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

GENE C. BENCKINI,	:	
Plaintiff,	:	**CIVIL ACTION**
	:	
v.	:	
	:	
UPPER SAUCON TOWNSHIP,	:	**No. 04-4304**
Defendant.	:	

MEMORANDUM AND ORDER

Schiller, J. **October 17, 2005**

Plaintiff Gene Benckini filed this action against Defendants, Upper Saucon Township ("the Township") and the Upper Saucon Police Department, alleging violations of his constitutional rights stemming from his numerous interactions with the Township over a period of years. This Court, by Order dated March 23, 2005, dismissed the Upper Saucon Police Department from this litigation. Presently before the Court is the Township's motion for summary judgment. For the reasons that follow, the Court grants Defendant's motion.

I. BACKGROUND

This case stems from the long-standing tensions between Benckini and the Township. Currently before the Court are claims arising out of several interactions Benckini had with the Township and its employees over the course of two decades.

The first event Benckini cites is his September 13, 2002 arrest. On that date, six officers and four police cars arrived at his property. (Mot. for Summ. J. Ex. B [hereinafter "Benckini Dep."] at 155-56.) Benckini was informed that the officers had a warrant for his arrest and then an unidentified officer handcuffed him, while another officer instructed Benckini to get into one of the

police cars and referred to him as a child molester. (*Id*. at 156.) As Benckini was pushed towards the police car by an officer, the right side of his forehead banged against the car. (*Id*. at 158-61.) He suffered a brush burn and splitting headaches as a result of the incident. (*Id*. at 167, 179.) Benckini also suffered cuts on his wrists because the handcuffs were too tight; he was given some bandages and pain killers, and a nurse treated him for his injured wrists. (*Id*. at 167-69.) His wrists healed in approximately two weeks. (*Id*. at 178-79.)

Benckini also claims that the Township dumped sewage onto his property. He first noticed that the Township's sewage processing plant was dumping sewage onto his property in the fall of 1976. (*Id*. at 50.) In an attempt to halt the dumping, Benckini contacted both Township and Pennsylvania personnel. (Am. Compl. ¶ 6; Pl.'s Opp'n to Def.'s Mot. for Summ. J. at 2.) The plant stopped processing sewage in 1989. (Benckini Dep. at 54; Mot. for Summ. J. Ex. C [hereinafter "Beil Aff."] ¶ 4.) All told, Benckini estimates that the dumping continued for a period exceeding ten years, and either "came to a halt about '89" when the plant physically closed or ended in 1993 when the plant was officially closed by the "environment department." (Benckini Dep. at 253-54; Pl.'s Opp'n to Def.'s Mot. for Summ. J. at 3.)

Next, Benckini asserts that his property was condemned and bought by the Township without just compensation. (Pl.'s Opp'n to Def.'s Mot. for Summ. J. at 3-4.) The alleged condemnation of approximately 15 acres of Benckini's property occurred when he was in jail and took place through the bankruptcy court. (Benckini Dep. at 254.) Benckini provides no documentation regarding the condemnation, but he claims that any relevant information was lost because his home was "ransacked" by a "county detective" who stole the paperwork. (*Id*. at 254-55; Pl.'s Opp'n to Def.'s Mot. for Summ. J. at 3.) On July 25, 2001, Benckini filed for Chapter 12 bankruptcy and was

subsequently removed as debtor in possession. (Mot. for Summ. J. Ex. D [hereinafter "Jan. 27, 2005 Bankr. Order"] ¶¶ 1, 4.) The Chapter 12 trustee, Frederick Reigle, was vested with the power to sell Benckini's real estate pursuant to the Bankruptcy Code, and on April 11, 2003, he filed a motion to sell, among other items, 15.49 acres of land, free and clear of all liens and encumbrances, to the Township for $412,500. (*Id*. ¶¶ 4, 8; Benckini Dep. at 262.) Benckini's counsel filed a response to the motion, but on May 15, 2003, the motion "was approved by the court and the Trustee was authorized to sell the Real Estate to Upper Saucon Township free and clear of liens and encumbrances in accordance with the terms of the Sale Motion and Sale Order." (Jan. 27, 2005 Bankr. Order ¶¶ 10-11.) A timely appeal of the Sale Order was not filed nor was a stay of the Sale Order requested. (*Id*. ¶ 13.) There is also no evidence that Benckini ever availed himself of any Pennsylvania procedures for preventing the sale of his property or obtaining additional compensation for the sale of the land. Furthermore, the Trustee hired somebody to appraise the land, but Benckini did not agree with the appraisal value. (Benckini Dep. at 263-64.)

