

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

WILLIAM J. PEOTROWSKI, JR., :
Plaintiff, :
 :
v. : CA 04-30T
 :
JONATHAN R. WHEELER, ALIAS, :
SUSAN P. WEEDEN, ALIAS, :
JOEL K. GERSTERNBLATT, ALIAS, :
VARIOUS JOHN DOES AND JANE DOES, :
Defendants. :

REPORT AND RECOMMENDATION

David L. Martin, United States Magistrate Judge

Before the court is the Motion for Summary Judgment by Defendants Jonathan R. Wheeler, Susan P. Weeden and Joel K. Gersternblatt ("Motion for Summary Judgment" or "Motion"). Defendants seek summary judgment based on the doctrines of res judicata and absolute or qualified immunity. Plaintiff William J. Peotrowski, Jr. ("Plaintiff"), has filed an objection to the Motion for Summary Judgment.

This matter has been referred to me for preliminary review, findings, and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B) and D.R.I. Local R. 32(a). A hearing was conducted on May 11, 2004. For the reasons stated herein, I recommend that the Motion for Summary Judgment be granted.

Facts¹ and Travel

¹ The Facts are taken from the Complaint, Defendants' Statement of Undisputed Facts in Support of Motion for Summary Judgment ("Defendants' SUF"), and the exhibits attached to the Memorandum of Law in Support of a Motion for Summary Judgment by Defendants Jonathan R. Wheeler, Susan P. Weeden and Joel K. Gersternblatt ("Defendants' Mem.").

Plaintiff failed to file a "concise statement of all material facts as to which he contends there is a genuine issue necessary to be litigated," D.R.I. Loc. R. 12.1(a)(2), as required by the Local Rules.

On October 1, 1998, Plaintiff appeared in Warwick Municipal Court to answer to an Ordinance Complaint charging several violations² of the City of Warwick (the "City") minimum housing ordinance relating to property at 96 Balcom Avenue, Warwick, Rhode Island.³ See Complaint ¶ 13; Defendants' Statement of Undisputed Facts in Support of Motion for Summary Judgment ("Defendants' SUF") ¶ 1; Memorandum of Law in Support of a Motion for Summary Judgment by Defendants Jonathan R. Wheeler, Susan P. Weeden and Joel K. Gersternblatt ("Defendants' Mem."), Exhibit ("Ex.") A (Ordinance Complaint). Plaintiff was a tenant at the 96 Balcom Avenue premises, which was owned by his former wife, Mary-Anne Peotrowski. See Complaint ¶ 14-16; Defendants' SUF ¶¶ 1, 7. The Ordinance Complaint was initiated and prosecuted by Defendant Weeden, Chief Minimum Housing Inspector for the City ("Inspector Weeden"). See Complaint ¶¶ 4, 14.

Instead, he filed an affidavit in which he states that he "must depose various witnesses, under oath, in order to defend against Defendant's [sic] Motion for Summary Judgment." Affidavit ("Plaintiff's Aff.") ¶ 3. Accordingly, the court may take the facts as stated in Defendants' SUF as true. See Ruiz Rivera v. Riley, 209 F.3d 24, 28 (1st Cir. 2000) (noting that failure to comply with local rule such as Rule 12.1 "justifies the court's deeming the facts presented in the movant's statement of undisputed facts admitted and ruling accordingly")(citing Ayala-Gerena v. Bristol Myers-Squibb Co., 95 F.3d 86, 95 (1st Cir. 1996)); Anabell's Ice Cream Corp. v. Town of Glocester, 925 F.Supp. 920, 924 (D.R.I. 1996)(noting that "movant's version of the facts may be ... taken as true," given failure to contest statement of undisputed facts as required by Rule 12.1).

² Plaintiff was charged with failing to protective coat the exterior walls and failing to repair and protective coat the exterior trim of the 96 Balcom Avenue premises. See Defendants' SUF ¶ 2; Defendants' Mem., Exhibit ("Ex.") A (Ordinance Complaint).

³ The Ordinance Complaint lists the offense date as August 14, 1998, and the initial appearance date as October 1, 1998. See Defendants' Mem., Ex. A (Ordinance Complaint). Plaintiff states that he was arraigned on October 1, 1998. See Complaint ¶ 13.

Plaintiff was tried before Defendant Gerstenblatt,⁴ Chief Judge of the Warwick Municipal Court ("Judge Gerstenblatt"), on July 29, 1999. See Complaint ¶¶ 6, 17; Defendants' SUF ¶ 3. Plaintiff was found guilty and assessed a fine of \$225.00 and court costs of \$30.00. See Complaint ¶ 17; Defendants' SUF ¶ 3. Plaintiff filed an appeal of the Municipal Court's decision on July 29, 1999. See Complaint ¶ 18;⁵ Defendants' SUF ¶ 4. However, the appeal was not transmitted to the Third Division District Court. See Complaint ¶ 18; Defendants' SUF ¶ 5.

During the time between July 29, 1999, and December 30, 2002, Plaintiff made various inquiries as to when the appeal would be transferred to the Third Division District Court. See Complaint ¶ 19. During this period, according to Defendants, the City never attempted to collect the fine or have Plaintiff make any repairs. See Defendants' SUF ¶ 6. Eventually the property was sold, and Plaintiff vacated the premises. See id. ¶ 7. On or about July 12, 2002,⁶ the Ordinance Complaint was dismissed by the City pursuant to Warwick Municipal Court Rule 48(a). See id. ¶ 8; see also Complaint ¶ 20.

Plaintiff on December 30, 2002, filed in the Rhode Island Superior Court a Miscellaneous Petition, requesting that the Clerk of the Warwick Municipal Court, Defendant Wheeler ("Clerk Wheeler"), be ordered to forward the appeal to the District Court

⁴ Although the name "Joel K. Gersternblatt" appears in the caption of the Complaint, the correct spelling of this Defendant's name is "Gerstenblatt." The court has corrected the spelling wherever it does not appear in the title of a pleading or a quotation.

⁵ In one instance Plaintiff lists the date of the appeal as July 19, 1999. See Complaint ¶ 20. However, elsewhere Plaintiff correctly identifies the date as July 29, 1999. See id. ¶¶ 18-19, 31-32.

⁶ Defendants state that the date of the dismissal was July 12, 2002. See Defendants' SUF ¶ 8. Plaintiff implies that the dismissal occurred on July 15, 2002. See Complaint ¶ 20.

or to appoint a third party for the purpose of transmitting the appeal. See Complaint ¶¶ 5, 22; Defendants' SUF ¶¶ 9-10. On or about January 19, 2003, Plaintiff amended the Miscellaneous Petition to include claims of due process and equal protection violations against Defendants Wheeler and Gerstenblatt. See Defendants' SUF ¶ 11; Defendants' Mem., Ex. B (Amended Miscellaneous Petition). A "Stipulation/Order," Complaint ¶ 23, was entered in the Superior Court on February 24, 2003, pursuant to which Plaintiff's complaint would be dismissed with prejudice upon the forwarding of Plaintiff's Municipal Court appeal to the District Court, see id.; Defendant's SUF ¶ 12; Defendants' Mem., Ex. C (Stipulation).

Plaintiff alleges that the appeal was not transferred to the District Court until August 15, 2003, after Plaintiff filed a second motion requesting such transfer. See Complaint ¶ 24. On October 31, 2003, a dismissal under Criminal Rule 48(a) was entered in the District Court, dismissing all complaints against Plaintiff arising out of the Ordinance Complaint, voiding his conviction in the Municipal Court, and confirming the earlier Municipal Court dismissal. See Complaint ¶ 26; Defendants' SUF ¶ 13; Defendants' Mem., Ex. D (Dismissal under Criminal Rule 48(a)).

Plaintiff filed a Complaint (Document #1) in this court on February 3, 2004. On February 20, 2004, Defendants filed their Answer (Document #4) to the Complaint. A pretrial conference was conducted on March 9, 2004, and an Order Staying Discovery for thirty days (Document #9) was subsequently issued. Defendants on March 30, 2004, filed the instant Motion for Summary Judgment (Document #10), with accompanying memorandum, as well as Defendants' SUF (Document #11). On April 14, 2004, Plaintiff's Objection to Defendant's [sic] Motion for Summary Judgment (Document #12) was filed, along with a memorandum in support

thereof and an affidavit⁷ ("Plaintiff's Aff."). A hearing was conducted on May 11, 2004. The court continued the Order Staying Discovery, and the matter was taken under advisement.

Law

I. Pro Se Status

Although Plaintiff is a disbarred attorney, he is proceeding pro se and is accorded the special consideration afforded pro se litigants. See Independence One Mortgage Corp. v. Bell, No. 93 C 5077, 1997 WL 269613, at *4 n.1, (N.D. Ill. May 15, 1997) (according such consideration); see also Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 596, 30 L.Ed. 652 (1972); Rodi v. Ventetuolo, 941 F.2d 22, 23 (1st Cir. 1991). At the same time, a plaintiff's pro se status does not excuse him from complying with procedural rules. See Instituto de Educacion Universal Corp. v. U.S. Dep't of Educ., 209 F.3d 18, 24 n.4 (1st Cir. 2000).

