UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

JOHN M. GERA, Plaintiff, v. BOROUGH OF FRACKVILLE, et al., Defendants.	CIVIL ACTION NO. 3:20-CV-00469 (MARIANI, J.) (MEHALCHICK, M.J.)

REPORT AND RECOMMENDATION

Pro se Plaintiff John M. Gera ("Gera") commenced the above-captioned civil rights action on March 20, 2020, asserting various claims against the Borough of Frackville (the "Borough") and four Borough officials: Solicitor Mark Semanchik, Esq., Police Chief Richard Bell, Police Officer Devin Buccieri, and Secretary Brenda Deeter (collectively, "Defendants"). (Doc. 1, at 1-2). In Gera's amended complaint, which stands as the operative complaint in this case, Gera asserts claims for civil rights violations, criminal conspiracy, harassment, slander and defamation, pain and suffering, and intentional infliction of emotional distress ("IIED") against the aforementioned Defendants. (Doc. 34, at 10-32). Before the Court are three motions: (1) Defendants' second motion to dismiss Gera's first amended complaint; (2) Gera's third motion for entry of default for Defendants' failure to answer his complaint; and (3) Gera's second motion for summary judgment. (Doc. 32; Doc. 35; Doc. 39). The motions have been fully briefed and are now ripe for disposition. (Doc. 32; Doc. 35; Doc. 36; Doc. 37; Doc. 38; Doc. 39; Doc. 40; Doc. 41; Doc. 42; Doc. 43; Doc. 44).

For the reasons that follow, it is respectfully recommended that: (1) Defendants' motion to dismiss be **GRANTED**, Gera's amended complaint be dismissed without

prejudice, and he be granted leave to file a second amended complaint; (2) Gera's third motion for entry of default judgment be **DENIED**; and (3) Gera's second motion for summary judgment be **DENIED** without prejudice as premature. (Doc. 32; Doc. 35; Doc. 39).

I. BACKGROUND AND PROCEDURAL HISTORY

Gera initiated this action by filing a complaint on March 20, 2020. (Doc. 1). Summons was issued and provided to Gera, who served Defendants by sending copies of the summons and complaint on March 27, 2020. Gera filed his first proof of service of process on April 10, 2020. (Doc. 4). Defendants filed a motion to dismiss Gera's complaint on May 5, 2020, and Gera filed a motion for entry of default on May 7, 2020. (Doc. 5; Doc. 8). On May 11, 2020, Gera filed a motion for summary judgment as well as a brief in support and statement of facts. (Doc. 10; Doc. 11; Doc. 12). On May 22, 2020, Gera filed a second proof of service reflecting that the Schuylkill Sheriff's Department had served Defendant in person on May 18, 2020. (Doc. 17). On May 29, 2020, Defendants filed a brief in opposition to Gera's motion for summary judgment. (Doc. 18). On February 8, 2021, the undersigned issued a report and recommendation in which it was recommended that the Court (1) grant Defendants' motion to dismiss without prejudice and grant Gera leave to file an amended complaint; (2) deny Gera's motion for summary judgment; and (3) deny Gera's motion for entry of default judgment as moot and premature. (Doc. 21). On April 4, 2022, the District Court adopted the undersigned's report and recommendation. (Doc. 31).

On March 30, 2021, Gera filed a second motion for entry of default and attached affidavit. (Doc. 24; Doc. 25). On April 13, 2021, Defendants filed a brief in opposition to Gera's second motion for entry of default. (Doc. 26). On April 21, 2022, Gera filed a reply brief. (Doc. 27). On April 29, 2021, Gera filed an objection to the undersigned's report and

recommendation. (Doc. 28). On May 12, 2021, Defendants filed a reply brief to Gera's objection, and Gera filed a reply brief on May 26, 2021. (Doc. 29; Doc. 30).

On April 21, 2022, Gera filed second motion for entry of default and attached affidavit. (Doc. 32; Doc. 33). On May 3, 2022, Gera filed an amended complaint which stands as the operative complaint in this case. (Doc. 34). On May 18, 2022, Defendants filed a motion to dismiss Gera's amended complaint and brief in support on May 19, 2022. (Doc. 35; Doc. 36). On May 31, 2022, Gera filed a brief in opposition to Defendants' motion to dismiss (Doc. 37). Defendants filed a reply brief to Gera's motion on June 14, 2022. (Doc. 38). On June 23, 2022, Gera filed a motion for summary, a statement of facts, and a brief in support of his motion for summary judgement.[1] (Doc. 39; Doc. 40; Doc. 41). On July 13, 2022, Defendants filed briefs in opposition to Gera's motion for summary judgment. (Doc. 42; Doc. 43). On July 25, 2022, Gera filed a reply brief. (Doc. 44).

II. DISCUSSION

A. GERA'S MOTION FOR ENTRY OF DEFAULT JUDGMENT

Because Gera's motion for entry of default judgment, if meritorious, would render moot Defendants' motion to dismiss and Gera's motion for summary judgment, the undersigned will first address the motion for entry of default. (Doc. 32). At the outset, it is difficult for the undersigned to construe the specific arguments Gera makes in support of his

[1] Given the undersigned's recommendation that Gera's amended complaint be dismissed without prejudice and the fact that discovery has not yet begun in this action, the undersigned finds that Gera's motion for summary judgment is premature. Therefore, it is recommended that Gera's motion for summary judgment be **DENIED** without prejudice to Gera's right to file a subsequent motion for summary judgment after discovery concludes, or at some other appropriate time. (Doc. 39); *see In re Pettaway,* 457 F. App'x 96, 98 (3d Cir. 2012).

motion for entry of default. (Doc. 33). Gera broadly alleges that "Defendants never replied to Gera's second served summon and complaint." (Doc. 33, ¶ 8).

