IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

ROIAN GREGORY,	:	
	:	C.A. No. 12C-07-043 WLW
Plaintiff,	:	
	:	
v.	:	
	:	
DOVER POLICE DEPARTMENT,	:	
	:	
Defendant.	:	

Submitted: October 19, 2012
Decided: December 31, 2012

ORDER

Upon Defendant's Motion to Dismiss.
Granted.

Stephen B. Potter, Esquire and Tiffany M. Shrenk, Esquire of Potter Carmine & Associates, P.A., Wilmington, Delaware; attorneys for Plaintiff.

William W. Pepper, Sr., Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware and Daniel A. Griffith, Esquire of Whiteford Taylor & Preston, LLC, Wilmington, Delaware; attorneys for Defendant.

WITHAM, R.J.

The matter before this Court is Defendant's Motion to Dismiss Plaintiff's Complaint on the ground that Defendant is immune from liability for Plaintiff's negligence claim under the County and Municipal Tort Claims Act, 10 *Del. C.* § 4010 *et seq.* For the foregoing reasons, Defendant's Motion is granted.

FACTS

Plaintiff Roian Gregory ("Plaintiff") filed a *pro se* complaint on July 27, 2012 against the Dover Police Department ("Defendant"). In her complaint, Plaintiff, an emergency room technician, alleges that she was drawing blood from a detainee at Kent General Hospital on July 28, 2010, when the detainee broke free from the two police officers restraining her and kicked Plaintiff in the face. Plaintiff's complaint alleges that the officers did not properly restrain the detainee and that she suffered injuries to her neck and spinal cord as a result of the officers' negligence. She is seeking $225,000 in damages for past and future medical expenses. The complaint was filed one day shy of the expiration of the statute of limitations.[1]

On August 16, 2012, Defendant filed a motion to dismiss Plaintiff's complaint on two grounds. In its motion, Defendant first contends that it is not a legal entity capable of being sued. Defendant also alleges that Plaintiff's claim of negligence

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[1] This action is based on a claim for personal injuries and therefore, is subject to the two-year statute of limitations set forth in 10 *Del. C.* § 8119. Section 8119 states:

> No action for the recovery of damages upon a claim for alleged personal injuries shall be brought after the expiration of 2 years from the date upon which it is claimed that such alleged injuries were sustained... .

19 *Del. C.* § 8119.

against the two Dover police officers involved in the aforementioned incident is barred by the County and Municipal Tort Claims Act (hereinafter "TCA").[2]

On September 6, 2012, counsel entered an appearance on Plaintiff's behalf and requested an additional 30 days to respond to Defendant's motion to dismiss. This Court granted the extension on September 10, 2012, and scheduled oral argument on the motion for October 12, 2012.

Plaintiff's response, which was filed on October 5, 2012, opposes dismissal on two grounds. First, Plaintiff contends that, as a *pro se* litigant, her complaint should not be dismissed on account that she named the wrong defendant; rather, this Court should afford her the opportunity to amend her pleading to substitute the City of Dover ("the City") as the named defendant. Second, Plaintiff argues that the officers' failure to shackle her assailant was a ministerial decision, and thus, the City is not immunized from liability. Alternatively, Plaintiff argues that the shackles that should have been used on the detainee's feet fall within the scope of the so-called"equipment" exception found at 10 *Del. C.* § 4012(1) and, thus, lift the bar to immunity.

Standard of Review

When deciding a motion to dismiss under Superior Court Civil Rule 12(b)(6), a complaint is subjected to a broad test of sufficiency.[3] The Court must accept all

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[2] 10 *Del. C.* §§ 4010-13.

[3] *C&J Paving, Inc. v. Hickory Commons, LLC*, 2006 WL 3898268, at *1 (Del. Super. Ct. Jan. 3, 2007).

well-pleaded factual allegations in the complaint as true.[4] Dismissal is appropriate only if it is reasonably certain "that the plaintiff could not prove any set of facts that would entitle him to relief."[5] Stated differently, a complaint will not be dismissed unless it clearly lacks factual or legal merit.[6]

DISCUSSION

Defendants first argue that Plaintiff's failure to name the City, the proper defendant in this case,[7] warrants dismissal of the entire action because any attempt to substitute the defendant will occur after the limitations period has expired. Plaintiff pleads for leniency, and asks for leave to amend her complaint to substitute the City as the proper defendant. Although Plaintiff is correct in her assertion that this Court interprets the submissions of *pro se* litigants with some degree of leniency,[8] *pro se* litigants are required to make a good faith effort to comply with the rules of procedure in this Court.

