IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

JOHN H. DAVIS, JR.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	C.A. No.: 99C-04-006
	:	
TOWN OF GEORGETOWN, et al.	:	NON-ARBITRATION CASE
	:	
Defendants.	:	JURY OF TWELVE DEMANDED

MEMORANDUM OPINION

Date Submitted: June 11, 2001
Date of Decision: August 22, 2001

Bruce A. Rogers, Esquire, 104 East Pine Street, Georgetown, Delaware 19947, attorney for Plaintiff;

Bruce C. Herron, Esquire, 1220 N. Market Street, P.O. Box 25047, Wilmington, Delaware 19899,attorney for Defendant.

GRAVES, J.

INTRODUCTION

John A. Davis, Jr. (hereinafter "Plaintiff"), a former Georgetown Police Officer, alleges in his complaint violations of procedural due process, violations of substantive due process, malicious or intentional interference with contract, intentional infliction of emotional distress, invasion of privacy, prima facie tort, fraud, fraud in the inducement, breach of contract, slander and defamation, waiver of immunity, wrongful discharge and entitlement to punitive damages. The Defendants are the Town of Georgetown, The Mayor of Georgetown, The Town Council of Georgetown, the Town Manager of Georgetown, the Chief of Police of the Town of Georgetown, Robert Ricker, Beatrice Hylbert, Michael R. Wyatt, Gary D. Tonge, Lee J. Turek, David W. Baird and William S. Topping, in their respective individual and official capacities (hereinafter "Defendants"). Defendants' Answer contains several affirmative defenses, including statutory immunity pursuant to 10 *Del. C.* § 4011. On July 7, 2000, Defendants filed a Motion for Summary Judgment. The parties have briefed the motion and the Court held oral argument in the matter on May 9, 2001. Supplemental briefing was filed on June 11, 2001. This is the Court's decision on the summary judgment motion.

FACTS[1]

Withdrawal of Application for Chief of Police

Plaintiff was an employee of the Town of Georgetown Police Department from 1977 until December 3, 1998. As of 1993, Plaintiff had reached the rank of Lieutenant. On April 3, 1998, Georgetown's Chief of Police, Harvey A. Gregg Jr., died.

In April 1998, Defendant Town Council began the process to hire a new Chief of Police. Defendant Baird, at the direction of Defendant Town Council, established a search committee.

[1] The facts are developed from the pleadings, deposition testimony, an affidavit, and written materials which have come into evidence through discovery.

The search committee consisted of working and retired police chiefs and State Police Officers. Defendant Town Council instructed Defendant Baird that the search committee was to establish standards, compile an advertisement for the position, review applications, and recommend finalists whom the search committee identified as qualified candidates. Defendant Town Council decided to only consider candidates identified by the search committee as possessing the necessary professional qualifications for serving as Chief of Police.

Plaintiff applied for the Police Chief position. On June 25, 1998, after the application deadline passed, the search committee met to examine applications and set aside six candidates it deemed qualified for the position. Candidates within this group of six were recommended for interviews. Plaintiff's application was not selected as one of the six.[2]

Defendant Baird informed Plaintiff he had been eliminated from consideration and offered him the opportunity to withdraw his application before the Panel's findings became public. In a meeting on July 2, 1998, with Defendants Baird and Ricker, Plaintiff discussed the terms of his withdrawal from the application process. Plaintiff requested assurances in exchange for his withdrawal, namely: permanent day shift five days a week unless in case of emergency, the opportunity to continue running an equipment business out of his home, continued use of a take home car, payment of professional dues by the Town, and transfer back to the detective division. The record reflects conflicts about what was or was not agreed upon as to the assurances Plaintiff wanted prior to withdrawing his application but the bottom line is Plaintiff got what he wanted and/or expected. Plaintiff has acknowledged that throughout the balance of

[2] In his lawsuit, Plaintiff disputes whether "not selected" means "eliminated." I think that may be far too technical an analysis as to whether Mr. Baird committed "fraud" in reporting to Plaintiff that basically he had not made the cut. The deposition testimony of Major Martin Johnson, a retired Delaware State Police officer who served on the committee, best sums up this matter: "But John is a local boy, and we kind of felt that it would be best if they considered interviewing him, even though he was not identified as one of those which we felt met their criteria."

his tenure with the Department he received the aforementioned except for the transfer to the detective division. But he also acknowledged he knew that was a decision to be made by the new Chief and not the Town Manager.

