EFiled: Mar 17 2017 04:52PM EDT
Transaction ID 60356232
Case No. 2017-0112-TMR

IN THE COURT OF CHANCERY OF STATE OF DELAWARE

LYNN J. ROGERS,	)	
	)	
Plaintiff,	)	
	)	C.A. No. 2017-0112-TMR
v.	)	
	)	
MILTON FIRE DEPARTMENT, INC.,	)	
	)	
Defendant.	)	

DEFENDANT MILTON FIRE DEPARTMENT, INC.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Defendant, Milton Fire Department, Inc. ("MFD"), by and through its undersigned counsel, hereby moves this Honorable Court for the entry of an Order dismissing Plaintiff's Amended Verified Complaint[1] with prejudice, and in support thereof avers as follows:

Procedural History

1. Plaintiff, Lynn J. Rogers ("Rogers" or "Plaintiff") instituted the above-captioned civil action by the filing of his Verified Complaint on February 14, 2017. A true and correct copy of the Verified Complaint is attached hereto as Exhibit "A."

[1] Plaintiff has also filed a complaint against MFD in the Superior Court (attached hereto as Exhibit "B") which omits the *ultra vires* and employment discrimination claims but appears to be identical in all other respects. It is unclear why Plaintiff has chosen to burden both the Court of Chancery and the Superior Court with identical claims. In addition, Plaintiff has also filed a separate complaint in the Superior Court against Jack Bushey individually, and the causes of action set forth therein arise from the same facts as the instant matter and the Superior Court case against MFD.

2. Plaintiff subsequently filed an Amended Verified Complaint on February 21, 2017 (hereinafter, the "Complaint"). A true and correct copy of the Complaint is attached hereto as Exhibit "C."

3. Plaintiff's 182-paragraph Complaint sets forth seven (7) causes of action: (I) '*Ultra Vires*'; (II) Due Process; (III) Defamation; (IV) Age Discrimination; (V) Employment Discrimination; (VI) Civil Conspiracy; and (VII) Intentional Infliction of Emotional Distress.[2] Each of these causes of action should be dismissed with prejudice for the reasons more fully set forth below. All of Plaintiff's claims are either time-barred, otherwise barred by statute, inadequately pled as a matter of law, or some combination of the three.

Applicable Legal Standard

4. Court of Chancery Rule 12(b)(6) governs MFD's motion to dismiss the Complaint. The Court must "accept the well-pled allegations of the [Complaint] as true, and draw reasonable inferences in favor of [Rogers]," but "conclusory allegations need not be treated as true, nor should inferences be drawn unless they truly are reasonable." *Feldman v. Cutaia*, 951 A.2d 727, 731 (Del. 2008); *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 727 (Del. Ch. 1999) ("neither inferences nor conclusions of fact unsupported by allegations of specific

[2] Plaintiff's Complaint is discursive and oftentimes vague, and it is therefore somewhat difficult to follow. MFD attempts in this Motion to address Plaintiff's claims in as orderly a manner as is possible under the circumstances.

fact ... are accepted as true"); *see also In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 168 (Del. 2006) (court "is required to accept only those 'reasonable inferences that logically flow from the face of the complaint,' and 'is not required to accept every strained interpretation of the allegations proposed by the plaintiff.'") (quoting *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001)). Ultimately, Rogers' "[f]actual allegations must be enough to raise a right to relief above the speculative level," and make a "'showing,' rather than a blanket assertion, of entitlement to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 & n.3 (2007) ("labels and conclusions" or a "formulaic recitation of the elements of the cause of action will not do"); *Desimone v. Barrows*, 924 A.2d 908, 929 (Del. Ch. 2007) (noting that in *Twombly*, "our nation's high court ... embraced the pleading principle that Delaware courts have long applied").

Legal Argument

Count I – *Ultra Vires*

5. Count I of Rogers' Amended Verified Complaint appears to be a claim of *ultra vires* action by MFD with respect to events which transpired between 2010 and 2014.