Plaintiff's problem is that, as of July 28, 2012, the two-year statute of

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[4] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

[5] *Nix v. Sawyer*, 466 A.2d 407, 410 (Del. 1983).

[6] *Diamond State Tel. Co. v. Univ. of Del.*, 269 A.2d 52, 58 (Del. 1970).

[7] It is well established that municipal police departments are "not separate entities for the purpose of suit, but rather, are distinct departments or entities of the [city or municipal] government [themselves]."*Breitigan v. State*, 2003 WL 2166376, at *2 (D. Del. July 16, 2003).

[8] *Johnson v. State*, 442 A.2d 1362, 1364 (Del. 1982).

limitations has run on any negligence claim she may assert against the City.[9] Superior Court Civil Rule 15(a) ("Rule 15(a)") is the only available vehicle by which a plaintiff may amend a complaint to change or add a defendant after the statute of limitations has run.[10] Notwithstanding Rule 15(a)'s liberal requirement that leave be "freely given when justice so requires," a motion to add or substitute a party after the statute of limitations has run must be denied if it fails to satisfy the requirements of Rule 15(c).[11] Rule 15(c) neither expands nor contracts the scope of amendments available under Rule 15(a), but rather establishes a series of requirements that must be satisfied if the plaintiff wishes to render the amendment effective as of the time of the filing of the original complaint.[12]

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[9] *See supra* note 1 and accompanying text.

[10] *See 3 Moore's Federal Practice* § 15.19(3)(a). Superior Court Civil Rule 15(a) is virtually identical to its counterpart in the Federal Rules of Civil Procedure, and provides:

> (a) *Amendments*: A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the Court otherwise orders.

Super. Ct. Civ. R. 15(a). A motion to amend a pleading under Rule 15(a) may be used to add, substitute or drop parties. *Parker v. State*, 2003 WL 24011961, at *3 (Del. Oct. 14, 2003) (table).

[11] *See Mergenthaler, Inc. v. Jefferson*, 332 A.2d 396, 398 (Del. 1975).

[12] *See Annone v. Kawasaki Motor Corp.*, 316 A.2d 209, 211 (Del. 1974). Rule 15(c) enumerates three distinct prerequisites for an amendment to relate back to the original complaint:

Here, Plaintiff has not filed a formal motion to amend her complaint to substitute the City as the proper defendant, as required by Rule 15(a). Even assuming Plaintiff's counsel had filed a motion to amend her complaint in a timely fashion, it is unnecessary for the Court to determine whether the proposed amendment would relate back to the date of the original filing because there are alternate grounds supporting dismissal.

The Court need not wade into the relation-back analysis prescribed by Rule 15c) because Plaintiff cannot maintain her action in the face of the Municipal Torts Claim Act ("the Act"). Section 4011(a) of the Act reads, in pertinent part, "[e]xcept as otherwise expressly provided by statute, all governmental entities and their employees shall be immune from suit on any and all tort claims seeking recovery of damages ...."[13] Subsection b of that section enumerates six examples of activities for which local governmental entities are immune.[14] Among the immune undertakings

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(1) the claims in the amended complaint must arise out of the same occurrences set forth or attempted to be set forth in the original complaint; (2) within the period provided by law for commencing the action against the party (*i.e.,* the statute of limitations), the party to be brought in by the amendment received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits; and (3) within the same period, the party to be brought in by the amendment knew or should have known that, but for a mistake concerning the identity of the party, the suit would have been brought against the party. *See Mullen v. Alarmguard of Delmarva, Inc.*, 625 A.2d 258, 264 (Del. 1993) (citing Super. Ct. Civ. R. 15(c)).

[13] 10 *Del. C.* § 4011(a). The grant of governmental immunity conferred by section 4011(a) is broad, while its exceptions are narrow and restrictive. *Sadler v. New Castle Cty.*, 565 A.2d 917, 921 (Del. 1989). In fact, the only actions for which municipalities may be liable are those listed in 10 *Del. C.* § 4012.

[14] *See Id.* § 4011(b).

listed in section 4011(b) are those arising from discretionary functions.[15] The Act provides three exceptions to this broad grant of tort immunity.[16] The activities enumerated in section 4012 are the only activities to which municipal immunity is waived,[17] and are to be strictly construed.[18]

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[15] *Id.* § 4011(b)(3). This subsection provides that governmental entities are immune for those activities that can be classified as:

> (3) The performance or failure to exercise or perform a discretionary function or duty, whether or not the discretion be abused and whether or not the statute, charter, ordinance, order, resolution, regulation, or resolve under which the discretionary function or duty is performed is valid or invalid.