Entry of default judgment is governed by Rule 55 of the Federal Rules of Civil Procedure. Under subsection (a) of that rule, the Clerk of Court is instructed to enter a default against a defendant who "has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise." Fed. R. Civ. P. 55(a). "Entry of a default is a prerequisite to entry of a default judgment under Rule 55(b)." *Sys. Indus., Inc. v. Han*, 105 F.R.D. 72, 74 (E.D. Pa. 1985) (emphasis in original). However, "before a default can be entered, the court must have jurisdiction over the party against whom the judgment is sought, which also means that the party must have been effectively served with process." *Enigwe v. Gainey,* No. CIV.A. 10-684, 2012 WL 213510, at *2 (E.D. Pa. Jan. 23, 2012) (quoting another source); *see also Pergola v. Umar*, No. 90-CV-1876, 1991 WL 152968, at *2 (E.D. Pa. Aug. 6, 1991) ("[W]here a defendant has not been properly served with the summons and complaint, there is no requirement to file a responsive pleading and hence, a court may not grant plaintiff's motion for default for failure to do so.").

Gera filed his amended complaint on May 3, 2022. (Doc. 34). On May 18, 2022, Defendants responded by filing a motion to dismiss, in accordance with Rule 12(a)(1)(A) of the Federal Rules of Civil Procedure. (Doc. 35); Fed. R. Civ. P. 12(a)(1)(A) ("A defendant must serve an answer: (i) within 21 days after being served with the summons and complaint; or (ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent"). Gera filed his second motion for entry of default and supporting declaration on April 21, 2022, based on Defendants' failure to timely submit a response. (Doc. 32; Doc. 33).

Defendants' response to the case was timely. *See* Fed. R. Civ. P. 12(a)(1)(A). As such, Gera's motion for entry of default judgment would not be appropriate as Defendants have defended the suit by filing a timely motion to dismiss and have otherwise participated in the litigation process. *Lomma v. Ohio_Nat'l Life Assurance Corp.*, No. 3:16-CV-2396, 2018 WL 8344839, at *1 (M.D. Pa. Jan. 4, 2018) (determining entry of default judgment was not appropriate where Defendants have defended the suit by filing a timely motion to dismiss, a timely motion for summary judgment, and otherwise participated in the litigation process).

Accordingly, it is recommended that the Court deny Gera's motion for entry of default judgment.

B. DEFENDANTS' MOTION TO DISMISS

Defendants first move to dismiss under Fed. R. Civ. P. 8(a), arguing that Gera's amended complaint, rather than curing the deficiencies of the original complaint, adds additional paragraphs that do not provide relevant factual background giving rise to Gera's varied causes of action and restates the same conclusory paragraphs of the original complaint. (Doc. 35; Doc. 36, at 23-24). In seeking dismissal under Rule 12(b)(6), Defendants argue that Gera's claims are barred by the *Younger* abstention doctrine and that his allegations fail to state a claim upon which relief can be granted.[2] (Doc. 36). In opposition, Gera argues that he

[2] In *Younger*, the Supreme Court of the United States held that a federal court should abstain from interfering with a pending state criminal proceeding, including interfering with bail-related proceedings, absent extraordinary circumstances. 401 U.S. 37, 41 (1971); *see also Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013); *Cooley v. DiVecchio*, 307 F. App'x 611, 614 (3d Cir. 2009) (noting that it "would have been inappropriate for the District Court to interfere in [the plaintiff's] state court criminal proceedings . . . pursuant to the abstention theory articulated in *Younger* . . ." Defendants argue that Gera's claims are brough to enjoin pending state proceeding *John Gera v. Borough of Frackville* (Commonwealth Court of Pennsylvania Dkt. No. 192 CD 2020) and no extraordinary circumstances are present. (Doc. 36, at 9-10). As the undersigned finds that Gera's first amended complaint contains no

has met the requirements of this rule and the amended complaint is "written this way, because of all the violations the Borough of Frackville did against Gera's civil and constitutional rights." (Doc. 37, at 15). Upon consideration of the amended complaint, the undersigned finds that Gera's amended complaint should be dismissed for failure to state a claim under Rule 8(a) and Rule 12(b)(6).

1. Legal Standard

Rule 12(b)(6) of the Federal Rules of Civil Procedure authorizes a defendant to move to dismiss for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To assess the sufficiency of a complaint on a Rule 12(b)(6) motion, a court must first take note of the elements a plaintiff must plead to state a claim, then identify mere conclusions which are not entitled to the assumption of truth, and finally determine whether the complaint's factual allegations, taken as true, could plausibly satisfy the elements of the legal claim. *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 221 (3d Cir. 2011). In deciding a Rule 12(b)(6) motion, the court may consider the facts alleged on the face of the complaint, as well as "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

After recognizing the required elements which make up the legal claim, a court should "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). The plaintiff must provide some factual ground for relief, which "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell*

---

colorable federal claims that Gera would be unable to pursue in state court, regardless of the *Younger* abstention, the undersigned declines to address this argument.

Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). "[T]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. Thus, courts "need not credit a complaint's 'bald assertions' or 'legal conclusions . . .'" *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997) (quoting *In re Burlington Coat Factory Securities Litigation*, 114 F.3d 1410, 1429-30 (3d Cir. 1997)). The court also need not assume that a plaintiff can prove facts that the plaintiff has not alleged. *Associated Gen. Contractors of Cal. v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983).

