UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FARNOLIA GARRETT, et al.,
Plaintiffs,

vs.

WEST CHESTER POLICE DEPT., et al.,
Defendants.

Case No. 1:13-cv-499
Beckwith, J.
Litkovitz, M.J.

REPORT AND RECOMMENDATION

I. Introduction

Plaintiffs Farnolia Garrett (F. Garrett) and Martel Garrett (M. Garrett), proceeding pro se, bring this action claiming violations of their civil rights. They originally named as defendants the West Chester Police Department and several of its officers (collectively, the "West Chester defendants"); the Hamilton County Sheriff's Department (RECI) and John Ruebusch, individually (collectively, the "Hamilton County defendants"); "Agent 1-John Hand (previous 7441 Apt. 10)"; John and Jane Doe defendants; and "Richard Barrett (Previous 7441 Apt. 10)." The West Chester defendants have been dismissed from the lawsuit. (*See* Doc. 62). The matter is before the Court on the Hamilton County defendants' motion for summary judgment (Doc. 64) and plaintiffs' opposing memorandum (Doc. 66). The matter is also before the Court on plaintiffs' response to the Court's Order to Show Cause why defendant John Hand should not be dismissed from the lawsuit for lack of service (Doc. 73) and the Hamilton County defendants' Suggestion of Improper Service filed in reply to the Show Cause Order. (Doc. 76). Also pending before the Court are several miscellaneous motions filed by the parties, including motions for sanctions filed by both the West Chester defendants and the Hamilton County defendants, and two motions to amend filed by plaintiffs. For the reasons that follow, the undersigned recommends that summary judgment

be granted in favor of the Hamilton County defendants on all claims against them; the complaint against defendant Hand be dismissed without prejudice for lack of service; the complaint against defendant "Richard Barrett (Previous 7441 Apt. 10)" be dismissed *sua sponte* for failure to state a claim for relief; plaintiffs' motions to amend be denied; the West Chester defendants and the Hamilton County defendants' motions for sanctions under Rule 11 be granted; and this matter be terminated on the Court's docket.

II. Procedural history

The procedural history of this case is set forth in the Court's Order and Report and Recommendation issued on December 16, 2013 (Doc. 46) and the Court's March 10, 2014 Order (Doc. 73) and will not be repeated here in full. Those matters that are pertinent to resolution of the present motions will be incorporated herein.

III. This matter should be dismissed as to defendant Hand.

On March 10, 2014, the undersigned issued an Order noting that more than 120 days had elapsed since the August 2, 2013 filing date of the complaint, and plaintiffs had failed to effect proper service of the summons and complaint on defendant "Agent 1-John Hand." (Doc. 73). The Court found in its Order that although plaintiffs had served defendant Hand via certified mail at the United States Attorney's Office (Doc. 11), service was not effective because Hand is not a federal employee, officer or agent and, in any event, plaintiffs had not completed service on Hand in addition to serving the United States. (Doc. 73). Plaintiffs were ordered to either serve a summons and copy of the complaint on defendant Hand within 20 days of the filing date of the Order, or show cause why service could not be effected within that time period. (*Id.*). Plaintiffs were informed that failure to comply with the terms of the Order would result in a Report and

Recommendation to the District Judge that plaintiffs' claims against defendant Hand be dismissed for lack of service. (*Id.*).

In response to the Order to show cause, plaintiffs have submitted a computer printout that lists a tracking number and indicates that a package with that tracking number was delivered by UPS via certified mail to an unidentified location on March 13, 2014. (Doc. 75, Exh. A). The Hamilton County defendants state in their Suggestion of Improper Service that the tracking number corresponds with a package addressed to "John Hand C/O Joseph Deters (Prosecutors Office) City of Cincinnati Police Officer," which contained a copy of the complaint and was delivered to the Hamilton County Clerk's Office via certified mail on March 13, 2014. (Doc. 76, Exh. A). Defendants note that plaintiff has not alleged that defendant Hand is an employee of the Hamilton County Prosecutor's Office, and based upon an inquiry conducted by counsel, it appears Hand is not an employee of the Prosecutor's Office. (Doc. 76). Counsel therefore suggests to plaintiffs that they have failed to effect proper service.