In summary, the only request not met was transfer to the detective division, which Plaintiff conceded he knew, at the time he withdrew his application, was to be the decision of the new Chief.

Resignation/Retirement

On October 6, 1998, a woman indicated Plaintiff had solicited sexual favors from her while on duty approximately one and one half years earlier. Ralph Mitchell of the Delaware State Police Internal Affairs Unit informed Chief Topping of a sexual misconduct complaint involving plaintiff which originated from a complaint against a State Police officer. Chief Topping and Ralph Mitchell interviewed the alleged victim, who denied having sex but said she was offered money for sex. Defendant Topping initiated an internal affairs investigation of Plaintiff and contacted another police agency requesting an investigation into this matter. An internal affairs investigation was initiated against Plaintiff. Chief Topping asked Chief Horseman of the Harrington Police Department to be lead investigator.

On the Friday before October 13, 1998, Plaintiff had lunch with Chief Topping and was told of the complaint. Plaintiff agreed to be interviewed about the charges against him by Chief Horseman, the lead investigator, on October 12, 1998. Before the interview, Plaintiff signed a "Garrity Warning."[3] Plaintiff confirmed much of the witness's story except the allegations he solicited sex from her. Plaintiff stated in the interview that instead, he paid her money for

[3] The warning stated that the interview involved administrative matters and was not pursuant to a criminal prosecution and any self-incriminating statement would not be used against John Davis in any criminal legal proceedings.

potential information regarding the sale of drugs. The investigator had concerns as to what had happened. Plaintiff was placed on paid administrative leave pending the outcome of the investigation.

While Plaintiff was on administrative leave, the Police Department needed pay vouchers that were in Plaintiff's possession. After calling Plaintiff and still not being able to locate the vouchers, Chief Topping instructed a sergeant to open Plaintiff's desk. Plaintiff's locked work desk was opened in search of the pay vouchers and several illegal items were found in the desk. It was unclear whether the items were evidence or personal property. A second internal affairs investigation against Plaintiff was opened based on this incident.

On October 21, 1998, Plaintiff, his attorney, the Town Manager, the Mayor, and Chief Topping met to discuss Plaintiff's status. Plaintiff was informed he was being moved from Administrative Leave to Dismissal because new information had surfaced about other female complaints involving Plaintiff and because of the second internal affairs investigation based on the items found in his desk. Plaintiff was advised that the results of the investigations would be referred to The Department of Justice for potential criminal prosecution. A resolution requiring Plaintiff's departure from the Police Department was discussed.

Plaintiff contends as follows. At the October 21, 1998, meeting, Defendants Baird, Ricker, and Topping stated they would stop the investigations if Plaintiff resigned or retired immediately. The Mayor and Chief Topping informed Plaintiff that the investigation would be closed and the charges would go away if he left the Department. Plaintiff was informed of the second set of charges and what was found in the desk but was not provided with the name of the individual who filed the second complaint.

A present dispute remains as to whether Plaintiff would "retire' or "resign." Nevertheless, an agreement was reached that Plaintiff would remain on paid administrative leave and the investigation would be suspended while the options of his departure were explored.

Therefore, on November 13 and 20, 1998, Plaintiff's counsel met with the Town officials to resolve the terms and conditions of Plaintiff's departure from the Town. Defendants' evidence is that it was agreed during these discussions that Plaintiff would resign and the Town would cease the investigation and take no further action on the pending charges. In addition, Plaintiff would be compensated for all accrued vacation time but not accumulated sick leave.

Since Plaintiff disputed Defendants' position, Defendants objected to Mr. Rogers remaining as Plaintiff's attorney as he was a potential witness. Mr. Rogers reported he would not be testifying as to the meetings he attended as Plaintiff's representative. There was an agreed upon Court order stating in pertinent part: "[P]laintiff's attorney Bruce A. Rogers may not be called as a witness by any party in the trial of this matter." Because his attorney cannot testify, the only evidence regarding what happened in meetings subsequent to the October 21, 1998, meeting is that of the Defendants'.

