

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

James E. Cicco,	:	
Plaintiff	:	No. 2:17-cv-899
	:	
v.	:	
	:	(Judge Mark R. Hornak)
Borough of Beaver, Pennsylvania,	:	
Et.al.	:	
Defendants	:	(electronically filed)
	:	JURY TRIAL DEMANDED

MOTION TO DISMISS PLAINTIFF’S COMPLAINT

AND NOW come Defendants the Borough of Beaver, Pennsylvania, the Borough of Beaver Chief of Police, Daniel Madgar, in his official capacity, Borough Manager , the Borough of Beaver Police Department Daniel Madgar, in his official capacity move for the dismissal of Plaintiff’s Complaint and assign the following reasons therefore:

1. The complaint does not show a pattern but instead alleges sporadic incidents.

2. There is a six year gap from 2010 to 2016 when comparing the most recent incident with the matter directly involving Plaintiff James E. Cicco.

3. The dating of the incidents need to support the Monell-Canton claims and are as follows:
 - a. May 19, 2010, Officer Wijnen-Reims, an incident involving Officer Wijnen-Reims and Sidney Doyle concerning a PFA Order.

b. December 12, 2004, Adam Colbert went to Thursday's bar where a fight started between several patrons. Officer Wijnen-Reims responded in his capacity as a Beaver Police Officer. Green, Robert Capo, Sr., Benjamin H. Capo, Stiles and Koslick filed a federal lawsuit alleging a violation of their civil rights and state law claims against the Borough of Beaver, the Police Department and Officer Wijnen-Reims.

If the federal lawsuit suit was settled, a matter not stated in the complaint, it could not be used to establish a Monell claim.

c. October 21, 2004, Lori Stiles and Richard Doychek became involved in an incident with Officer Wijnen-Reims.

d. On September 28, 2004, Robert Capo, Sr. and his son, Benjamin H. Capo, were involved in the alleged excessive force matter with the force used by Officer Wijnen-Reims.

e. July 7, 2003, Christopher Eric Green reportedly was involved in an incident with Officer Wijnen-Reims.

As stated, Green, Robert Capo, Sr., Benjamin H. Capo, Stiles and Koslick combined to file a federal law suit alleging a violation of their civil rights. If the matter was settled, then it cannot be used to establish a Monell claim.

f. March 22, 2002, James K. Hooker became involved in an incident with Wijnen-Reims while he was involved in clearing and salting the roads of Brighton Township.

g. December 25, 2001, Richard Esprit was to meet his ex-wife, Stacy Coakley to exchange custody of their son, Jeffrey Wijnen-Reims, Coakley's husband was also present. There was a fight between Richard Esprit and Wijnen-Reims. The complaint does not allege that any civil suit was filed or how the matter was otherwise resolved, if at all.

4. The Moving Defendants contend that the complaint does not show a pattern, but instead that the complaint alleges sporadic incidents. The complaint alleges that Officers Jeffrey Wijnen-Reims and Howard M. Blinn were acting "individually" and in their "official capacity". There was no hint or suggestion in the complaint that either Officer is a policy maker. Those official capacity claims should be dismissed.

5. The caption of the complaint asserts that Daniel Madgar, wearing the hats of Chief of Police and Borough Manager, has been sued in his official capacity. However, the complaint itself also mentions that he is sued in his "individual" capacity.

6. The individual capacity claim or claims against Defendant Madgar should be dismissed because there are no facts alleged to support them or that he is otherwise entitled to qualified immunity.

7. There was no written policy that the Moving Defendants are alleged to have had and failed to follow. The policy claim therefore must be dismissed.

8. Nowhere in the early examples used by Plaintiff to support his Monell or Monell-Canton claim, was a K-9 involved. The examples used by Plaintiff do not support claims based on failure to train or improper use of K-9.

It is clear that Plaintiff contends use of Borough of Beaver K-9 Czar was significant.

9. Plaintiff alleges the K-9 attacked him at Defendant Wijnen-Reims command and that he, Plaintiff, was seriously injured by the K-9, Paragraph 75.

