EFiled: Mar 17 2017 05:06PM EDT
Transaction ID 60356373
Case No. S17C-02-021 THG

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

LYNN J. ROGERS,	)	
	)	
Plaintiff,	)	
	)	C.A. No. S17C-02-021 THG
v.	)	
	)	
MILTON FIRE DEPARTMENT, INC.,	)	TRIAL BY JURY OF
	)	TWELVE DEMANDED
Defendant.	)	

DEFENDANT'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 Complaint[1] with prejudice, and avers as follows:

1. Plaintiff, Lynn J. Rogers ("Rogers" or "Plaintiff") instituted the above-captioned civil action by the filing of his Complaint on February 16, 2017. A true and correct copy of the Complaint is attached hereto as Exhibit "A."

2. Plaintiff's 178-paragraph Complaint sets forth five (5) causes of action: (I) Due Process; (II) Defamation; (III) Age Discrimination; (IV) Civil

[1] Plaintiff has also filed a verified complaint against MFD in the Court of Chancery (the subsequent, amended version is attached hereto as Exhibit "B") which includes claims of *ultra vires* action by MFD and employment discrimination 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 (attached hereto as Exhibit "C"), and the causes of action set forth therein arise from the same facts as the instant matter and the Court of Chancery case against MFD.

Conspiracy; and (V) Intentional Infliction of Emotional Distress.[2] 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.

3. On a motion to dismiss under Superior Court Civil Rule 12(b)(6), 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); see also *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").

4. Count I of Plaintiff's Complaint is styled as a due process claim under 42 U.S.C. § 1983. Plaintiff alleges that he was denied procedural and substantive due process for a variety of reasons. See Exhibit A, ¶ 140.

5. Assuming for the sake of argument that MFD is a state actor in this case,[3] Count I must still be dismissed because it is barred by the applicable two-year statute of limitations. All actions attributed to MFD and complained of in Count I of Plaintiff's Complaint are alleged to have happened between 2011 and 2014.

[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.

[3] 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.

6. State law determines the applicable statute of limitations for claims brought under 42 U.S.C. § 1983. *Wilson v. Garcia*, 471 U.S. 261 (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.

7. Count II of Plaintiff's Complaint alleges claims of libel, slander, and slander *per se*. See Exhibit A, ¶ 153.

8. The most recent allegedly defamatory statement complained of in Count II of Plaintiff's Complaint is alleged to have been made in October 2014. See Exhibit A, ¶ 153(e). Defamation actions in Delaware are governed by the two-year statute of limitations for personal injuries. *DeMoss v. The News-Journal Company*, 408 A.2d 944 (Del. 1979). Accordingly, Count II of Plaintiff's Complaint must be dismissed.

9. Count III of Plaintiff's Complaint presents a conclusory allegation of age discrimination and sets forth no facts suggesting that Rogers was discriminated against on the basis of his age. See Exhibit A, ¶ 156-160. Count III represents a mere "formulaic recitation" of the elements of a cause of action without any supporting factual averments.

10. 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 …." (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 the charging party must file suit *within 90 days* of receiving the Delaware or 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*. (Emphasis added).

11. Assuming for the sake of argument that Plaintiff is/was an employee of MFD,[4] Plaintiff's claim of age discrimination set forth in Count III of the Complaint must still be dismissed because Plaintiff did not comply with the mandatory administrative process required by statute and cannot comply with it now because the statutory period has expired.

[4] 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. Notably, Plaintiff admits in his Complaint that MFD is a volunteer fire company.

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

13. First, Count IV should be dismissed because it relates to the alleged conduct of various non-party individuals rather than to any act of MFD as a corporate entity. Second, civil conspiracy is not an independent cause of action and 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 other claims are dismissed, Count IV must also be dismissed with prejudice.

14. Count V of Plaintiff's Complaint alleges intentional infliction of emotional distress ("IIED"). The claim is barred by the two-year statute of limitations applicable to personal injuries because Plaintiff asserts in paragraphs 165-167 of his Complaint that MFD's members did nothing to reverse their October 2014 decision regarding his membership status after his wife passed away in 2016. Plaintiff's real grievance is with MFD's October 2014 decision.

15. 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." Not only does Plaintiff not describe any "extreme and outrageous" conduct, but Plaintiff does not describe any conduct at all. Plaintiff alleges in paragraphs 167-168 that there was a "hardening of the hearts" which led to "awkwardness." A "hardening of the hearts" is Plaintiff's subjective perception and does not describe any conduct, let alone extreme and outrageous conduct. "Awkwardness" is, as a matter of law, not a 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)) ("the humiliation, embarrassment, and anxiety plaintiff has asserted do not constitute extreme emotional distress.").

16. Plaintiff goes on to allege in paragraphs 170-176 that he was "devastated" to learn that he may not be able to participate in a colleague's funeral, but that he ended up participating exactly as planned. Nowhere does Plaintiff allege any extreme or outrageous conduct on the part of MFD. 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 had alleged that he experienced emotional pain, he does not allege any conduct that a reasonable finder of fact could possibly regard as extreme and outrageous.

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 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