintiff presents no evidence to develop his *Monell* claim against the Defendant Police Department, which he must do as the party bearing the burden of proof on this issue.²⁰ Accordingly, the Court finds that the Defendant Police Department has satisfied its initial burden as the movant and Plaintiff has failed to designate any specific facts to raise a triable issue of fact as to the existence of any

¹⁷ *Id.* at 605 (citing *Monell*, 436 U.S. at 694, 98 S.Ct. at 2037).

¹⁸ *Id.*

¹⁹ *Monell*, 436 U.S. at 690-95, 98 S.Ct. at 2035-38.

²⁰ *Celotex*, 477 U.S. at 322, 106 S.Ct. at 2552.

policy, custom, or decision that led to the purported violation of his rights under the federal constitution. Therefore, the Defendant Police Department is entitled to judgment as a matter of law as Plaintiff has failed to establish a viable claim under the tenets of *Monell*.

b. Liability of Dunning and Duncan in Their Official Capacities

Plaintiff also fails to establish the liability of Dunning and Duncan in their official capacities.²¹ To maintain a Section 1983 suit against police officers acting in their official capacities, a plaintiff must show that his injuries resulted from the execution of an official policy, custom, or practice.²² Plaintiff makes no effort to demonstrate, in either his complaint or motion filed in opposition to Defendants' summary judgment motion, that either Dunning or Duncan acted in accordance with an official policy or custom when they allegedly violated Plaintiff's constitutional

²¹ Although Plaintiff's Complaint does not state the capacity in which he is suing Dunning and Duncan, a reasonable reading of the Complaint in light of the factors enunciated by the United States Court of Appeals for the Third Circuit in *Melo v. Hafer*, 912 F.2d 628 (3d Cir. 1990), *aff'd*, 502 U.S. 21, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991), and *Gregory v. Chehi*, 843 F.2d 111 (3d Cir. 1988), suggest that Plaintiff is suing the Defendant Officers in both capacities. Plaintiff seeks punitive damages, which cannot be recovered from the Defendant Officers if they are sued in their official capacities. *See Gregory*, 843 F.2d at 119-20. Other factors suggest that Plaintiff is suing the Defendant Officers in their official capacities. Defendants request dismissal of Plaintiff's claims to the extent that they can be construed to bring suit against the Defendant Officers in their official capacities on the grounds of immunity. Thus, Defendants clearly read the Complaint as setting forth claims against the Defendant Officers in their official capacities. As such, the Court will construe the Complaint as suing the Defendant Officers both in their individual and official capacities.

²² *Monell*, 436 U.S. at 690; *see also Kentucky v. Graham*, 473 U.S. 159, 165-66, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985) (noting that a claim against a state official in his or her official capacity "is no different from a suit against the State itself.").

rights. For this reason, the Court grants summary judgment in favor of Defendants with respect to any Section 1983 claims Plaintiff asserts against Dunning and Duncan in their official capacities.

c. Liability of Dunning and Duncan in Their Individual Capacities

This leaves for resolution Plaintiff's allegations that Dunning and Duncan, in their individual capacities, violated his rights under the federal constitution by falsely arresting him and questioning him without providing Miranda warnings. Plaintiff's constitutional arguments are founded upon the Fourth Amendment's prohibition against unreasonable searches and seizures, and the Fifth Amendment's right against self-incrimination, as applied to the States through the Fourteenth Amendment. Defendants move for summary judgment on all claims against Dunning and Duncan in their individual capacities, arguing that: (1) an arrest pursuant to a facially valid warrant is a complete defense to a federal constitutional claim for false arrest made pursuant to Section 1983; and (2) any alleged violation of Plaintiff's Miranda rights, standing alone, cannot form the basis for liability under Section 1983.

i. False Arrest Claim

Defendants claim they are entitled to summary judgment as to any false arrest claim asserted against Dunning and Duncan in their individual capacities because the officers arrested Plaintiff pursuant to a facially valid warrant. In response, Plaintiff contends that he was arrested without probable cause. Specifically, Plaintiff argues that Robinson's violation of the no-contact order somehow negates the validity of the arrest warrant charging Plaintiff with harassment. Because Plaintiff was arrested

pursuant to a facially valid warrant, to succeed on his Section 1983 claim for false arrest, he must prove that (1) the officers “knowingly or deliberately, or with reckless disregard for the truth, made false statements or omissions that create a falsehood in applying for a warrant;” and (2) that “such statements or omissions are material, or necessary, to the finding of probable cause.”²³

