

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PETER E. SHURR, III,)
)
 Plaintiff,)
)
 v.) Civ. No. 03-523-SLR
)
 MUNICIPAL CITY OF NEWARK,)
 DELAWARE,)
 ACTING CITY MANAGER CARL LUFT,)
 POLICE OFFICERS EMPLOYED BY)
 THE CITY OF NEWARK, INCLUDING)
 CHIEF OF POLICE,)
 GERALD CONWAY,)
 CAPTAIN WILLIAM NEFOSKI,)
 DETECTIVE MIKE ZSEP,)
 OFFICERS JERRY DAWSON,)
 TRUMAN BOLDEN,)
 JOSEPH KENDRICK,)
 FRANK GILLESPIE,)
 TERRY SIMPSON,)
 THE CITY OF NEWARK CLERK OF)
 THE COURT EDNA CONNER,)
 ELECTED COUNCILPERSON)
 JERRY CLIFTON,)
)
 Defendants.)

MEMORANDUM ORDER

At Wilmington, this 28th day of January, 2004, upon review of defendants' motions to dismiss and plaintiff's response thereto;

IT IS ORDERED that defendants' motions to dismiss (D.I. 4, 6) will be **granted** for the reasons that follow:

1. Plaintiff filed the present action on June 3, 2003, against the City of Newark, the acting City Manager, several

members of the Newark Police Department, and a court clerk pursuant to 42 U.S.C §§ 1983 and 1985 alleging violations of his civil rights. Plaintiff contends that he was falsely arrested and maliciously prosecuted as a result of a conspiracy by members of the police department. (D.I. 1 at 3) Plaintiff alleges that the police ignored exculpatory evidence and charged him with criminal mischief and tampering with property. That charge was later reduced to disorderly conduct, of which plaintiff was subsequently found not guilty.

2. In analyzing a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the court must accept as true all material allegations of the complaint and it must construe the complaint in favor of the plaintiff. See Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts, Inc., 140 F.3d 478, 483 (3d Cir. 1998). "A complaint should be dismissed only if, after accepting as true all of the facts alleged in the complaint, and drawing all reasonable inferences in the plaintiff's favor, no relief could be granted under any set of facts consistent with the allegations of the complaint." Id. Claims may be dismissed pursuant to a Rule 12(b)(6) motion only if the plaintiff cannot demonstrate any set of facts that would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Where the plaintiff is a pro se litigant, the court has an obligation to construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 520-521

(1972); Gibbs v. Roman, 116 F.3d 83, 86 n.6 (3d Cir. 1997); Urrutia v. Harrisburg County Police Dep't., 91 F.3d 451, 456 (3d Cir. 1996). The moving party has the burden of persuasion. See Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991).

3. It is well established law that a court must have jurisdiction over each of the parties in an action. See Earle v. McVeigh, 91 U.S. 503, 504 (1875) ("Due notice to the defendant is essential to the jurisdiction of all courts, as sufficiently appears from the well-known legal maxim, that no one shall be condemned in his person or property without notice, and an opportunity to be heard in his [defense]."). Personal jurisdiction must be effected through proper service of process, and actual notice by a defendant does not satisfy this constitutional requirement. Fed. R. Civ. P. 4. See also Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 350 (1999) ("In the absence of service of process (or waiver of service by the defendant), a court ordinarily may not exercise power over a party the complaint names as defendant."). Further, a defendant may answer a complaint, without waiving his affirmative defense of lack of personal jurisdiction. See R.H. Hassler, Inc. v. Shaw, 271 U.S. 195 (1926).

4. In the present case, service of process was only effected as to defendant Luft. Plaintiff asserts that the

failure to properly effect service of process was "unintentional." (D.I. 9) Notwithstanding plaintiff's good motives, due process demands that where a plaintiff has failed to obtain personal jurisdiction over each of the defendants through proper service of process the case must be dismissed. Consequently, with the exception of defendant Luft, the court will dismiss the case without prejudice due to insufficient process. Fed. R. Civ. P. 12(b)(4).

5. With respect to defendant Luft, the court concludes that plaintiff has failed to state a claim upon which relief can be granted. Taking all the facts plaintiff has alleged to be true, plaintiff's complaint fails to allege any facts at all that concern conduct by Luft. See Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988). Consequently, as to defendant Luft, plaintiff's complaint is dismissed for failure to state a claim upon which relief can be granted.

Sue L. Robinson
United States District Judge