6. The doctrine of *ultra vires* was largely abolished in Delaware by passage of 8 *Del. C.* § 124, Section 124 of the Delaware General Corporation Law ("Section 124*"). CORPORATION LAW AND PRACTICE* § 11.05 ("Section 124 of

the statute, first adopted by the 1967 revision, abolishes the doctrine of ultra vires in Delaware, except in three narrow circumstances."). Section 124 identifies only three instances in which a corporation's lack of power or capacity may be asserted, and that list does not include non-injunctive direct stockholder claims.[3] *See Southeastern Pennsylvania Transportation Authority v. Volgenau*, C.A. No. 6354-VCN (Del. Ch. Aug. 31, 2012).

7. Although Plaintiff's prayer for relief at the end of the Complaint somewhat creatively requests an "injunction *nunc pro tunc* reversing the actions taken against Rogers by MFD," Plaintiff is not in reality seeking injunctive relief.[4] Rather, Plaintiff is simply seeking to have corporate actions reversed several years afterward, purportedly on the basis that the corporation did not have the capacity to undertake those actions at the time. What Plaintiff is attempting to do here is exactly the type of thing that Section 124 is meant to prevent.

8. Section 124 requires that a stockholder seeking to enjoin a corporate act on the basis that it is undertaken *ultra vires* must seek to enjoin the act before it

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[3] Section 124 states, in pertinent part: "No act of a corporation and no conveyance or transfer of real or personal property to or by a corporation shall be invalid by reason of the fact that the corporation was without capacity or power to do such act or to make or receive such conveyance or transfer, but such lack of capacity or power may be asserted:

(1) In a proceeding by a stockholder against the corporation to enjoin the doing of any act or acts or the transfer of real or personal property by or to the corporation…."

[4] Plaintiff's Supplemental Information form makes reference to injunctive relief "from defendant's handling of plaintiff's land use application." This is presumably an error.

is completed; otherwise, it will be deemed valid and will not be set aside. *Southeastern Pennsylvania Transportation Authority, supra*, at 7.

9. Count I of the Complaint must be dismissed because Section 124 does not permit a direct stockholder suit against a Delaware corporation to set aside an action previously taken by the corporation on the basis that it was *ultra vires*.

10. Additionally, Count I of Plaintiff's Complaint is barred by the statute of limitations set forth at 10 *Del. C.* § 8106 to the extent that it arises from actions alleged to have occurred more than three years before Plaintiff commenced this action.

11. A statute of limitations is not binding on a court of equity. *See, e.g., Adams v. Jankouskas*, 452 A.2d 148, 157 (Del. 1982). However, the Court of Chancery generally applies the legal statute of limitations by analogy. *See, e.g., id.; Atlantis Plastics Corp. v. Sammons*, 558 A.2d 1062, 1064 (Del. Ch. 1989). The time fixed by the legal statute of limitations is deemed to create a presumptive time period for purposes of the Court's application of the equitable doctrine of laches absent circumstances that would make the imposition of the time bar unjust. *U.S. Cellular Inv. Co. v. Bell Atlantic Mobile Sys., Inc.*, 677 A.2d 497, 502 (Del. 1996); *Kahn v. Seaboard Corp.*, 625 A.2d 269, 277 (Del. Ch. 1993). If the claim is barred under the statute of limitations, the Court need not engage in a traditional laches analysis. *Atlantic Plastics*, 558 A.2D at 1064. Equity follows the law, and it should

so here by deeming Plaintiff's claims time-barred wherever they would likewise be time-barred in the Superior Court.

Count II –Due Process

12. Count II of Plaintiff's Complaint is styled as a due process claim pursuant to 42 U.S.C. § 1983, and Plaintiff alleges that he was denied procedural and substantive due process for a variety of reasons. See Exhibit C, ¶ 143.