II. Summary Judgment Standard

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kearney v. Town of Wareham, 316 F.3d 18, 21 (1st Cir. 2002)(quoting Fed. R. Civ. P. 56(c)). "A dispute is genuine if the evidence about the fact is such that a reasonable jury could resolve the point in the favor of the non-moving party. A fact is material if it carries with it the potential to affect the outcome of the suit under the

⁷ In his affidavit Plaintiff stated that in order to defend against Defendants' Motion for Summary Judgment, he "must depose various witnesses, under oath . . ." Plaintiff's Aff. ¶ 3. Defendants apparently considered this a request to conduct depositions and on April 20, 2004, filed an objection thereto. See Objection to Plaintiff's Request for Depositions (Document #13). As noted above, at the May 11, 2004, hearing the court continued the previous Order Staying Discovery (Document #9).

applicable law.’” Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 52 (1st Cir. 2000)(quoting Sánchez v. Alvarado, 101 F.3d 223, 227 (1st Cir. 1996)).

In ruling on a motion for summary judgment, the court must examine the record evidence “in the light most favorable to, and drawing all reasonable inferences in favor of, the nonmoving party.” Feliciano de la Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 5 (1st Cir. 2000)(citing Mulero-Rodriguez v. Ponte, Inc., 98 F.3d 670, 672 (1st Cir. 1996)). “[W]hen the facts support plausible but conflicting inferences on a pivotal issue in the case, the judge may not choose between those inferences at the summary judgment stage.” Coyne v. Taber Partners I, 53 F.3d 454, 460 (1st Cir. 1995). Furthermore, “[s]ummary judgment is not appropriate merely because the facts offered by the moving party seem more plausible, or because the opponent is unlikely to prevail at trial. If the evidence presented is subject to conflicting interpretations, or reasonable men might differ as to its significance, summary judgment is improper.” Gannon v. Narragansett Elec. Co., 777 F. Supp. 167, 169 (D.R.I. 1991)(citation and internal quotation marks omitted).

Discussion

I. The Complaint

In the section of his Complaint entitled “Legal Claims,” Complaint at 5, Plaintiff alleges that his rights protected by the Fifth and Fourteenth Amendments were violated in four respects: 1) by the actions of Defendants in maliciously prosecuting Plaintiff, see id. ¶ 30; 2) by the actions of Defendants in not forwarding his July 29, 1999, appeal of the Municipal Court conviction, see id. ¶ 31; 3) by the actions of Defendants in attempting to dismiss the Ordinance Complaint subsequent to Plaintiff’s July 29, 1999, appeal, see id. ¶ 32;

and 4) by the actions of Defendants in not forwarding Plaintiff's appeal subsequent to the Superior Court's February 24, 2003, order to transfer the matter to the district court, see id. ¶ 33.⁸ Plaintiff further alleges that each of these four claims is

⁸ Although Plaintiff alleges violations of both the Fifth and Fourteenth Amendments, see Complaint ¶¶ 21, 30-33, aside from one reference to "equal protection of the laws," id. ¶ 20, he has not specified which of his constitutional rights were allegedly violated, see Defendants' Mem. at 11 (citing Nieves v. McSweeney, 241 F.3d 46, 53 (1st Cir. 2001)). In deference to Plaintiff's pro se status, the court assumes, based on his memorandum, that he also alleges violations of his right to due process of law. See Plaintiff's Mem. at 6-7, 9.

The Fifth Amendment states that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law ...," U.S. Const. amend. V, and the Fourteenth Amendment similarly provides that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law ...," U.S. Const. amend. XIV, § 1. The Fourteenth Amendment, directed towards state and municipal officials, is applicable here.

actionable under 42 U.S.C. §§ 1983⁹ and 1985(2) and (3).¹⁰ See

⁹ Section 1983 provides, in its entirety:

Civil action for deprivation of rights

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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

¹⁰ Section 1985 provides, in relevant part:

Conspiracy to interfere with civil rights

(2) Obstructing justice; intimidating party, witness, or juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of

Complaint ¶¶ 1, 34.

II. Res Judicata

Defendant argues that Plaintiff's Complaint is barred by the doctrine of *res judicata*. See Defendant's Mem. at 5-6.

Plaintiff counters that the prior matter was not adjudicated on the merits and, therefore, the instant Complaint should not be barred by *res judicata*. See Memorandum of Law in Opposition to Defendant's [sic] Motion for Summary Judgment ("Plaintiff's Mem.") at 2, 3-4.

A. Nature of *Res Judicata*

persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985.

Res judicata,¹¹ or claim preclusion,

renders a prior judgment by a court of competent jurisdiction in a civil action between the same parties conclusive as to any issues actually litigated in the prior action, or that could have been presented and litigated therein. Courts employ the doctrine of *res judicata* to maximize judicial efficiency by eliminating duplicative litigation, because such lawsuits only serve to waste the courts' finite resources. *Res judicata* also operates to prevent multiple and possibly inconsistent resolutions of the same lawsuit.

DiBattista v. State, 808 A.2d 1081, 1085-86 (R.I. 2002)(citations and internal quotation marks omitted); see also Comm'r of Internal Revenue v. Sunnen, 333 U.S. 591, 597, 68 S.Ct. 715, 719, 92 L.Ed. 898 (1948)(describing doctrine of *res judicata*). "When invoked, it makes a prior judgment in a civil action between the same parties conclusive with regard to any issues that were litigated in the prior action, or, that could have been presented and litigated therein." ElGabri v. Lekas, 681 A.2d 271, 275 (R.I. 1996); see also DiBattista v. State, 808 A.2d at 1086 ("Under this rule, all claims arising from the same transaction or series of transactions which could have properly been raised in a previous litigation are barred from a later action.").

Federal district courts are required to "give state court judgments the same *res judicata* effect that the state's own law prescribes." Keating v. Rhode Island, 785 F.Supp. 1094, 1098 (D.R.I. 1992); see also Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 81, 104 S.Ct. 892, 896, 79 L.Ed.2d 56 (1984) ("It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was

¹¹ *Res judicata* is a Latin term meaning "[a] matter adjudged" ElGabri v. Lekas, 681 A.2d 271, 275 (R.I. 1996)(quoting Black's Law Dictionary 1305 (6th ed. 1990))(alteration in original).

rendered."); DiPinto v. Sperling, 9 F.3d 2, 4 (1st Cir. 1993) ("Federal courts must accord a state court judgment the same preclusive effect it would receive in the state where it was rendered."). Under Rhode Island law, *res judicata* "bars any relitigation (1) of the same cause of action (2) between the same parties or their privies (3) after final judgment has been rendered on the merits in the first suit." Keating v. Rhode Island, 785 F.Supp. at 1098; see also DiBattista v. Rhode Island, 808 A.2d at 1086 ("Res judicata serves as an absolute bar to a second cause of action where there exists identity of parties, identity of issues, and finality of judgment in an earlier action.")(citations and internal quotation marks omitted); ElGabri v. Lekas, 681 A.2d 271, 275 (R.I. 1996)(same). The rule is not altered because Plaintiff's Complaint alleges a violation of constitutional rights. See Lovely v. Laliberte, 498 F.2d 1261, 1263 (1st Cir. 1974); see also Keating v. Rhode Island, 785 F.Supp. at 1098 ("The bar applies to all matters that *could* have been raised and determined in the original action, including federal constitutional and civil rights questions, even if they were not actually raised.").

B. Failure to Forward Appeal Prior to February 24, 2003

The court finds Plaintiff's claim that his "rights protected by the Fifth and Fourteenth Amendments were violated by the actions of the Defendants by not forwarding Plaintiff's appeal of July 29, 1999," Complaint ¶ 31, to be identical to the cause of action Plaintiff filed in the Rhode Island Superior Court after he was found guilty of housing violations in the Warwick Municipal Court and attempted to appeal that finding. According to the Amended Miscellaneous Petition filed in Superior Court:

15. To date, the Respondents, Jonathan R. Wheeler and Joel K. Gerstenblatt, have not forwarded the appealed case to the Clerk of the Administrative Adjudication Court as required by the Rules of Procedure for the

Warwick Municipal Court.

16. The failure of the Respondents to forward the Petitioner's appeal is a violation of Petitioner's rights of due process and equal protection as set forth in the United States Constitution and the Constitution of the State of Rhode Island.

Defendants' Mem., Ex. B (Amended Miscellaneous Petition). Thus, the first requirement of the doctrine of *res judicata*, identity of the cause of action, see Keating v. Rhode Island, 785 F.Supp. at 1098; DiBattista v. Rhode Island, 808 A.2d at 1086, has been met.

