

Beach, Delaware; Rehoboth Beach police officers Paul Parsons, Jaimie Riddle, Michael Armstrong, Bonnie Ladd and Collette Sutherland; Rehoboth Beach EMT's John Wothers and Tammie Morrison; Rehoboth Beach City Solicitor Walter Speakman; Judge Merrill C. Trader ("Judge Trader"); secretary Linda White; court reporter Linda Lavender ("Lavender"); Clerk of the Court of the Court of Common Pleas, Doris Wilkins ("Wilkins"); Prothonotary, Joyce Collins; Sussex Correctional Institute ("SCI") Warden Rick Kearney ("Warden Kearney"); SCI¹; assistant attorneys general Veronica Faust ("Faust") and Christine Tunnell ("Tunnell"); and John Does I through X².

The current case is a continuation of Civil Case No. 03-362-KAJ brought by Hurst against various defendants. The allegations in that case surround actions supposedly taken prior to and after Hurst's arrest, but before the criminal court proceedings. The case at bar occasionally alludes to Civil Case No. 03-362-KAJ, but for the most part contains allegations for a time-frame later than the allegations in the earlier case.

Count I is brought pursuant to 42 U.S.C. § 1983 and alleges that all the defendants conspired to cover-up in the judicial system of Delaware alleged violations of applicable laws, regulations, court rules, ethical canons, and constitutional and civil rights. Hurst specifically refers to violations of the Fourth, Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution. Count II raises a cause of action for intentional infliction of emotional distress; Count III alleges negligent training and supervision;

¹SCI is named as a defendant in the complaint, but was inadvertently omitted from the listing in the court docket.

²John Does I through X are named as defendants, but were inadvertently omitted from the listing in the court docket.

Count IV alleges malicious abuse of process and prosecution; and, Count V alleges intentional and/or negligent exposure to tuberculosis. Count VI brings a second conspiracy claim against all the defendants and specifically names Wilkins, Lavender, Judge Trader, Faust and Tunnell. Finally, Counts VII through XIII raise supplemental state claims. Hurst seeks compensatory damages, as well as declaratory and injunctive relief.

II. STANDARD OF REVIEW

When a litigant proceeds *in forma pauperis*, 28 U.S.C. § 1915 provides for dismissal under certain circumstances. Section 1915(e)(2)(B) provides that the Court may dismiss a complaint, at any time, if the action is frivolous, malicious, fails to state a claim upon which relief may be granted or seeks monetary relief from a defendant immune from such relief. An action is frivolous if it "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989).

The Court must "accept as true factual allegations in the complaint and all reasonable inferences that can be drawn therefrom." *Nami v. Fauver*, 82 F.3d 63, 65 (3d Cir. 1996)(citing *Holder v. City of Allentown*, 987 F.2d 188, 194 (3d Cir. 1993)). Additionally, *pro se* complaints are held to "less stringent standards than formal pleadings drafted by lawyers" and can only be dismissed for failure to state a claim when "it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Haines v. Kerner*, 404 U.S. 519, 520-521 (1972)(quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Inasmuch as plaintiff proceeds *pro se*, I will construe the complaint liberally. *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

III. DISCUSSION

A. Personal Involvement

Hurst names Warden Kearney as a defendant. "A defendant in a civil rights action must have personal involvement in the alleged wrongs" to be liable. *Sutton v. Rasheed*, 323 F.3d 236, 249 (3d Cir. 2003)(quoting *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988)). The complaint contains no allegations against Warden Kearney, and Hurst provided no facts to support a claim against him. As a result, the claim lacks an arguable basis in law or in fact and is dismissed as frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B).

B. Eleventh Amendment Immunity

Hurst also brings suit against SCI. "Absent a state's consent, the Eleventh Amendment bars a civil rights suit in federal court that names the state as a defendant." *Laskaris v. Thornburgh*, 661 F.2d 23, 25 (3d Cir. 1981) (citing *Alabama v. Pugh*, 438 U.S. 781 (1978)). The State of Delaware has not waived its sovereign immunity under the Eleventh Amendment. See *Ospina v. Dep't of Corr.*, 749 F.Supp. 572, 579 (D.Del. 1991). Hence, as an agency of the State of Delaware, SCI is entitled to immunity under the Eleventh Amendment. See e.g. *Evans v. Ford*, C.A. No. 03-868-KAJ, 2004 WL 2009362, *4 (D.Del. Aug. 25, 2004) (dismissing claim against DOC, because DOC is a state agency and did not waive Eleventh Amendment immunity).

Hurst's claim against SCI has no arguable basis in law or in fact inasmuch as it is immune from suit. Therefore, it is frivolous and is dismissed pursuant to 28 U.S.C. § 1915(e)(2)(b).

C. Malicious Prosecution

Counts IV and VII raise claims under federal and state law for malicious prosecution. To succeed on a malicious prosecution claim under 42 U.S.C. § 1983, Hurst must show that (1) the defendants initiated a criminal proceeding; (2) the criminal proceeding ended in his favor; (3) the proceeding was instituted without probable cause; (4) the defendants acted maliciously or for a purpose other than bringing him to justice; and (5) he suffered a deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding. See *Estate of Smith v. Marasco*, 318 F.3d 497, 521 (3d Cir. 2003). Under Delaware law, to sustain a cause of action sounding in malicious prosecution there must be: (1) the institution of civil proceedings; (2) without probable cause; (3) with malice; (4) the termination of the proceedings in the aggrieved party's favor; and (5) damages which were inflicted upon the aggrieved party by seizure of property or other special injury. *Kaye v. Pantone, Inc.*, 395 A.2d 369, 372 (Del. Ch. 1978).

