

FILED

NOV 17 2021

Hon. Louis S. Scausi, J.S.C.

WILLIAM G. JOHNSON, ESQ.
 N.J. Bar ID No. 0001471992
 JOHNSON & JOHNSON, ESQS.
 89 HEADQUARTERS PLAZA, SUITE 1425
 MORRISTOWN, NEW JERSEY 07960
 (973) 993-3131

Attorney for Defendants
 Washington Township, Brian Szymanski,
 Derek Heymer, Brian Bigham, Michael Hade,
 Philip Seabeck, Thomas Falleni, Andrew Tesori,
 Jason Hensley, Michael Thompson,
 Anthony Costantino, Roger Garrison

<p>MICHAEL L. BARISONE, Plaintiff, -vs- WASHINGTON TOWNSHIP in Morris County, New Jersey, POLICE OFFICER BRIAN SZYMANSKI, POLICE OFFICER DEREK HEYMER, POLICE OFFICER BRIAN BIGHAM, POLICE OFFICER MICHAEL HADE, POLICE OFFICER PHILIP SEABECK, POLICE OFFICER THOMAS FALLENI, POLICE OFFICER ANDREW TESORI, POLICE OFFICER JASON HENSLEY, POLICE OFFICER MICHAEL THOMPSON, POLICE OFFICER ANTHONY COSTANTINO, POLICE OFFICER ROGER GARRISON, JOHN & JANE DOE 1-20, & ABC COMPANY 1-20, Defendants.</p>	<p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MORRIS COUNTY DOCKET NO.: MRS-L-0001562-21 <u>CIVIL ACTION</u> ORDER DISMISSING PLAINTIFF'S COMPLAINT AS TO DEFENDANTS WASHINGTON TOWNSHIP, POLICE OFFICER BRIAN SZYMANSKI, POLICE OFFICER DEREK HEYMER, POLICE OFFICER BRIAN BIGHAM, POLICE OFFICER MICHAEL HADE, POLICE OFFICER PHILIP SEABECK, POLICE OFFICER THOMAS FALLENI, POLICE OFFICER ANDREW TESORI, POLICE OFFICER JASON HENSLEY, POLICE OFFICER MICHAEL THOMPSON, POLICE OFFICER ANTHONY COSTANTINO, POLICE OFFICER ROGER GARRISON</p>
---	---

THIS MATTER having been opened to the Court on motion of Johnson & Johnson, Esqs., (William G. Johnson, Esq., appearing) attorneys for Washington Township, Brian Szymanski, Derek Heymer, Brian Bigham, Michael Hade, Philip Seabeck, Thomas Falleni, Andrew Tesori, Jason Hensley, Michael Thompson, Anthony Costantino, and

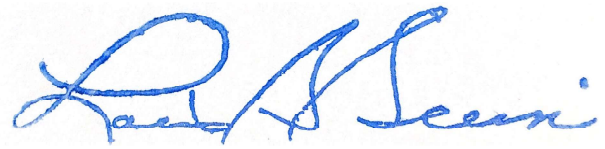
Roger Garrison; on notice to Deininger & Associates, LLP (Christopher L. Deininger, Esq., appearing) Attorneys for Plaintiff Michael L. Barisone; for an Order Dismissing the Plaintiff's complaint, and the Court having considered the matter, and for good cause shown;

IT IS ON THIS 17th **DAY OF** November, **2021**

ORDERED that the Complaint of the Plaintiff, as to Defendants Washington Township, Brian Szymanski, Derek Heymer, Brian Bigham, Michael Hade, Philip Seabeck, Thomas Falleni, Andrew Tesori, Jason Hensley, Michael Thompson, Anthony Costantino, and Roger Garrison, is hereby dismissed; and it is further

ORDERED that Defendant's Cross-Motion for leave to file a Second Amended Complaint is **DENIED**; and it is further

ORDERED that service of this Order shall be deemed effectuated upon all parties upon its upload to eCourts. Pursuant to R.1:5-1(a), movant shall serve a copy of this Order on all parties not served electronically within seven (7) days of this Order.



LOUIS S. SCEUSI, J.S.C.

OPPOSED

Statement of Reasons

MICHAEL L. BARISONE

V.

