

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

CHIMERE SHOCKLEY,	)	
	)	
Plaintiff,	)	
	)	C.A. No. N12C-12-103 CLS
v.	)	
	)	
JOHN C. WHITEHEAD	)	
	)	
Defendant.	)	

Date Submitted: December 17, 2013
Date Decided: March 26, 2014

On Defendant John C. Whitehead's Motion to Dismiss. **GRANTED.**
On Plaintiff's Motion for Leave to Amend the Complaint. **DENIED.**
On Plaintiff's Motion to Compel. **MOOT.**

ORDER

Daniel F. McAllister, Esq., City of Wilmington Law Department, Wilmington, Delaware 19801. Attorney for Defendants John C. Whitehead, City of Wilmington, and Wilmington Police Department.

S. Harold Lakenau, Esq., Lundy Law, Wilmington, DE 19806. Attorney for Plaintiff.

Scott, J.

Introduction

There are three motions before the Court: Defendant John C. Whitehead's ("Whitehead") Motion to Dismiss, Chimere Shockley's ("Plaintiff") Motion for Leave of Court to File an Amended Complaint, and Plaintiff's Motion to Compel. The Court has reviewed the parties' submissions and held oral argument.¹ For the reasons that follow, Whitehead's Motion to Dismiss is **GRANTED** and Plaintiff's Motion for Leave of Court to File an Amended Complaint is **DENIED**. Consequently, Plaintiff's Motion to Compel is rendered **MOOT**.

Background

On or about December 10, 2010, Plaintiff was driving a vehicle traveling northbound on Walnut Street and approaching the 10th Street intersection in Wilmington. Defendant Officer John Whitehead ("Whitehead") was driving a vehicle registered to the Wilmington Police Department ("WPD") when he struck Plaintiff's vehicle while attempting to make a left turn from the center lane. At all relevant times, Whitehead was acting in the course and scope of his employment.

On December 11, 2012, Plaintiff, through counsel, filed a complaint against Whitehead and WPD to recover expenses related to the treatment of her injuries. In a separate count against Whitehead, Plaintiff claimed that the accident was "proximately caused by the negligent conduct of the Defendant Whitehead" based

¹ Discovery was stayed until the resolution of the motion to dismiss and motion to amend the complaint.

on his acts and omissions while operating the vehicle (*e.g.*, failure to maintain a proper lookout, “operat[ing] the motor vehicle in a careless and imprudent manner in violation of 21 Del. C. [§] 4176”).² Plaintiff asserted that WPD was responsible for Whitehead’s negligence under the doctrine of *respondeat superior*.

On January 10, 2013, Whitehead and WPD answered the Complaint and filed a motion to dismiss for failure to state a claim. In the Answer, the defendants stated that the “City of Wilmington Police Department is not a separate juridical entity which may sue or be sued.”³ In the motion to dismiss, the defendants explained that it could not be sued independently because it is a department of the City of Wilmington (“the City”). The Court issued a letter to Plaintiff informing her that she had until February 4, 2013 to respond to WPD’s motion. Having received no response, the Court granted WPD’s motion on March 6, 2013.⁴

On August 29, 2013, Whitehead moved to dismiss Plaintiff’s claim, claiming immunity under the Delaware County and Municipal Tort Claims Act, 10 *Del. C.* § 4010, *et seq.* (“the Act”). Whitehead argued that, while he was acting in the course and scope of his employment, the claim against him fails because it does

² Complaint, at ¶ 11(a)-(d).

³ Answer, at ¶ 22.

⁴ On May 31, 2013, Plaintiff’s insurer, Titan Indemnity Insurance Co., as subrogee of Plaintiff, filed a claim against the City and Whitehead seeking reimbursement for the amounts paid to Plaintiff as a result of Whitehead’s alleged negligence. The Court granted the City and Whitehead’s moved to dismiss the action on the ground that 21 *Del.C.* §2118 requires disputes among insurers to be submitted to arbitration. *Titan Indemnity a/s/o Chimere Shockley v. City of Wilmington*, N13C-05-339 PRW, Wallace, J., Order dated Feb. 5, 2014.

not allege wanton negligence or malicious intent. On November 15, 2013, Plaintiff filed her response to Whitehead's motion, a motion to amend the complaint, and a motion to compel.