The second factor, identity of parties, is also present. In C.A. No. KC 02-1176, in Superior Court, Plaintiff sued Jonathan R. Wheeler and Joel K. Gerstenblatt, see Defendants' Mem., Ex. B (Amended Miscellaneous Petition), Defendants here. Although in the instant action Plaintiff also names Susan P. Weeden, it does not appear from Plaintiff's Complaint that he contends that she had any part in failing to forward his appeal as alleged in ¶ 31.¹² Thus, the presence of an additional defendant in this action does not render the doctrine of *res judicata* inapplicable to this count of Plaintiff's Complaint, as there are no

¹² Although Plaintiff states that his "rights protected by the Fifth and Fourteenth Amendments were violated by the actions of the Defendants . . .," Complaint ¶¶ 30-33, the only specific references to Inspector Weeden in the "Factual Background" section of the Complaint pertain to the malicious prosecution claim, see id. ¶ 12 ("On various dates from prior to May 7, 1998 and up to and including the drafting of said Ordinance Complaint, Susan P. Weeden, Alias, conspired with various John Does and/or various Jane Does for the purpose of instituting a minimum housing complaint."); id. ¶ 14 ("The minimum housing Ordinance Complaint was commenced and prosecuted by Defendant, Susan P. Weeden, Alias, maliciously and without probable cause . . ."); id. ¶ 27 ("By reason of the action commenced by the Defendant, Susan P. Weeden, Alias, plaintiff was forced to incur expenses . . ."); id. ¶ 28 ("Defendant Susan P. Weeden, Alias, instituted the mentioned action maliciously and with intent to injure plaintiff . . ."). She is not mentioned in any of the factual allegations relating to the appeal and dismissal of Plaintiff's conviction. See id. ¶¶ 18-26.

allegations against Inspector Weeden relating thereto.

The court also finds that there was a final judgment on the merits in the prior litigation. Plaintiff argues that the Superior Court matter was not adjudicated on the merits, but, rather, was terminated by a stipulation. See Plaintiff's Mem. at 2. He cites Otherson v. Department of Justice, INS, 711 F.2d 267 (D.C. Cir. 1983), for the proposition that application of the doctrine of *res judicata* is not proper in such a situation, see Plaintiff's Mem. at 3-4. However, the Otherson case dealt with issue preclusion, not claim preclusion. See Otherson, 711 F.2d at 274 ("Generally speaking, when a particular fact is established not by judicial resolution but by stipulation of the parties, that fact has not been 'actually litigated' and thus is not a proper candidate for issue preclusion.")(footnote omitted). Moreover, the Otherson court specifically distinguished claim preclusion, the situation here, stating that "[u]nder the doctrine of claim preclusion (*res judicata*), by contrast, **even issues determined by stipulation** may not be reopened in later actions upon the same claim." Id. at 274 n.7 (emphasis added). The Superior Court action against Defendants Wheeler and Gerstenblatt was dismissed with prejudice. See Defendant's Mem., Ex. C (Stipulation)("Plaintiff's Complaint may be dismissed, with prejudice to the above entitled matter"). It thus serves as a final adjudication of Plaintiff's claim against these Defendants for failing to forward his appeal, see DiPinto v. Sperling, 9 F.3d at 4 ("A dismissal, with prejudice, constitutes a final judgment on the merits."), thereby meeting the third requirement for application of the doctrine of *res judicata*.

The court finds that as to this claim "there exists identity of parties, identity of issues, and finality of judgment in an earlier action." DiBattista v. Rhode Island, 808 A.2d at 1086 (citations and internal quotation marks omitted); see also

Keating v. Rhode Island, 785 F.Supp. at 1098. Accordingly, Plaintiff's claim against Defendants for failing to forward his appeal of July 29, 1999, prior to the Superior Court's February 24, 2003, stipulation, see Complaint ¶ 31, is barred by the doctrine of *res judicata*.

C. Remaining Claims

The court, however, declines to recommend dismissal based on *res judicata* to Plaintiff's three remaining claims. As explained below, it is not clear that these claims could have been presented and litigated in the prior proceeding. See DiBattista v. State, 808 A.2d at 1086; ElGabri v. Lekas, 681 A.2d at 275.

1. Malicious Prosecution

With regard to Plaintiff's malicious prosecution claim, the Rhode Island Supreme Court has held that "before a litigant may institute a 42 U.S.C. § 1983 claim for alleged constitutional deprivations in connection with a criminal prosecution, the conviction must first be overturned on appeal or in collateral proceedings." Laurence v. Sollitto, 788 A.2d 455, 458-59 (R.I. 2002) (citing Heck v. Humphrey, 512 U.S. 477, 486-87, 114 S.Ct. 2364, 2372, 129 L.Ed.2d 383 (1994)) ("[I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983.") (footnote omitted)). Here, Plaintiff's appeal of his Municipal Court conviction had not yet been addressed. As a result, he could not have included the malicious

prosecution claim in the action in the Superior Court. See Laurence v. Sollitto, 788 A.2d at 459 ("Because the appeal of plaintiff's conviction is now presently pending, he has not met this threshold requirement."). The court therefore concludes that Plaintiff's malicious prosecution claim is not barred by the doctrine of *res judicata*.

2. July 2002 Dismissal of Ordinance Complaint

The court also declines to find that *res judicata* bars Plaintiff's claim that Defendants violated his constitutional rights "by attempting to dismiss the Ordinance Complaint subsequent to Plaintiff's appeal of July 29, 1999," Complaint ¶ 32; see also Complaint ¶ 20 (alleging that Defendants Gerstenblatt and Wheeler "conspired to dismiss the Ordinance Complaint and verdict that was appealed ... without a hearing in open court as required by the Rules of Procedure ..."). The Ordinance Complaint was dismissed by the City in mid-July of 2002. See Defendants' SUF ¶ 8 ("On July 12, 2002, the Ordinance Complaint was dismissed by the City pursuant to Rule 48(a) in the Warwick Municipal Court."); see also Complaint ¶ 20 ("On or prior to July 15, 2002, Defendants ... conspired to dismiss the Ordinance Complaint and verdict"). Plaintiff filed the Miscellaneous Petition in the Rhode Island Superior Court on December 30, 2002, see Complaint ¶ 22; Defendants' SUF ¶ 9, and he amended that petition on or about January 16 or 19, 2003, see Defendants' SUF ¶ 11; Defendants' Mem., Ex. B (Amended Miscellaneous Petition). Plaintiff did not mention the July, 2002, dismissal in the Amended Miscellaneous Petition. See Defendants' Mem., Ex. B (Amended Miscellaneous Petition). It is reasonable to assume that had Plaintiff known of the dismissal, he would have included allegations pertaining thereto in the Amended Miscellaneous Petition. See Feliciano de la Cruz v. El Conquistador Resort & Country Club, 218 F.3d 1, 5 (1st Cir. 2000)

(noting that in ruling on motion for summary judgment, the court must "draw[] all reasonable inferences in favor of[] the nonmoving party"). Plaintiff could not have litigated a claim of which he was not aware. Accordingly, the court concludes that this issue could not have been presented and litigated in the prior proceeding in Superior Court and, therefore, should not be barred by *res judicata*. See ElGabri v. Lekas, 681 A.2d at 275; see also DiBattista v. State, 808 A.2d at 1086.

3. Failure to Forward Appeal after February 24, 2003

As for Plaintiff's contention that his constitutional rights were violated "by the actions of Defendants by not forwarding Plaintiff's appeal subsequent to a Superior Court Order agreeing to forward the same on February 24, 2003," Complaint ¶ 33, Plaintiff could not have included this claim in the Miscellaneous Petition and Amended Miscellaneous Petition filed in Superior Court. The claim did not arise until after the disposition of that action on February 24, 2003. Thus, *res judicata* clearly is not applicable to this allegation as it could not have been litigated previously. See DiBattista v. State, 808 A.2d at 1086; ElGabri v. Lekas, 681 A.2d at 275 (R.I. 1996).

D. Conclusion Re *Res Judicata*

In summary, the court finds that the doctrine of *res judicata* bars Plaintiff's allegations regarding the failure to forward his appeal prior to the Superior Court's February 24, 2003, stipulation. Accordingly, I recommend that the Motion for Summary Judgment be granted as to that claim on the basis of *res judicata*. However, the court further finds that *res judicata* does not bar Plaintiff's claim of malicious prosecution, his claim pertaining to the Municipal Court's July 2002 dismissal of the Ordinance Complaint, and his claim relating to the failure to forward his appeal subsequent to the Superior Court's February 24, 2003, stipulation. Therefore, summary judgment should not be

granted on the basis of *res judicata* as to those claims.

III. Judicial Immunity

Defendants argue that Judge Gerstenblatt, as Chief Judge of the Warwick Municipal Court, is absolutely immune from suit. See Defendants' Mem. at 6-7. Plaintiff counters that Judge Gerstenblatt is not entitled to absolute immunity. See Plaintiff's Mem. at 4-5.

It is well established that judges are absolutely immune from suit for their judicial acts unless they act in the clear absence of all jurisdiction. See Mireles v. Waco, 502 U.S. 9, 11-12, 112 S.Ct. 286, 288, 116 L.Ed.2d 9 (1991)("[O]ur cases make clear that the immunity is overcome in only two sets of circumstances. First, a judge is not immune from liability for nonjudicial actions, *i.e.*, actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction.")(citations omitted); Stump v. Sparkman, 435 U.S. 349, 356-57, 98 S.Ct. 1099, 1105, 55 L.Ed.2d 331 (1978)("A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the clear absence of all jurisdiction.")(internal quotation marks omitted); Pierson v. Ray, 386 U.S. 547, 553-54, 87 S.Ct. 1213, 1217-18, 18 L.Ed.2d 288 (1967)("Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in Bradley v. Fisher, 13 Wall. 335, 20 L.Ed. 646 (1872)."); see also Antoine v. Byers & Anderson, Inc., 508 U.S. 429, 435, 113 S.Ct. 2167, 2171, 124 L.Ed.2d 391 (1993)("The doctrine of judicial immunity is supported by a long-settled

understanding that the independent and impartial exercise of judgment vital to the judiciary might be impaired by exposure to potential damages liability.").