WASHINGTON TOWNSHIP, ET AL.

MRS-L-1562-21

Pending before the Court is a motion to dismiss the Complaint of Michael Barisone (“Plaintiff”) as to Defendants Washington Township, Brian Szymanski (“Szymanski”), Derek Heymer (“Heymer”), Brian Bigham (“Bigham”), Michael Hade (“Hade”), Phillip Seabeck (“Seabeck”), Thomas Falleni (“Falleni”), Andrew Tesori (“Tesori”), Jason Hensley (“Hensley”), Michael Thompson (“Thompson”), Anthony Costantino (“Costantino”), and Roger Garrison (“Garrison”) (collectively the “Defendants”). Plaintiff timely filed an opposition to this motion on October 26, 2021 as well as a cross-motion seeking leave to serve a second amended complaint pursuant to R. 4:9-1.

I. BACKGROUND

The facts herein are largely derived from the Defendants’ Statement of Facts contained in their motion. On July 22, 2021, Plaintiff filed a First Amended, Corrected Complaint against Washington Township and eleven of its police officers. In this Complaint, Plaintiff alleges he co-owned a farm in Washington Township. He further asserts that various persons occupied, including Lauren Kanarek (“Kanarek”) and Robert Goodwin (“Goodwin”). Plaintiff alleges he maintained a business at this location where he provided training services for persons interested in competing in dressage. Plaintiff alleges he began providing training to Kanarek on or about March of 2018, and that Kanarek and Goodwin began residing at the farm on or about May of 2019. At some point following this, Plaintiff alleges that Kanarek began displaying increasingly

threatening or unacceptable behavior towards Plaintiff and other farm residents and visitors. This included harassment, stalking, and threats on social media. Plaintiff alleges that he was placed in reasonable fear of physical harm.

According to the Plaintiff, Defendants Tesori and Seabeck allegedly authored a false and misleading police report regarding the investigation of a July 31, 2019 incident at the farm. Further, Plaintiff alleges the same two Defendants intentionally disregarded facts and circumstances being presented to them and intentionally failed to act. With respect to Defendants Hensley and Seabeck, Plaintiff alleges they responded to the farm on August 31, 2019 and intentionally disregarded facts and circumstances being presented to them and intentionally failed to act with respect to that incident. Plaintiff further alleges Hensley and Seabeck intentionally discounted, mischaracterized, and/or ignored Plaintiff's reports regarding the August 1, 2019 incident. Plaintiff further alleges Defendant Seabeck had a conversation with an assistant prosecutor with the Morris County Prosecutor's Office wherein he failed to provide a full, complete, and/or accurate report of the incident.

Plaintiff asserts that Defendants Thompson and Falleni responded to the Plaintiff's property on August 3, 2019. Plaintiff alleges these Defendants failed to investigate criminal acts and failed to take other appropriate non-discretionary action in response to a notification that such criminal conduct was occurring but failed to intervene. Plaintiff further alleges that Thompson and Falleni failed to intervene in what was obviously a police matter, and these Defendants authored a false and misleading police report dated August 8, 2019.

Plaintiff asserts that Defendants Bigham and Costantino responded to his property on August 4, 2019. Plaintiff alleges that these Defendants intentionally disregard the facts and circumstances being reported to them and intentionally failed to act to intervene. Plaintiff alleges

that Defendants Bigham and Costantino authored and issued a false and misleading report dated August 4, 2019.

Plaintiff asserts that he made various against unidentified police officers regarding an incident that took place on August 5, 2019 at the Washington Township Police Department. Specifically, Plaintiff asserts that when he arrived at the Washington Township Police Department on August 5, 2019, he requested to speak to a supervisor. Plaintiff asserts that despite his request, the unidentified officers he spoke with intentionally ignored the facts and circumstances, intentionally blocked him from speaking with a supervisor above them in rank, improperly and intentionally characterized the situation as a private dispute, refused to aid or assist him, and forced him to leave the building without allowing him to speak with anyone with supervisory authority over them or the situation at the farm. Plaintiff asserts that these unidentified officers failed to prepare a police report.