A November 24, 1998, letter from Defendant Baird to Plaintiff's attorney references the vacation leave Plaintiff is due and informs that Plaintiff is not eligible for accumulated sick leave upon resignation. This letter tracks Defendants' representations as to the meetings of November 13, 1998, and November 20, 1998. Defendant Baird sent a letter to Plaintiff's attorney dated December 2, 1998, in response to a November 30, 1998, memorandum from Plaintiff's attorney

regarding resignation.[4] The December 2, 1998, letter states that the "agreed upon" terms Plaintiff's attorney listed did not represent the terms agreed upon. This letter further states the terms and conditions of resignation; no where is "retirement" mentioned. Defendant Baird informed Plaintiff's attorney that a letter of resignation was to be submitted by December 4, 1998. Plaintiff was informed he was not eligible for service pension benefits or sick leave upon resignation. The letter further informed Plaintiff's attorney that upon receipt of a letter of resignation, the Town would cease the internal affairs investigation, it would state that the allegations were unfounded with the condition precedent that the Department of Justice agree not to prosecute,[5] the second set of allegations would not be filed, and there would be an exchange of property in the others' possession between the parties. The Town reserved the right to continue the internal affairs investigation and formally present Plaintiff with administrative charges if Plaintiff did not agree to the terms and conditions.

On December 3, 1998, Plaintiff sent a letter to Defendant Ricker stating his intent to retire. Then, by letter dated December 4, 1998, Plaintiff notified the Town of his intent to retire effective immediately. This letter contained no conditions or qualifications for Plaintiff's leaving his position.

[4] The record contains a letter from Bruce A. Rogers, Esquire, on Plaintiff's behalf to Defendants Ricker and Baird dated November 30, 1998. This letter sets forth the alleged agreed upon terms and conditions of Plaintiff's retirement. It states that unless the binding mutual agreements are objected to in writing before the submission of Plaintiff's retirement letter the Town shall be bound. However, Bruce A. Rogers, Esquire, is barred from testifying. Under D.R.E. 801 the letter is hearsay as it is a statement being offered to prove the truth of the matter asserted made by a declarant incapable of testifying at trial or a hearing. Furthermore, neither D.R.E. 803 or 804 provides an exception to the hearsay rule that would provide for the admissibility of the letter. Thus, the only evidence of the agreement is the December 2, 1998, letter and Defendants' witnesses. Therefore, there is no factual dispute as to the terms and conditions of separation.

[5] The letter informs Plaintiff that the Town cannot guarantee action will not be taken as it has no jurisdiction over the activities of the Department of Justice but that the Department of Justice has indicated it does not plan to pursue legal action on the initial allegations.

During his deposition, Plaintiff testified that he had not seen the December 2, 1998, letter from Defendant Baird before he submitted his December 3, 1998, letter. He also testified he could not speak for his attorney on whether his attorney saw the December 2d letter before he sent the December 4, 1998, letter enclosing Plaintiff's December 3d letter.[6]

Six weeks later, by letter dated January 18, 1999, Plaintiff's attorney notified Defendants that Plaintiff was withdrawing his retirement application and was prepared to return to active duty due to Defendants' material breach of the agreement under which he retired.

ISSUES

Defendants have moved for summary judgment, and it is the Court's role to determine whether Plaintiff carried his burden and established the existence of material issues of fact on the following issues:

1. Whether Defendants fraudulently prevented Plaintiff from pursuing a position as Chief of Police?
2. Whether Defendants fraudulently changed the terms for Plaintiff's withdrawal from consideration for this position?
3. Whether Defendants fraudulently changed the terms of Plaintiff's retirement agreement?
4. Did Defendants violate 11 *Del. C.* § 9200, *et seq.*, and if so, was Plaintiff deprived of due process of law by such violation?

[6] Plaintiff testified he never saw the letter prior to signing and delivering his resignation letter. My decision is not based on Plaintiff seeing the letter. The letter was addressed to Mr. Rogers. It contained an ultimatum. It is the only evidence of the ultimatum – resign by the 4th. It seems more than conceded that resignation came on the 3d. At oral argument, the Court asked Mr. Rogers to let it see the letter for the "stamp-in" date. He looked and said the file was not in a condition to retrieve it immediately. The Court asked that it be found and forwarded. It was not contained in Plaintiff's subsequent written submission nor even mentioned. The inference remains that even if Plaintiff did not lay his eyes on it, his attorney had it.