In Plaintiff's response to Whitehead's motion, Plaintiff argued that the motion was premature and that she should be permitted to discover whether Whitehead's conduct amounted to gross negligence. Plaintiff further argued that the Authorized Emergency Vehicle Statute ("AEVS"), "21 Del. C. [§] 4106 [,] provides an exception to immunity for emergency vehicles."⁵ In Plaintiff's motion to amend, Plaintiff sought to amend the complaint in order to add the City because Plaintiff "mistakenly named the incorrect entity, The Wilmington Police Department."⁶ Plaintiff explained that the City was on notice of the claim since it provided Whitehead and WPD's defense and that the City would not be prejudiced since discovery was ongoing and trial was not yet scheduled. Plaintiff failed to acknowledge that the claim against WPD was dismissed in the Court's March 6, 2013 Order. Plaintiff moved to compel Whitehead's responses to Plaintiff's Request for Production and Interrogatories served on August 5, 2013.

⁵ Pl. Resp. to Whitehead Mot., at ¶ 5. The Court notes that the response to the motion to dismiss made no reference to the applicable standard of review or to any authorities other than 21 *Del. C.* § 4106 in the one-sentence argument in Paragraph 5. As this Court stated previously, "in all but the simplest motions, counsel is required to develop a reasoned argument supported by pertinent authorities." *Gonzalez v. Caraballo*, 2008 WL 4902686, at *3 (Del. Super. Nov. 2, 2008).

⁶ Mot. to Amend the Compl., at ¶ 3.

The City opposed Plaintiff's motion to amend, asserting that Plaintiff's prior failure to amend the complaint constituted inexcusable neglect. The City also argued that the two-year statute of limitations⁷ bars the amendment and that the relation-back provisions of Super. Ct. Civ. R. 15(c) do not apply since the City did not know, nor should it have known, that but for Plaintiff's mistake, she would have named the City since Plaintiff waited until long after the first motion to dismiss to amend the Complaint.

On December 17, 2013, the Court held oral argument on all three motions. The Court took the motions to dismiss and to amend under advisement and granted a stay of discovery until those motions were decided upon.

Discussion

I. Whitehead's Motion to Dismiss is GRANTED because Plaintiff Failed to Allege Facts which Show that Whitehead is Subject to this Suit.

When deciding a motion to dismiss for failure to state a claim brought pursuant to Del. Super. Ct. Civ. R. 12(b)(6), the Court must "accept as true all non-conclusory, well-pleaded allegations" in the complaint.⁸ "For purposes of a motion to dismiss, 'even vague allegations are 'well-pleaded' if they give the opposing party notice of the claim.' The Court will not, however, accept as true

⁷ 10 Del. C. § 8119.

⁸ *Smith v. Silver Lake Elementary Sch.*, 2012 WL 2393722, at *1 (Del. Super. June 25, 2012)(citing *Spence v. Funk*, 396 A.2d 967, 968 (Del.1978)).

conclusory allegations ‘without specific supporting factual allegations.’”⁹ The Court will grant a motion to dismiss only if, after drawing all reasonable inferences in favor of the plaintiff, there appears no reasonably conceivable set of circumstances under which the plaintiff can recover.¹⁰

The County and Municipal Tort Claims Act grants immunity from tort claims to governmental entities and their employees.¹¹ However, the Act also provides that

[a]n employee may be personally liable for acts or omissions causing property damage, bodily injury or death in instances in which the 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 wilful and malicious intent.**¹²

Wanton negligence and willful and malicious intent require a much higher showing than simple negligence. To succeed on a claim of wanton negligence, a plaintiff must show that the employee, “with no intent to cause harm, perform[ed] an act so unreasonable and dangerous that he either knows or should know that there is an imminent likelihood of harm which can result.”¹³ In other words, such actions must “manifest in an ‘I don’t care’ attitude that demonstrates a conscious

⁹ *Abbott v. Gordon*, 2008 WL 821522, at *4 (Del. Super. Mar. 27, 2008) *aff’d*, 957 A.2d 1 (Del. 2008)(quoting *In re Gen. Motors (Hughes) S’holder Litig.*, 897 A.2d 162, 168 (Del.2006)).

¹⁰ *Id.* (quoting *Spence v. Funk*, 396 A.2d 967, 968 (Del.1978)).

¹¹ 10 Del. C. § 4011(a).

¹² § 4011(c)(emphasis added).