Plaintiff further alleges that an incident took place on August 6, 2019. Plaintiff asserts that various unidentified employees of Washington Township, including one identified as the Chief Building Inspector, arrived at Plaintiff's premises to conduct inspections, and it is further alleged that Plaintiff and other occupants were ordered to vacate various living spaces at the farm.

Plaintiff alleges that on the evening of August 6, 2019, various unidentified employees of Washington Township as well as unidentified Washington Township Police Officers returned to the farm to determine whether he and other occupants vacated the living quarters as had been previously ordered. Plaintiff alleges further that during this time one of the occupants was bitten by a dog belonging to another occupant and that Defendants refused to remove the dog from the premises. Plaintiff asserts that Officers Garrison and Hade authored a false police report on August 11, 2019 regarding this incident.

Lastly, Plaintiff alleges that on August 7, 2019, an incident occurred at the farm wherein one of the occupants was shot in the chest multiple times. Plaintiff further indicates he was arrested and is presently being held in jail.

Plaintiff filed a complaint alleged that the Defendants violated his civil rights under both the United States and New Jersey Constitutions. Additionally, Plaintiff alleged the actions of Defendants violated the New Jersey Law Against Discrimination. Plaintiff also alleges that Defendants committed the wrongful acts, actions, and omissions constitution intentional torts against Plaintiff, including acts of official misconduct, criminal civil rights deprivation, and/or wrongful conduct not subject to tort immunity.

II. ARGUMENT

Defendant, through their motion to dismiss, argue that even in accepting the plaintiff's factual allegations as true, each of the Plaintiff's alleged causes of action fail as a matter of law. Specifically, Defendant asserts that 1.) Plaintiff's complaint fails to set forth a cause of action for any civil rights violation, 2.) that the filing of a false police report is not a civil rights violation, 3.) that the failure to conduct an adequate investigation is not a civil rights violation, 4.) that the failure to intervene in a dispute is not a civil rights violation; and 5.) that Defendants are entitled to qualified immunity.

Plaintiff, in response, requests that the Court both deny Defendants' motion to dismiss and grant Plaintiff's cross-motion to file and serve a second amended complaint pursuant to R. 4:9-1. Plaintiff argues that their Complaints do adequately specify Constitutional and Civil Rights violations and sound in intentional torts.

III. MOTION TO DISMISS

Rule 4:6-2 governs motions to dismiss. A motion to dismiss pursuant to R. 4:6-2(e) “should be granted in only the rarest of instances” and generally without prejudice. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 772 (1989). When considering a motion to dismiss for failure to state a claim, the court’s inquiry is limited to an examination of the “legal sufficiency of the facts alleged on the face of the complaint.” Id. at 746. In that regard, the court is not concerned with plaintiff’s ability to prove the allegation. Id. Instead, courts must “search the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.” Id. In addition, courts must accept as true the facts alleged in the complaint and construe all reasonable inferences of fact in favor of plaintiff. Craig v. Suburban Cablevision, Inc., 140 N.J. 623, 625–26 (1995).

In evaluating motions to dismiss, courts may consider “allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim.” Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005) (citation omitted). It is the existence of the fundament of a cause of action in those documents that is pivotal; the ability of the plaintiff to prove its allegations is not at issue. Id.

IV. ANALYSIS

This Court finds that Plaintiff’s complaint fails to set forth a cause of action for a civil rights violation. Having reviewed the complaint in a light most favorable to the plaintiff and even in taking the Plaintiff’s assertions to be true, there is no support for any civil rights violations under either the United States or New Jersey Constitutions. Where a person, acting under the color of state law, deprives another of rights protected by the United States Constitution, the deprived party

is provided a civil remedy under Section 1983 of Title 42 of the United States Code. Mattern v. City of Sea Isle, 131 F.Supp.3d 305, 313 (Dist. N.J. 2015). The Plaintiff asserts that various civil rights were violated by alleged failures to prepare and file accurate police reports on various occasions. However, this Court finds that there is no civil rights violation for the failure to prepare and file an accurate police report as Courts have found that merely filing false police reports, without more, does not create a right of action for damages under 42 U.S.C. 1983. See Landrigan v. City of Warwick, 628 F.2d 736, 744 (1st Cir. 1980). There is no Constitutional right to a correct police report. See Jarrett v. Twp. Of Bensalem, 312 F. App'x 505, 507 (3d Cir. 2009); see also Thompson v. Howard, No. 09-1416, 2013 U.S. Dist. LEXIS 74974, at *14 (W.D. Pa. May 29, 2013); see also Bush v. City of Phila., No. 98-0994, 1999 U.S. Dist. LEXIS 11428, at *9 (E.D. Pa. July 15, 1999).

