IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ANDREAS PLONKA and CAROLINE PLONKA,

Plaintiffs,

v.

BOROUGH OF SUSQUEHANNA et al.,

Defendants.

CIVIL ACTION NO. 3:17-CV-00262

(JUDGE CAPUTO)

MEMORANDUM

Presently before the Court is an Amended Complaint (Doc. 10) filed by Plaintiffs Andreas and Caroline Plonka, proceeding *in forma pauperis*. Because Plaintiffs are proceeding *in forma pauperis*, the Court must screen the Amended Complaint pursuant to 28 U.S.C. § 1915(e)(2)(B) to assess whether it should be dismissed as frivolous or malicious, for failure to state a claim upon which relief may be granted, or because it seeks monetary relief from a defendant who is immune from such relief. For the reasons set forth below, the Court concludes that the Amended Complaint should be dismissed in its entirety.

I. Background

Plaintiffs Andreas and Caroline Plonka, through counsel, originally filed this lawsuit on February 10, 2017. (Doc. 1.) The Court granted Plaintiffs' application to proceed *in forma pauperis*, dismissed the original Complaint in part without prejudice pursuant to its screening obligation under 28 U.S.C. § 1915(e)(2)(B), and granted Plaintiffs leave to file an amended complaint. (*See* Doc. 7.) On March 29, 2017, Plaintiffs filed an Amended Complaint, naming the Borough of Susquehanna (the "Borough") and Susquehanna Borough Police Chief Robert Sweet ("Chief Sweet") as Defendants. (Doc. 10.) In their Amended Complaint, Plaintiffs allege that a discussion between Plaintiffs and the Susquehanna Borough Council during a January 15, 2015 Council meeting became argumentative. In response, councilmembers requested the Borough Police to escort Plaintiffs out of the Susquehanna Borough Building. Chief Sweet proceeded to grab Mr.

Plonka's arm and twist it behind his back while physically pushing Mr. Plonka toward the exit. Upon reaching the exit door, Chief Sweet pushed Mr. Plonka into the door in an attempt to force him out of the building. As a result of this collision, Mr. Plonka suffered an open wound injury to his leg, which has yet to heal completely and has required treatment from multiple medical providers. Plaintiffs allege that Chief Sweet has used excessive force in other unspecified matters and that the Borough was aware of these prior incidents. Plaintiffs further assert that the Borough failed to take any action to implement proper training procedures in order to eliminate the use of excessive force by the Borough police force.

Plaintiffs assert a claim under 42 U.S.C. § 1983 alleging the use of excessive force in violation of Mr. Plonka's Fourth Amendment right against Chief Sweet in his official capacity and the Borough, a failure-to-train claim against the Borough, state-law claims for assault and battery against Chief Sweet, and a state-law claim for loss of consortium against Chief Sweet on behalf of Mrs. Plonka.

II. Legal Standard

The Court has an ongoing statutory obligation to conduct a preliminary review of complaints filed by plaintiffs proceeding *in forma pauperis*. An application to proceed *in forma pauperis* is governed by 28 U.S.C. § 1915. This section provides,[1] in pertinent part:

> (a)(1) Subject to subsection (b), any court of the Untied States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.
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> (e)(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any

[1] Although subsection (a)(1) refers to "prisoners," courts examining the statute have concluded that the statute also applies to indigent non-prisoners proceeding *in forma pauperis* in federal court. *See Douris v. Middletown Twp.*, 293 Fed. Appx. 130, 132 n.1 (3d Cir. 2008).

> time if the court determines that (A) the allegation of poverty is untrue; or (B) the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief.