A court must then determine whether the well-pleaded factual allegations give rise to a plausible claim for relief. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Palakovic v. Wetzel*, 854 F.3d 209, 219-20 (3d Cir. 2017) (quoting *Iqbal*, 556 U.S. at 678) (internal quotation marks omitted); *see also Sheridan v. NGK Metals Corp.*, 609 F.3d 239, 262 n.27 (3d Cir. 2010). The court must accept as true all allegations in the complaint, and any reasonable inferences that can be drawn therefrom are to be construed in the light most favorable to the plaintiff. *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994). This "presumption of truth attaches only to those allegations for which there is sufficient factual matter to render them plausible on their face." *Schuchardt v. President of the United States*, 839 F.3d 336, 347 (3d Cir. 2016) (internal quotation and citation omitted). The plausibility determination is context-specific and does not impose a heightened pleading requirement. *Schuchardt*, 839 F.3d at 347.

Additionally, Federal Rule of Civil Procedure 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Thus, a well-pleaded

complaint must recite factual allegations sufficient to raise the plaintiff's claimed right to relief beyond the level of mere speculation, set forth in a "short and plain" statement of a cause of action. There is no requirement that the pleading be specific or probable. *Schuchardt*, 839 F.3d at 347 (*citing Phillips v. County of Allegheny*, 515 F.3d at 224, 233-234 (3d Cir. 2008). Rule 8(a) requires a "showing that 'the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007) (quoting Fed. R. Civ. P. 8(a)(2)); *see also Phillips*, 515 F.3d at 233 (citing *Twombly*, 550 U.S. at 545).

2. Federal Law Claims

In the complaint, Gera purports to set forth claims under "18 U.S. Code CHAPTER 13—CIVIL RIGHTS, 18 U.S. Code § 241, § 242 and 42 U.S. Code CHAPTER 21—CIVIL RIGHTS, SUBCHAPTER I—GENERALLY § 1983, § 1985, §1986, etc. . ." (Doc. 34, ¶ 1).

Gera's amended complaint is bereft of any factual allegations that could support his legal claims, and fails to meet the pleading requirements of Rule 8. (Doc. 34). The pleading does not provide any meaningful opportunity for Defendants to decipher or answer the allegations levied against them. It is so "rambling and unclear" as to defy response. *Tillio v. Spiess*, 441 F. App'x 109, 110 (3d Cir. 2011); *see also Earnest v. Ling*, 140 F. App'x 431, 432 (3d Cir. 2005) (affirming dismissal of a "complaint [that] fail[ed] to clearly identify which parties [the plaintiff] seeks to sue"). For example, Gera alleges "Bell has Two (2) "Start" Dates when he started his investigation on Gera: one was January 25, 2018, in his Attestation and the other on June 4, 2018, in Numerous Court papers? . . . " (Doc. 34, ¶ 55). Gera further alleges "Question: What Date are the Defendants and the Courts using to show when the Borough of Frackville opened /began their investigation????" (Doc. 34, ¶ 56). Gera also alleges that the

FB "violated Gera's, 5th Amendment (V) Rights because: No person shall be held, -- nor be deprived of life, liberty, (state of being free within society from oppressive restrictions imposed by authority on one's way of life, behavior, or political views), or property without due process of law; etc."(Doc. 34, ¶ 102).

In short, Gera's amended complaint violates Rule 8's dictate that a complaint "must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). Far from being a plain statement showing how Gera is entitled to relief from the defendants, this filing leaves all of the "defendants having to guess what of the many things discussed constituted [a cause of action]." *Binsack v. Lacakwanna County Prison*, 438 F. App'x 158 at 160 (3d Cir. 2011). The undersigned cannot discern the factual grounds or legal basis for this complaint. *See also Zomerfeld v. Larksville Borough*, No. 3:22-CV-235, 2022 WL 2313156, at *6 (M.D. Pa. June 3, 2022), *report and recommendation adopted sub nom. Zomerfeld v. Larksville Borough*, No. CV 3:22-235, 2022 WL 2307465 (M.D. Pa. June 27, 2022). Gera cites to various federal and state statutes – including 18 U.S.C. § 242, 18 U.S.C. § 241, 28 U.S.C. §4101; 15 U.S.C. § 1692d; 18 U.S.C. § 2340, none of which give rise to a federal claim for relief.

Furthermore, 18 Pa.C.S. § 4904; 231 Pa. Code § 223.3, 42 Pa.C.S. § 8953 are all state statues. However, as discussed *infra*, the undersigned finds that Gera has failed to state any plausible federal claim for relief of which it had original jurisdiction. Ordinarily, when all federal law claims have been dismissed and only state law claims remain, the balance of these factors indicates that any remaining claims properly belong in state court. *Hill v. Mastriano*, No. 4:22-CV-556, 2022 WL 2712581, at *9 (M.D. Pa. Apr. 26, 2022), *report and recommendation adopted*, No. 4:22-CV-00556, 2022 WL 3045030 (M.D. Pa. Aug. 2,

2022), *appeal dismissed*, No. 22-2420, 2022 WL 16734499 (3d Cir. Sept. 15, 2022), and aff'd, No. 22-2464, 2022 WL 16707073 (3d Cir. Nov. 4, 2022).