The Court finds that the Plaintiff, through his complaint, has asserted his constitutional rights were violated by Defendants due to their filing of false police reports. As the aforementioned case law clearly indicates, there is no constitutional right to an accurate police report. Even in taking the Plaintiff's complaint to be true and finding that the police reports that are cited in the complaint contained falsehoods, such falsehoods fail to form the basis for alleging a civil rights violation.

Plaintiff also asserts that the Defendants failed to conduct a proper investigation of his claims and that, as a result, his civil rights were violated. Courts have held that a Plaintiff does not have a constitutional right to have police investigate on their behalf, let alone do so to their satisfaction. See Rossi v. City of Chi., 90 F.3d 729, 735 (7th Cir. 2015) (citing Deshaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1989)). This Court finds clear precedent that there is no constitutional cause of action for a failure to investigate. See Thomas v. City of

Phila., 290 F. Supp. 3d 371, 386 (E.D. Pa. 2018); see also Wright v. City of Phila., 229 F.Supp. 3d 322, 332 n.3 (E.D. Pa. 2017). This Court finds that Plaintiff clearly asserts his constitutional rights were violated by Defendants failure to investigate his assertions regarding Kanarek and Goodwin. As the aforementioned case law makes clear, there is no constitutional right to an adequate investigation. Accordingly, there exists no constitutional violation for Defendants' failure to conduct an adequate investigation.

Plaintiff asserts in his complaint that Defendants should have intervened in his dispute with Kanarek and Goodwin. Accordingly, Plaintiff alleged his constitutional rights were violated by “the defendants’ intentional, deliberate, persistent false characterization of the occurrences at the Farm being reported to the defendants as private disputes between a landlord and tenant when, in reality, the occurrences were police matters that required the intervention of law enforcement.” See Amended Complaint, Paragraph 170(d). This Court finds two provisions of the New Jersey Tort Claims are applicable to this claim. See N.J.S.A. 59:5-4; see also N.J.S.A. 59:5-5. N.J.S.A. 59:5-4 sets forth that neither a public entity or employee is liable for failing to provide police protection services or, where provided, for failing to provide sufficient services. N.J.S.A. 59:5-5 establishes that neither a public entity or employee is liable for injury caused by a failure to make an arrest or for the failure to keep an arrested party in custody. While a police officer bears the duty of investigation information from citizens regarding criminal or otherwise unlawful activity, their failure to make an arrest as it pertains to such activity does subject the municipality to tort liability. See Wuethrich v. Delia, 155 N.J. Super. 324, 326 (App. Div. 1978). Municipalities are not liable in tort for the failure to protect individuals from the criminal propensities of third parties. Id. Courts have found, pursuant to 59:5-5, that police officers are immune from liability for alleged failures to intervene or take appropriate action in response to a request for assistance. See Lee v.

Doe, 232 N.J. Super. 569 (App. Div. 1989). Similarly, pursuant to N.J.S.A. 59:5-4, Courts have upheld dismissal of claims regarding inadequate security and negligence related to an alleged failure to respond to warnings regarding an assailant and finding them barred under the statute. See Sczyrek v. County of Essex, 324 N.J. Super. 235 (App. Div. 1999). Critically, the Sczyrek Court held that the immunity set forth in N.J.S.A. intended to shield governmental policy decisions from tort liability and stated:

“There is no reason [...] why the statutory immunity should not apply whenever there is a claim based on a ‘failure to provide police protection service.’ This is so whether that failure is attributable to a policy decision at the highest level a tactical decision by some lesser ranking official (perhaps a desk sergeant who determines what, if any, response is appropriate to a particular call), and even the alleged actions of telephone operators or other non-ranking employees which may lead to a ‘failure to provide police protection.’” Id. at 243-43.

