STATE OF VERMONT
CALEDONIA COUNTY, SS

DAVID LAY Plaintiff v. WILLIAM PETTENGILL, ELIZABETH NOVOTNY, DAVID GARTENSTEIN, DANIEL TROIDL, THE COMMISSIONER OF THE VERMONT DEPARTMENT OF PUBLIC SAFETY, ANDTHE STATE OF VERMONT Defendants	SUPERIOR COURT Docket No. 256-12-04 Cacv

DECISION ON MOTIONS

Plaintiff, a former Vermont State Trooper, executed a general release of claims and separated from the Vermont State Police and Department of Public Safety following an internal investigation related to his retention of certain items of State Police property. The investigation was compounded by a request Plaintiff made to a colleague, while suspended pending investigation, to destroy certain items in his work desk and cruiser. Following his separation from the State Police, Plaintiff found employment as a private contractor in Iraq. The Deputy Windham County State's Attorney subsequently received a probable cause affidavit from the State Police complaining that Plaintiff had violated 13 V.S.A. § 3015 (obstruction of justice) and obtained from the district court a warrant for Plaintiff's arrest. Plaintiff's employer learned of the charge and dismissed him, whereafter he returned to Vermont to be arraigned.

By his eight-count complaint, filed April 25, 2008, Plaintiff alleges that the several Defendants, each involved in some capacity in his separation from the State Police or his prosecution for obstruction of justice, violated his civil rights and committed several torts. On July 3, 2008, Plaintiff moved to amend his complaint, *inter alia*, to correct slight typographical errors, to add one defendant to charges from which the defendant was omitted, to more carefully specify "extra-prosecutorial conduct," to amend an allegation relating to the outcome of criminal charges against him, and to add a ninth count for abuse of process. [1]

[1] For administrative simplicity, it generally is preferable that motions to amend pleadings be filed together with full-text revisions of the pleadings amended, though Rule 15 makes no such requirement. This helps to prevent confusion—in this case, it would mean consulting one unified document instead of three—and to benefit everyone working with the record. This consideration is mentioned merely as a suggestion for future practice.

The right to amend a pleading as of course terminates at service of a responsive pleading, provided however that leave to amend "shall be freely given when justice so requires." V.R.C.P. 15(a). Where later amendment is sought, the court is to consider whether the motion implicates, *inter alia*, (1) undue delay; (2) bad faith; (3) futility of amendment; and (4) prejudice to the opposing party. *Perkins v. Windsor Hosp. Corp.*, 142 Vt. 305, 313 (1982). In this case, none of these concerns is implicated, and Defendants have not opposed the amendment. Plaintiff's motion to amend the Complaint is GRANTED, as is his further motion, filed July 21, 2008, to clarify a claim and to withdraw part in conformity with the evidence[2]. The court approaches the pleadings as amended.

I.

It is well to begin by identifying the Defendants and the positions they occupied at the times relevant to this action. William Pettengill was Plaintiff's supervisor, and he was involved in calling Plaintiff's acts to the attention of the Vermont State Police Internal Affairs Unit. Elizabeth Novotny was General Counsel to the Department of Public Safety, and she was involved in negotiating Plaintiff's separation from the State Police and to some degree in recommending whether Plaintiff may have committed a crime. David Gartenstein was Deputy Windham County State's Attorney, and he brought charges against Plaintiff. Daniel Troidl was a Lieutenant in charge of internal investigations; and he was involved in investigating Plaintiff's actions and referring certain information to Gartenstein. The Commissioner and State are named as well.

On June 13, 2008, Defendant Gartensetein moved to dismiss all claims against him on the principal basis that the claims are barred by prosecutorial immunity. *Czechorowski v. State*, 178 Vt. 524, 527 (2005); *Muzzy v. State*, 155 Vt. 279, 280 (1990); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (as to § 1983 claims against prosecutors).

On June 16, 2008, the remaining defendants, Petengill, Novotny, Troidl, and the State, moved to dismiss all claims against them. Arguments for dismissal of the various counts, summarized only casually here, include limitations, severance of causation by the prosecutorial actions of Defendant Gartenstein, legally-unreasonable reliance, sovereign immunity, lack of standing, and compliance with statutory reporting duties.

