



**ROBINSON, Chief Judge**

**I. INTRODUCTION**

On October 6, 2000, plaintiff Maurice Barrett filed this action against defendants Joseph Paesani, Wendy Caple, the State of Delaware, Noreen Renard, and M. Jane Brady, alleging civil rights violations under 42 U.S.C. § 1983 for malicious prosecution. (D.I. 2) Subsequently, the court dismissed defendants Joseph Paesani, the State of Delaware, Noreen Renard and M. Jane Brady as parties to this action. (D.I. 23)

The court has jurisdiction over plaintiff's claims pursuant to 28 U.S.C. § 1331. Currently before the court is defendant's motion to dismiss the complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). (D.I. 29) Because defendant submitted documents in support of the motion to dismiss, the court will review the motion as one for summary judgment. (Id.) Also before the court is plaintiff's motion to amend the complaint to add Iris Murray as a defendant, and motion for representation by counsel, pursuant to 28 U.S.C. § 1915(e). (D.I. 30, 32) For the reasons discussed below, defendant's motion for summary judgment is granted, plaintiff's motion to amend the complaint is denied, and plaintiff's motion for representation by counsel is denied as moot.

**II. BACKGROUND**

On May 20, 1999, the Delaware Superior Court sentenced plaintiff for the crimes of Criminal Trespass and Offensive

Touching. (D.I. 2) He received a sentence of Level V incarceration for nine months on each charge, which was suspended for nine months probation on each. (Id.) The incarcerative portions of the two sentences were to be served consecutively, but the non-incarcerative portions were to be served concurrently. (Id.) Due to this sentence, plaintiff's probation expired on February 20, 2000. (Id.) However, on May 10, 2000, defendant, plaintiff's probation officer, filed a Violation of Probation report, alleging plaintiff committed additional crimes while on probation. (Id.) As a result, plaintiff was arrested on June 27, 2000. (Id.)

Plaintiff contends that his rights were violated when defendant filed the Violation of Probation Report, as plaintiff was no longer on probation as of the filing date. (Id.) He asserts that due to his inability to post bail of \$25,000, he remained in jail following his arrest, which resulted in a loss of his employment, house, and car. (Id.) He further states that his daughter's college scholarship was in jeopardy due to his failure to meet related financial obligations. (Id.) Because of these losses, he contends that he is unable to afford counsel, which he feels is necessary in this complex case. (D.I. 30)

Plaintiff further alleges that defendant has been conspiring against him with Ms. Iris Murray, and thus seeks to name Ms. Murray as an additional defendant. (D.I. 32) He claims that

defendant and Ms. Murray are long-term friends who have sought to have him arrested and incarcerated because he ended his 19-year relationship with Ms. Murray. (Id.) Thus, plaintiff contends that the March 2000 assault charges brought by Ms. Murray are as a result of this conspiracy. (D.I. 35)

Defendant states that she has acted in good faith at all times. (D.I. 29 at 2) She relied on the November 19, 2000 probation expiration date as stated in the Probation and Parole computer database. (Id., Ex. A at ¶ 13) Thus, upon receipt of information that plaintiff was engaging in criminal conduct, defendant filed the Violation of Probation report. (Id. at ¶ 15) Because plaintiff failed to appear at his Violation of Probation hearing, the Superior Court issued a *capias*. (Id. at ¶ 16) Plaintiff's arrest on June 27, 2000 was based on the alleged violation of probation, as well as numerous arrest warrants for crimes committed in the spring of 2000. (Id.)

### **III. STANDARD OF REVIEW**

Since the parties have referred to matters outside the pleadings, defendant's motion to dismiss shall be treated as a motion for summary judgment. See Fed. R. Civ. P. 12(b)(6); Camp v. Brennan, 219 F.3d 279, 280 (3rd Cir. 2000) (consideration of matters beyond the complaint converts a motion to dismiss into a motion for summary judgment). A party is entitled to summary judgment only when the court concludes "that there is no genuine

issue of material fact and that the party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no material issue of fact is in dispute. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986). Once the moving party has carried its initial burden, the nonmoving party “must come forward with ‘specific facts showing that there is a genuine issue for trial.’” Id. at 587 (quoting Fed. R. Civ. P. 56(e)). “Facts that could alter the outcome are ‘material’, and disputes are ‘genuine’ if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct.” Horowitz v. Fed. Kemper Life Assur. Co., 57 F.3d 300, 302 n.1 (3rd Cir. 1995). If the nonmoving party fails to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof, the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The mere existence of some evidence in support of the party will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that factual issue. See Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 249 (1986). The court, however, must “view all the underlying facts and all reasonable inferences therefrom in the light most favorable to

the party opposing the motion.” Pa. Coal Ass’n v. Babbitt, 63 F.3d 231, 236 (3rd Cir. 1995); Pacitti v. Macy’s, 193 F.3d 766, 772 (3rd Cir. 1999).