The only colorable federal bases for relief invoked by Gera are causes of action under 42 U.S.C. § 1983, 42 U.S.C. § 1985, and 42 U.S.C. § 1986. (Doc. 34, at 10-18). However, the undersigned will address each statute Gera purports to allege a cause of action under. A thorough review of Gera's amended complaint reveals that none of his allegations state a claim for relief under these civil rights statutes.

i. 18 U.S.C. § 241; 18 U.S.C. § 242

Gera claims Defendants have violated his rights under 18 U.S.C. § 241 (conspiracy against rights) and 18 U.S.C. § 242 (deprivation of rights under color of law). (Doc. 34, ¶¶ 1, 23, 26-28, 41, 81). In support of these claims, Gera alleges Defendants Bell, Buccieri, Semanchick, and Deeter "[v]iolated Gera's Civil Rights under 18 U.S. Code § 241 when they Conspired to deny Gera Records, Information and Evidence that he had requested from FB, Police Blotters, etc., by giving False Statements and Attestations to Gera, the Authorities and the Courts, so Gera would not be justly heard by the Courts." (Doc. 34, ¶ 81). Those criminal statutes do not provide a private right of action for a litigant such as Gera. *See Carpenter v. Ashby*, 351 F. App'x 684, 688 (3d Cir. 2009) (agreeing with the district court's "dismissal of the 18 U.S.C. § 241 and § 242 claims" because "[n]either statute creates a civil cause of action"). Accordingly, it is recommended that Gera's 18 U.S.C. § 241 and § 242 claims be dismissed for failure to state a claim upon which relief may be granted.

ii. 28 U.S.C. § 4101

Next, Gera purports to bring a defamation claim pursuant to 28 U.S.C. § 4101. (Doc. 34, ¶¶ 29, 123). Gera alleges that Defendant Semanchick wrote and sent a libel civil

defamation to cause Gera harm and injure his reputation and never presented any creditable facts or evidence to support his false and defamatory imputation. (Doc. 34, ¶ 124). Gera alleges this was done to prevent Gera from obtaining FB record and "to take the focus off FB Criminality and make it like Gera did something wrong . . . . " (Doc. 34, ¶¶ 125, 129). However, this statue does not provide a proper basis for a civil claim. *Eyajan v. Nesco Res., LLC*, No. 1:20-CV-204, 2022 WL 4608691, at *4 (W.D. Pa. Sept. 30, 2022) ("As other courts have noted, a private cause of action is not available under 28 U.S.C. § 4101—the statute merely defines defamation for the purposes of judicial recognition of foreign defamation judgments.") (citing *Stockstill v. Fresno Dep't of Soc. Servs.*, No. 1:19-cv-00889, 2020 WL 1274622, at *11 (E.D. Cal. Mar. 17, 2020). "[T]here is no federal claim [under the statute] for simple defamation by a private actor." *Slottke v. Wis. Dep't of Workforce Dev.*, 734 F. App'x 354, 355 (7th Cir. 2018)). Accordingly, it is recommended that Gera's 28 U.S.C. § 4101 claim be dismissed for failure to state a claim upon which relief may be granted.

iii. 18 U.S.C. § 2340

Gera also alleges that Defendants' actions caused him emotional and mental distress in violation of 18 U.S.C. § 2340, which criminalizes torture. (Doc. 34, at 30). Gera states that he lives in fear of FB and suffers from a myriad of emotional and physical effects because of this fear including mental anguish, humiliation, embarrassment, fear, emotional distress, anxiety, and depression. (Doc. 34, ¶¶ 137-143). However, "18 U.S.C. §§ 2340 and 2340A . . . criminalize torture *outside* the United States; they do not provide civil redress for torture *within* the United States." *Renkel v. United States*, 456 F.3d 640, 644–45 (6th Cir. 2006) (emphasis added). The Act provides for *criminal* penalties only; Congress has expressly declined to create a private cause of action. *See* 18 U.S.C. § 2340B ("Nothing in this chapter shall ... be construed

as creating any substantive or procedural right enforceable by law by any party in any civil proceeding."); *see also Karim-Panahi v. 4000 Massachusetts Apartments*, 302 F. Supp. 3d 330, 338 (D.D.C. 2018), *aff'd per curiam*, No. 187054, 2018 WL 6167393 (D.C. Cir. Jan. 24, 2019); *Brown v. Victor*, Civil No. 3:08-CV-01178, 2008 WL 11450547, at *1 (M.D. Pa. July 1, 2008). *See generally Saleh v. Titan Corp.*, 580 F.3d 1, 13 n.9 (D.C. Cir. 2009) ("Congress has created an extensive body of [criminal] law with respect to allegations of torture. But Congress has declined to create a civil tort cause of action that plaintiffs could employ.").

Accordingly, it is recommended that Gera's 18 U.S.C. § 2340 claim be dismissed for failure to state a claim upon which relief may be granted.

iv. 15 U.S.C.A. § 1692(d)

Gera alleges violations under Section 1692d of the Fair Debt Collection Practices Act ("FDCPA"), an act intended to protected consumers from the effect of abuse debt collection practices. *See* 15 U.S.C. § 1692(d); *Dowell v. Bayview Loan Servs.*, LLC, No. 1:16-CV-02026, 2017 WL 9486188, at *19 (M.D. Pa. May 4, 2017), *report and recommendation adopted*, No. 1:16-CV-02026, 2017 WL 4230924 (M.D. Pa. Sept. 25, 2017) ("Section 1692d provides that "[a] debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt."); (Doc. 34, at 25). Gera alleges that Defendants harassed him by coming to his home to terrorize and threaten him, and Borough of Frackville allowed this harassment to continue. (Doc. 34, ¶¶ 108-116). However, as Gera is not a consumer and Defendants are not debt collectors, 15 U.S.C.A 1692(d) is not applicable in this context. Accordingly, it is recommended that Gera's claim under Section 1692d of the FDCPA be dismissed for failure to state a claim upon which relief may be granted.

v. 42 U.S.C. § 1983

42 U.S.C. § 1983 provides a private cause of action for violations of federal constitutional rights. The statute provides, in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .
>
> 42 U.S.C. § 1983.

