

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

JAMES E. CICCO,

Plaintiff,

2:17-cv-899

ELECTRONICALLY FILED

v.

BOROUGH OF BEAVER,
PENNSYLVANIA ET AL,

Defendants.

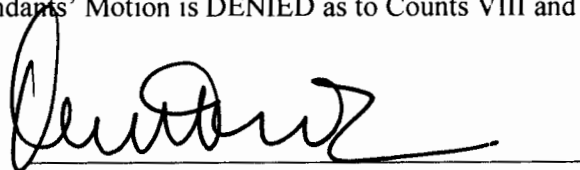
MEMORANDUM ORDER

AND NOW, this 25th day of October, 2017, it is hereby ORDERED that for the reasons stated on the record at the Oral Argument held in open Court on October 24, 2017, Defendants' [ECF No. 14] Motion to Dismiss for Failure to State a Claim brought by Borough of Beaver and Daniel Madgar in his official capacity is hereby GRANTED in part and DENIED in part. Defendants shall file their Answer to Plaintiff's Complaint on or before November 28, 2017.

1. As to Count I, the Motion is GRANTED to the extent Plaintiff claims an Eighth Amendment violation or uses the Fourteenth Amendment as a vehicle to assert an Eighth Amendment claim. However, the Court concludes that in light of the court's decision in *Gallagher v. Commonwealth of Pennsylvania*, No. Civ.A.05-280E, 2007 WL 141062 (W.D. Pa. Jan. 16, 2007), it would be premature to grant the Motion as to the remaining Fourteenth Amendment claims at this juncture. Accordingly, the Motion is DENIED in all other respects as to Count I.
2. As to Count II, the Court concludes that the claim as asserted does facially support a claim for negligence on behalf of the moving Defendants. Defendants' Motion is DENIED as to Count II.
3. As to Count V, in light of mixed Third Circuit case law, the Court cannot say as a matter of law that a malicious prosecution claim could not exist against the moving Defendants, or that Defendants are immune under Pennsylvania's Torts Claims Act. The Court concludes that there is

a sufficient factual basis pled to make out a claim that the charges were brought without probable cause. Accordingly, the Motion is DENIED as to Count V.

4. To the extent Count VI is duplicative of other claims in the Complaint, the Court need not grant Defendant's Motion to Dismiss, as it will fold into other claims. To the extent Count VI is not duplicative, it states a claim upon which relief can be granted. Defendants' Motion is DENIED as to Count VI.
5. Count VII states a claim for relief against the moving Defendants, including a *Monell* claim against the Borough and claims against Defendant Madgar in his individual capacity. The Court cannot conclude as a matter of law that the incident in 2010 (separately and in conjunction with those which came before it) is not so serious that it would have put every reasonable Chief of Police on notice of the substantial risk of serious constitutional violations by placing the officer back on the street. Defendants' Motion is DENIED as to Count VII.
6. Counts VIII and IX are essentially Fourteenth Amendment claims, which for the reasons previously noted the Court concludes are premature to remove from the case at this stage. To the extent Count IX alleges a state-created danger claim, the Court cannot say that the gaps in time between incidents, or a police K-9 not being involved in the previous incidents, would bar such a claim as a matter of law. Accordingly, Defendants' Motion is DENIED as to Counts VIII and IX.



Mark R. Hornak
United States District Judge

cc: All counsel of record