To effectuate § 1915, the Third Circuit Court of Appeals has established a two-step process for reviewing *in forma pauperis* applications. *See Deutsch v. United States*, 67 F.3d 1080, 1084 n.5 (3d Cir. 1995); *see also Garland v. U.S. Airways, Inc.*, No. 05-140, 2007 WL 895139, at *2 (W.D. Pa. Mar. 21, 2007) (noting that the screening provisions of 28 U.S.C. § 1915(e)(2) "appl[y] to both prisoner and non-prisoner *in forma pauperis* complaints"). First, leave to proceed *in forma pauperis* is based on a showing that the litigant is unable to pay court costs and filing fees. *See Douris v. Middletown Twp.*, 293 Fed. Appx. 130, 132 (3d Cir. 2008). Second, if *in forma pauperis* status is granted, the Court determines whether the Complaint should be dismissed pursuant to § 1915(e)(2)(B). *Id.*; *Garland*, 2007 WL 895139, at *2.

Because the Court already granted Plaintiffs leave to proceed in *forma pauperis* , the Court now turns to the second step to assess whether the Amended Complaint should be dismissed.

III. Discussion

Upon screening the Amended Complaint, the Court concludes that Plaintiffs' federal-law claims must be dismissed pursuant to § 1915(e)(2)(B)(ii).[2] Consequently, the

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[2] Section 1915(e)(2)(B)(ii) states that the district court "shall dismiss the case at any time if the court determines that . . . the action . . . fails to state a claim on which relief may be granted." This language "is substantially similar to that used in Federal Rule of Civil Procedure 12(b)(6)." *Garland v. U.S. Airways, Inc.*, No. 05-140, 2007 WL 895139, at *3 (W.D. Pa. Mar. 21, 2007); *see Baker v. Reitz*, 1:CV-12-1452, 2012 WL 6055591, at *1 (M.D. Pa. Dec. 6, 2012) ("Section 1915(e)(2)(B)(ii) provides this ground for summary dismissal of a complaint (before service)—failure to state a claim under Rule 12(b)(6) principles."). "In deciding whether to dismiss a complaint under Rule 12(b)(6) (and hence under the IFP statute), all factual allegations, and all reasonable inferences therefrom, must be accepted as true and viewed in the light most favorable to the plaintiff." *Garland*, 2007 WL 895139, at *3 (citing *Colburn v. Upper Darby Twp.*, 838 F.2d

Court will decline to exercise supplemental jurisdiction over Plaintiffs remaining state-law claims. *See* 28 U.S.C. 1367(c)(3). Plaintiffs' Amended Complaint therefore will be dismissed in its entirety.

A. The Amended Complaint Fails to State a Claim Under 42 U.S.C. § 1983

1. Excessive Force Claim Against Defendant Police Chief Sweet in His Official Capacity and the Borough of Susquehanna

The Amended Complaint states that Chief Sweet is being sued in his official capacity. (Am. Compl. ¶ 7.) As the Court explained in its prior Memorandum, an official capacity suit against a municipal officer is simply another way of pleading the same action against the municipality itself. *See Kentucky v. Graham*, 473 U.S. 159, 165 (1985). That is, "an official-capacity suit is, in all respects other than name, to be treated as a suit against the [municipal] entity." *Id.* at 166. Accordingly, Plaintiffs' Fourth Amendment claim against Chief Sweet in his official capacity is treated appropriately as a claim against the Borough of Susquehanna.[3] But in order for a municipality to be liable for damages under 42 U.S.C. § 1983, Plaintiffs must sufficiently plead that they were deprived of a federally-protected right pursuant to a municipal policy or custom. *Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 694 (1978). A municipal policy is a "statement, ordinance, regulation, or decision officially adopted and promulgated by [a

663, 666 (3d Cir. 1988)).