There is also ample authority that judges are specifically immune to suits brought pursuant to 42 U.S.C. § 1983. See Dennis v. Sparks, 449 U.S. 24, 27, 101 S.Ct. 183, 186, 66 L.Ed.2d 185 (1980)("[T]his Court has consistently adhered to the rule that judges defending against § 1983 actions enjoy absolute immunity from damages liability for acts performed in their judicial capacities.")(internal quotation marks omitted); Pushard v. Russell, 815 F.2d 1, 2 (1st Cir. 1987)("The law is well settled that the principle of judicial immunity survived the enactment of 42 U.S.C. § 1983."); Siano v. Justices of Massachusetts, 698 F.2d 52, 55 n.4 (1st Cir. 1983)("[The plaintiff] correctly perceives that he is precluded from bringing a section 1983 damages action against the Justices by the doctrine of judicial immunity.").

Although Plaintiff states that Judge Gerstenblatt is being sued in his individual capacity, see Complaint ¶ 6, it is clear that he is being sued for actions taken in his judicial capacity, see Stump v. Sparkman, 435 U.S. at 362, 98 S.Ct. at 1107 ("[T]he factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity."); see also Mireless v. Waco, 502 U.S. at 13, 112 S.Ct. at 288 ("a judicial act does not become less judicial by virtue of an allegation of malice or corruption of motive") (internal quotation marks omitted); Cleavinger v. Saxner, 474 U.S. 193, 199-200, 106 S.Ct. 496, 500, 88 L.Ed.2d 507 (1985) ("Such immunity applies however erroneous the act may have been, and however injurious in its consequences it may have proved to

the plaintiff. Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed.")(citation and internal quotation marks omitted); Dennis v. Sparks, 449 U.S. at 27, 101 S.Ct. at 186 (noting that judge had properly been dismissed from the suit on immunity grounds despite allegations of conspiracy); Cok v. Cosentino, 876 F.2d 1, 2 (1st Cir. 1989) ("There is no question that [the defendant judge] was protected by absolute immunity from civil liability for any normal and routine judicial act. This immunity applies no matter how erroneous the act may have been, how injurious its consequences, how informal the proceeding, or how malicious the motive.")(citations omitted).

As it pertains to Judge Gerstenblatt, Plaintiff's claim that his rights were violated by the actions of Defendants in "maliciously prosecuting [him]," Complaint ¶ 30, does not deprive Judge Gerstenblatt of his absolute immunity. See Dennis v. Sparks, 449 U.S. at 26-27, 101 S.Ct. at 185-86 (noting, in case involving claims that injunction was corruptly issued, that judge had properly been dismissed from the suit on immunity grounds despite allegations of conspiracy); see also Campana v. Muir, 615 F.Supp. 871, 877-78 (M.D. Pa. 1985)(stating that the doctrine of judicial immunity barred claims of libel and malicious prosecution against judge); Chamberlain v. Thompson, 302 S.E.2d 721, 722 (Ga. Ct. App. 1983)(noting, in case alleging false arrest and malicious prosecution by justice of the peace, that judges are immune from liability in civil actions for acts performed in their judicial capacity). Moreover, because forwarding the appeal clearly would be considered a "normal and routine judicial act," Cok v. Cosentino, 876 F.2d at 2, failing to forward the appeal must also be considered a judicial act, protected by absolute immunity.

As for the dismissal of the Ordinance Complaint in July of 2002, that, too, would have to be considered a "normal and routine judicial act," id. Plaintiff nonetheless asserts that Judge Gerstenblatt's action was taken in the "clear absence of all jurisdiction." Plaintiff's Mem. at 5. Plaintiff argues that "[t]he case had been appealed on July 19, 1999,^[13] and Gerstenblatt acted upon said case on or about July 15, 2002, approximately [three] years after the case was appealed. Clearly Gerstenblatt has no jurisdiction over a case appealed to another court." Id. The court disagrees. The case was properly in Municipal Court. Jurisdiction did not disappear the moment Plaintiff filed his appeal, but continued until the case was transferred to the District Court.

The court concludes that Judge Gerstenblatt's actions were judicial acts and that they were not taken in the absence of all jurisdiction. Accordingly, Judge Gerstenblatt is not deprived of his absolute immunity from suit. As to Judge Gerstenblatt, therefore, the Motion for Summary Judgment should be granted on grounds of judicial immunity, and I so recommend.

IV. Quasi-Judicial Immunity

Defendants contend that Inspector Weeden, Chief Minimum Housing Inspector, who initiated the Ordinance Complaint against Plaintiff,¹⁴ is entitled to absolute quasi-judicial, or prosecutorial, immunity. See Defendants' Mem. at 7-8. Plaintiff disagrees. See Plaintiff's Mem. at 6.

¹³ See n. 5.

¹⁴ Although in the "Legal Claims" section of his Complaint Plaintiff alleges that his "rights ... were violated by the actions of the Defendants," Complaint ¶¶ 30-33, the only specific allegations directed against Inspector Weeden in the "Factual Background" portion relate to the claim for malicious prosecution, see n.12.

A prosecutor is absolutely immune from suit for actions taken in the course of performing her prosecutorial duties. See Imbler v. Pachtman, 424 U.S. 409, 431, 96 S.Ct. 984, 995, 47 L.Ed.2d 128 (1976)("[I]n initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983."); see also Buckley v. Fitzsimmons, 509 U.S. 259, 273, 113 S.Ct. 2606, 2615, 125 L.Ed.2d 209 (1993)("[A]cts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity."); Harrington v. Almy, 977 F.2d 37, 40 (1st Cir. 1992)("The decision whether or not to charge is at the core of the prosecutorial functions the courts have sought to insulate from second guessing through civil litigation."); Willhauck v. Halpin, 953 F.2d 689, 711 n.22 (1st Cir. 1991)("[A] § 1983 action brought after the fact for damages against prosecutors in their individual capacity would ... be barred by the doctrine of prosecutorial immunity."); Celia v. O'Malley, 918 F.2d 1017, 1019 (1st Cir. 1990)("Absolute immunity is afforded to prosecutors in their quasi-judicial role in order to ensure the independence and effectiveness of the criminal justice system."); Malachowski v. City of Keene, 787 F.2d 704, 711 (1st Cir. 1986) ("In his capacity as prosecutor ... he is absolutely immune from a suit for damages under § 1983."). The immunity afforded to a prosecutor remains even when she institutes a prosecution in bad faith for the purpose of retaliation. See Celia v. O'Malley, 918 F.2d at 1019 (citing Siano v. Justices of Massachusetts, 698 F.2d 52, 58 (1st Cir. 1983)); Campbell v. Maine, 787 F.2d 776, 778 (1st Cir. 1986)(refusing to recognize a bad faith exception to the scope of prosecutorial immunity as defined in Imbler); cf. Reid v. New

Hampshire, 56 F.3d 332, 337 (1st Cir. 1995)(holding that allegation that prosecutors repeatedly misled trial court in order to conceal their alleged misconduct does not defeat absolute immunity).

While a proper allegation of conspiracy could overcome Inspector Weeden's prosecutorial immunity, see Malachowski v. City of Keene, 787 F.2d at 711 (citing San Filippo v. U.S. Trust Co. of New York, 737 F.2d 246, 256 (2nd Cir. 1984)), Plaintiff's allegations here fall far short of what is required. He alleges that she "conspired with various John Does and/or various Jane Does for the purpose of instituting a minimum housing complaint," Complaint ¶ 12. He fails to allege that the conspiracy is based on some racial or otherwise class-based, invidiously discriminatory animus, a necessary requirement to state a claim under 42 U.S.C. § 1985. See Burns v. State Police Ass'n of Mass., 230 F.3d 8, 12 (1st Cir. 2000)("To state a claim under [42 U.S.C.] § 1985(3), a plaintiff must, among other requirements, allege the existence of a conspiracy intended to deprive an individual or class of persons of protected rights based on some racial, or perhaps otherwise class-based, invidiously discriminatory animus.")(footnote, citation, and internal quotation marks omitted). Furthermore, Plaintiff's claim of a conspiracy is completely unsupported and, thus, need not be credited by the court. See Slotnick v. Garfinkle, 632 F.2d 163, 166 (1st Cir. 1980)("[The plaintiff's] complaint ... neither elaborates nor substantiates its bald claims that certain defendants 'conspired' with one another. [His] section 1985 claim was thus properly dismissed"); Slotnick v. Staviskey, 560 F.2d 31, 33 (1st Cir. 1977)("Despite language hinting at a wider conspiracy, the plaintiff has failed to plead facts supporting these vague claims, and the courts need not conjure up

unpleaded facts to support these conclusory suggestions."); see also Rogan v. Menino, 175 F.3d 75, 77 (1st Cir. 1999)("[B]ald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like need not be credited."); Rubinovitz v. Rogato, 60 F.3d 906, 909 (1st Cir. 1995)(noting that for purposes of summary judgment facts are considered in light most favorable to nonmoving party, but court "need not credit purely conclusory allegations").