¹³ *Vannicola v. City of Newark*, 2010 WL 5825345, at *10 (Del. Super. Dec. 21, 2010)(quoting *Sadler v. New Castle Co.*, 524 A.2d 18, 23 (Del.Super.1987)).

indifference to the consequence of one's actions.”¹⁴ “Wilful conduct has been defined in tort law as including the element of actual intent to cause injury.”¹⁵ Malice can be implied from the circumstances or express.¹⁶ Express malice is defined as “ill will against a person, and is indicated by the disposition or temper of mind with which the party did a particular act, as where he did it with the view to injure a particular individual generally, or in some specific manner, or that the he acted from personal animosity or an old grudge.”¹⁷

Although Whitehead was acting in the course and scope of his employment, Plaintiff failed to allege sufficient facts in the Complaint to show that Whitehead is not entitled to immunity under the Act. In the Complaint, Plaintiff characterized Whitehead’s acts and omissions as “negligent conduct.”¹⁸ Plaintiff did not allege any other facts which support claims for wanton negligence or willful and malicious intent. Plaintiff did allege that Whitehead’s negligent conduct included “operat[ing] the motor vehicle in a careless and imprudent manner in violation of 21 Del. C. [§] 4176 (a).”¹⁹ However, this mere assertion that Whitehead operated the vehicle in a careless manner also does not rise to the level of wanton negligence or willful and malicious intent. Therefore, Plaintiff failed to allege

¹⁴ *Id.*

¹⁵ *Humphrey v. Bd. of Prof'l Counselors of Mental Health*, 97A-12-009-JOH, 1998 WL 733791 (Del. Super. Sept. 25, 1998)(citing *McHugh v. Brown*, Del.Supr., 125 A.2d 583, 585 (1956).

¹⁶ *Vannicola*, 2010 WL 5825345 at *9 (quoting *Herbener v. Crossan*, 20 Del. 38, 55 A. 223, 224 (Del.Super.1902)).

¹⁷ *Id.*

¹⁸ Complaint, at ¶¶ 11-13.

¹⁹ *Id.* at ¶ 11(a).

facts sufficient to show that Whitehead is not immune from suit based on the operation of the Act.

As for Plaintiff's argument that the AEVS exempts Whitehead from immunity, the Court finds that Plaintiff has also failed to allege sufficient facts showing gross negligence, which is required sustain a claim for personal liability under the AEVS. The AEVS allows the driver of a police vehicle, when responding to an emergency or when in pursuit of a suspect, to

- (1) Park or stand, [...];
- (2) Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;
- (3) Exceed the speed limits so long as the driver does not endanger life or property; [and]
- (4) Disregard regulations governing direction of movement or turning in specified directions.²⁰

The AVES exempts such drivers from personal liability for personal injuries “caused by the negligent or wrongful act or omission of such driver except acts or omission amounting to gross negligence or willful or wanton negligence so long as [the certain requirements in § 4106(c)] have been followed.”²¹ As the Supreme Court stated in *City of Wilmington v. Sikander*, “the [owner of such vehicle] is solely liable for [the driver's] ordinary negligence otherwise not privileged (failure to keep a proper lookout, e.g.),

²⁰ 21 *Del. C.* §4106(1)-(4).

²¹ § 4106(d).

and [the driver] would be liable solely for his gross negligence or willful or wanton negligence, and acts performed with willful and malicious intent.”²²

As stated above, Plaintiff failed to allege wanton and willful conduct. Plaintiff has also failed to allege with particularity that Whitehead’s conduct constituted gross negligence, which is defined as “a higher level of negligence representing an extreme departure from the ordinary standard of care.”²³ Consequently, Plaintiff’s claim cannot proceed against Whitehead under the AEVS. The Court does not find Plaintiff’s argument that, through discovery, Plaintiff can prove gross negligence as a ground for denying the motion since the applicable standard of review requires Plaintiff to first plead sufficient factual allegations supporting a claim for gross negligence.²⁴

²² *City of Wilmington v. Sikander*, 2006 WL 686589, at *2, 897 A.2d 767 (Del. 2006)(TABLE). In *Sikander*, the Supreme Court considered the relationship between the AEVS and Section 4012(1) of the Act. Under Section 4012(1), “[a] governmental entity shall be exposed to liability for its negligent acts or omissions causing property damage, bodily injury or death” “[i]n its ownership, maintenance or use of any motor vehicle, special mobile equipment, trailer, aircraft or other machinery or equipment, whether mobile or stationary.”

²³ *Hughes ex rel. Hughes v. Christiana Sch. Dist.*, 950 A.2d 659 (Del. 2008)(TABLE)(quoting *Browne v. Robb*, 583 A.2d 949, 953 (Del.1990)).