As stated by the Court in the Order to show cause, plaintiffs alleged in the complaint that Hand worked as a maintenance technician at Tall Timber Apartments from June 2012 to January 2013. (Doc. 73). Plaintiffs make no allegations in their response to the Order to show cause that suggest Hand was an employee or agent of the Hamilton County Prosecutor's Office at any time. Therefore, service of the complaint on the Prosecutor's Office is not effective as to Hand. Plaintiffs have made no attempt to show why service could not be properly effected on Hand within the extended period of time allotted by the Court. The complaint should therefore be dismissed without prejudice as to defendant Hand. *See* Fed. R. Civ. P. 4(m).

IV. The Hamilton County defendants' motion for summary judgment (Doc. 64)

A. Summary judgment standard

A motion for summary judgment should be granted if the evidence submitted to the court demonstrates that there is no genuine issue as to any material fact and that the movant is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). "[A] party seeking summary judgment . . . bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp.*, 477 U.S. at 323. *See also Guarino v. Brookfield Township Trustees*, 980 F.2d 399, 405 (6th Cir. 1982). The movant bears the burden of demonstrating that no material facts are in dispute. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The movant may carry its burden of showing the absence of a genuine issue of material fact as to an essential element of the non-movant's case by "pointing out to the court" that the non-moving party lacks evidence to support an essential element of its case. *See Barnhart v. Pickrel, Shaeffer & Ebeling Co. L.P.A.*, 12 F.3d 1382, 1389 (6th Cir. 1993).

The party opposing a properly supported motion for summary judgment "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248 (quoting *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253 (1968)). In response to a properly supported summary judgment motion, the non-moving party "is required to present some significant probative evidence which makes it necessary to resolve the parties' differing versions of the dispute at trial."

Sixty Ivy Street Corp. v. Alexander, 822 F.2d 1432, 1435 (6th Cir. 1987) (quoting *First Nat'l Bank*, 391 U.S. at 288-89).

Because plaintiffs are pro se litigants, their filings are liberally construed. *Spotts v. United States*, 429 F.3d 248, 250 (6th Cir. 2005); *Boswell v. Mayer*, 169 F.3d 384, 387 (6th Cir. 1999) (pro se plaintiffs enjoy the benefit of a liberal construction of their pleadings and filings); *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (stating that the Court holds pleadings of pro se litigants to less stringent standards than formal pleadings drafted by lawyers).

B. Plaintiffs' claims against the Hamilton County defendants

Plaintiffs claim in their complaint that they are the victims of police misconduct, and they are suing defendants in both their personal and official capacities for violations of their civil rights under the Fourth and Fourteenth Amendments to the United States Constitution. (Doc. 3 at 1-2). Plaintiffs allege in support of their claims that they asked the West Chester defendants to investigate the removal and return of certain personal belongings and items from plaintiffs' apartment. (*Id.* at 3). They further allege that defendant Andrew Schweier of the West Chester Police Department subcontracted with defendant Ruebusch to perform forensic testing on plaintiffs F. Garrett and M. Garrett's laptop and F. Garrett's cell phone. (*Id.* at 5). Plaintiffs allege that defendant Schweier informed plaintiff F. Garrett that he delivered the items to the Hamilton County Regional Electronics Computer Investigations (RECI) Section on April 13, 2012, but defendant Ruebusch stated that he received the property on a different date. (*Id.*). Plaintiffs allege that defendant Ruebusch tampered with evidence and lied to cover up "inappropriate fake pictures of minor black children" that defendant Schweier had created and sent to plaintiff F. Garrett's cell phone, together with an inappropriate video of plaintiff F. Garrett

"getting undressed inside the privacy of her home" that defendant Schweier had taken under surveillance. (*Id.*). Plaintiffs allege that defendant Ruebusch helped defendant Schweier confiscate the inappropriate pictures and videos that defendant Schweier had created in an effort to harm plaintiffs. (*Id.*).

The Hamilton County defendants move for summary judgment pursuant to Fed. R. Civ. P. 56 on the claims brought against them. They argue that (1) plaintiff F. Garrett consented to the search of her property and therefore no Fourth Amendment violation occurred, and (2) the nature of plaintiffs' claims are criminal and those claims therefore cannot be brought in a civil proceeding.