13. Assuming only for the sake of argument that MFD is a state actor under the circumstances present in this case,[5] Count II must still be dismissed with prejudice because it is entirely barred by the applicable two-year statute of limitations. Plaintiff alleges no conduct that occurred within two years prior to the filing of his original complaint on February 14, 2017.

14. State law determines the applicable statute of limitations for claims brought under 42 U.S.C. § 1983. *Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985). Civil rights claims are characterized as personal injury actions for purposes of determining the statute of limitations. *Id*. at 280. In Delaware, the statute of limitations for personal injury actions is two years. *See* 10 *Del. C.* § 8119.

15. All actions attributed to MFD and complained of in Count II of Plaintiff's Complaint are alleged to have happened between 2011 and 2014. Claims arising from those alleged actions are barred by the applicable statute of

[5] This should not be construed as an admission by MFD. MFD reserves all rights it has to challenge Plaintiff's characterization of MFD as a state actor for purposes of this litigation.

limitations, and Count II of Plaintiff's Complaint must therefore be dismissed with prejudice. In the alternative, Count II is barred by the doctrine of laches.

Count III – Defamation

16. Count III of Plaintiff's Complaint alleges claims of libel, slander, and slander *per se*. See Exhibit C, ¶ 153.

17. The most recent allegedly defamatory statement complained of in Count III of Plaintiff's Complaint is alleged to have been made in October 2014. See Exhibit C, ¶ 153(e).

18. Defamation actions in Delaware are governed by the two-year statute of limitations for personal injuries – 10 *Del. C.* § 8119. *DeMoss v. The News-Journal Company*, 408 A.2d 944 (Del. 1979).

19. Accordingly, Count III of Plaintiff's Complaint must be dismissed with prejudice as no defamatory statements are alleged to have been made within the past two years. In the alternative, Count III is barred by the doctrine of laches.

Count IV – Age Discrimination

20. Count IV of Plaintiff's Complaint presents a bare, conclusory allegation of age discrimination and sets forth no facts in support of the idea that Rogers was discriminated against on the basis of his age. See Exhibit C, ¶ 155-160.

21. Preliminarily, Count IV is inadequately pled as a matter of law pursuant to the well-established legal principles set forth in paragraph 4 above, and

it could therefore be dismissed on that basis alone. Count IV represents a mere "formulaic recitation" of the elements of a cause of action without any supporting factual averments. Nowhere in Plaintiff's Complaint does he allege any facts to even suggest that his age played a role in the events giving rise to this lawsuit.

22. Further, there is no common law cause of action for age discrimination in Delaware, and Plaintiff cites no Delaware statute in support of his claim. More importantly, Title 19, Chapter 7 of the Delaware Code sets forth a mandatory administrative process which must be exhausted before an aggrieved party alleging discrimination may file suit. Pursuant to 19 *Del C*. § 712(c)(1), "[a]ny person claiming to be aggrieved by a violation of this chapter **shall** first file [with the Department of Labor] a charge of discrimination within 300 days of the alleged unlawful employment practice or its discovery, setting forth a concise statement of facts, in writing, verified and signed by the charging party." (Emphasis added). 19 *Del. C.* § 714(a) provides that "[a] charging party may file a civil action in **Superior Court**, **after exhausting the administrative remedies provided herein and receipt of a Delaware Right to Sue Notice acknowledging same**. (Emphasis added). Also, 19 *Del. C.* § 714(b) provides that "[t]he Delaware Right to Sue Notice shall include authorization for the charging party to bring a civil action under this chapter in **Superior Court** by instituting suit **within 90 days** of its receipt or within 90 days of receipt of a federal Right to Sue Notice,

whichever is later. (Emphasis added). Finally 19 *Del. C.* § 712(b) states, in pertinent part: "This subchapter shall afford the **sole remedy** for claims alleging a violation of this chapter **to the exclusion of all other remedies**. Upon termination of the administrative process by the Department, the charging party may institute a civil action in Superior Court of the State of Delaware pursuant to §§ 714 and 715 of this title." (Emphasis added).