5. Was Plaintiff's property interest as a policeman violated?

6. Whether Defendants are immune from suit on Plaintiff's claims for wrongful discharge, malicious interference with contract, defamation, intentional infliction of emotional distress, prima facie tort, and invasion of privacy pursuant to 10 *Del. C.* § 4011 *et seq.,* Delaware's County and Municipal Tort Claims Act.

DISCUSSION

I. Summary Judgment Standard

Summary judgment may be granted only when no material issues of fact exist, and the moving party bears the burden of establishing the non-existence of material issues of fact. *Moore v. Sizemore,* Del. Supr., 405 A.2d 679, 680 (1979). Once the moving party meets its burden, then the burden shifts to the non-moving party to establish the existence of material issues of fact. *Id.* at 681. Where the moving party produces an affidavit or other evidence sufficient under Super. Ct. Civ. R. 56 in support of its motion and the burden shifts, then the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial. Super. Ct. Civ. R. 56 (e); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 – 23 (1986). If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of his or her case, then summary judgment must be granted. *Burkhart v. Davies,* Del. Supr., 602 A.2d 56, 59 (1991), *cert. den.*, 112 S. Ct. 1946 (1992); *Celotex Corp. v. Catrett, supra.* If, however, material issues of fact exist or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is inappropriate. *Ebersole v. Lowengrub,* Del. Supr., 180 A.2d 467, 470 (1962).

II. Fraud Claims

The Supreme Court of Delaware has held that in an action for deceit or fraudulent misrepresentation an intent to defraud must be established. *Harman v. Masoneilan Int'l, Inc.*, Del. Supr., 442 A.2d 487, 499 (1982). The Court defined actionable fraud as a false representation of a material fact knowingly made with the intent to be believed by one ignorant of its falsity who relies thereon and is deceived. *Id.* In *Stephenson v. Capano Development, Inc.*, Del. Supr., 462 A.2d 1069, 1074 (1983), the Supreme Court laid out the common law elements of fraud as:

1) a false representation, usually one of fact made by the defendant;
2) the defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth;
3) an intent to induce the plaintiff to act or to refrain from acting;
4) the plaintiff's action or inaction taken in justifiable reliance upon the representation; and,
5) damage to the plaintiff as a result of such reliance.

Fraud Regarding Police Chief Position

There is no material issue of fact that the search committee set aside six applications and that Plaintiff's application was not included among those six. When Defendant Baird informed Plaintiff that he had not made the cut he was not making a false representation. Plaintiff presents the Court with deposition testimony supporting his proposition that the search committee did not completely eliminate Plaintiff from consideration for the Chief of Police position (see Martin Johnson deposition referenced *infra* p. 3 Fn. 2). This may be true but it does not mean Defendant Baird's communication was false or misleading.

Plaintiff cannot establish that Defendant Baird fraudulently induced him to withdraw his application. He cannot prove a false representation. He cannot establish by inference or otherwise that Defendant Baird knew it was false because in fact Plaintiff had not made the cut of qualified candidates.

At oral argument, the Court asked Plaintiff what were his damages as to this claim. He submitted authority as to damages for his defamation claim but did not address this Court's inquiry. Plaintiff has not shown what his damages are as to this claim.

Summary judgment is granted as to the fraudulent misrepresentation claim with regard to the chief of police position.

Fraud Regarding Change in Terms and Conditions for Withdrawal

Assuming Plaintiff had some right to demand assurances for withdrawing his application or that there was some agreed upon consideration to support this claim, the Court finds Plaintiff got what he wanted and expected. The only demand not met was Plaintiff's transfer back to the detective division.

The Court finds that Defendants met all the conditions for the withdrawal of Plaintiff's application from consideration with the exception of transfer back to the detective division. Plaintiff has conceded that he was aware that the new police chief would be responsible for making the decision on transfer back to the detective division.

Summary judgment is granted on this claim.

Fraud Regarding Retirement

Plaintiff also claims that Defendants fraudulently changed the terms and conditions upon which Plaintiff agreed to depart from the police department. Plaintiff argues that he relied upon misleading and illegal representations of Defendants in his decision to retire earlier than anticipated from the police department. It is Plaintiff's position that the terms and conditions of his separation from the Town were discussed in several meetings between his attorney and Defendants.

At the October 21, 1998, meeting attended by Plaintiff, it was agreed that the Town would suspend its internal investigation and options would be explored as to his departure. The only admissible evidence as to what happened thereafter comes from the Defendants. Plaintiff has no evidence to dispute Defendants' position.