C. The parties' affidavits

In support of their motion for summary judgment, the Hamilton County defendants have submitted the affidavit of defendant Ruebusch. (Doc. 64-1). Defendant Ruebusch makes the following statements in his affidavit: Defendant Ruebusch was an Electronics Crimes Analyst with the Hamilton County RECI section. (*Id.*, ¶ 1). Plaintiff F. Garrett signed a "West Chester Police Department Permission to Search" form dated April 10, 2012, consenting to a search of her property without a warrant. (*Id.*, ¶ 3; Exh. A). Plaintiff F. Garrett never revoked her consent to search. (*Id.*, ¶ 4). On April 11, 2012, the West Chester Police Department requested that RECI conduct a forensic analysis on plaintiff F. Garrett's laptop computer and cell phone. (*Id.*, ¶ 2). Defendant Ruebusch began a forensic examination of the laptop and cell phone on July 19, 2012. (*Id.*, ¶ 5; Exh. B). During the forensic examination, malicious software was discovered on the laptop, most of which was traceable to software downloaded via a peer-to-peer application. (*Id.*, ¶ 6). As shown by the Forensic Summary, these applications did not originate with the West

Chester Police Department or Hamilton County. (*Id.*, ¶ 6, Exh. C). No data of evidentiary value was located on the cell phone during the analysis. (*Id.*, ¶ 7, Exh. C). Defendant Ruebusch did not damage, add or remove any files or information from the laptop or cell phone. (*Id.*, ¶ 8). Defendant Ruebusch returned the cell phone to the West Chester Police Department on August 23, 2012. (*Id.*, ¶ 5; Exh. B).

Plaintiff F. Garrett has submitted an affidavit in response to the Hamilton County defendants' motion for summary judgment. (Doc. 66). Only certain statements in the affidavit pertain to the actions of defendant Ruebusch. Plaintiff F. Garrett states that she gave the laptop and cell phone in question to the West Chester Police Department on April 9, 2012. (F. Garrett Aff., ¶ 3). She alleges that although defendant Ruebusch purportedly states in his affidavit that "he received Plaintiff's Property from [the] West Chester Police Dept. on April 11, 2012," his statement conflicts with the RECI intake receipt showing Ruebusch did not receive the property until April 13, 2012. (Doc. 66, ¶ 2; Exh. B). Plaintiff F. Garrett further asserts that the laptop was owned by plaintiff M. Garrett, who did not give either the West Chester Police Department or defendant Ruebush consent to search the laptop. (*Id.*, ¶ 5). Plaintiff F. Garrett states that the forensic examination of the laptop showed malicious software, such as viruses and spyware, that was transmitted by the defendants, police agencies, and an individual named Brenda Walker, all of whom plotted with each other. (*Id.*, ¶ 7). Plaintiff F. Garrett has attached to her affidavit a copy of a letter she received from the United States Department of Education dated July 5, 2012, advising her that the Department had been informed by the U.S. Department of Homeland Security that plaintiff used a computer infected with malicious software to access her Federal Student Aid Account. (Doc. 66, Exh. J).

D. The Fourth Amendment

Plaintiffs' allegations against the Hamilton County defendants, liberally construed, assert a violation of plaintiffs' Fourth Amendment right to be free from unreasonable searches. The Fourth Amendment prohibits unreasonable searches and seizures. *Fernandez v. California*, __ U.S. __, 134 S. Ct. 1126, 1131-1132 (2014). A search conducted pursuant to a valid consent is permissible under the Fourth Amendment. *Id.* *See also United States v. Morgan*, 435 F.3d 660, 663 (6th Cir. 2006) (citing *Schneckloth v. Bustamonte,* 412 U.S. 218, 228 (1973)). Valid consent may be given by a party who "possessed common authority over or other sufficient relationship to the . . . effects sought to be inspected." *Id.* (citing *United States v. Matlock,* 415 U.S. 164, 171 (1974)). "[E]ven where third-party consent comes from an individual without actual authority over the property searched, there is no Fourth Amendment violation if the police conducted the search in good faith reliance on the third-party's *apparent authority* to authorize the search through her consent." *Id.* (emphasis in the original) (citing *United States v. Hunyady,* 409 F.3d 297, 303 (6th Cir. 2005) (citing *United States v. Gillis,* 358 F.3d 386, 390 (6th Cir. 2004)). The standard for judging apparent authority is an objective one. *Id.* (quoting *Gillis,* 358 F.3d at 390-91). "A search consented to by a third party without actual authority over the premises [or effects] is nonetheless valid if the officers reasonably could conclude from the facts available that the third party had authority to consent to the search." *Id.* (quoting *Gillis,* 358 F.3d at 390-91).