[3] In its prior opinion dismissing Plaintiffs' original Complaint in part, the Court, resolving all doubts in favor of Plaintiffs, assumed they were also suing Chief Sweet in his individual capacity. (Doc. 6, at 6 n.3; *see* Doc. 7, at 3(A).) However, Plaintiffs' Amended Complaint once again states explicitly, and exclusively, that they are suing Chief Sweet in his official capacity. (*See* Am. Compl. ¶ 7.) As such, the Court no longer assumes that Plaintiffs are intending to sue Chief Sweet in his individual capacity. Considering Plaintiffs are represented by counsel, and considering the clarity provided by the Court in its prior Memorandum and Order with respect to this issue, the fact that Plaintiffs' Amended Complaint continues to exclusively state that Chief Sweet is being sued in his "official capacity" forecloses any other interpretation. *See Brandt v. Monte*, 626 F. Supp. 2d 469, 494-95 (D.N.J. 2009) (citing *Edelman v. Jordan*, 415 U.S. 651, 666–67 (1974)).

local governing] body's officers." *Id.* at 690. A municipal custom, on the other hand, "is an act 'that has not been formally approved by an appropriate decision-maker,' but that is 'so widespread as to have the force of law.'" *Natale v. Camden Cty. Corr. Facility*, 318 F.3d 575, 584 (3d Cir. 2003) (quoting *Bd. of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 404 (1997)).

Plaintiffs' Amended Complaint again fails to plausibly allege that the deprivation of Mr. Plonka's Fourth Amendment right was effectuated pursuant to any municipal policy, custom, or the like. The Amended Complaint fails to identify any ordinance, regulation, or official decision adopted by the Borough, and its conclusory references to the existence of a municipal custom seemingly acknowledge the pleading's deficiencies. (*See, e.g.*, Am. Compl. ¶ 30 ("Upon information and belief, Plaintiff alleges that the Defendants adhered to a custom of allowing police officers to use excessive force against citizens."); *id.* ¶ 31 ("Defendant's custom of permitting the use of excessive force by police officers is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."); *see also id.* ¶¶ 21, 26.) These naked assertions and legal recitations fail to satisfy the contemporary pleading requirements for a municipal liability claim. *See, e.g.*, *Niblack v. Murray*, No. 12-6910, 2013 WL 4432081, at *8 (D.N.J. Aug. 14, 2013) (dismissing a municipal liability claim because the plaintiff only alleged "'a formulaic recitation of the elements of a [municipal liability] claim'" without asserting any facts supporting such bald allegations (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 681 (2009)); *cf. Boyden v. Twp. of Upper Darby*, 5 F. Supp. 3d 731, 743-44 (E.D. Pa. 2014) (declining to dismiss a municipal liability claim when the complaint alleged sufficient facts to support the allegation that the officers acted pursuant to a custom of allowing excessive force).

Consequently, Plaintiffs have not stated a plausible excessive force claim against Chief Sweet in his official capacity, which is simply another way of advancing this claim against the Borough directly. Accordingly, this claim will be dismissed.

2. Failure-to-Train Claim Against Defendant Borough of Susquehanna

Plaintiffs again attempt to allege a municipal liability claim against the Borough for the failure to train its police officers. (Am. Compl. ¶¶ 21-22, 26-28.) In order to succeed on a failure-to-train claim under § 1983, Plaintiffs must "(1) identify the deficiency in training; (2) prove that the deficiency caused the alleged constitutional violation; and (3) prove that the failure to remedy the deficiency constituted deliberate indifference on the part of the municipality." *Lapella v. City of Atl. City*, No. 10-2454, 2012 WL 2952411, *6 (D.N.J. July 18, 2012) (citations omitted). Plaintiffs must identify a specific deficiency, rather than general ineffectiveness of training, and there "must be an affirmative link between the alleged inadequacies of the training and the constitutional violation at issue." *Niblack*, 2013 WL 4432081, at *7; *see Shultz v. Carlisle Police Dep't*, 706 F. Supp. 2d 613, 624-25 (M.D. Pa. 2010) ("When plaintiff asserts liability on the basis of a failure to train, '[a] plaintiff pressing a § 1983 claim must identify a failure to provide *specific training* that has a causal nexus with their injuries and must demonstrate that the absence of that specific training can reasonably be said to reflect a deliberate indifference to whether constitutional deprivations occurred.'" (quoting *Reitz v. Cty. of Bucks*, 125 F.3d 139, 145 (3d Cir. 1997)) (emphasis added). The Supreme Court has noted that a "municipality's deliberately indifferent failure to train is *not* established by (1) presenting evidence of the shortcomings of an individual; (2) proving that an otherwise sound training program occasionally was negligently administered; or (3) showing, without more, that better training would have enabled an officer to avoid the injury-causing conduct." *Simmons v. City of Phila.*, 947 F.2d 1042, 1060 (3d Cir. 1991) (citing *City of Canton v. Harris*, 489 U.S. 378, 391 (1989)) (emphasis in original).