²⁴ See Del. Super. Ct. Civ. R. 9(b). Rule 9(b) states that “[i]n all averments of fraud, negligence or mistake, the circumstances constituting fraud, negligence or mistake shall be stated with particularity. Malice, intent, knowledge and other condition of mind of a person may be averred generally.”

II. Plaintiff's Motion for Leave to File an Amended Complaint is DENIED due to Plaintiff's Inexcusable Delay and Continued Failure to Cure.

If a party seeks to amend a pleading after the time limits set forth in Del. Super. Ct. Civ. Rule 15(a), it may do so “by leave of court or written consent of the adverse party; and leave shall be freely given when justice so requires.”²⁵ However, the Court will not allow the party to amend the pleading if “there is evidence of undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies, prejudice, futility, or the like.”²⁶ While “delay alone is insufficient reason to deny leave to amend,”²⁷ “inexcusable delay and repeated attempts at amendment may justify denial.”²⁸ “Justice will not permit a motion to amend a pleading when the opposing party will be prejudiced or the delay in amendment was the result of inexcusable carelessness.”²⁹

When a plaintiff seeks to amend a complaint by adding a party after the expiration of the statute of limitations, the plaintiff must satisfy the requirements set forth in Rule 15(c) in order for the amendment to “relate back.”³⁰ Those requirements are as follows:

²⁵ Del. Super. Ct. Civ. Rule 15(a).

²⁶ *Hess v. Carmine*, 396 A.2d 173, 177 (Del. Super. 1978).

²⁷ *Id.*

²⁸ *Mullen v. Alarmguard of Delmarva, Inc.*, 625 A.2d 258, 263 (Del. 1993).

²⁹ *Malachi v. Sosa*, 2011 WL 2178626, at *4 (Del. Super. May 25, 2011).

³⁰ Rule 15(c)(3).

- (1) that the claim ‘must arise out of the same conduct, transaction, or occurrence;’
- (2) that ‘the party to be added must have received notice of the institution of the action, so that the party will not be prejudiced;’ and,
- (3) that ‘within the time provided by the rules, the party to be added must have known or should have known that, but for the mistake concerning the identity of proper party, the action would have been brought against the party to be added....’³¹

The Court will not allow Plaintiff to amend the Complaint not only due to Plaintiff’s unnecessary delay, but also Plaintiff’s continued failure to name the City despite being informed as early as January 10, 2013 that she named the incorrect party. Plaintiff did not move for leave of Court to amend the Complaint until eleven months after she filed suit. During that time, Plaintiff was informed through the defendants’ Answer and motion to dismiss that WPD was not the proper party in this suit. In the motion to dismiss, the defendants explained that WPD was a department of the City. Plaintiff did not respond to the motion or take other action to name the proper party after the Court dismissed the claim against WPD in the March 6, 2013 Order.³² It was not until eight months later that Plaintiff moved to amend the complaint. At no time has Plaintiff provided justification for the failure to name the City. This, along with the eleven months

³¹ *Flowers v. WITCO Chemicals Corp.*, 2000 WL 1727229 at *1, 765 A.2d 951 (Del. 2000) (TABLE)(quoting *Taylor v. Champion*, 693 A.2d 1072, 1074 (Del. 1997)).

³² Notably, Plaintiff’s counsel did not address this Court’s March 6, 2013 order in the motion to amend.

since the suit was filed or the ten months since the defendants filed their Answer and motion to dismiss, constitutes undue delay. The Answer and “motion to dismiss put[] [] [P]laintiff on notice and yet, [P]laintiff fail[ed] ‘to take any corrective measures...’”³³ Therefore, Plaintiff may not amend the motion to add the City because of undue delay and the continued failure to correct the original complaint.

Conclusion

For the foregoing reasons, Whitehead’s Motion to Dismiss is **GRANTED**; thus, Plaintiff’s motion to compel is now **MOOT**. In addition, Plaintiff’s Motion for Leave to File an Amended Complaint is **DENIED**.

IT IS SO ORDERED.

/s/Calvin L. Scott
Judge Calvin L. Scott, Jr.

³³ *L & R Saunders Assoc. d/b/a Radiology Professionals v. Bank of Am.*, 2012 WL 4479232 (Del. Super. Sept. 12, 2012) *reargument denied*, 2012 WL 5357998 (Del. Super. Oct. 12, 2012) (citing *Bowers v. City of Wilmington*, 723 F.Supp.2d 700, 709 (D.Del.2010)).