Finally, Benckini complains that the Township hauled loads of fill soil onto his property, which prevented him from removing trees from his property, thereby resulting in great loss to his nursery business. (Am. Compl. ¶ 8.)

II. STANDARD OF REVIEW

Summary judgment is appropriate when the admissible evidence fails to demonstrate a dispute of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c) (1994); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). When the moving party does not bear the burden of persuasion at trial, that party may meet its burden on summary

judgment by showing that the nonmoving party's evidence is insufficient to carry its burden of persuasion at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Thereafter, the nonmoving party demonstrates a genuine issue of material fact if sufficient evidence is provided to allow a reasonable jury to find for him at trial. *Anderson*, 477 U.S. at 248. In order to meet this burden, the opposing party must point to specific, affirmative evidence in the record and not simply rely on mere allegations, conclusory or vague statements, or general denials in the pleadings. *Celotex*, 477 U.S. at 324; *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 252 (3d Cir. 1999) (noting that bare assertions or suspicions will not withstand motion for summary judgment). In reviewing the record, "a court must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor." *Armbruster v. Unisys Corp*., 32 F.3d 768, 777 (3d Cir. 1994). Furthermore, a court may not make credibility determinations or weigh the evidence in making its determination. *See Reeves v. Sanderson Plumbing Prods*., 530 U.S. 133, 150 (2000); *see also Goodman v. Pa. Tpk. Comm'n*, 293 F.3d 655, 665 (3d Cir. 2002).

III. DISCUSSION

The operative Complaint in this litigation was filed on February 15, 2005. Based on a generous reading of the Amended Complaint, the Court is able to parse out the following claims, all of which Benckini has leveled against the only remaining Defendant, the Township: (1) a § 1983 excessive force claim; (2) a defamation claim; (3) a claim based on the Township's improper dumping of sewage onto his property; (4) a claim based on an alleged condemnation action and improper taking of his property; and (5) a claim arising out of fill soil that the Township allegedly hauled onto his property. The Court shall address each of these in turn.

A. Benckini's September 13, 2002 Arrest

1. Excessive Force

Benckini claims that on September 13, 2002, a number of police officers arrived at his business. (Am. Compl. ¶ 5.) Among them was Officer David Petzold, who allegedly handcuffed Benckini in a rough manner and informed Benckini that he was being arrested for molesting neighborhood children. (*Id.*) Additionally, certain officers shoved Benckini against a police car, forcing him to hit his head on the roof of the car. (*Id*.) In his summary judgment response, for the first time in this litigation, Benckini names five other officers who he asserts were present during the arrest. (Pl.'s Opp'n to Def.'s Mot. for Summ. J. at 1.) None of these individual officers are before this Court.

This claim arises under 42 U.S.C. § 1983. To establish a claim under § 1983, a plaintiff must show that a defendant, acting under color of state law, deprived him of a federal constitutional or statutory right. *See* 42 U.S.C. § 1983 (2005); *see also Harvey v. Plains Twp. Police Dep't*, 421 F.3d 185, 189 (3d Cir. 2005). Section 1983 itself creates no new substantive rights, but rather serves as a mechanism for vindicating the violation of federal constitutional and statutory rights. *See Graham v. Conner*, 490 U.S. 386, 393-94 (1989).

The Third Circuit has directed that, "[d]istrict courts must review claims of municipal liability 'independently of the section 1983 claims against the individual police officers.'" *Carswell v. Borough of Homestead*, 381 F.3d 235, 244 (3d Cir. 2004) (*quoting Kneipp v. Tedder*, 95 F.3d 1199, 1213 (3d Cir. 1996)). No individual police officers are presently before the Court in this action; the Township is the only remaining Defendant. For a municipality to be liable under § 1983, the municipality itself must have caused the constitutional violation. *See id*. (*citing City of Canton*

v. Harris, 489 U.S. 378, 385 (1989)). Furthermore, Benckini must identify a municipal policy or custom that is directly linked to the alleged constitutional deprivation. *Harris*, 489 U.S. at 385; *see also Debellis v. Kulp*, 166 F. Supp. 2d 255, 275 (E.D. Pa. 2001) (stating that municipal liability under § 1983 requires a showing that "the municipality had an official policy or custom, and that the policy or custom caused the deprivation of a constitutionally protected right"). It is well settled that "[a] municipality cannot be responsible for damages under section 1983 on a vicarious liability theory." *Carswell*, 381 F.3d at 244; *see also Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694-95 (1978). Merely employing a tortfeasor is insufficient to establish § 1983 liability against a municipality. *See Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 403 (1997); *see also Leatherman v. Tarrant County*, 507 U.S. 163, 166 (1993) ("[A] municipality cannot be held liable under § 1983 on a *respondeat superior* theory.").