Id.

[16] *Id.* § 4012. Section 4012 provides:

> A governmental entity shall be exposed to liability for its negligent acts or omissions causing property damage, bodily injury, or death in the following instances:
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> (1) In its ownership, maintenance or use of any motor vehicle, special mobile equipment, trailer, aircraft or other machinery or equipment, whether mobile or stationary.
>
> (2) In the construction, operation or maintenance of any public building or the appurtenances thereto, except as to historic sites or buildings, structures, facilities or equipment designed for use primarily by the public in connection with public outdoor recreation.
>
> (3) In the sudden and accidental discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalines and toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water.

Id.

[17] *Fiat Motors of North America v. Mayor and Council of Wilmington*, 498 A.2d 1062, 1066 (Del. 1985).

[18] *Sadler v. New Castle Cty.*, 565 A.2d 917, 923 (Del. 1989).

Thus, whether Plaintiff's tort claims survive Defendant's motion to dismiss depends first on whether the police officers' failure to restrain the detainee in question qualifies as a ministerial act. Plaintiff relies upon *Sussex County v. Morris* as authority that the police officers' failure to shackle the detainee's feet while transporting her to the hospital is a ministerial act.[19] In *Morris*, the Supreme Court found that the transport of a mentally ill patient by a Sussex County constable was ministerial.[20] Relying on Section 895D of the Restatement (Second) of Torts, the court defined a ministerial act or decision as one that "involves less in the way of personal decision or judgment or the matter for which judgment is required has little bearing of importance upon the validity of the act."[21] Applying this definition, the court held that the care and transport of prisoners is ordinarily considered ministerial.[22] As this Court is duty bound to follow the definition of ministerial as set forth by the Supreme Court in *Morris*, the decision made by the police officers in the present case clearly qualifies as ministerial.

But the analysis does not end there. The City is not liable merely because its actions are ministerial in nature. The City's actions must also fall within one of the

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[19] 610 A.2d 1354 (Del. 1992).

[20] *Id.* at 1359.

[21] *Id.*

[22] *Id.*

three exceptions found within section 4012.[23] Plaintiff relies solely upon the so-called equipment exception articulated in section 4012(1). In relying upon the equipment exception, Plaintiff must fashion its claim to fall within the specific language of section 4012(1), which provides:

> A governmental entity shall be exposed to liability for its negligent acts or omissions causing property damage, bodily injury or death in the following instances:
>
> (1) in its ownership, maintenance or use of any motor vehicle, special mobile equipment, trailer, aircraft or other machinery or equipment, whether mobile or stationary.

In *Sadler v. New Castle County*, the Supreme Court cautioned that using the term "equipment" to "embrace an endless variety of material items within the possession, ownership, or control of a governmental entity ... may seriously erode the Act's general grant of immunity and result in the exception swallowing the rule."[24] The Court limited the excepted equipment "to those items of unusual design or size, such as motor vehicles, aircraft or electric transmission lines, which in their normal use or application pose a particular hazard to members of the public."[25] This Court has noted repeatedly that handcuffs or similar restraints are not equipment within the

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[23] *See Hercules, Inc. v. AMEC Virginia*, 1999 WL 167830, at *4 (Del. Super. Ct. Feb. 12, 1999) (rejecting a reading that would expand the limited exceptions to immunity found within section 4012 to include all ministerial acts).

[24] *Sadler*, 565 A.2d at 922-23.

[25] *Id.* at 923.

meaning of the Act.[26] As such, the shackles involved here do not constitute the sort of "equipment" contemplated by section 4012(1). The officers' failure to use such restraints cannot lift the bar to immunity. As Plaintiff's claim of negligence implicates no other exception found within section 4012 of the Act, the City is immune from liability. Defendant's motion to dismiss is hereby **GRANTED**.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh

[26] *See Triple C. Railcar Serv., Inc. v. City of Wilmington*, 630 A.2d 629 (Del. Super. Ct. 1993) (citing, with approval, *White v. City of Wilmington*, C.A. No. 84C-AP-87, at 2 (Del. Super. Ct. 1986), for the proposition that handcuffs do not fall within the class of equipment excepted by § 4012(1)).