SUPERIOR COURT OF THE STATE OF DELAWARE

WILLIAM L. WITHAM, JR.
RESIDENT JUDGE

KENT COUNTY COURT HOUSE 38 THE GREEN DOVER, DELAWARE 19901

October 16, 2012

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RE: Tilghman v. Delaware State University, et al.

C.A. No. K10C-10-022 WLW

Gentlemen:

Before this Court is the issue of whether it should grant Plaintiff's Motion for Reargument on the Court's grant of summary judgment in favor of the State Defendants on Plaintiff's §1983 claims.

FACTUAL AND PROCEDURAL BACKGROUND

Because the parties are familiar with the facts, the Court does not recite them here except as necessary to aid in understanding this disposition.¹ Clevon Tilghman III ("Plaintiff"), then a full-time student at Delaware State University ("DSU"), was arrested by Delaware State Police ("DSP") on Oct. 18, 2008, after a

¹ For a full recitation of the facts of this case, see *Tilghman v. Del. State Univ.*, 2012 WL 3860825, at *1 (Del. Super. Aug. 15, 2012).

Tilghman v. Delaware State University, et al.

C.A. No. K10C-10-022

Page 2

Homecoming dance at DSU's Memorial Hall. Plaintiff was charged in the Court of

Common Pleas with Criminal Trespass in the second degree and Resisting Arrest.

A nolle prosequi order was entered on the Criminal Trespass charge. Plaintiff pled

no contest to the charge of Resisting Arrest, and was sentenced to Probation Before

Judgment.

On Oct. 15, 2010, Plaintiff filed a complaint against the State of Delaware;

the state Department of Safety and Homeland Security; the Division of State

Police; Corporal Eric Foraker, in his individual and official capacity, Corporal

Jeffrey Whitemarsh, in his individual and official capacity (collectively "the State

Defendants"); and DSU which alleged, primarily, that he was unlawfully arrested

and detained. The complaint set forth a panoply of claims, including Intentional

Infliction of Emotional Distress, False Imprisonment, False Arrest, Battery,

Defamation, Negligence, and a number of claims under 42 U.S.C. §1983 for

deprivation of his civil rights. On January 3, 2012, the State Defendants moved for

summary judgment on all claims, and DSU joined in the motion on January 11,

2012. Defendants' motion was granted in part and denied in part by this Court on

August 15, 2012. The Court summarily dismissed the §1983 claim, partially on the

grounds that federal law barred a participant in a Probation Before Judgment

program from bringing a subsequent §1983 claim.

Plaintiff filed a motion for reargument on August 22, 2012, which seeks only

to reargue the Court's ruling with respect to the §1983 claim. The State Defendants

filed its opposition memorandum to Plaintiff's Motion for Reargument on August

31, 2012. Plaintiff thereafter filed a Motion to Strike the State Defendants'

opposition memorandum as untimely.

Standard of Review

Superior Court Civil Rule 59(e) provides that a party may file a motion for

reargument "within 5 days after the filing of the Court's opinion or decision." The standard for a Rule 59(e) motion is well defined under Delaware law. A motion for reargument will be denied unless the Court has overlooked precedent or legal principle that would have controlling effect, or misapprehended the law or the facts such as would affect the outcome of the decision. Motions for reargument should not be used merely to rehash the arguments already decided by the court, or to present new arguments not previously raised. Such tactics frustrate the efficient use of judicial resources, place the opposing party in an unfair position, and stymie "the orderly process of reaching closure on the issues."

Parties' Contentions

Plaintiff first seeks to strike the State Defendants' opposition motion as untimely pursuant to Superior Court Civil Rule 59(e). Second, he contends that this Court erroneously dismissed his §1983 claims, in part, because it deemed his Probation Before Judgment agreement to be an admission of guilt. Plaintiff avers that, on the contrary, the Delaware Supreme Court has held that the successful completion of a Probation Before Judgment agreement renders the participant innocent as a matter of law.⁸ Thus, Plaintiff contends that he is entitled to reargument because this Court misrelied on federal precedent that is factually distinct from the case at bar.