These claims fail for the simple reason that the criminal proceeding did not end in Hurst's favor. Indeed, his conviction was affirmed by the Delaware Supreme Court. See *Hurst v. Delaware*, No. 138,2003, 2003 WL 21810821 (Del. 2003). Therefore, I am dismissing the malicious prosecution claims found in Counts IV and VII as frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B).

D. Malicious Pleading

Hurst brings an intentional and/or negligence exposure to tuberculosis claim in Count V of the complaint. Hurst refers to the allegations contained in paragraphs 1 through 50 of his complaint to support this claim, yet those paragraphs contain no facts

referring to exposure to tuberculosis. More importantly, Hurst makes the same allegations in Civil Case No. 03-362(KAJ), Docket Item 1, paragraph 29.

A complaint is malicious when it “duplicates allegations of another [] federal lawsuit by the same plaintiff.” *Pittman v. Moore*, 980 F.2d 994, 995 (5th Cir.1993); see also *Banks v. Gillie*, Civ. Act. No. 03-3098, 2004 U.S. Dist. LEXIS 5413, at *9 (E.D.La. Feb. 25, 2004) (duplicative and repetitive complaints are considered malicious for purposes of § 1915); *McGill v. Juanita Kraft Postal Service*, No. 3:03-CV-1113-K, 2003 WL 21355439, at *2 (N.D. Tx. June 6, 2003) (complaint is malicious when it “‘duplicates allegations of another pending federal lawsuit by the same plaintiff’ or when it raises claims arising out of a common nucleus of operative facts that could have been brought in the prior litigation”) (quotations omitted).

Hurst brings the “tuberculosis claim,” even though he raised an identical claim in Civil Case No. 03-362-KAJ. I therefore conclude that the claim is malicious within the meaning of Section 1915(e)(2)(B). Count V, therefore, is dismissed.

Aside from those claims which are to be dismissed, Hurst has raised what appear to be, at this point, cognizable claims and he will be allowed to proceed with those.

IV. CONCLUSION

Accordingly, IT IS HEREBY ORDERED that:

1. The claims brought against Warden Rick Kearney and the Sussex Correctional Institute are DISMISSED as frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B);

2. The malicious prosecution claims, Counts IV and VII, are DISMISSED as frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B).; and

3. The intentional and/or negligent exposure to tuberculosis claim, Count V, is DISMISSED as malicious pursuant to 28 U.S.C. § 1915(e)(2)(B).

IT IS FURTHER ORDERED that pursuant to Fed. R. Civ. P. 4(c)(2) and (d)(2), Hurst shall complete and return to the clerk of the court an **original** "U.S. Marshal-285" form for the **each defendant**, as well as for the **Attorney General** of the State of Delaware, 820 N. FRENCH STREET, WILMINGTON, DELAWARE, 19801, pursuant to DEL. CODE ANN. tit. 10 § 3103(c). Hurst shall also provide an **original** "U.S. Marshal-285" form for the **Chief Executive Officer for the City of Dover** and the **Chief Executive Officer for the City of Rehoboth Beach**. Additionally, Hurst shall provide the Court with one copy of the complaint (D.I. 1) for service upon each defendant. **Furthermore, Hurst is notified that the United States Marshal will not serve the complaint until all "U.S. Marshal 285" forms have been received by the clerk of the court. Failure to provide the "U.S. Marshal 285" forms for each defendant, the attorney general and the chief executive officers for the Cities of Dover and Rehoboth Beach within 120 days of this order may result in the complaint being dismissed or defendants being dismissed pursuant to Federal Rule of Civil Procedure 4(m).**

Upon receipt of the form(s) required by paragraph 6 above, the United States Marshal shall forthwith serve a copy of the complaint (D.I. 1), this order, a "Notice of

Lawsuit" form, the filing fee order(s), and a "Return of Waiver" form upon each of the defendants so identified in each 285 form.

Within **thirty (30) days** from the date that the "Notice of Lawsuit" and "Return of Waiver" forms are sent, if an executed "Waiver of Service of Summons" form has not been received from a defendant, the United States Marshal shall personally serve said defendant(s) pursuant to Fed. R. Civ. P. 4(c)(2) and said defendant(s) shall be required to bear the cost related to such service, unless good cause is shown for failure to sign and return the waiver.

Pursuant to Fed. R. Civ. P. 4(d)(3), a defendant who, before being served with process timely returns a waiver as requested, is required to answer or otherwise respond to the complaint within **sixty (60) days** from the date upon which the complaint, this order, the "Notice of Lawsuit" form, and the "Return of Waiver" form are sent. If a defendant responds by way of a motion, said motion shall be accompanied by a brief or a memorandum of points and authorities and any supporting affidavits.

No communication, including pleadings, briefs, statement of position, etc., will be considered by the Court in this civil action unless the documents reflect proof of service upon the parties or their counsel.

The plaintiff must NOTE: *** When an amended complaint is filed prior to service, the Court will **VACATE** all previous Service Orders entered, and service **will not take place**. An amended complaint filed prior to service shall be subject to re-screening pursuant to 28 U.S.C. §1915(e)(2). *******

The plaintiff must further Note: *** Discovery motions and motions for appointment of counsel filed prior to service will be dismissed without prejudice, with leave to refile following service. ***


UNITED STATES DISTRICT JUDGE

January 24, 2006
Wilmington, Delaware