According to Plaintiff, Dunning knowingly made false statements in his warrant application. In particular, Plaintiff suggests that Dunning, as the affiant, deceived the approving magistrate by not informing him of the outstanding no-contact order against Robinson. The record, however, belies any actual or intended deception on Dunning’s part. Dunning’s affidavit clearly mentions the existence of a prior order prohibiting Robinson from contacting Plaintiff and states that Robinson “made every effort to not engage in a verbal or physical altercation with [Plaintiff].” Plaintiff has failed to proffer any evidence that Dunning knowingly or recklessly made false statements in his warrant application.

Furthermore, Plaintiff seemingly overlooks the fact that, based upon the uncontroverted evidence in the record, Dunning and Duncan had probable cause as a matter of law to arrest him for harassment. The existence of probable cause to arrest is a complete defense to a claim of false arrest under Section 1983.²⁴ Probable cause

²³ *Wilson v. Russo*, 212 F.3d 781, 786-87 (3d Cir. 2000) (internal citations omitted).

²⁴ *See Baker v. McCollan*, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979); *Herman v. City of Millville*, 66 Fed. Appx. 363, 365 (3d Cir. 2003) (holding that probable cause is a complete defense to claims of false arrest, false imprisonment, and malicious prosecution).

to arrest exists when the arresting officer possesses “information which would warrant a reasonable man into believing that a crime is being or has been committed.”²⁵ Although Plaintiff vehemently protested his innocence at the time of his arrest, the uncontroverted affidavit and exhibits proffered in support of Defendants’ motion for summary judgment show that the witnesses to the altercation stated that Plaintiff had made an unprovoked attack on Robinson. Beyond the vague and conclusory statements found within his motion in opposition, Plaintiff has not alleged any facts to support the conclusion that Defendants’ lacked probable cause to arrest and detain him. Accordingly, Defendants are entitled to summary judgment on the merits of Plaintiff’s false arrest claim.

ii. Fifth Amendment Claim

Plaintiff also appears to contend that Defendants’ failure to read him his Miranda rights prior to his arrest entitles him to relief under 42 U.S.C. § 1983. This argument misconstrues the nature of the remedy provided by *Miranda v. Arizona*.²⁶ That remedy entails nothing more than the suppression of evidence at a criminal trial. A *Miranda* violation cannot form the foundation for an independent civil action because there is no constitutional right to *Miranda* warnings. Thus, Strong cannot base a claim for damages on the mere fact that Defendants did not immediately inform him of his rights.

²⁵ *Garner v. State*, 314 A.2d 908, 910 (Del. 1973).

²⁶ 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

3. Conclusion

Based on the foregoing analysis, Defendants are entitled to immunity under the County and Municipal Tort Claims Act, 10 *Del. C.* §§ 4010-13, and, alternatively, under 42 U.S.C. § 1983. Accordingly, summary judgment will be granted in favor of Defendants with respect to Plaintiff's tort claims, including those asserted for false arrest, malicious prosecution, defamation, and wrongful imprisonment.

C. Additional Causes of Action

Plaintiff's Complaint purports to state a cause of action for "official misconduct" and "denying Plaintiff protection under Court Ordered No Contact Order." Official Misconduct is a statutory crime.²⁷ There is no corresponding civil cause of action.²⁸ To the extent that Plaintiff accuses Defendants of violating the no-contact order, the Court is not aware of any cause of action allowing Plaintiff to sue for damages for the negligent non-enforcement of a court order. As such, the remainder of Plaintiff's claims shall be dismissed upon which relief can be granted.

CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment must be **GRANTED** in its entirety.

²⁷ See 11 *Del. C.* 1211.

²⁸ See *Shaffer v. Davis*, 1990 WL 81892, at *3 (Jun. 12, 1990) (noting that 11 *Del. C.* § 1211 is among a subset of statutory crimes enacted to protect public administration, and since plaintiffs are not within the class for whom these statutes were to benefit, no civil causes of action may be based upon them).

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IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh
oc: Prothonotary
xc: Earl Strong, *pro se*
Bruce C. Herron, Esquire