Plaintiff asserts that as Chief Minimum Housing Inspector Inspector Weeden is not entitled to absolute prosecutorial immunity because she is not employed by the City in the City Solicitor's office and that prosecutorial immunity attaches only to "a legal officer who represents the government in criminal proceedings." Plaintiff's Mem. at 6. Nonetheless, he admits that she "was acting as a prosecutor in the sense that she was the person who instituted the minimum housing complaint." Id.; see also Complaint ¶ 14 ("The minimum housing Ordinance Complaint was commenced and prosecuted by Defendant, Susan P. Weeden").

Moreover, the United States Supreme Court "has made clear that the availability of absolute immunity turns on a functional analysis of the prosecutorial activity under consideration." Harrington v. Almy, 977 F.2d at 40 (citing Burns v. Reed, 500 U.S. 478, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991); Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976)); see also Johnson v. Rhode Island Parole Bd. Members, 815 F.2d 5, 6 (1st Cir. 1987)(noting "functional approach to immunity law"). Thus, absolute immunity has been extended to "certain 'quasi-judicial' agency officials who, irrespective of *title*, perform *functions* essentially similar to those of judges or prosecutors, in a setting similar to that of a court." Bettencourt v. Bd. of

Reg. In Med. of Massachusetts, 904 F.2d 772, 782 (1st Cir. 1990); see also Burns v. Reed, 500 U.S. at 490, 111 S.Ct. at 1941 (noting that at common law absolute "immunity extended to any hearing before a tribunal which perform[ed] a judicial function") (alteration in original)(internal quotation marks omitted); Cleavinger v. Saxner, 474 U.S. 193, 200, 106 S.Ct. 496, 500, 88 L.Ed.2d 507 (1985)("[T]he Court has extended absolute immunity to certain others who perform functions closely associated with the judicial process."); Johnson v. Rhode Island Parole Bd. Members, 815 F.2d at 6 (recognizing that quasi-judicial immunity extends to parole board members); Malachowski v. City of Keene, 787 F.2d at 712 ("The Court has also accorded absolute immunity to agency officials performing functions analogous to those of a prosecutor."); Duncan v. Mississippi Bd. of Nursing, 982 F.Supp. 425, 433 (S.D. Miss. 1997)(noting that defendant, including member of state board of nursing, who "engages in actions comparable to an adjudicatory or judicial role" is entitled to absolute immunity); Laden v. City of Philadelphia, Civ. A. No. 92-0697, 1992 WL 129784, at *1 (E.D. Pa. June 8, 1992) (extending quasi-judicial immunity to city Board of License and Inspection Review because "[i]ndividuals involved in the judicial process or who perform duties related to such process are also absolutely immune").

It is clear to the court that, whatever her title, Inspector Weeden's duties here are, if not those of a prosecutor, closely akin thereto and occurred in a judicial setting. She "commenced and prosecuted," Complaint ¶ 14, the minimum housing Ordinance Complaint in the Warwick Municipal Court. Utilizing the functional analysis established by the Supreme Court, the court concludes that Inspector Weeden is absolutely immune from suit based on quasi-judicial immunity and recommends that the Motion

for Summary Judgment be granted as to Inspector Weeden on this basis.

V. Qualified Immunity

Defendants argue that Clerk Wheeler is entitled to qualified immunity and that Judge Gerstenblatt and Inspector Weeden, in the alternative, are also entitled to qualified immunity.¹⁵ See Defendants' Mem. at 9-11. Plaintiff disputes that Defendants are entitled to qualified immunity. See Plaintiff's Mem. at 6-9.

A. Nature of Qualified Immunity

The Court of Appeals for the First Circuit has stated that "a public actor's liability under section 1983 'is not absolute: the doctrine of qualified immunity provides a safe harbor for a wide range of mistaken judgments.'" Cox v. Hainey, 391 F.3d 25, 29 (1st Cir. 2004)(quoting Hatch v. Dep't for Children, Youth & Their Families, 274 F.3d 12, 19 (1st Cir. 2001)); see also Riverdale Mills Corp. v. Pimpare, 392 F.3d 55, 60 (1st Cir. 2004) ("Qualified immunity is designed to protect most public officials: 'it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.'")(quoting Malley v. Briggs, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)). "[T]he doctrine of qualified immunity protects public officials from civil liability 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Cox v. Hainey, 391 F.3d at 29 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)).

Plaintiff contends that "[t]he question of qualified immunity should rest with the jury and ... not be decided by a

¹⁵ Having determined that Judge Gerstenblatt and Inspector Weeden are entitled to absolute immunity, the court need not address the qualified immunity question as it pertains to these Defendants.

Motion for Summary Judgment." Plaintiff's Mem. at 9; see also id. at 8 (citing Crews v. Petrosky, 509 F.Supp. 1199, 1204 (W.D. Pa. 1981)). However, the United States Supreme Court has stated, and the First Circuit has reiterated, that "[q]ualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation.' The privilege is 'an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.'" Saucier v. Katz, 533 U.S. 194, 200-01, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001)(quoting Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)) (internal citation omitted); see also Cox v. Hainey, 391 F.3d at 29 (same). Thus, the applicability of qualified immunity "should be determined at the earliest practicable stage in the case." Cox v. Hainey, 391 F.3d at 29. The court, therefore, rejects Plaintiff's argument that the qualified immunity issue should not be decided at this juncture.

B. Ministerial versus Discretionary Duties

Plaintiff also appears to rely on the distinction between ministerial and discretionary functions in asserting that Clerk Wheeler is not entitled immunity. See Plaintiff's Mem. at 7 (citing Crews v. Petrowsky, 509 F.Supp. at 1203); see also Complaint ¶ 25 (stating that Clerk Wheeler "was entitled to no more protection in an action under 42 U.S.C. Section 1983 than any other ministerial functionary who failed to discharge a mandatory duty"); id. ¶ 21 (arguing that Defendants Gerstenblatt and Wheeler violated Plaintiff's civil rights "by ministerially acting ..."). Defendants apparently assume, without discussion, that Clerk Wheeler was performing discretionary functions. See Defendants' Mem. at 9.

The Supreme Court has emphasized the narrow scope of the

"ministerial duty" exception to qualified immunity. See Gagne v. City of Galveston, 805 F.2d 558, 560 (5th Cir. 1986)(citing Davis v. Scherer, 468 U.S. 183, 196 n.14, 104 S.Ct. 3012, 3020 n.14, 82 L.Ed.2d 139 (1984)); see also McIntosh v. Weinberger, 810 F.2d 1411, 1432 (8th Cir. 1987)(noting narrowness of ministerial duty exception), partially vacated and remanded on other grounds sub nom. Turner v. McIntosh, 487 U.S. 1212, 108 S.Ct. 2861, 101 L.Ed.2d 898, and cert. denied sub nom. McIntosh v. Carlucci, 487 U.S. 1217, 108 S.Ct. 2870, 101 L.Ed.2d 905 (1988); Dugas v. Jefferson County, 931 F.Supp. 1315, 1321 n.4 (E.D. Tex. 1996) (noting that circuit courts had commented on "the extremely restricted breadth of the ministerial function exception")(citing cases).¹⁶ In Davis v. Scherer, the appellee alleged that

¹⁶ Some courts have questioned the continuing validity of the ministerial-discretionary duty distinction altogether. See, e.g., Varrone v. Bilotti, 123 F.3d 75, 82 (2nd Cir. 1997)("The continued validity of the ministerial-discretionary function distinction in determining qualified immunity has been questioned.")(citing cases); McIntosh v. Weinberger, 810 F.2d 1411, 1432 (8th Cir. 1987)("[T]he plaintiffs have cited, and we can find, no recent case other than that before us in which a court has rejected qualified immunity simply because the official in question was performing a ministerial duty."), partially vacated and remanded on other grounds sub nom. Turner v. McIntosh, 487 U.S. 1212, 108 S.Ct. 2861, 101 L.Ed.2d 898, and cert. denied sub nom. McIntosh v. Carlucci, 487 U.S. 1217, 108 S.Ct. 2870, 101 L.Ed.2d 905 (1988); Coleman v. Frantz, 754 F.2d 719, 727 (7th Cir. 1985)("[I]t would be unwise to engage in a case by case determination of Section 1983 immunity based upon the ministerial versus discretionary nature of the particular official act challenged."); Williamson v. City of Virginia Beach, 786 F.Supp. 1238, 1260 n.28 (E.D. Va. 1992)(observing that eliminating ministerial-discretionary function distinction for qualified immunity in § 1983 actions "provides more certain guidance to public officials regarding the scope of the protection afforded them by qualified immunity ... [and] also remedies the perverse notion that high ranking officials with discretionary and policy-making powers ... are immune from suit when similar immunity from suit is unavailable to lowly functionaries who have little, if any, choice in carrying out their ministerial functions"), aff'd, 991 F.2d 793 (4th Cir. 1993)(table); cf. Ricci v. Key Bancshares of Maine, Inc., 768 F.2d 456, 464 (1st Cir. 1985) ("[B]reaking down discretionary acts ... into discretionary and

violation of an administrative regulation constituted breach of a ministerial duty. See Davis v. Scherer, 468 U.S. at 196 n.14, 104 S.Ct. at 3020 n.14. The Supreme Court disagreed. See id. at 194, 104 S.Ct. at 3019 ("Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision."); see also Gagne v. City of Galveston, 805 F.2d at 560 ("[T]he Court has never implied that the immunity defense is lost when an official is engaged in routine tasks.").