² Super. Ct. Civ. R. 59(e).

³ Kennedy v. Invacare Corp., 2006 WL 488590, at *1 (Del. Super. Jan. 31, 2006).

⁴ Woodward v. Farm Family Cas. Ins. Co., 2001 WL 1456865, at *1 (Del. Super. Aug. 24, 2001).

⁵ Id

⁶ Plummer v. Sherman, 2004 WL 63414, at *2 (Del. Super. Jan. 14, 2004); see also Bd. of Managers of the Del. Crim. Justice Info. Sys. v. Gannett Co., 2003 WL 1579170, at *3-4 (Del. Super. Jan. 17, 2003) (holding that a motion for reargument is not a device for raising new arguments or stringing out the length of time for making argument), rev'd on other grounds, Gannett Co. v. Bd. of Managers of the Del. Crim. Justice Info. Sys., 2003 WL 23104811 (Del. Supr. Dec. 30, 2003).

⁷ *Plummer*, 2004 WL 63414, at *2.

⁸ See Ryan v. State, 791 A.2d 742, 744 (Del. Supr. 2002).

Tilghman v. Delaware State University, et al. C.A. No. K10C-10-022 Page 4

The State Defendants aver that their opposition motion was timely filed because Rule 59(e) permits, but does not mandate, the filing of a response by the non-movant. The State Defendants oppose reargument on the grounds that Plaintiff improperly uses his motion to raise a new argument. Because Plaintiff did not properly raise this argument in his response to the State Defendants' Motion for Summary Judgment, the State Defendants argue that Plaintiff is barred from raising it in his motion for reargument. Second, the State Defendants contend that reargument is unnecessary because this Court's reliance on federal law in its assessment of the legal significance of Plaintiff's Probation Before Judgment agreement was proper.

DISCUSSION

A. Motion to Strike

Plaintiff moves to strike the State Defendants' memorandum in opposition to Plaintiff's Motion for Reargument on the grounds that it was untimely filed under Superior Court Civil Rule 59(e). Rule 59(e) provides, in pertinent part, "[w]ithin 5 days after service of [a motion for reargument], the opposing party may serve and file a brief answer to each ground asserted in the motion." Plaintiff filed a certificate of service certifying that a copy of the motion for reargument was mailed to both the State Defendants and DSU on August 22, 2012. By the express language of Rule 59(e), the State Defendants had until August 29, 2012 to serve and file a response. But the State Defendants waited until August 31, 2012, two days after the tolling of the five-day reargument period, to file and serve their opposition memorandum. Counsel for the State Defendants attributes this delay to the fact that he was out of the office during the week that Plaintiff filed his Motion

⁹ Super. Ct. Civ. R. 59(e).

¹⁰ In computing the five-day filing period for a motion for reargument under Superior Court Civil Rule 59(e), intervening Saturdays, Sundays, and holidays are excluded. *Hessler, Inc. v. Farrell*, 260 A.2d 701, 702 (Del. 1969).

Tilghman v. Delaware State University, et al. C.A. No. K10C-10-022 Page 5

for Reargument. Although the time limitations imposed by Rule 59(e) can be rather draconian,¹¹ they cannot be enlarged absent a showing of hardship or impracticability.¹² Counsel's inadvertence is not enough. The Court, therefore, must reluctantly strike the State Defendants' opposition memorandum as untimely.

The Court notes that a non-movant's response to a Motion for Reargument is a permissive filing under Rule 59(e).¹³ Thus, even if Plaintiff's Motion for Reargument is, as he contends, "unopposed," this Court has a responsibility to review, and not simply rubber stamp, Plaintiff's motion. The Court's decision to grant reargument remains discretionary.

B. Motion for Reargument

Plaintiff's motion for reargument essentially contends that the Court overlooked controlling state authority when evaluating the legal significance of Plaintiff's Probation Before Judgment agreement. Instead, the Court relied on federal case law, most notably *Heck v. Humphrey*¹⁴ and *Gilles v. Davis*, ¹⁵ to conclude that the deferred adjudication of Plaintiff's resisting arrest charge barred

Pulling v. Original Lincoln Logs, Ltd., 1990 WL 123008, at *1 (Del. Super. July 26, 1990).