E. Summary judgment should be granted in favor of the Hamilton County defendants.

Plaintiffs have failed to come forward with evidence that shows there is a genuine issue of material fact on their claims against the Hamilton County defendants. It is undisputed that plaintiff F. Garrett gave the laptop and cell phone at issue to the West Chester Police Department

on April 9, 2012, and that the West Chester Police Department in turn gave the items to defendant Ruebusch to perform a forensic examination.[1] Plaintiff F. Garrett does not dispute that she consented to a search of the laptop and cellphone for this purpose. Plaintiffs have not produced any evidence that creates a genuine issue of material fact as to the validity of plaintiff F. Garrett's consent. Plaintiff F. Garrett states in her affidavit that the laptop was owned by plaintiff M. Garrett; however, she does not allege that M. Garrett was the sole owner of the laptop, and plaintiffs indicate in the complaint that they jointly owned the laptop. (*See* Doc. 3 at 5- "Defendant John Ruebusch (ECA) was subcontracted by Defendant, Andrew Schweier, to do forensics on Plaintiff's Farnolia and Martel Garrett's, laptop, and Plaintiff, Farnolia Garrett's cell phone."). Thus, according to the allegations of the complaint, plaintiffs had common authority over the laptop, and either one of them could have therefore validly consented to a search of the laptop. Assuming, *arguendo*, that plaintiff M. Garrett was the sole owner of the laptop, plaintiff F. Garrett nonetheless had apparent authority to consent to Ruebusch's search of the laptop because it is undisputed she brought the laptop to the West Chester Police Department and she signed the consent to search form. (Doc. 64, Exh. A). A reasonable officer would conclude from these facts that plaintiff F. Garrett had authority to consent to a search of the laptop. *See U.S. v. Morgan*, 435 F.3d at 663.

Accordingly, plaintiffs have not presented evidence which raises a genuine issue of material fact on their Fourth Amendment claims against defendant Ruebusch and the Hamilton

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[1] Plaintiff F. Garrett alleges that defendant Ruebusch has made conflicting statements about the date he received the property from the West Chester police and has asserted in his affidavit that he received the property on April 11, 2012. (Doc. 66, ¶ 2, citing Exh. B). In fact, Ruebusch states in his affidavit that the West Chester Police Department requested that RECI perform a forensic analysis on April 11, 2012. (Doc. 64-1, ¶ 2). He does not state when he actually received the property. (Doc. 64-1). In any event, plaintiff has not shown that the alleged discrepancy is material to plaintiffs' Fourth Amendment claim against defendant Ruebusch.

County Sheriff's Department. The undisputed facts show that defendant Ruebusch performed a valid, consensual search of the laptop and cellphone which plaintiff F. Garrett brought to the West Chester Police Department. For these reasons, summary judgment should be granted in favor of defendants Ruebusch and the Hamilton County Sheriff's Department on plaintiffs' claims against them.