Section 1983 does not create substantive rights, but instead provides remedies for rights established elsewhere. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985). To succeed on a § 1983 claim, a plaintiff must demonstrate that the Defendants, acting under color of state law, deprived the plaintiff of a right secured by the United States Constitution. *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1141 (3d Cir. 1995). A "defendant in a civil rights action must have personal involvement in the alleged wrongs to be liable and cannot be held responsible for a constitutional violation which he or she neither participated in nor approved." *Baraka v. McGreevey*, 481 F.3d 187, 210 (3d Cir. 2007) (internal citations and quotation marks omitted). "Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence. Allegations of participation or actual knowledge and acquiescence, however, must be made with appropriate particularity." *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988).

Gera's allegations do not state a claim based on a violation of his constitutional rights under § 1983. Initially, Gera's allegations appear to be most analogous to a cause of action for malicious prosecution. Gera contends Defendants maliciously investigated him without

having any basis or jurisdiction to do so and then improperly blocked him from obtaining information that would show he never acted inappropriately and always in accordance with the law. (Doc. 34, ¶ 2, 3, 44, 45, 46, 48, 58-61). For example, Gera alleges Defendant Buccieri "went to Gera's home to intimidate, harass, terrorize, etc. and tried to build a case against him and she is still involved with the continuing criminal investigation on Gera" and that Defendant Bell called Gera's home to intimidate, harass and threaten him and told him not to go to "WBHS" graduation, despite WBHS being out of his jurisdiction. (Doc. 34, ¶¶ 46, 48). Gera also alleges that Defendant Bell wrote a false and perjured attestation stating that the FDP received complaints about Gera, although Defendant Bell has never given any documentation to Gera or the Court to support these claims. (Doc. 34, ¶ 53). Additionally, Gera alleges that Defendant Semanchick gave false statements and documents to authorities about Gera and that Defendant Deeter wrote a false and perjured attestation stating that she conducted a thorough investigation and thereafter, she provided all records within the Agency's possession. (Doc. 34, ¶¶ 61, 69).

Similar to Gera's initial complaint, whether construed as a malicious prosecution or similar claim, Gera's amended complaint fails to state a claim upon which relief may be granted because Gera does not allege that he was charged for any crimes, was taken into custody for investigation, was arrested, or was otherwise deprived of his liberty. (*See generally* Doc. 34) Rather, Gera makes general references to an ongoing investigation against him throughout his amended complaint. (Doc. 34, ¶¶ 55, 87, 148, 163, 164). As such, he has not alleged a constitutional violation based on Defendants' conduct arising from and following the restaurant incident. *See, e.g.*, *Douris v. Brobst*, No. 99-CV-3357, 2000 WL 199358, at *4 (E.D. Pa. Feb. 18, 2000); *Bryant v. Vanluvender*, No. 3:11-CV-1329, 2011 WL 6826635, at *3

(M.D. Pa. Dec. 28, 2011); *Garner v. Twp. of Wrightstown*, 819 F. Supp. 435, 445 (E.D. Pa.) ("[U]nlike the plaintiff who stated a viable Section 1983 abuse of process claim in [a different case], no criminal charges were ever brought against [plaintiff] and he was never arrested."); *Agarwal v. City of Jersey City*, 388 F. App'x 199, 202 (3d Cir. 2010) ("[T]he complaint does not allege that she suffered a deprivation of liberty consistent with the concept of seizure as a consequence of a legal proceeding.") (citing *Donahue v. Gavin*, 280 F.3d 371, 380-82 (3d Cir. 2002) (discussing requirement of a Fourth Amendment violation to establish malicious prosecution).

Nor do Gera's allegations of verbal threats and harassment provide a basis for a § 1983 claim. (Doc. 34, ¶¶ 46, 49, 108-121). "Assuming [Gera]'s allegations are true, it is well-settled that the use of words, no matter how violent, is not actionable under 42 U.S.C. § 1983." *Santos v. Beggs*, No. CA 13-2, 2013 WL 5931420, at *2 (W.D. Pa. Nov. 5, 2013) (citing *Gannaway v. Berks County Prison,* 439 F. App'x 86 (3d Cir. 2011); *Wright v. O'Hara*, No. CIV.A. 00-1557, 2004 WL 1793018, at *7 (E.D. Pa. Aug. 11, 2004) ("Where plaintiff has not been physically assaulted, defendant's words and gestures alone are not of constitutional merit")); *see also Burkholder v. Newton*, 116 F. App'x 358, 360 (3d Cir. 2004) ("It is well established that allegations of threats or verbal harassment, without injury or damage, do not state a claim under 42 U.S.C. § 1983." (internal quotation marks omitted)); *Taylor v. Sanders*, No. 1:11-CV-1291, 2012 WL 4104871, at *3 (M.D. Pa. Sept. 18, 2012) ("Acts of verbal harassment and taunting alone cannot qualify as constitutional violations."), *aff'd*, 536 F. App'x 200 (3d Cir. 2013); *Dawson v. NJ State Trooper Barracks*, No. 11-CV-2779, 2011 WL 3653671, at *4 (D.N.J. Aug. 19, 2011) (collecting cases).