In noting that the appellee's argument "mistakes the scope of the 'ministerial duty' exception to qualified immunity," Davis v. Scherer, 468 U.S. at 196 n.14, 104 S.Ct. at 3020 n.14, the Supreme Court made the following observations. First, the Court stated that "[a] law that fails to specify the precise action that the official must take in each instance creates only discretionary authority; and that authority remains discretionary however egregiously it is abused." Davis v. Scherer, 468 U.S. at 196 n.14, 104 S.Ct. at 3020 n.14; see also Gagne v. City of Galveston, 805 F.2d at 560 (quoting Davis v. Scherer). Thus, if an official were required to exercise his or her judgment, even

ministerial components would seem to vitiate much of the protection of discretionary action which absolute immunity was designed to provide.").

Other courts have addressed the difficulty in applying the ministerial-discretionary distinction. See, e.g., Horta v. Sullivan, 4 F.3d 2, 11 (1st Cir. 1993)(noting that, despite the Supreme Court's reference to discretionary functions in Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), "it has never since been clear exactly what role, if any, this concept is supposed to play in applying qualified immunity"); F.E. Trotter, Inc. v. Watkins, 869 F.2d 1312, 1315 (9th Cir. 1989)("Few official actions consist entirely of the unfettered exercise of discretion; most have some ministerial element."); Williamson v. City of Virginia Beach, 786 F.Supp. 1238, 1260 (E.D. Va. 1992)("[T]here are few, if any, acts performed by officials which are not discretionary."); see also id. at 1259 ("all conduct involves some discretion").

if rarely or to a limited degree, the Supreme Court would apparently find the official's duty to be discretionary, not ministerial, in nature. See Gagne v. City of Galveston, 805 F.2d at 560 (quoting Davis v. Scherer); see also Horta v. Sullivan, 4 F.3d at 12 ("[T]he officials' duties were not merely ministerial, as the officials retained a considerable measure of personal discretion in applying the administrative regulations.") (discussing Davis v. Scherer). Second, the Supreme Court emphasized that the breach of an official duty, whether ministerial or discretionary, "would forfeit official immunity only if that breach itself gave rise to the appellee's cause of action for damages." Davis v. Scherer, 468 U.S. at 196 n.14, 104 S.Ct. at 3020 n.14; see also id. at 194 n.12, 104 S.Ct. at 3019 n.12 ("Neither federal nor state officials lose their immunity by violating the clear command of a statute or regulation--of federal or of state law--unless that statute or regulation provides the basis for the cause of action sued upon."); Gagne v. City of Galveston, 805 F.2d at 560 (same); accord Horta v. Sullivan, 4 F.3d at 12 (noting that under Davis v. Scherer "the officials could lose their immunity only if the breach of the state regulation rather than of a constitutional duty gave rise to plaintiff's damages claim").

In the instant case, it is clear to the court that the regulations at issue fail "to specify the precise action that the official must take in each instance," Davis v. Scherer, 468 U.S. at 196 n.14, 104 S.Ct. at 3020 n.14. The Warwick Municipal Court Code of Ordinances provides that:

The clerk of the court shall have charge of all administrative duties and shall supervise the day-to-day operation of the court with regard to oversight of all office personnel and the collection and gathering of all monies due to the court. The clerk of the court shall keep a regular docket of all cases disposed of; shall

record the judgments, orders and sentences of the court; and shall furnish certified copies thereof when required, for which copies the clerk shall charge the same fees by law allowed to clerks of the superior court. He/she shall keep his/her office open to the public during such hours as the court shall determine and shall also serve defendant until the court is in session. Additionally, he/she shall perform such additional duties and carry out such additional responsibilities as set forth in the rules of the court, and as directed by the chief judge.

Code of Ordinances, Ch. 42, Sec. 42-6 (Duties of clerk). There is no mention of the duties of the clerk regarding appeals.¹⁷ The Code of Ordinances further provides that "any defendant found guilty of any violation of a minimum housing violation may, within five days of such conviction, file an appeal from said conviction to the third division of the district court and be entitled to a trial de novo in accordance with G.L. 1956, §§ 8-8-3(d) and 8-8-3.2, as amended." Code of Ordinances, Sec. 42-9 (Jurisdiction generally); see also Warwick Municipal Court General Rules 45 (Judicial Review) ("Appeals. Any person desiring

¹⁷ In his Amended Miscellaneous Petition to the Superior Court, Plaintiff quoted Rule 43 of the Warwick Municipal Court General Rules, which provides:

Forwarding of findings and Dispositions to the Administrative Adjudication Court

The Clerk of the Court, in a timely manner, shall transmit to the Clerk of the Administrative [Adjudication] Court, the findings and dispositions of this Court, as well as any so called, "pay-by-mails," for matters over which the Warwick Municipal Court and the Administrative Adjudication Court share jurisdiction. Timely shall mean at such times, and at such intervals as determined by the Chief Judge.

Defendants' Mem., Ex. B (Amended Miscellaneous Petition). However, the Administrative Adjudication Court had no jurisdiction over appeals of convictions for housing violations and, indeed, has been replaced by the Traffic Tribunal, see n. 18. Thus, Plaintiff's reference to Rule 43 has no relevance to his appeal of his conviction for a minimum housing violation.

to appeal from an adverse decision of the Municipal Court pursuant to the provisions of this chapter may seek review thereof pursuant to the procedures set forth in 31-43-4^[18] of R.I.G.L., or the salient section of the City of Warwick Code of Ordinances,^[19] depending on the charge."). Again, although these provisions instruct an aggrieved person regarding appeals, they do not specify what the clerk is to do when an appeal is filed. Accordingly, the court concludes that Clerk Wheeler retained enough discretion in performing his duties to render the ministerial function exception inapplicable in the instant matter. See Davis v. Scherer, 468 U.S. at 196 n.14, 104 S.Ct. at 3020 n.14; Gagne v. City of Galveston, 805 F.2d at 560; Horta v. Sullivan, 4 F.3d at 12.

As to whether Clerk Wheeler's alleged breach of an official duty itself gave rise to Plaintiff's cause of action for damages, see Davis v. Scherer, 468 U.S. at 196 n.14, 104 S.Ct. at 3020 n.14, it can hardly be said that Defendant violated the "clear command of a statute or regulation," id. at 194 n.12, 104 S.Ct. at 3019 n.12. As discussed above, neither the City Ordinance to which Plaintiff refers, Code of Ordinances, Sec. 42-9, nor Rule 45 of the Warwick Municipal Court General Rules specifies what the clerk is to do when an appeal is filed. Moreover, Plaintiff states in his Complaint that his cause of action arises from

¹⁸ R.I. Gen. Laws § 31-43-4, which appeared in Title 31 of the Rhode Island General Laws (Motor and Other Vehicles), was repealed by P.L. 1999, ch. 218, art. 1, § 1, effective July 1, 1999, and the Administrative Adjudication Court was abolished. See R.I. Gen. Laws § 31-43-4 (repealed). The Administrative Adjudication Court was replaced by the Traffic Tribunal. See R.I. Gen. Laws §§ 31-41.1-1 through 31-41.1-11.

¹⁹ The "salient section of the City of Warwick Code of Ordinances," Warwick Municipal Court General Rules 45, refers to Code of Ordinances Sec. 42-9, quoted above.

violations of his rights under the Fifth and Fourteenth Amendments to the United States Constitution. See Complaint ¶¶ 30-33; cf. Gagne v. City of Galveston, 805 F.2d at 560 ("Thus allegations about the breach of a statute or regulation are simply irrelevant to the question of an official's eligibility for qualified immunity in a suit over the deprivation of a constitutional right."); Horta v. Sullivan, 4 F.3d at 12 ("The damages claim in Count I is based on a purported Fourth Amendment violation, not upon the breach of the ... guidelines."). Therefore, Clerk Wheeler has not forfeited his qualified immunity.

C. Conclusion Re Ministerial Duty Exception

The court concludes that Clerk Wheeler's actions (or inactions) do not fall within the ministerial function exception, because he retained sufficient discretion in the performance of his duties. The regulations do not specify the precise action to be taken in each instance, see Davis v. Scherer, 468 U.S. at 196 n.14, 104 S.Ct. at 3020 n.14, and Clerk Wheeler's alleged breach of his official duty does not itself give rise to Plaintiff's cause of action, see id. The court, therefore, declines to find that Clerk Wheeler is deprived of qualified immunity. Accordingly, the court will evaluate Plaintiff's remaining three claims utilizing the Supreme Court's "sequential analysis for determining whether [Clerk Wheeler] violated clearly established rights of which a reasonable person would have known." Cox v. Hainey, 391 F.3d at 29 (citing Saucier v. Katz, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)).