V. The complaint against Richard Barrett should be dismissed *sua sponte*.

Plaintiffs name "Richard Barrett (Previous 7441 Apt. 10)" as a defendant in this lawsuit. However, they make no allegations against this individual in the complaint. In fact, plaintiffs do not even mention Richard Barrett in the body of the complaint. The complaint does not give this defendant fair notice of the claim against him and the grounds upon which it rests, *see Erickson*, 551 U.S. at 93, and the complaint fails to state a plausible claim for relief against this defendant. *See Ashcroft*, 556 U.S. at 663. Congress has authorized the *sua sponte* dismissal of complaints which fail to state a claim upon which relief may be granted. 28 U.S.C. § 1915(e)(2)(B)(ii). *See also Hill v. Lappin*, 630 F.3d 468, 470-71 (6th Cir. 2010) ("dismissal standard articulated in *Iqbal* and *Twombly* governs dismissals for failure to state a claim" under § 1915(e)(2)(B)(ii)). Accordingly, the Court should *sua sponte* dismiss the complaint against "Richard Barrett (Previous 7441 Apt. 10)" for failure to state a claim for relief.

VI. Plaintiffs' motions for leave to amend the complaint (Docs. 58, 63) should be denied.

Plaintiffs have filed two motions for leave to amend the complaint. Plaintiffs filed a motion on December 30, 2013, seeking to add "Miller Valentine Group Tall Timber Apts. Owner Where Plaintiffs, lived" as a defendant to this lawsuit. (Doc. 58). Plaintiffs filed a motion on January 14, 2014, seeking to add "Denorver Garrett Et. Al," Karen Garrett-Wife, Malike

Garrett-Son, Aminah Garrett-Daughter, and Elijah Garrett-Son, as plaintiffs to the lawsuit. (Doc. 63).

The Federal Rules provide that the Court "should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a). Futility of amendment is a factor relevant to the Court's decision whether to grant leave to amend. *Coe v. Bell,* 161 F.3d 320, 341-42 (6th Cir. 1998) (citing *Brooks v. Celeste*, 39 F.3d 125, 130 (6th Cir. 1994)).

Plaintiffs' motion for leave to amend the complaint to add The Miller Valentine Group as a defendant to this lawsuit should be denied. To state a claim for relief against a defendant, plaintiffs' complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). A complaint does not suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.* at 678. The complaint must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citations omitted).

The motion to amend does not state a plausible claim for relief against The Miller Valentine Group. Plaintiffs allege only that the Miller Valentine Group owned the Tall Timber Apartments where plaintiffs lived "when all the Continuous Illegal Acts of Deprivation, and Wiretap took place." (Doc. 58 at 1). Plaintiffs do not allege any facts which, if accepted as true, show that The Miller Valentine Group engaged in any wrongdoing or violated plaintiffs' civil rights in any manner. The amendment would be futile, and plaintiffs' motion to amend the

complaint to add The Miller Valentine Group as a defendant to this lawsuit should be denied for this reason.

Plaintiffs' motion to add "Denorver Garrett Et. Al" as plaintiffs to this lawsuit (Doc. 63) should likewise be denied. Plaintiffs allege in support of the motion that the individuals they seek to add as plaintiffs are "also victims" of police misconduct. (*Id.* at 2). Plaintiffs allege that unspecified "Defendants plotted on the Plaintiff, Denorver Garrett at his place of Employment, LBS School Bus Tranportation [sic]," defamed Denorver Garrett, and "possibly sabotaged his career opportunity" at LBS. (*Id.* at 2). Plaintiffs allege that "[t]he two Defendants, Harry and Chuck [last names unknown] were employed as Bus Drivers in an effort to plot and do harm" to Denorver Garrett's reputation and that they illegally accessed and entered Denorver Garrett's truck while he was on his bus route. (*Id.*). Plaintiffs have attached exhibits which they purport to be (1) copies of pages from Karen Garrett's email account, and (2) "conversations of the Defendants aka AGENTS." (*Id.*, citing Exhs. 1-28). These "conversations" are actually several pages of incomprehensible computer generated text and characters. Plaintiffs make no allegations concerning the other parties they seek to add as plaintiffs to the lawsuit.

The nebulous and rambling allegations in the motion to amend do not state a plausible claim for relief against any defendant named in this lawsuit. The motion to amend includes no factual allegations connecting the alleged actions of the bus drivers "Harry and Chuck" with any of the named defendants. The exhibits attached to the amended complaint have no apparent connection to the allegations made in the original complaint or in the motion to amend. Plaintiffs' motion to amend the complaint should therefore be denied because the amendment would be futile.