Further, to the extent that Gera alleges violations of his equal protection rights, to state

such a claim, he is required to plead that "he has been treated differently from others with whom he is similarly-situated and that the unequal treatment was the result of intentional or purposeful discrimination." *Wilson v. Taylor*, 515 F. Supp. 2d 469, 472 (D. Del. 2007) (internal quotations omitted). There are no such allegations present in Gera's amended complaint and none can plausibly be inferred. (Doc. 34); *see Kinnard v. Pa. Dep't of Corr.*, No. 18-CV-298, 2019 WL 4060922, at *6 (W.D. Pa. July 24, 2019), *report and recommendation adopted*, No. 18-CV-298, 2019 WL 4058938 (W.D. Pa. Aug. 27, 2019).

Gera also appears to assert municipal liability against the Borough of Frackville based on allegations of failures to train, investigate, supervise, discipline, and terminate police officers. (Doc. 34, ¶¶ 71, 73, 74). To be sure, a municipality, like the Borough of Frackville, may be held liable under § 1983 for failure to train, monitor or supervise, but only where a plaintiff can "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 the alleged constitutional deprivations occurred." *Gilles v. Davis*, 427 F.3d 197, 207 n.7 (3d Cir. 2005); *see Monell v. Dep't of Social Servs.*, 436 U.S. 658, 691 (1978). A municipality may only be found liable under Section 1983 "when the municipality itself causes the constitutional violation at issue." *City of Canton v. Harris*, 489 U.S. 378, 385 (1989). This is so because government entities are not vicariously liable for their employees' acts under Section 1983. *Monell*, 436 U.S. at 694-95.

The plaintiff must also allege well-pleaded facts which show that, through this official deliberate conduct, the municipality was the "moving force" behind the injury alleged. *Reitz v. Cty. of Bucks*, 125 F.3d 139, 145 (3d Cir. 1997). Courts have recognized that this is a high burden. *Reitz*, 125 F.3d at 145; *Watson v. Phila. Hous. Auth.*, 629 F. Supp. 2d 481, 487 (E.D.

Pa. 2009). With respect to such claims, a plaintiff must show a policy or custom of insufficient screening of potential employees that is "so widespread as to have the force of law." *M.S. ex rel. Hall v. Susquehanna Twp. Sch. Dist.*, 43 F. Supp. 2d 412, 426 (M.D. Pa. 2014) (citing *Bd. of the Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 403-04 (1997)). A municipality may only be found liable under *Monell* "when the alleged constitutional transgression implements or executes a policy, regulation or decision officially adopted by the governing body or informally adopted by custom." *Beck v. City of Pittsburgh*, 89 F.3d 966, 971 (3d Cir. 1996). Accordingly, "although the municipality may not be held liable for a constitutional tort under § 1983 on the theory of vicarious liability, it can be held responsible as an entity when the injury inflicted is permitted under its adopted policy or custom." *Beck*, 89 F.3d at 971.

"In limited circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983." *Connick v. Thompson*, 563 U.S. 51, 61 (2011). However, a failure to train or supervise "must amount to 'deliberate indifference to the rights of a person with whom the untrained employees come into contact.'" *Connick*, 563 U.S. at 61 (quoting *Canton*, 489 U.S. at 388). Deliberate indifference for a failure-to-train claim is a "stringent" standard, which requires "proof that a municipal actor disregarded a known or obvious consequence of his action." *Bryan Cty.*, 520 U.S. at 410. To demonstrate deliberate indifference based on a failure to train or supervise, a plaintiff typically must show a "pattern of similar constitutional violation by untrained employees." *Thomas v. Cumberland Cty.*, 749 F.3d 217, 223 (3d Cir. 1999).

Thus, while it is sometimes possible "to establish deliberate indifference based on a single incident[,] this showing is available in a very narrow range of circumstances." *Peters v.*

Cmty. Educ. Ctrs., Inc., No. 11-850, 2014 WL 981557, at *9 (E.D. Pa. Mar. 13, 2014). "To find deliberate indifference from a single-incident violation," the risk of injury must be a "highly predictable consequence" of the municipality's failure to train and supervise its employees. *Thomas*, 749 F.3d at 225 (quoting *Connick*, 563 U.S. at 63-64). Thus, "[l]iability in single-incident cases depends on '[t]he likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights.'" *Thomas*, 749 F.3d at 223-24 (quoting *Bryan Cty.*, 520 U.S. at 409).

Even if that showing can be made, the plaintiff still must demonstrate that the failure to train "proximately caused his constitutional injury by identifying a particular failure in a training program that is 'closely related to the ultimate injury.'" *Buoniconti v. City of Phila.*, 148 F. Supp. 3d 425, 441 (E.D. Pa. 2015) (quoting *Canton*, 489 U.S. at 391). Furthermore, a municipality can only be liable under § 1983 where the failure to train "demonstrates a 'deliberate' or 'conscious' choice by the municipality." *Doe v. Luzerne Cty.*, 660 F.3d 169, 179 (3d Cir. 2011). "To determine whether a municipality's alleged failure to train its employees amounted to a deliberate or conscious choice, it must be shown that '(1) municipal policymakers know that employees will confront a particular situation; (2) the situation involves a difficult choice or a history of employees mishandling; and (3) the wrong choice was made by an employee will frequently cause deprivation of constitutional rights.'" *Doe*, 660 F.3d at 179-80 (citing *Carter v. City of Phila.*, 181 F.3d 339, 357 (3d Cir. 199)).