Plaintiffs' Amended Complaint fails to identify any specific deficiency in any training program that caused the constitutional violation alleged. Instead, Plaintiffs once again advance conclusory allegations and formulaic recitations that fall far short of stating a plausible claim against the Borough for the failure to train its police force. (*See, e.g.*, Am. Compl. ¶ 21 ("Upon information and belief, Plaintiff will be able to show prior

incidents through discovery to establish pattern or practice of excessive force by the police which the Borough of Susquehanna has allowed over the years."); *id.* ¶ 22 ("Upon information and belief, Susquehanna Borough failed to take any action to implement proper training procedure in order to eliminate excessive force being used by Police Chief Robert Sweet and other officers of Susquehanna Borough.")); *see Niblack*, 2013 WL 4432081, at *9 (dismissing failure-to-train claim when plaintiff "does not identify any facts detailing specific deficiencies in any training programs"). Accordingly, Plaintiffs' failure-to-train claim under § 1983 against the Borough will be dismissed.

B. State-Law Claims Against Defendant Police Chief Sweet

The Amended Complaint also asserts claims for both assault and battery against Chief Sweet and a claim for loss of consortium against Chief Sweet on behalf of Plaintiff Mrs. Plonka. (Am. Compl. Counts II-III.) However, because Plaintiffs' federal-law claims have been dismissed, the Court will decline to exercise supplemental jurisdiction over these remaining state-law claims. *See* 28 U.S.C. § 1367(c)(3). Accordingly, they will be dismissed.

C. Leave to Amend

The Third Circuit has instructed that if a complaint is vulnerable to dismissal, the district court must permit a curative amendment, unless an amendment would be inequitable or futile. *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 236 (3d Cir. 2008); *Grayson v. Mayview State Hosp*., 293 F.3d 103, 108 (3d Cir. 2002) (citing *Shane v. Fauver*, 213 F.3d 113, 116 (3d Cir. 2000)). Here, considering that the Amended Complaint suffers from the same pleading defects as the original Complaint, the Court finds that leave to further amend Plaintiffs' failure-to-train claim under § 1983 against the Borough would be futile. Additionally, for the same reason, leave to further amend Plaintiffs' Fourth Amendment excessive force claim under § 1983 against the Borough would also be futile.[4] Accordingly, the Court will not grant leave to amend these

[4] To reiterate, this claim against the Borough is identical to the Fourth Amendment excessive force claim under § 1983 against Chief Sweet in his official capacity.

dismissed claims.

However, Plaintiffs will be given leave to file a second amended complaint to properly allege a Fourth Amendment excessive force claim under § 1983 against Chief Sweet in his individual capacity. If Plaintiffs choose to file a second amended complaint properly alleging a Fourth Amendment claim against Chief Sweet in his individual capacity, they may also advance the state-law claims against Chief Sweet that the Court dismissed pursuant to 28 U.S.C. § 1367(c)(3) herein.

IV. Conclusion

For the above stated reasons, Plaintiffs' Amended Complaint (Doc. 10) will be dismissed. The Court will grant Plaintiffs' leave to file a second amended complaint in accordance with this Memorandum and accompanying Order.

An appropriate order follows.

April 5, 2017
Date

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

See Kentucky v. Graham, 473 U.S. 159, 165-66 (1985).