VII. The parties' miscellaneous motions.

The West Chester defendants filed a joint motion to quash subpoenas/stay discovery in December 2013. (Doc. 44). In light of the dismissal of the West Chester defendants from this lawsuit in January 2014, their motion to quash/stay discovery will be denied as moot.

Plaintiffs filed a motion for discovery in December 2013 related to an alleged plot by the West Chester defendants and the issuance of subpoenas for two individuals who allegedly helped the West Chester defendants create "the Fake nude photos of the black Minor children" that the West Chester police allegedly presented as fraudulent evidence in an effort to harm plaintiffs. (Doc. 49). Because this motion seeks discovery from defendants who have been dismissed from the lawsuit, the motion will be denied as moot.

Plaintiff F. Garrett has filed a motion to "review and examine the Property Room to identify any unreturned items that the Defendants, illegally confiscated and did not return." (Doc. 56). The Hamilton County defendants oppose the motion. (Doc. 61). In light of the previous dismissal of the West Chester defendants from this lawsuit (Doc. 62) and the undersigned's recommendation that the Hamilton County defendants be dismissed from the case, plaintiffs' motion should be denied as moot.

VIII. Defendants' motions for Rule 11 sanctions

A. Rule 11

Pursuant to Fed. R. Civ. R. 11(a), a pro se litigant must sign every pleading, written motion, and other paper submitted to the Court for filing. Such signature constitutes a certificate by the pro se litigant that "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," such pleading, motion, or paper "is not being

presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation" and "the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." Fed. R. Civ. P. 11(b)(1), (2). The Court may impose appropriate sanctions against a pro se litigant for his or her violation of Rule 11. *See Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 548 (1991) (Rule 11 "speaks of attorneys and parties in a single breath and applies to them a single standard."); *Spurlock v. Demby*, 48 F.3d 1219 (6th Cir. 1995) (unpublished), 1995 WL 89003, at *2 (Rule 11 does not provide a different standard for attorneys and non-attorneys). *See also Doyle v. United States*, 817 F.2d 1235 (5th Cir. 1987).

Sanctions under Rule 11 are intended to deter abuse of the legal process. *Merritt v. Int'l Ass'n of Machinists & Aerospace Workers*, 613 F.3d 609, 626 (6th Cir. 2010) (citing *Herron v. Jupiter Transp. Co.*, 858 F.2d 332, 335 (6th Cir. 1988)). The remedial purpose of Rule 11 is to require attorneys, as well as pro se litigants, to "stop, look, and listen" before instituting a lawsuit or submitting a filing to the court. *Schmidt v. Nat'l City Corp.*, 3:06-cv-209, 2008 WL 4057753, at *4 (E.D. Tenn. Aug. 26, 2008) (quoting *Golyar v. McCausland,* 738 F. Supp.2d 1090, 1097 (W.D. Mich. 1990)). An appropriate sanction, including a monetary sanction, may be imposed against a pro se litigant who commits a Rule 11 violation:

> A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

Fed. R. Civ. P. 11(c)(4). *See also Schmidt*, 3:06-cv-209, 2008 WL 4057753 ("The purpose of an award of attorneys fees under Rule 11 is to deter similar conduct in the future; it is not intended to compensate the party injured by the Rule 11 violation.").

A decision as to sanctions under Rule 11 is within the district court's discretion. *Rentz v. Dynasty Apparel Indus., Inc.*, 556 F.3d 389, 395 (6th Cir. 2009) (citing *Ridder v. City of Springfield,* 109 F.3d 288, 293, 298 (6th Cir. 1997)). Factors to be considered in determining whether a sanction is warranted include: "[w]hether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; [and] what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case. . . ." Fed. R. Civ. P. 11, Advisory Committee's Note.

B. The Hamilton County defendants' motion for sanctions should be granted.

The Hamilton County defendants filed their motion for Rule 11 sanctions on October 17, 2013, seeking to impose sanctions on plaintiffs for filing an application to the Clerk for entry of default (Doc. 23). (Doc. 34). The Hamilton County defendants allege that the application is filled with inaccuracies and is frivolous, and it is apparent plaintiffs did not file the application in good faith.

