

In the Circuit Court of Berkeley County, West Virginia

J. H.,)	
Plaintiff,)	
)	
vs.))	Case No. CC-02-2019-C-161
)	
Department of Military Affairs and Public)	
Safety,)	
Michael Kennedy,)	
Derek R. Walker,)	
Christopher S. Merson,)	
Austin M. Ennis ET AL,)	
Defendants)	

Order Denying Motion to Dismiss and Motion for Stay

On a previous day the State Police moved to dismiss the within First Amended Complaint alleging that it fails to state a claim upon which relief can be granted. The court entered a scheduling order and the State Police have since sought a stay of discovery. The Plaintiff has responded to both motions and the State Police have replied with regard to the Motion for a Stay. The court finds that the scheduling order on the motion to dismiss was improvidently entered and the motion should have been denied as it fails to establish a right to the relief it requests for the reasons set forth below. The court therefore will dispense with the reply and rule.

The court's task on a motion to dismiss under Rule 12(b)(6) is determine whether the plaintiff's complaint states a cause of action on which relief can be granted.

Chapman v. Kane Transfer Co., 160 W. Va. 530, 538, 236 S.E.2d 207, 212 (1977), sets forth the standard as follows:

In appraising the sufficiency of a complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Therefore, in order for the State Police to achieve dismissal of the complaint under Rule 12(b)(6), it must demonstrate that it is beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief under the First Amended Complaint. The allegations pertinent to this complaint are that two uniformed, on-duty West Virginia State Police officers subdued a suspect and in the process at least one of them used force exceeding that necessary to effect the arrest. As the Plaintiff phrased it:

On or about November 19, 2018 in Berkeley County, West Virginia, Defendants Kennedy, Walker, Merson and Ennis, individually and acting together as a mob under color of law, brutally and severely beat and hit the Plaintiff, J.H., a minor, in about the head and body, causing him injuries along with bodily damage, pain and suffering.

Plaintiff's First Amended Complaint at paragraph 7.

The State Police, like every other defendant in this case, focuses on the statutory references made by the Plaintiff in his Amended Complaint. Rule 8, Rules of Civil Procedure, provides in pertinent part as follows:

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several types may be demanded.

The State Police fails to address that the gist of the case is a battery upon the Plaintiff who then seeks additionally to base his recovery on statutes which may or may not provide a private right of relief. The State Police fail to address the basic tort raised. Assuming without deciding that the State Police is correct on this point, that hardly decides the whether the Plaintiff can make a case for battery. The Restatement (Second) of Torts § 13 (1965) provides as follows:

An actor is subject to liability to another for battery if

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An actor is subject to liability to another for battery if

(a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and

(b) a harmful contact with the person of the other directly or indirectly result

The Supreme Court of Appeals cited with approval § 13 of the Restatement in *Funeral Servs. by Gregory, Inc. v. Bluefield Cmty. Hosp.*, 186 W. Va. 424, 427, 413 S.E.2d 79, 82 (1991), *overruled on other grounds by Courtney v. Courtney*, 190 W. Va. 126, 437 S.E.2d 436 (1993) (regarding the statute of limitations for claims for emotional distress). The State Police's brief simply does not explain why "beat[ing]" or "hit[ting]" the Plaintiff, as alleged in the First Amended Complaint would not suffice to establish a right of recovery if proved to the satisfaction of a jury.

The State Police claim it is not responsible for the alleged torts of its officers because one of the alternative forms of relief requested states that they acted beyond the scope of their authority. The complaint also alleges that the officers in question were uniformed, on duty and exercising authority under the color of law. It cites the alternative language in paragraph 3 of the First Amended Complaint, which states as follows:

3. Defendants Michael Kennedy and Derek Walker were members of the West Virginia State Police, as they are defined in West Virginia Code §§ 15-2-12 and 13, and were acting ***both within and outside the scope of their duties*** when the events described below occurred and the claims listed below arose. [Emphasis added.]

As mentioned above, the Rules permit a plaintiff to plead in the alternative. In examining the motion for dismissal, and considering whether it is beyond doubt that the Plaintiff can prevail, the court is required to consider the possibility that uniformed officers effecting an arrest might be acting within the scope of their duties. As such, it is not beyond doubt that the State Police might be liable for acts of its officers while within

the scope of their duties. *W. Virginia Reg'l Jail & Corr. Facility Auth. v. A.B.*, 234 W. Va. 492, 766 S.E.2d 751, 756 (2014) held at syllabus point 12.

If the plaintiff identifies a clearly established right or law which has been violated by the acts or omissions of the State, its agencies, officials, or employees, or can otherwise identify fraudulent, malicious, or oppressive acts committed by such official or employee, the court must determine whether such acts or omissions were within the scope of the public official or employee's duties, authority, and/or employment. To the extent that such official or employee is determined to have been acting outside of the scope of his duties, authority, and/or employment, the State and/or its agencies are immune from vicarious liability, but the public employee or official is not entitled to immunity in accordance with *State v. Chase Securities, Inc.*, 188 W.Va. 356, 424 S.E.2d 591 (1992) and its progeny. ***If the public official or employee was acting within the scope of his duties, authority, and/or employment, the State and/or its agencies may be held liable for such acts or omissions under the doctrine of respondeat superior along with the public official or employee.*** [Emphasis added.]

If the facts of the case prove that the officers' acts are indeed tortious and are within the scope of their employment with the State Police, then the State Police may be held liable for such acts. Since the Plaintiff claims he was beaten by uniformed State Police officers in the performance of their official duties and exercising their authority given them by the State Police, it cannot be said without doubt that the Plaintiff can prove no set of facts which will entitle him to relief against the State Police.

The court does not making any findings relative to qualified immunity and defers whether this defense will afford any relief to the Defendant. While it is true that this will expose the State Police, at least temporarily, to the burdens of litigation, no case cited by the State Police exhibit the application of qualified immunity on a Rule 12(b)(6) motion. All of the cases identified by the court have been on summary judgment. Given the qualified nature of the defense, there is no reason to prohibit factual inquiry.

The motion of the State Police to dismiss the case pursuant to Rule 12(b)(6) is denied.

The motion of the State Police to stay discovery is denied.

The clerk is directed to send a true and correct copy of this order to counsel of record.

/s/ Michael Lorensen
Circuit Court Judge
23rd Judicial Circuit

Note: The electronic signature on this order can be verified using the reference code that appears in the upper-left corner of the first page. Visit www.courtsww.gov/e-file/ for more details.