Plaintiff alleges here that Defendants failed to properly intervene in the Plaintiff’s dispute with Kanarek and Goodwin. Even taking the Plaintiff’s assertions to be true, this Court finds that the claim is barred by N.J.S.A. 59:5-4 and N.J.S.A. 59:5-5. For each of the aforementioned claims, this Court finds that Plaintiff has either failed to invoke an actual civil right or that the claims, even taken to be true, are barred by the New Jersey Tort Claims Act. Similarly, the Court finds the Plaintiff’s assertions that Defendants violated the New Jersey Law Against Discrimination are barred for the reasons stated herein. Further, Plaintiff’s claims that Defendants perpetrated intentional torts are also barred for the reasons stated herein.

This Court also finds Defendants’ assertion that they are entitled to qualified immunity to be correct. Governmental officials performing discretionary functions are provided with qualified immunity in order to shield them from civil liability insofar as the official believed their actions can be reasonably deemed consistent with the rights they are

alleged to have violated. See Anderson v. Creighton, 483 U.S. 635, 638-39 (1987). Where an officer performs their duties reasonably, qualified immunity “applies regardless of whether the government official’s error is ‘a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.’” See Pearson v. Callahan, 555 U.S. 223, 231 (2009). Further, Government officials engaged in discretionary activity are:

“[Q]ualifiedly immune from suit brought against them for damages under section 1983 ‘insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’ Where a defendant asserts a qualified immunity defense in a motion for summary judgment, the plaintiff bears the initially burden of showing that the defendant’s conduct violated some clearly established statutory or constitutional right. Only if the plaintiff carries this initial burden must the defendant then demonstrate that no genuine issue of material fact remains as to the “objective reasonableness” of the defendant’s belief in the lawfulness of his actions. This procedure eliminates the needless expenditure of money and time by one who justifiably asserts a qualified immunity defense from suit. Thus, we begin with the predicate question of whether Plaintiff’s allegations are sufficient to establish ‘a violation of a constitutional right at all.’” Sherwood v. Mulvihill, 113 F.3d 396, 398-99 (3rd Cir. 1997)(internal citations omitted).

This Court finds that the allegations set forth by Plaintiff are wholly barred by qualified immunity. This Court further finds that Plaintiff has failed to allege a cognizable constitutional violation. Accordingly, there were no rights “clearly established” at the time of any interactions between Plaintiff and the named Defendants in this matter. This is also true with respect to the alleged violation of the New Jersey Law Against Discrimination violation alleged by the Plaintiff or the claimed intentional torts alleged to have been committed by Defendants. Therefore, the Defendants are entitled to qualified immunity as it pertains to all of Plaintiff’s complaints, and dismissal must be granted accordingly.

Further, Plaintiff’s cross motion for leave to file a second amended complaint is denied. This Court notes that Plaintiff seeks to amplify his Amended Complaint by adding a cause of action for civil rights injury and damages arising from the intentional mistreatment of a victim of

crime in violation of the Victim's Rights Amendment. Plaintiff also asserts there are recognized causes of action for civil rights deprivations arising from policework based in unlawful discrimination. Plaintiff argues that such claims and causes of action have been made out, that his complaint is entitled to proceed, and that there is no immunity from statutory claims under the Tort Claims Act nor is there any immunity from intentional torts. Specifically, Plaintiff seeks to assert that the police discriminated against him as a "mentally-fragile man" in his fifties in favor of a criminally fragile man in his fifties.

The Court finds no showing in the Plaintiff's proposed Second Amended Complaint to show that Plaintiff falls under a Constitutionally protected class to raise claims of discrimination. The Court finds Plaintiff's attempt to distinguish this case from the matter asserted by Defendants in their reply on the basis that Plaintiff has asserted constitutional rights to fairness, respect, and compassion to be absurd. The Court continues to find that no constitutional rights that were violated in this matter. Further, Plaintiff has failed to articulate any facts that sound in intentional tort. Merely using the word "intentional," which Plaintiff asserts he has done more than 85 times in his proposed Second Amended Complaint, simply does not make it so.

V. CONCLUSION

Based on the foregoing analysis, Defendants' Motion to Dismiss the Complaint is **GRANTED without prejudice**. Furthermore, Plaintiff's cross motion to file a second Amended Complaint is **DENIED**. A confirming Order accompanies this Statement of Reasons.