The Hamilton County defendants' motion for Rule 11 sanctions should be granted. Plaintiffs' complaint was filed on August 2, 2013 (Doc. 3), and it was served on these defendants on August 9 and 13, 2013, respectively. (Docs. 10, 11). The Hamilton County defendants

timely filed their answer to the complaint on August 30, 2013. (Doc. 19). Plaintiffs filed their application for entry of default on September 11, 2013, based on defendants' alleged failure to plead or otherwise defend against this lawsuit. (Doc. 23). Because the Hamilton County defendants clearly had timely filed an answer to the complaint as of that date (Doc. 19), the application for entry of default had no reasonable basis in fact or law. Moreover, although the Hamilton County defendants served the motion for sanctions on plaintiffs pursuant to Rule 11(c)(2) and advised plaintiffs they could view the docket sheet to confirm that a copy of their answer had been filed and served on plaintiffs (Doc. 34, Exh. A),[2] plaintiffs did not withdraw the application for entry of default. Nor have plaintiffs stated a valid reason in response to the motion for sanctions for why sanctions should not be imposed against them. (Doc. 35). Accordingly, the imposition of Rule 11 sanctions is warranted.

C. The West Chester defendants' motion for Rule 11 sanctions should be granted.

The West Chester defendants move for Rule 11 sanctions and sanctions under the Court's inherent discretion because they allege the complaint plaintiffs filed in this action was frivolous. (Doc. 43). The West Chester defendants contend that plaintiffs were on notice prior to filing this lawsuit that there was no basis in law for their claims, and plaintiffs knew their allegations against defendant Schweier lacked any evidentiary support. The West Chester defendants allege that plaintiffs filed this lawsuit merely to harass them. Plaintiffs allege in response that the motion for sanctions is "bogus and unfounded" because these defendants have engaged in a continuous plot and conspiracy to harm plaintiffs. (Doc. 47). Plaintiffs have attached several exhibits to their response, including numerous pages of garbled computer code.

[2] Defendants waited more than 21 days after serving their motion for sanctions on plaintiffs before filing the motion with the Court as required under Rule 11. *See* Fed. R. Civ. P. 11(c)(2).

The West Chester defendants' motion for Rule 11 sanctions should be granted under the particular circumstances presented here. This lawsuit was not the first time plaintiffs sued the West Chester defendants for violations of their civil rights based on the acts and omissions alleged in the complaint. To the contrary, before instituting this lawsuit, plaintiffs had filed three state court actions against the West Chester defendants based on the same factual allegations described in their federal complaint. (*See* Report and Recommendation, Doc. 46 at 6-7). After consolidating the latter two state court actions, the state court dismissed plaintiffs' lawsuit on the grounds that (1) plaintiffs had failed to show the existence of a genuine issue of material fact, and (2) the doctrine of res judicata precluded plaintiffs from making filings based on the same issues and claims because the allegations in the complaint had previously been dismissed with prejudice. (Doc. 46 at 13, citing Doc. 17, Exh. 2). Plaintiffs were warned by the state court that if their litigious behavior continued, proceedings could be brought against them pursuant to Ohio Rev. Code § 2323.52, the vexatious litigator statute. (*See* Doc. 43, Exh. 6, p. 4). Undeterred, plaintiffs instituted this lawsuit less than two weeks after entry of final judgment in the consolidated state court action on July 24, 2013. (Doc. 17, Exh. 3). In view of the dismissal of the state court actions and the Ohio court's warning that plaintiffs could be declared vexatious litigators if they persisted in filing lawsuits against the West Chester defendants, plaintiffs were on notice that there was no reasonable basis in law or fact for their claims against the West Chester defendants in this lawsuit; rather, the claims were clearly barred by the doctrine of res judicata. Plaintiffs' complaint against the West Chester defendants was dismissed by the Court on this ground by Order dated January 14, 2014. (Doc. 62). Plaintiffs' filing of the instant lawsuit

against the West Chester defendants under these circumstances warrants the imposition of Rule 11 sanctions.