With respect to the plaintiff's Monell claim in this case, Gera has failed to assert well-pleaded facts which are sufficient to support this cause of action. As to the municipal liability claim, the complaint provides a factual recital of a 2018 encounter with Officer Buccieri and

prosecution of Gera by the Borough of Frackville Police Department. (Doc. 34, ¶¶ 37-69). The complaint alleges, without any further factual adornment, that:

> 71. Upon information and belief, the [Borough of Frackville] knew or had reason to know, before the actions described herein, that the police officers and other persons employed by them routinely engaged in action that violated the Constitutional Rights of citizens.
> …
>
> 73. The [Borough of Frackville] had the power and duty to investigate, supervise, discipline, train and terminate their police officers in order to prevent them from violating the Constitutional Rights of citizens. [Borough of Frackville] failed to fulfill that duty.
>
> 74. Upon information and belief, the [Borough of Frackville] failed to investigate, supervise, discipline, train or terminate the police officers and other persons employed by them, that committed, or conspired to commit Constitutional Violations.

(Doc. 1, ¶¶ 71, 73-74).

Aside from vaguely asserting that Borough of Frackville failed to train its police officers, Gera does not "identify a failure to provide *specific training* that has a causal nexus with [his] injuries, nor has he demonstrate[d] that the absence of that specific training can reasonably be said to reflect a deliberate indifference to whether the alleged constitutional deprivations occurred." *Gilles*, 427 F.3d at 207 n.7. Instead, Gera simply argues in conclusory fashion that the failure to offer some unspecified training or supervision was the cause of his injury, but this assertion, without more, is inadequate to support this claim. When considering a *Monell* failure-to-train claim based upon a single incident it is incumbent upon the plaintiff to assert well-pleaded facts which permit a finding of deliberate indifference grounded upon a risk of injury that must be a "highly predictable consequence" of the municipality's failure to train and supervise its employees. *Thomas*, 749 F.3d at 225 (quoting *Connick*, 563 U.S. at 63-64). Thus, pleading facts which establish "[l]iability in single-incident cases depends on

'[t]he likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights.'" *Thomas*, 749 F.3d at 223-24 (quoting *Bryan Cty.*, 520 U.S. at 409). None of these essential elements of a *Monell* failure-to-train claim are addressed in a meaningful fashion in Gera's amended complaint.

Gera's amended complaint does not make sufficient allegations which would permit a finding of institutional *Monell* liability against the Borough of Frackville. With respect to this institutional liability claim, in order to state a valid cause of action a plaintiff must provide some factual grounds for relief which "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. "Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Fairly construed, as to the Borough of Frackville, Gera's amended complaint amounts to little more than a formulaic recitation of the elements of a cause of action, without additional supporting well-pleaded facts to show how the Borough of Frackville could bear constitutional liability in this case. Gera's *Monell* claims fail as a matter of law, and are subject to dismissal.

Accordingly, it is recommended that Gera's 42 U.S.C § 1983 claims be dismissed for failure to state a claim upon which relief may be granted.

vi. 42 U.S.C. § 1985 and 42 U.S.C. § 1986

Although Gera has not identified a particular subdivision of § 1985 as the basis for his claim, the only applicable provision is § 1985(3). (Doc. 34, at 18). Section 1985(3) allows civil actions against individuals who conspire "for the purposes of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." 42 U.S.C. § 1985(3). To state a conspiracy claim, Gera must have a claim of

an underlying constitutional injury. *Durham v. Dep't of Corrections*, 173 F. App'x 154, 157 (3d Cir. 2006). Furthermore, the conspiracy claim must illustrate an agreed-upon "'intent to deprive of equal protection, or equal privileges and immunities,'" in conjunction with "'some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.'" *Farber v. City of Paterson*, 440 F.3d 131, 135 (3d Cir. 2006) (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 101, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971) (emphasis omitted). Gera must allege facts showing that "the conspiracy was motivated by discriminatory animus against an identifiable class and that the discrimination against the identifiable class was invidious." *Farber*, 440 F.3d at 135.

Gera pleads only general conclusory allegations of conspiracy, which are insufficient to state a claim. (Doc. 34, ¶¶ 81-87). For example, Gera alleges that Defendant Buccieri "conspired with Bell and Semanchik, to allow Bell's attestation to appear truthful that an investigation started in January 25, 2018, on Gera," and that Semanchick "conspired without any legal reason and acting under color of law, when he submitted papers and attestation to Gera." (Doc. 34, ¶¶ 85-86). Gera further alleges that the FB "conspired because they had no legal jurisdiction or legal reason to investigate Gera . . . ." (Doc. 34, ¶ 87). These bare assertions that all Defendants conspired against him do not suggest the existence of a plausible claim for relief. *See, e.g.*, *Johnson v. Dollinger*, No. CV 18-4751, 2019 WL 1596340, at *8 (E.D. Pa. Apr. 12, 2019) ("To successfully plead a claim of conspiracy, the law is clear that a plaintiff must assert facts to suggest that an agreement was made. Johnson's Complaint does not assert a single fact that would allow the Court to infer that an agreement between the Defendants has been made. His complaint merely contains bare conclusory labels of conspiracy, which are clearly insufficient." (internal quotation marks and citation omitted)); *Goodson v. Maggi*,

797 F. Supp. 2d 624, 639 (W.D. Pa. 2011) ("Plaintiff must set forth specific factual allegations that demonstrate collusion or concerted action among the alleged conspirators."). Therefore, Gera has failed to state a § 1985 claim.