23. Assuming only for the sake of argument that Plaintiff is/was an employee of MFD,[6] Plaintiff's claim of age discrimination set forth in Count IV of the Complaint must still be dismissed with prejudice because Plaintiff did not comply with the mandatory administrative process required by statute, cannot at this point comply with the mandatory administrative process because the statutory period has expired, and because he has filed suit in the wrong court. Although the Court of Chancery would not have jurisdiction to hear Plaintiff's age discrimination suit even if it had been timely filed after exhaustion of the mandatory administrative process, MFD submits that this Honorable Court may nonetheless find that Count IV is now barred due to Plaintiff's failure to comply with the applicable Delaware statutes and/or because it is inadequately pled as a matter of law. In the alternative, Count IV is barred by the doctrine of laches.

[6] This should not be construed as an admission by MFD. MFD reserves all rights it has to challenge Plaintiff's characterization of MFD his employer for purposes of this litigation.

Count V – Employment Discrimination

24. For the avoidance of unnecessary repetition, MFD directs the Court to the discussion of Count IV above by way of explanation of the reasons why Plaintiff's employment discrimination claim in Count V of the Complaint must also be dismissed with prejudice.

25. The claim set forth in Count V of Plaintiff's Complaint is governed by the same statutory scheme and mandatory administrative process applicable to his age discrimination claim. Plaintiff utterly failed to comply with any portion of Title 19, Chapter 7, and he cannot now maintain his employment discrimination claim in this or any other Court. In the alternative, Count V is barred by the doctrine of laches.

26. Even if the Court finds that Count V is instead governed by the three-year statute of limitations applicable to alleged breaches of the implied covenant of good faith and fair dealing, nowhere in Plaintiff's Complaint does he plead any facts to support the entirely conclusory allegations that MFD engaged in "fraud, deceit, or misrepresentation" (which must be pled with particularity) or that MFD falsified or manipulated his personnel records. Despite discussing his personnel file at some length in the Complaint, Rogers conspicuously neglects to allege that anything contained in the file was falsified, fabricated, or manipulated by MFD. Count V is precisely the sort of "formulaic recitation" of the elements of a cause of

action, devoid of supporting factual averments, that the *Twombly* Court and the Court of Chancery have deemed inadequate as a matter of law. Count V therefore fails to adequately state a claim upon which relief may be granted, and it should be dismissed with prejudice.

27. In the alternative, Rogers was/is not an "employee" of MFD under applicable Delaware law and therefore cannot make out a claim for employment discrimination or for breach of the implied covenant of good faith and fair dealing. No covenant may be implied in a contract that does not exist. As Plaintiff admits in his Complaint (see, e.g., Exhibit C, ¶ 141) MFD is a volunteer fire department which, by its nature, is staffed by volunteers rather than employees. Further, Rogers has not been deprived of any wages or employment benefits by virtue of any action or omission on the part of MFD.

Count VI – Civil Conspiracy

28. Count VI of Plaintiff's Complaint alleges a civil conspiracy among MFD members to expel Rogers from membership in MFD and violate his constitutional rights.

29. First, Count VI should be dismissed with prejudice because it relates to the alleged conduct of various non-party individuals rather than to any act of MFD as a corporate entity.

30. Second, because civil conspiracy is not an independent cause of action, it can only be maintained in parallel with an underlying tort or statutory violation. *NACCO Indus., Inc. v. Applica Inc.*, 2009 WL 4981577, at *31 (Del. Ch. Dec. 22, 2009) (noting that "[a] breach of contract is not an underlying wrong that can give rise to a civil conspiracy claim") (citing *Empire Fin. Servs. v. Bank of N.Y. (Del.)*, 900 A.2d 92, 97 (Del. 2006)). To the extent that Plaintiff's tort claims and claims arising from alleged statutory violations are dismissed (and MFD respectfully submits that they should be), Count VI must also be dismissed with prejudice.