D. Qualified Immunity Analysis

The First Circuit has construed the Supreme Court's framework for analyzing qualified immunity to consist of three inquiries:

(i) whether the plaintiff's allegations, if true, establish a constitutional violation; (ii) whether the constitutional right at issue was clearly established at the time of the putative violation; and (iii) whether a reasonable officer, situated similarly to the defendant, would have understood the challenged act or omission to contravene the discerned constitutional right.

Cox v. Hainey, 391 F.3d at 29-30; see also Riverdale Mills Corp. v. Pimpare, 392 F.3d at 60. The question of whether Plaintiff has alleged facts that show Clerk Wheeler's conduct violated a constitutional right should be treated as a "threshold question." Saucier v. Katz, 533 U.S. at 201, 121 S.Ct. at 2156; see also Cox v. Hainey, 391 F.3d at 30. "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." Saucier v. Katz, 533 U.S. 194, 201, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001).

1. Malicious Prosecution

Plaintiff alleges that his "rights protected by the Fifth and Fourteenth Amendments were violated by the actions of the Defendants in maliciously prosecuting [him]." Complaint ¶ 30. It is Plaintiff's burden to establish, by clear proof, that: 1) Clerk Wheeler initiated a criminal proceeding against Plaintiff; 2) there was no probable cause to initiate the proceeding; 3) the proceeding was instituted maliciously; and 4) the proceeding terminated in Plaintiff's favor. See Rezendes v. Beaudette, 797 A.2d 474, 748-49 (R.I. 2002); Clyne v. Doyle, 740 A.2d 781, 782 (R.I. 1999)(same); see also Nieves v. McSweeney, 241 F.3d 46, 53 (1st Cir. 2001)(same).

The only specific factual allegations regarding the institution of the Ordinance Complaint, indeed regarding this claim in general, are directed against Inspector Weeden. See Complaint ¶ 12 ("On various dates from prior to May 7, 1998 and

up to and including the drafting of said Ordinance Complaint, Susan P. Weeden, Alias, conspired with various John Does and/or Jane Does for the purpose of instituting a minimum housing complaint."); id. ¶ 14 ("The minimum housing Ordinance Complaint was commenced and prosecuted by Defendant, Susan P. Weeden, Alias, maliciously and without probable cause"); id. ¶ 27 ("By reason of the action commenced by the Defendant, Susan P. Weeden, Alias, plaintiff was forced to incur expenses"); id. ¶ 28 ("Defendant Susan P. Weeden, Alias, instituted the mentioned action maliciously and with intent to injure plaintiff"). Nowhere does Plaintiff allege that Clerk Wheeler instituted the Ordinance Complaint.

As for probable cause, although Plaintiff disputes that he was responsible for the minimum housing violations, see Complaint ¶ 14 ("Plaintiff was not the owner of the real estate located at 96 Balcom Avenue, Warwick Rhode Island, and had never entered into a written agreement with the owner of said real estate agreeing to maintaining the exterior of the same in good repair."), he does not dispute that the violations existed. Plaintiff's argument apparently is that he was not responsible for the violations since he was the occupant, not the owner, of the premises. See Complaint ¶¶ 14-15. Even assuming that Plaintiff's position is correct, a point which Defendants dispute, see Defendants' Mem. at 8 n.2 ("Sec. 26-261 states that 'No person shall own, occupy, or permit to be occupied by another any dwelling or dwelling unit that does not comply with the requirements of this article.'")(citing Code of Ordinances, Ch. 26, Art. IX, Sec. 26-261), at most he has alleged an error in instituting the Ordinance Complaint against the wrong party.

Moreover, there is no evidence of malice, only Plaintiff's bare allegations thereof (which, as noted above, are directed

against Inspector Weeden). That is not enough to defeat summary judgment. See Rogan v. Menino, 175 F.3d 75, 77 (1st Cir. 1999) (“[B]ald assertions ... need not be credited.”); Rubinovitz v. Rogato, 60 F.3d 906, 909 (1st Cir. 1995)(noting that court “need not credit purely conclusory allegations”).

Finally, the proceeding terminated in Plaintiff’s favor. Following his appeal of the Municipal Court conviction, the Ordinance Complaint against Plaintiff was dismissed by the District Court on October 31, 2003, and Plaintiff’s conviction was voided. See Defendant’s Mem., Ex. D (Dismissal under Criminal Rule 48(a)).

Even if Plaintiff had established the elements necessary to prove malicious prosecution, which he has not, “more is needed to transform malicious prosecution into a claim cognizable under section 1983.” Nieves v. McSweeney, 241 F.3d at 53; see also Roche v. John Hancock Mut. Life Ins. Co., 81 F.3d 249, 256 (1st Cir. 1996)(“[A] garden-variety claim of malicious prosecution garbed in the regalia of § 1983 must fail.”). Plaintiff “also must show a deprivation of a federally-protected right.” Nieves v. McSweeney, 241 F.3d at 53. “[S]ubstantive due process may not furnish the constitutional peg on which to hang a federal malicious prosecution tort.” Id. (citation and internal quotation marks omitted); see also Roche v. John Hancock Mut. Life Ins. Co., 81 F.3d at 256 (“There is no substantive due process right under the Fourteenth Amendment^[20] to be free from malicious prosecution”). In addition, the First Circuit has held that “the availability of a plainly adequate remedy under [state] law defeats the possibility of a procedural due process claim here.” Roche v. John Hancock Mut. Life Ins. Co., 81 F.3d at 256 (citations omitted). In the instant case, it is clear to

²⁰ See n.8.

the court that an adequate procedural remedy was available to Plaintiff under state law. He appealed his conviction. See Complaint ¶ 18; Defendants' SUF ¶ 4. He then filed a Miscellaneous Petition and Amended Miscellaneous Petition in the Superior Court, see Complaint ¶ 22; Defendants' SUF ¶¶ 9-11; Defendants' Mem., Ex. B (Amended Miscellaneous Petition), and the Superior Court granted him the relief he sought, namely that the appeal of his Municipal Court conviction be forwarded to the District Court, see Complaint ¶¶ 23, 26; Defendants' SUF ¶¶ 12-13; Defendants' Mem., Ex. C (Stipulation). The District Court ultimately dismissed the Ordinance Complaint and voided Plaintiff's conviction. See Complaint ¶ 27; Defendants' SUF ¶ 13; Defendants' Mem., Ex. D (Dismissal under Criminal Rule 48(a)). Thus, the court concludes that Plaintiff has not established a due process violation.

Nor has Plaintiff alleged any facts which would sustain an equal protection claim. See Cok v. Cosentino, 876 F.2d at 4 (holding that plaintiff "ha[d] alleged no facts to sustain an equal protection claim or cause of action ..."); see also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."); Anderson ex. rel. Dowd v. City of Boston, 375 F.3d 71, 82 (1st Cir. 2004)(quoting Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.). Plaintiff has made no allegations whatsoever regarding racially discriminatory intent or purpose. The only reference to equal protection pertains to his contention that the Ordinance Complaint was improperly dismissed, not the malicious prosecution claim, and Plaintiff merely states that Defendants Gerstenblatt and Wheeler, among other, unnamed persons, "conspired to dismiss the Ordinance

Complaint and verdict ... without a hearing in open court as required by the Rules of Procedure in an attempt to obstruct justice and to deny Plaintiff his right to equal protection of the laws," Complaint ¶ 20.

As to Plaintiff's malicious prosecution claim, Plaintiff has not alleged sufficient facts against Clerk Wheeler to establish a constitutional violation. Therefore, the court need go no further with this claim.

2. July 2002 Dismissal of the Ordinance Complaint

Plaintiff alleges that "[o]n or prior to July 15, 2002, [Judge Gerstenblatt and Clerk Wheeler] conspired to dismiss the Ordinance Complaint and verdict that was appealed on July 19,^[21] 1999[,] without a hearing in open court as required by the Rules of Procedure in an attempt to obstruct justice and to deny Plaintiff his right to equal protection of the laws," Complaint ¶ 20, and that his rights "were violated by the actions of the Defendants by attempting to dismiss the Ordinance Complaint subsequent to Plaintiff's appeal of July 29, 1999," *id.* ¶ 32. Although Defendants contend that Plaintiff has not identified the specific constitutional right allegedly violated, *see* Defendants' Mem. at 11, construing the Complaint liberally, *see Strahan v. Coxe*, 127 F.3d 155, 158 n.1 (1st Cir. 1997)(citing *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 595-96, 30 L.Ed.2d 652 (1972)), it appears to the court that Plaintiff is alleging a violation of his right to procedural due process.

Plaintiff appealed his conviction in Municipal Court for minimum housing violations on July 29, 1999. *See* Complaint ¶¶ 18, 20,²² 32. The Ordinance Complaint was dismissed by the City

²¹ *See* n.5.