10. In Paragraph 78, K-9 Czar is alleged to have re-engaged and began to attack Cicco a second time inflicting alleged but not described series injuries.

Since none of the earlier incidents involve the use of a K-9, they do not support the Monell or Monell-Canton claim.

COUNT I – CIVIL RIGHTS JAMES CICCICO V. DEFENDANTS

11. In Paragraph 100, Plaintiff asserts the application of 42 §1983 and rights under the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution. The Eighth Amendment applies only to sentenced prisoners. The Fourteenth Amendment is not applicable at least to the Moving Defendants. In Paragraph 103, Plaintiff alleges his Monell claim which we claim is nonexistent based upon the earlier paragraphs.

COUNT II – NEGLIGENCE JAMES CICCO V. DEFENDANTS

12. The Moving Defendants assert that the state law claims are barred by application of Pennsylvania's Governmental Immunity Statute commonly referred to as The Tort Claims Act.

COUNT IV – INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, CIVIL RIGHTS JAMES CICCO V. DEFENDANTS

13. Not applicable to Moving Defendants.

COUNT V – MALICIOUS PROSECUTION, CIVIL RIGHTS JAMES CICCO V. DEFENDANTS

14. The Borough of Beaver is immune by application of the Pennsylvania Tort Claims Act.

15. Nowhere in the complaint is it factually alleged that Defendant Madgar prosecuted anybody. He must be dismissed.

COUNT VI – CIVIL RIGHTS, CIVIL RIGHTS JAMES CICCO V. DEFENDANTS

16. Plaintiff repeats his Fourth Amendment claims. Factually they do not apply in any way to Daniel Madgar apparently sued in his individual capacity.

17. In Counts VI, though The Borough of Beaver is named, there are no facts connecting Beaver Borough to the constitutional torts.

COUNT VII, CIVIL RIGHTS JAMES CICCO V. DEFENDANTS

18. Paragraph 134 makes it clear that this is the Fourth Amendment claim all over again.

19. Paragraph 135 is in reality a mix of conclusory allegations. In order to be a Police Officer in Pennsylvania, every Officer must complete The Act 180 basic training class. The court can take judicial notice of that fact as well as the requirement for 12 credit hours of annual education. Once these facts so noticed are considered, it becomes apparent that these are simply conclusions of law unsupported by any factual allegations whatsoever.

COUNT VII – CIVIL RIGHTS CIVIL RIGHTS JAMES CICCO V. DEFENDANTS

20. Paragraph 139 purports to be a Fourteenth Amendment claim. The reality is that the Cicco matter, if there is any merit at all, is a Fourth Amendment claim against only the two Officers involved in the stop and seizure.

COUNT IX – CIVIL RIGHTS CIVIL, RIGHTS JAMES CICCO V. DEFENDANTS

21. The state-created danger theory of liability does not apply to the Beaver Borough. With the gap of somewhere between six and fourteen years, when the alleged seizure of Cicco occurred, the state-created danger cause of action is simply not applicable.

22. If there are qualified immunity individual capacity claims against Daniel Madgar, it is asserted that they must be dismissed based on qualified immunity.

WHEREFORE, Moving Defendants, The Borough of Beaver, The Police Department, Daniel Madgar, both in his official capacity as Beaver Chief of Police and Borough Manager move this Court to adopt and enter an Order dismissing the Moving Defendants as parties to the present lawsuit.

Respectfully submitted,
Lavery Law

By: /s Robert G. Hanna, Jr.

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Attys for Defendants Borough of
Beaver, and Daniel Madgar, both in
his official capacity as Beaver Chief
of Police and Borough Manager

DATE: September 1, 2017

CERTIFICATE OF SERVICE

I, Heather Barbour, an employee with the law firm of Lavery Law, do hereby certify that on this 1st day of September, 2017, I served a true and correct copy of the foregoing Motion to Dismiss via U.S. Western District Court's electronic case filing system, and U.S. Mail addressed as follows:

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