Count VII – Intentional Infliction of Emotional Distress

31. Count VII of Plaintiff's Complaint alleges intentional infliction of emotional distress ("IIED"). It should be dismissed with prejudice because it is barred by the applicable statute of limitations and otherwise fails to state a claim upon which relief may be granted. On its face, the Complaint does not adequately plead a cause of action for IIED.

32. First, the claim is barred by the two-year statute of limitations applicable to personal injuries because Plaintiff asserts in paragraphs 169 through 171 of his Complaint that MFD's members in essence did nothing to reverse their October 2014 decision regarding his membership status after his wife passed away

in 2016. It is readily apparent that Plaintiff's real grievance is with MFD's October 2014 decision regarding his membership status.

33. The Restatement (Second) of Torts, as adopted in Delaware, attaches liability for IIED to one who "by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another." Plaintiff appears to allege that MFD's members did not consider an appeal after his wife's death, although Plaintiff does not even allege that he requested an appeal at that time. In any event, mere maintenance of the status quo following the death of Plaintiff's wife does not constitute the sort of conduct that gives rise to a claim of IIED as a matter of law. Not only does Plaintiff not describe any "extreme and outrageous" conduct, but Plaintiff does not actually describe any conduct at all. Notably, Plaintiff does not allege that MFD did or said anything that actually caused him any emotional distress, let alone severe emotional distress. Instead, Plaintiff alleges in paragraphs 171 and 172 of his Complaint that there was a "hardening of the hearts" which led to "awkwardness." A "hardening of the hearts" is Plaintiff's entirely subjective perception and does not describe any conduct on the part of MFD or its members, let alone extreme and outrageous conduct. "Awkwardness" is, as a matter of law, not the sort of harm that is sufficient to maintain a claim of IIED. *See, e.g.*, *Beckett v. Trice*, 1994 Del. Super. LEXIS 599 (Del. Super. Ct. Nov. 4, 1994) (*aff'd*, 660

A.2d 393 (Del. 1995)) (finding that "the humiliation, embarrassment, and anxiety plaintiff has asserted do not constitute extreme emotional distress.").

34. Plaintiff goes on to allege in paragraphs 173-182 of his Complaint that he was "devastated" to find out that he might not be able to participate as planned in a colleague's funeral, but that he in fact ended up participating exactly as planned. Nowhere does Plaintiff allege any extreme or outrageous conduct on the part of MFD. Instead, Plaintiff recounts a perfectly normal conversation he had with President Hopkins which ultimately resulted in Plaintiff doing what he had planned to do anyway, with no negative consequences or ill effects. Although Plaintiff alleges that some entirely vague actions on the part of MFD or its members were intended to cause him emotional pain, Plaintiff does not allege that he experienced any emotional pain. Even if he did allege that he experienced emotional pain, he does not allege any conduct that a reasonable finder of fact could possibly regard as extreme and outrageous.

35. In Count VI of the Complaint, Plaintiff yet again engages in "formulaic recitation" of elements without pleading any supporting facts. As noted in paragraph 4 above, "neither inferences nor conclusions of fact unsupported by allegations of specific fact ... are accepted as true." *In re Lukens Inc. S'holders Litig.*, 757 A.2d at 727. Plaintiff's Count VI fails to state a claim upon which relief may be granted, and it must be dismissed with prejudice.

WHEREFORE, for all of the foregoing reasons, Defendant Milton Fire Department, Inc. respectfully requests that this Honorable Court enter an Order in the form attached hereto dismissing Plaintiff's Amended Verified Complaint with prejudice and granting such other and further relief to Defendant as the Court deems proper and just.

Respectfully submitted,

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Dated: March 17, 2017