²² *See id.*

pursuant to Rule 48(a) of the Warwick Municipal Court General Rules. See Defendants' SUF ¶ 8; see also Complaint ¶ 20. Plaintiff's appeal was ultimately addressed by the District Court, which entered a Dismissal under Criminal Rule 48(a)²³ on October 31, 2003. See Complaint ¶ 26; Defendants' SUF ¶ 13; see also Defendants' Mem., Ex. D (Dismissal under Criminal Rule 48(a)). According to the October 31, 2003, dismissal:

This dismissal is effective as to the instant appeal before this Court for trial de novo, and also effective to dismiss all complaints lodged in the Municipal Court of the City of Warwick and effectively voids the conviction entered by the Municipal Court, confirming the dismissal of the case entered in the Municipal Court docket on June 12, 2002.^[24]

Defendants' Mem., Ex. D (Dismissal under Criminal Rule 48(a)).

The court initially notes that, aside from his reference to conspiring with Judge Gerstenblatt, see Complaint ¶ 20, Plaintiff has made no specific factual allegations that Clerk Wheeler was involved in the July, 2002, dismissal of the Ordinance Complaint by the Municipal Court. The court need not credit this bald assertion of conspiracy. See Rogan v. Menino, 175 F.3d 75, 77 (1st Cir. 1999); see also Rubinovitz v. Rogato, 60 F.3d 906, 909 (1st Cir. 1995)(noting that court "need not credit purely

²³ Rule 48 provides, in relevant part:

Dismissal

(a) By Attorney for City - The attorney for the City may file a dismissal of a complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

Warwick Municipal Court Rules of Procedure R. 48(a).

²⁴ The reference to June 12, 2002, appears to be in error, as Plaintiff and Defendants agree that the original dismissal occurred in July of 2002. See Complaint ¶ 20; Defendants' SUF ¶ 8; see also n.6.

conclusory allegations”).

Even assuming that Clerk Wheeler entered the July, 2002, dismissal, there appears to be nothing improper about said dismissal. The applicable rule provides that “[t]he attorney for the City may file a dismissal of a complaint and **the prosecution shall thereupon terminate.**” Warwick Municipal Court Rules of Procedure R. 48(a) (emphasis added). Rule 48(a) further provides that “[s]uch a dismissal may not be filed during the trial without the consent of the defendant.” *Id.* Here, the dismissal was filed well after the trial had concluded. Thus, no consent was required. The rule does not address situations such as the present one, where the dismissal was entered while the appeal was still pending.

Granted, Plaintiff challenges the dismissal of the Ordinance Complaint “without a hearing in open court as required by the Rules of Procedure” Complaint ¶ 20. However, the court observes that the dismissal of the Ordinance Complaint was not “an adverse decision of the Municipal Court . . . ,” Warwick Municipal Court General Rules R. 45.²⁵ The dismissal gave Plaintiff the relief he was seeking through his appeal, namely dismissal of the Ordinance Complaint and voiding of his conviction.

In any event, the July, 2002, dismissal did not prevent

²⁵ As noted previously, the rule provides that “[a]ny person desiring to appeal from an adverse decision of the Municipal Court pursuant to the provisions of this chapter may seek review thereof pursuant to . . . the salient section of the City of Warwick Code of Ordinances” Warwick Municipal Court General Rules R. 45; see also Code of Ordinances, Ch. 42 § 42-9(b) (“[A]ny defendant found guilty of any violation of a minimum housing violation may, within five days of such conviction, file an appeal from said conviction to the third division of the district court and be entitled to a trial de novo”).

Plaintiff from ultimately proceeding with his appeal.²⁶ As discussed above, see Discussion section V.D.1. supra at 34-35, he was able to address the delay in forwarding the appeal to the District Court by petitioning the Superior Court for an order directing the Municipal Court to do so. See Complaint ¶ 22; Defendants' SUF ¶¶ 9-11; Defendants' Mem., Ex. B (Amended Miscellaneous Petition). The Superior Court did what Plaintiff requested. See Complaint ¶ 23; Defendants' SUF ¶ 12; Defendants' Mem., Ex. 3 (Stipulation). Eventually, the District Court dismissed the Ordinance Complaint, voided Plaintiff's conviction, and confirmed the earlier dismissal. See Complaint ¶ 26; Defendants' SUF ¶ 13; Defendants' Mem., Ex. D (Dismissal under Criminal Rule 48(a)). Thus, Plaintiff clearly was afforded adequate state procedural remedies. Cf. Roche v. Hohn Hancock Mut. Life Ins. Co., 81 F.3d 249, 265 (1st Cir. 1996)(noting that availability of adequate state remedy defeated plaintiff's procedural due process claim).

The court concludes that Plaintiff has not established that the July, 2002, dismissal of the Ordinance Complaint constitutes a constitutional violation. See Cox v. Hainey, 391 F.3d 25, 29-30 (1st Cir. 2004). Accordingly, because Plaintiff has not met this threshold requirement, see Saucier v. Katz, 533 U.S. 194, 201, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001), the court's analysis as to this claim need proceed no further, see id.

3. Failure to Forward Appeal after February 24, 2003

There remains only Plaintiff's claim that his rights were

²⁶ The court recognizes that the July, 2002, dismissal may have contributed to the delay in forwarding Plaintiff's appeal to the District Court prior to the Superior Court's February 24, 2003, stipulation. However, the court has already determined that Plaintiff's claim pertaining to that delay is barred by the doctrine of res judicata. See Discussion section II.B. supra at 11-13.

violated because his appeal was not forwarded to the District Court "subsequent to a Superior Court Order agreeing to forward the same on February 24, 2003." Complaint ¶ 33. Plaintiff states that "[t]he Municipal Court case was not transferred to the Third Division District Court until August 15, 2003, after a second Motion requesting the transfer of the Minimum Housing case," id. ¶ 24, and that "[t]he case entitled City of Warwick vs. William Peotrowski was eventually dismissed in the Third Division District Court for the State of Rhode Island on the 31st day of October, 2003," id. ¶ 26.

In his memorandum Plaintiff cites Rheuark v. Shaw, 628 F.2d 297 (5th Cir. 1980), a case in which three defendants alleged that their attempts to appeal their criminal convictions were frustrated by "an inordinate delay in the transcription of the testimony and proceedings of their trials by the court reporter," id. at 299, in violation of their "constitutional rights to a speedy appeal and due process," id. The Fifth Circuit "assume[d] without deciding the issue that, at least in Rheuark's case, a delay of nearly two years from notice of appeal to the date when his statement of facts was finally prepared exceeds the limits of due process." Id. at 302-03; see also id. at 300 (stating explicitly that it was unnecessary for the court to decide this issue); Plaintiff's Mem. at 9.

Here, by contrast, Plaintiff in this claim alleges only a six-month delay from the Superior Court's February 24, 2003, stipulation to the transfer of the Municipal Court case to the District Court on August 15, 2003.²⁷ The court does not find six

²⁷ The court has already found that Plaintiff's claim relating to the delay prior to the Superior Court's February 24, 2003, stipulation is barred by the doctrine of *res judicata*. See Discussion section II.B. supra at 11-13. Thus, the only delay at issue here is that which occurred subsequent to February 24, 2003.

months to be a "substantial retardation of the appellate process," Rheuark v. Shaw, 628 F.2d at 302, rising to the level of a due process violation, see id. at 303 (adding caveat that "not every delay in the appeal of a case ... violates due process"); cf. United States v. Pratt, 645 F.2d 89, 91 (1st Cir. 1981)(distinguishing Rheuark v. Shaw and declining to hold nine-month delay in obtaining pretrial and trial transcripts for appeal unconstitutional). Granted, Plaintiff should not have had to file another motion seeking transfer of the case to the District Court. However, "[at] most, [Plaintiff] states a claim for negligent performance or dereliction of duty. The Supreme Court has made plain that due process, whether procedural or substantive, is not implicated by mere negligence of persons acting under color of state law.". Cok v. Cosentino, 876 F.2d at 4 (citing Daniels v. Williams, 474 U.S. 327, 328, 106 S.Ct. 662, 663, 88 L.Ed.2d 662 (1986)).

4. Conclusion Re Remaining Claims against Wheeler

The court concludes that, as to the three remaining claims against Clerk Wheeler, Plaintiff has not alleged facts sufficient to state a constitutional violation and Clerk Wheeler is therefore immune from suit based on the doctrine of qualified immunity. The Motion for Summary Judgment should be granted as to Clerk Wheeler on the basis of his qualified immunity, and I so recommend.

Conclusion

For the reasons stated above, I recommend that the Motion for Summary Judgment be granted. The Motion should be granted as to Plaintiff's claim regarding the delay in forwarding his appeal prior to the Superior Court's February 24, 2003, stipulation based on the doctrine of *res judicata*. The Motion should be granted as to all remaining claims against Judge Gerstenblatt and

Inspector Weeden on the basis of their absolute judicial and prosecutorial immunity, respectively. Finally, the Motion should be granted as to all remaining claims against Clerk Wheeler on the basis of his qualified immunity.

Any objections to this Report and Recommendation must be specific and must be filed with the Clerk of Court within ten (10) days of its receipt. See Fed. R. Civ. P. 72(b); D.R.I. Local R. 32. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district court and of the right to appeal the district court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

David L. Martin
United States Magistrate Judge
March 10, 2005