D. Recommended Sanction

The Court concludes that monetary sanctions are not necessary or appropriate to deter plaintiffs' behavior in the future under the circumstances presented. Rather, the undersigned determines that the imposition of nonmonetary sanctions under Rule 11 will be an adequate deterrent for plaintiffs to refrain from further violations of Rule 11. *Kratage v. Charter Township of Commerce*, 926 F. Supp. 102, 105 (E.D. Mich. 1996). Courts have restricted pro se litigants from filing further pro se actions without a certification from the Court that the claims asserted are not frivolous and that the suit is not brought for any improper purpose. *See Ortman v. Thomas*, 99 F.3d 807, 811 (6th Cir. 1992). The Court finds that a similar sanction is appropriate in this case "to deter repetition of the conduct" by plaintiffs, Fed. R. Civ. P. 11(c)(4), and is the "least severe sanction adequate to serve the purpose" of deterrence. *Orlett,* 954 F.2d at 420.

Rule 11's ultimate goal of deterrence will be sufficiently advanced in the present case by imposing the following recommended sanctions: (1) Any complaint plaintiffs seek to file in this Court should be subject to initial judicial review to determine if plaintiffs seek to re-litigate the same disputes underlying this case; and in the event the proposed complaint seeks to re-litigate the same disputes underlying this case, monetary sanctions should be imposed; and (2) Plaintiffs should be strongly admonished that monetary sanctions in the form of attorney fees may be imposed under Rule 11 if they engage in future filings in this lawsuit that are deemed frivolous or presented for an improper purpose under Rule 11.

IT IS THEREFORE RECOMMENDED THAT:

1) The complaint against defendant John Hand be **DISMISSED** without prejudice for lack of proper service.

2) The Hamilton County defendants' motion for summary judgment pursuant to Fed. R. Civ. P. 56 (Doc. 64) be **GRANTED** and judgment be granted in favor of defendants John Ruebusch and the Hamilton County Sheriff's Department (RECI) on all claims against them.

3) The complaint against defendant "Richard Barrett (Previous 7441 Apt. 10)" be **DISMISSED** *sua sponte* pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii).

4) Plaintiffs' motion for leave to amend the complaint to add "Denorver Garrett, Et. Al" as plaintiffs (Doc. 63) be **DENIED.**

5) Plaintiffs' motion for leave to amend the complaint to add "Miller Valentine Group Tall Timber Apts. Owner Where the Plaintiffs, lived" as a defendant (Doc. 58) be **DENIED**.

6) Plaintiff F. Garrett's motion to "review and examine the Property Room to identify any unreturned items that the Defendants, illegally confiscated and did not return" (Doc. 56) be **DENIED** as moot.

7) The Hamilton County defendants and West Chester defendants' motions for sanctions (Docs. 34, 43) be **GRANTED**, and that plaintiffs be sanctioned as follows:

> (1) Any complaint plaintiffs seek to file in this Court should include a copy of any Order adopting this Report and Recommendation; the complaint should be subject to initial judicial review to determine if plaintiffs seek to re-litigate the same disputes underlying this case; and in the event the proposed complaint seeks to re-litigate the same disputes underlying this case, monetary sanctions should be imposed; and (2) Plaintiffs should be strongly admonished that monetary sanctions in the form of attorney fees may be imposed under Rule 11 if they engage in future filings in this lawsuit that are deemed frivolous or presented for an improper purpose under Rule 11.

IT IS THEREFORE ORDERED THAT:

1) The West Chester defendants' joint motion to quash subpoena/stay discovery (Doc. 44) is **DENIED** as moot.

2) Plaintiffs' motion for discovery (Doc. 49) is **DENIED** as moot.

Date: 4/21/2014

Karen L. Litkovitz
United States Magistrate Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

FARNOLIA GARRETT, et al.,
Plaintiffs,

Case No. 1:13-cv-499
Beckwith, J.
Litkovitz, M.J.

vs.

WEST CHESTER POLICE DEPT., et al.,
Defendants.

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Pursuant to Fed. R. Civ. P. 72(b), **WITHIN 14 DAYS** after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. This period may be extended further by the Court on timely motion for an extension. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendation is based in whole or in part upon matters occurring on the record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon, or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections **WITHIN 14 DAYS** after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters,* 638 F.2d 947 (6th Cir. 1981).

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