The record contains two letters of correspondence, each containing different terms and conditions for separation. However, one of these letters is from Bruce Rogers, Esquire, who is incapable of testifying at trial. The letter, an out of court statement, is inadmissible without the availability of the declarant, Bruce Rogers, Esquire, to testify. Therefore, Defendants' December 2, 1998, letter on the Defendant's testimony as to the meeting with Plaintiff's representative, Mr. Rogers, is the only evidence of the agreement. The Defendants have complied with this agreement; thus, Plaintiff has not established any issue of fact regarding this claim.

Summary judgment is granted as to this claim.

VI. Breach of Contract

Plaintiff asserted a breach of contract claim in his Complaint. In subsequent briefing, this claim was not developed independently of the Fraud claims.

To successfully plead a breach of contract claim, the aggrieved party must allege the making of a contract, the obligation thereby assumed, and the breach. *Goodrich v. E.F. Hutton Group, Inc.*, Del. Ch., 542 A.2d 1200, 1204 (1988). Moreover, pleading that a breach occurred without alleging the actual existence of a contract is insufficient. *Id.* A contract is a mutually agreed upon decision to do or not to do a particular thing upon sufficient consideration. *Rash v. Equitable Trust Co.*, Del. Super., 159 A. 839 (1931). Therefore, to establish the existence of a contract a party must prove both mutual assent to the terms of the agreement by all parties and consideration. *Faw, Casson, & Co. v. Cranston*, Del. Ch., 375 A.2d 463, 466 (1977).

Breach of the Terms and Conditions for Withdrawal of Plaintiff's Application

Plaintiff cannot establish that a material issue of fact exists as to whether Defendants breached any agreement for withdrawal of his application. Deposition testimony establishes that for the rest of Plaintiff's term with the police department, Plaintiff stayed on day shift, was provided a take home car, continued to operate his business unimpeded by the Town, and his

professional dues were paid. Furthermore, Plaintiff conceded he knew at the time he withdrew his application that transfer to the detective division was to be the decision of the new Chief.

Summary Judgment is granted on this breach of contract claim.

Breach of the Terms for Plaintiff's Separation from the Town

Plaintiff also alleges Defendants breached the terms and conditions for Plaintiff's departure from the Town. Again, Plaintiff has no evidence to dispute Defendants' evidence as to the deal reached in the meetings with Mr. Rogers following the October 21, 1998, meeting.

Summary judgment is granted on this breach of contract claim.

VII. Constitutional Violations

Plaintiff argues that Defendants violated his rights as a policeman to due process, a hearing pursuant to the Law Enforcement Officer Bill of Rights (LEOBOR) 11 *Del. C.,* Ch. 9200, and his property interest as a policeman.

While alternative pleadings are permissible, it seems Plaintiff complains that he is entitled to money damages because he never had the opportunity to have a hearing, which is contemplated by statute. This position flies in the face of the fact that Plaintiff negotiated an end to the investigation and left the department. If, after he resigned, Defendants then proceeded with the investigation, which may have led to a disciplinary hearing, Plaintiff would have surely yelled foul.

Plaintiff got what he negotiated, an end to the investigation, and nothing else has come of it. Perhaps Plaintiff, because of his other arguments, believes this course of action is appropriate because he did not get what he personally thought he would receive, for example, sick pay compensation. But, the Court has already concluded that Plaintiff received what was negotiated between his attorney and the Town as reflected by Defendants' witnesses and exhibits.

Nor can the Plaintiff prove that his liberty interest has been violated because the Defendants "created and disseminated a false or defamatory impression in connection with his termination." *See Homar v. Gilbert,* 3d. Cir., 89 F.3d 1009 (1996) (holding that to prevail on a deprivation of liberty claim the plaintiff must demonstrate that the government "created and disseminated a false and defamatory impression in connection with his termination"). Plaintiff's only proof of this is hearsay on top of hearsay. Plaintiff has no admissible evidence to press this claim and from remarks at oral argument, it is apparent a decision was made not to pursue this by means of discovery and subpoena power.

Summary judgment is granted on these claims.