#### **IV. DISCUSSION**

##### **A. Plaintiff’s Malicious Prosecution Claim**

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege that a “person acting under color of state law” deprived him of a constitutionally protected right. Parratt v. Taylor, 451 U.S. 527, 535 (1981). “The traditional definition of acting under color of state law requires that the defendant in a § 1983 action has exercised power ‘possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.’” Barna v. City of Perth Amboy, 42 F.3d 809, 815 (3rd Cir. 1994) (quoting West v. Atkins, 487 U.S. 42, 48 (1988)); accord Lloyd v. Jefferson, 53 F. Supp.2d 643, 655 (D. Del. 1999). “‘It is firmly established that a defendant in a section 1983 suit acts under color of state law when he abuses the position given to him by the State’” Id. (quoting West, 487 U.S. at 49). In the case at bar, defendant does not dispute that she was acting in her official capacity when she filed the Violation of Probation Report and, therefore, was a state actor for § 1983 purposes. (D.I. 29, Ex. A at 1) Accordingly, the court’s analysis will focus on whether plaintiff has established a prima facie case of malicious prosecution.

To sustain a civil action for § 1983 malicious prosecution, plaintiff must demonstrate that: (1) the defendant initiated a criminal proceeding; (2) the proceeding ended in plaintiff's favor; (3) the proceeding was initiated without probable cause; and (4) the defendant acted maliciously or for a purpose other than bringing the defendant to justice. See Bell v. Brennan, 570 F. Supp. 1116, 1118 (E.D. Pa. 1983). The Third Circuit has defined the fourth element, malice, as "either ill will in the sense of spite, lack of belief by the actor himself in the propriety of the prosecution, or its use for an extraneous improper purpose." Lee v. Mihalich, 847 F.2d 66 (3rd Cir. 1988). To survive a motion for summary judgment, plaintiff must point to more than conclusory allegations as to malicious intent on the part of the defendant. See Felkner v. Christine, 796 F. Supp. 135 (M.D. Pa. 1992). Thus, an assertion of malice that is not supported by a developed record will not survive a motion for summary judgment. See id. at 142.

In the case at bar, plaintiff alleges that defendant deliberately filed a false Violation of Probation Report against him on May 20, 2000. (D.I. 2) He alleges that he told defendant that he was no longer on probation, and that she refused to investigate his claim. (D.I. 8 at 4) Plaintiff contends that defendant filed the false report in order to punish him for ending a relationship with Ms. Iris Murray, a close friend of

defendant. (D.I. 32) Plaintiff makes conclusory allegations regarding defendant's motives, but he has not provided any evidence to support his claim that defendant acted maliciously, as required by Felkner. See 796 F. Supp. at 142. Accordingly, because the plaintiff has failed to make a showing of an essential element of his case, i.e., that defendant acted maliciously, the court finds that there exist no genuine issues of material fact regarding plaintiff's claim of malicious prosecution.

**B. Plaintiff's Motion to Amend**

Though motions to amend are to be liberally granted, a district court "may properly deny leave to amend where the amendment would not withstand a motion to dismiss." Centifanti v. Nox, 865 F.2d 1422, 1431 (3rd Cir. 1989). Likewise, courts may deny leave to amend where they find "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, [or] futility of amendment..." Foman v. Davis, 371 U.S. 178, 182 (1962).

As previously discussed, in order to state a claim under § 1983, one must allege a deprivation of a constitutionally protected right by a "person acting under color of state law." Parratt, 451 U.S. at 535. Likewise, the wrongdoer must have

acted only because she was “‘clothed with the authority of state law.’” Barna, 42 F.3d at 815 (quoting West, 487 U.S. at 48.

Here, plaintiff’s motion must be denied on the grounds of futility. Plaintiff seeks to amend the complaint to add Ms. Iris Murray as a defendant, alleging that she conspired with defendant to have him arrested and incarcerated. (D.I. 32, 35) According to plaintiff, he was arrested once on charges related to Ms. Murray, in which defendant used the power of her job to initiate a fabricated arrest. (D.I. 35) The complaint fails to allege, however, that Ms. Murray has acted in any official capacity. Thus, plaintiff fails to meet the requirements of § 1983, and the motion to amend must be denied on the grounds of futility.

### **C. Motion for Representation by Counsel**

Plaintiff contends that representation by counsel is warranted since the case is complex and he is unskilled in the law. (D.I. 30) A pro se litigant proceeding in forma pauperis has no constitutional nor statutory right to representation by counsel. See Ray v. Robinson, 640 F.2d 474, 477 (3rd Cir. 1981). Typically, pro se litigants are afforded counsel, if at all, only after a threshold evaluation of the merits of their case. See Tabron v. Grace, 6 F.3d 147 (3rd Cir. 1993). In light of the court’s finding that plaintiff’s claim is without merit, plaintiff’s motion for representation by counsel is denied.

## **V. CONCLUSION**

For the reasons stated, defendant's motion to dismiss is granted, plaintiff's motion to amend is denied, and plaintiff's motion for representation by counsel is denied as moot. An appropriate order shall issue.