Plaintiff filed opposition papers to Defedant Gartenstein's motion June 30, 2008 and to the other defendants' motion on July 3, 2008. Defendant Gartenstein replied July 16, 2008 and the other defendants replied July 21, 2008. Plaintiff filed supplemental opposition August 6, 2008.

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[2] In his original Complaint, Plaintiff errantly claimed that criminal charges brought by Defendant Gartenstein under 13 V.S.A. § 3015 were not resolved as part of a plea bargain he made in relation to charges unrelated to his work for the State Police. They were, and Plaintiff's amended pleadings recognize this.

II.

"The purpose of a motion to dismiss for failure to state a claim upon which relief can be granted is to test the law of the claim, not the facts which support it." *Daniels v. Vermont Center for Crime Victims Services*, 173 Vt. 521, 522 (2001) (citation omitted).

> *If, on a motion ... to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.*

V.R.C.P. 12(b). "The element that triggers the conversion is a challenge to the sufficiency of the pleader's claim supported by extra-pleading material." *Bennett Estate v. Travelers Ins. Co.*, 138 Vt. 189, 191 (1980) (5 C. Wright & A. Miller, Federal Practice and Procedure s 1366 at 676).

The well-known case of *Levinsky v. Diamond* 140 Vt. 595 (1982) addresses issues both factually and procedurally very similar to the issues presented by the instant case and motions. *Levinsky* involved torts related to an allegedly gratuitous and improper criminal prosecution. The trial court dismissed the suit under V.R.C.P. 12(b) on the basis of prosecutorial and sovereign immunity. On appeal, the Supreme Court concluded that dismissal was premature:

> *Both immunity defenses should, [because contingent upon predicate facts], have been raised by the defendant in his answer, V.R.C.P. 12(b), and if believed to be sufficient to warrant dismissal of the action, accompanied by a motion for judgment on the pleadings, V.R.C.P. 12(c), or for summary judgment, V.R.C.P. 56.*

Id. (overruled on grounds relating to immunity doctrine, but not procedure, by *Muzzy v. State*, 155 Vt. 279 (1990)).

Although *Muzzy* significantly expanded the doctrine of prosecutorial immunity, the procedural awkwardness observed in *Levinsky* stands as a reminder that the temptation to shoehorn fact-dependent defenses into a 12(b) motion leads easily to premature disposition. In other words, it is no coincidence that *Levinsky*, invoked here to clarify procedure, would also involve allegations of improper prosecution—the nature of the cause of action virtually guarantees defenses that invite and depend upon new offerings of fact not contained within the four corners of a complaint.

Plaintiff and Defendants have gone beyond the legal adequacy of the Complaint and into the factual adequacy of its allegations. By way of illustration, note that the record contains parts of Plaintiff's district court file, arguments about causation in fact, competing hypothesis about Defendant Troidl's state of mind relative to a particular

statute, and of course multiple defenses requiring inferences of predicate facts. The parties have been attentive to procedural details, endeavoring and sometimes straining to root their arguments in the Complaint, but the conceit appears unsustainable.

There are now nine counts in this action. Rather than picking at them piecemeal, the court believes it would be more conducive to the just, speedy, and inexpensive resolution of these claims if Defendants' Rule 12(b)(6) motions were converted in whole to motions for summary judgment. It is not expected that conversion will put the parties to undue expense, as the legal issues have been thoroughly briefed. Both parties would benefit however from an opportunity to set out those factual issues upon which they contend there is no genuine dispute.

Order

For the foregoing reasons,

Petitioner's motions to amend, filed July 3 and 28, 2008, are GRANTED;

The instant motions are converted to motions for summary judgment, to be disposed as provided under V.R.C.P. 56; all parties shall be given reasonable opportunity to present all material made pertinent to such motions by Rule 56;

The clerk will set a status conference, at which an appropriate timeline will be established.

Dated at St. Johnsbury this 28 of August, 2008.

Harold E. Eaton, Jr.
Superior Court Judge