Gera also seeks to impose liability under 42 U.S.C. § 1986. Liability under 42 U.S.C. § 1986 is predicated on knowledge of a violation of 42 U.S.C. § 1985. *See Clark v. Clabaugh*, 20 F.3d 1290, 1295 (3d Cir.1994). Gera fails to allege any facts to support liability under 42 U.S.C. § 1985. Consequently, his claim under 42 U.S.C. § 1986 must be dismissed. *See Parran v. Wetzel*, No. 3:14-CV-1522, 2016 WL 1162328, at *4 (M.D. Pa. Mar. 23, 2016)

It is recommended that Gera's 42 U.S.C. § 1985 and 42 U.S.C. § 1986 claims be dismissed for failure to state a claim upon which relief may be granted.

3. State Law Claims

Where a complaint fails to state any claims over which the Court has original jurisdiction, the Court may decline to exercise supplemental jurisdiction over state law claims. 28 U.S.C. § 1367(c)(3). Whether a court will exercise supplemental jurisdiction is within its discretion. *Kach v. Hose*, 589 F.3d 626, 650 (3d Cir. 2009). That decision should be based on "the values of judicial economy, convenience, fairness, and comity . . . ." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988).

Gera's claims for harassment, slander, defamation, and IIED all sound in state law tort, as well as any claims based on violations of the state statutes upon which he relies. (Doc. 34, at 25, 27, 30, 31). To the extent Gera asserts claims for perjury, defamation, and slander, along with his IIED claim, these are state law claims over which the undersigned recommends the Court decline to exercise its jurisdiction given Gera's failure to state a federal claim for relief. Moreover, insofar as these claims are based on allegedly false statements provided in

connection with a judicial proceeding, Defendants would be entitled to absolute immunity from liability for making the allegedly perjurious, defamatory, and slanderous statements. *See, e.g.*, *Gatter v. Zappile*, 54 F. Supp. 2d 454, 456 (E.D. Pa. 1999), *aff'd*, 225 F.3d 648 (3d Cir. 2000). The undersigned finds nothing in the record to distinguish this case from the ordinary one as to the remaining state law claims and thus the balance of factors "point toward declining to exercise jurisdiction over the remaining state law claims." *Cohill*, 484 U.S. at 350.

In the absence of any plausible federal claim, the undersigned recommends the Court decline to exercise jurisdiction over Gera's state law claims. 18 Pa.C.S. § 4904; 231 Pa. Code § 223.3, 42 Pa.C.S. § 8953. *Hill*, 2022 WL 2712581, at *9.

III. LEAVE TO AMEND

The Court recognizes that *pro se* plaintiffs often should be afforded an opportunity to amend a complaint before the complaint is dismissed with prejudice, unless granting further leave to amend would be futile or result in undue delay. *See Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc.*, 482 F.3d 247, 253 (3d Cir. 2007); *Alston v. Parker*, 363 F.3d 229, 235-36 (3d Cir. 2004). The first amended complaint in its current form asserts causes of action that fail to state a claim upon which relief can be granted. To preserve Gera's rights as a *pro se* litigant, the undersigned will recommend that the Court grant him leave to file a second single, unified amended complaint setting forth factual allegations and legal claims in a manner that can be reviewed by the Court and, if necessary, answered by Defendants.

The second amended complaint must be a **unified pleading that stands by itself without reference to the original or first amended complaint**. *Young v. Keohane*, 809 F. Supp. 1185, 1198 (M.D. Pa. 1992). The second amended complaint must be "simple, concise, and direct," as is required under Rule 8(d)(1) of the Federal Rules of Civil Procedure. It should

specify the claims Gera wishes to bring and the specific facts that show Defendants' liability for each claim. *Boyd v. New Jersey Dep't of Corr.*, 583 F. App'x 30, 32 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 2374 (2015). As a final matter, the second amended complaint should be limited to those claims that arise out of the same transaction or occurrence, or series of transactions or occurrences, and that have questions of law or fact in common to all claims. Failure to file a second amended complaint in accordance with these directives may result in the recommendation that this action be dismissed in its entirety.

IV. RECOMMENDATION

Based on the foregoing, it is respectfully recommended that:

1. Defendants' motion to dismiss (Doc. 35) be **GRANTED**;
2. Gera's first amended complaint (Doc. 35) be **DISMISSED WITHOUT PREJUDICE** and Gera be **GRANTED** leave to file a second amended complaint within thirty (30) days of the disposition of this report and recommendation;
3. Gera's motion for entry of default judgment (Doc. 32) be **DENIED**;
4. Gera's motion for summary judgment (Doc. 39) be **DENIED WITHOUT PREJUDICE** as premature; and
5. The case be remanded to the undersigned for further proceedings.

BY THE COURT:

Dated: February 6, 2023

s/ Karoline Mehalchick
KAROLINE MEHALCHICK
Chief United States Magistrate Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

JOHN M. GERA, Plaintiff, v. BOROUGH OF FRACKVILLE, et al., Defendants.	CIVIL ACTION NO. 3:20-CV-00469 (MARIANI, J.) (MEHALCHICK, M.J.)

NOTICE

NOTICE IS HEREBY GIVEN that the undersigned has entered the foregoing **Report and Recommendation** dated **February 6, 2023**. Any party may obtain a review of the Report and Recommendation pursuant to Rule 72.3, which provides:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636(b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Dated: February 6, 2023

s/ Karoline Mehalchick
KAROLINE MEHALCHICK
Chief United States Magistrate Judge