VIII. Tort Claim Act

Plaintiff has asserted six tort claims against all of the Defendants in both their official and individual capacities. These claims are: malicious or intentional interference with contract, intentional infliction of emotional distress, invasion of privacy, prima facie tort, slander and defamation, and wrongful discharge. Defendants maintain that Delaware's County and Municipal Tort Claims Act, as contained in 10 *Del. C.* § 4010, *et seq.,* provides immunity from all of these claims.

In 10 *Del. C.* § 4011, it is provided as follows:

> (a) Except 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. That a governmental entity has the power to sue or be sued, whether appearing in its charter or statutory enablement, shall not create or be interpreted as a waiver of the immunity granted in this subchapter.

(b) Notwithstanding § 4012 of this title, a governmental entity shall not be liable for any damage claim which results from:

(1) The undertaking or failure to undertake any legislative act, including, but not limited to, the adoption or failure to adopt any statute, charter, ordinance, order, regulation, resolution or resolve.

(2) The undertaking or failure to undertake any judicial or quasi-judicial act, including, but not limited to, granting, granting with conditions, refusal to grant or revocation of any license, permit, order or other administrative approval or denial.

(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.

(4) The decision not to provide communications, heat, light, water, electricity or solid or liquid waste collection, disposal or treatment services.

(5) The discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalines, 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, except as provided in subdivision (3) of § 4012 of this title.

(6) Any defect, lack of repair or lack of sufficient railing in any highway, townway, sidewalk, parking area, causeway, bridge, airport runway or taxiway, including appurtenances necessary for the control of such ways

including but not limited to street signs, traffic lights and controls, parking meters and guardrails.

Paragraphs (1) to (6) of this subsection to which immunity applies are cited as examples and shall not be interpreted to limit the general immunity provided by this subsection.

(g) An employee may be personally liable for acts or omissions causing property damage, bodily injury or death in instances in which the governmental entity is immune under this section, but only for those acts which were not within the scope of employment or which were performed with wanton negligence or willful and malicious intent.

In 10 *Del. C.* § 4012, it is provided:

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.

(2) In the construction, operation or maintenance of any public building or the appurtenances thereto, except as to historic sites or buildings, structure, 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 some, 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.

The Town and the Defendants, who, while acting in their official capacities, would be considered the Town's employees[7], are immune from suit unless an exception in 10 *Del.C.* § 4012 exists. *Fiat Motors of North America, Inc. v. Mayor and Council of the City of Wilmington,* Del. Supr., 498 A.2d 1062 (1985); *Schueler v. Martin,* Del. Super., 674 A.2d 882 (1996); *Burns v. United Serv. Auto. Assoc. Properties Fund,, Inc.,* Del. Super., C.A. No. 90C-MR-60, Herlihy, J. (Mar.14, 1991). None of the exceptions in § 4012 exist. Thus, the Town and the Defendants, while acting in their official capacities, are immune from these claims.

Also, since Plaintiff has not alleged in his complaint or asserted in this summary judgment motion that he suffered property damage,[8] bodily injury or death, the Defendants cannot be liable in their individual capacities pursuant to 10 *Del. C.* § 4011 (c). *Gunzl v. Spayd,* Del. Super., C.A. No. 93C-09-089, Babiarz, J. (Mar. 28, 1995); *Hicks v. Mays,* Del. Super.,, C.A. Nos. 90C-DE-39, 91C-01-005, Steele, J. (June 7, 1991).

In light of the foregoing, I hold that these claims, even assuming they are meritorious, are barred due to Defendants' immunity.

[7] "'Employee' means a person acting on behalf of a governmental entity in any official capacity, whether temporarily or permanently, and whether, with or without compensation from local, state or federal funds, including elected or appointed officials... but the term 'employee' shall not mean a person or other legal entity acting in the capacity of an independent contractor under contract to the governmental entity." 10 *Del. C.* § 4010(1).

[8] "[E] conomic harm alone does not constitute 'property damage' as that term is used in the Act. *Dale v. Town of Elsmere,* Del. Supr., 702 A.2d 1219, 1223 (1997).

IV. Outstanding motion to reargue

This Court previously entered an order dated April 27, 2001, regarding discovery. Plaintiff has moved for reargument of that decision. In light of the foregoing conclusions, which result in the granting of summary judgment to Defendants, the discovery issue, as well as the motion to reargue, are moot.

CONCLUSION

Defendants' Motion for Summary Judgment is granted as to all of Plaintiff's claims.

IT IS SO ORDERED.

cc: Prothonotary Office