¹² McDaniel v. DaimlerChrysler Corp., 860 A.2d 321, 323 (Del. 2004); see also Delmarva Power & Light Co. v. First South Utility Const., Inc., 2007 WL 3105110, at *2 (Del. Super. Oct. 17, 2007) (citing In re Dingee, 316 A.2d 555 (Del. 1974) (refusing to enlarge the time limitations imposed by Rule 59(e) absent a showing of hardship or impracticability).

¹³ See Dial v. AstroPower, Inc., 2000 WL 140856, at *1 (Del. Super. Jan. 18, 2000).

¹⁴ 512 U.S. 477 (1994). In *Heck*, the Supreme Court held a Section 1983 claim that would imply that an arrest or conviction was invalid was not cognizable until the charges underlying the arrest or conviction were resolved in the plaintiff's favor. *Id.* at 487.

^{15 427} F.3d 197 (3d Cir. 2005). In *Gilles*, the Third Circuit concluded that a defendant's entrance into Pennsylvania's Accelerated Rehabilitation Disposition ("ARD") program is not a favorable termination under *Heck*. *Id*. at 209. The *Gilles* court noted that the ARD program imposed "several burdens upon the criminal defendant not consistent with innocence," including a probationary period, the imposition of costs, and the imposition of a reasonable charge relating to the administration of the program. *Id*. This Court notes that Delaware's Probation Before Judgment program is indistinguishable from Pennsylvania's ARD program. Both are court-supervised compromises that are not favorable terminations under *Heck*. *See id.*; *see also Singleton v. City of New York*, 632 F.2d 185, 194-95 (2d Cir. 1980) (reaching the same conclusion when evaluating the legal significance of an adjournment period under N.Y. Crim. Proc. Law § 170.55).

his Section 1983 claims. Plaintiff now attempts for the first time to distinguish *Heck* and *Gilles* from his own case on the grounds that he entered a plea of *nolo contendre* to the Resisting Arrest charge.

This Court need not address the merits of Plaintiff's arguments because they are raised, for the first time, in his motion for reargument. In their opening brief supporting their Motion for Summary Judgment, the State Defendants fully raised the issue of whether Plaintiff's Section 1983 claims were barred by *Heck*. Nothing prevented Plaintiff from raising his current arguments in either his response brief to the State Defendants' Motion for Summary Judgment, or in his subsequent reply brief. Accordingly, Plaintiff's Motion for Reargument must be denied because it runs afoul of the rule against utilizing a motion for reargument to raise new arguments.

Furthermore, Plaintiff's reliance on the *Ryan* case is misplaced. The issue before the Supreme Court in *Ryan* was the consequence of the plaintiff's successful completion of the Probation Before Judgment program for the purposes of his expungement request under 11 *Del. C.* § 4371.¹⁶ The *Ryan* case provides no instruction on the significance of a Probation Before Judgment agreement in the context of a federal Section 1983 claim. When faced with a federal cause of action, a court "is to apply state law in [Section] 1983 cases only if doing so is consistent with the Constitution and federal law." Thus, to the extent that federal law differs from Delaware law on the issue of the legal significance of a Probation Before Judgment agreement, this Court must apply federal law. Since this Court properly relied on controlling federal precedent in evaluating the consequence of Plaintiff's pretrial diversion agreement on his Section 1983 claim, the Plaintiff has failed to meet his burden of demonstrating that the Court overlooked or misapprehended the facts or law. Therefore, Plaintiff's Motion for Reargument is denied.

¹⁶ See Ryan, 791 A.2d at 744-45.

Tilghman v. Delaware State University, et al. C.A. No. K10C-10-022 Page 7

For the foregoing reasons, Plaintiff's motion for reargument is **DENIED**.

IT IS SO ORDERED.

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

WLWJr/dsc Via LexisNexis File & Serve

oc: Prothonotary cc: Order distribution