Claims of excessive force are analyzed under the Forth Amendment's objective reasonableness standard. *See Graham*, 490 U.S. at 393-94. This reasonableness standard asks "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id*. at 396. The right to make an arrest "necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Id*. (*citing Terry v. Ohio*, 392 U.S. 1, 22-27 (1968)).

Benckini has failed to point to any Township policy or custom that caused a violation of his constitutional rights. In fact, he has failed to point to any violation of his constitutional rights. Benckini's Amended Complaint states that Officer Petzold used excessive force when handcuffing Benckini during his arrest on September 13, 2002. (Am. Compl. ¶ 5.) However, at his deposition, Benckini admitted he did not know the name of the officer who handcuffed him or who pushed him

into a police car. (Benckini Dep. at 155-61.) In fact, Benckini's deposition makes clear that it was *not* Officer Petzold who handcuffed him:

> Q: And do you know who was escorting you to the car?
> A: Well, I was talking to David Petzold. He said he had a warrant. And Mike Borso walked over. And the other officer turned me around and then handcuffed me. And I didn't recognize who the officer – he's a bigger officer – turned around and handcuffed me.

(*Id*. at 158.) Of course, Benckini cannot simply rely upon the allegations in his Amended Complaint. *See Celotex*, 477 U.S. at 324. Benckini's summary judgment response lists the names of six officers who he now claims were involved in the September 13, 2002 arrest. (Pl.'s Opp'n to Def.'s Mot. for Summ. J. at 1.) But his claim cannot survive a motion for summary judgment by leveling unsubstantiated charges (which contradict his earlier sworn testimony) against parties who are not even before this Court.

In addition, Benckini has not put forward any evidence of a municipal policy or custom to use excessive force in handcuffing and detaining arrestees. The only "evidence" that Benckini has presented are his accusations. The Township cannot be held liable based on the unsupported assertion that its officers handcuffed Benckini too tightly or pushed him into a car. *See generally, Debellis*, 166 F. Supp. 2d at 275 ("Moreover, under Section 1983, municipalities do not have *respondeat superior* liability for the acts of their agents. In order to be liable under Section 1983, the municipality itself must have caused the violation."). As there is no *respondeat superior* liability under § 1983 and Benckini has failed to produce evidence that the Township was the "moving force" behind a constitutional violation, his § 1983 claim against the Township must be dismissed. *See Grazier v. City of Phila.*, 328 F.3d 120, 124-25 (3d Cir. 2003) (*quoting Harris*, 489 U.S. at 389).

2. Defamation

Although Benckini never specifically alleges a defamation claim in his Amended Complaint, he does assert that a police officer called him a child molester. (Am. Compl. ¶ 5.) He also seeks "libel damages," in part for "malicious slander destroying [his] business." (*Id*. *ad damnum* clause.) Finally, for the first time in the course of this litigation, Benckini claims that, on or around the spring of 1995, Police Chief Robert Coyle defamed him by recounting "false statements of a history of violent acts about the Plaintiff." (Pl.'s Opp'n to Def.'s Mot. for Summ. J. at 6.)

To the extent this defamation claim arises under § 1983, it must fail. Damage to reputation, by itself, cannot sustain a § 1983 action. *See Paul v. Davis*, 424 U.S. 693, 708-09 (1976) (holding that injury to reputation alone is not a liberty interest protected by the Fourteenth Amendment); *see also Siegert v. Gilley*, 500 U.S. 226, 233 (1991) ("Defamation by itself, is a tort actionable under the laws of most States, but not a constitutional deprivation.").

Insomuch as Benckini has attempted to bring a state law defamation claim, that too must fail. Under Pennsylvania law, a claim for defamation requires: (1) a defamatory communication; (2) published by defendant; (3) applied to plaintiff; (4) understood by the recipient to be defamatory; (5) understood by the recipient to apply to plaintiff; (6) special harm to plaintiff resulting from the publication; and (7) abuse of a conditionally privileged occasion. *See* 42 PA. CONS. STAT. ANN. § 8343(a) (2004); *see also Franklin Prescriptions, Inc. v. New York Times Co.*, Civ. A. No. 01-0145, 2004 WL 1770296, at *4 n.16 (E.D. Pa. Aug. 5, 2004). Again, there are no individual defendants before the Court. Also, because Benckini does not know to whom the statement was published, he cannot demonstrate several elements of the claim. The Court has nothing but bare allegations before it; any claims of special harm resulting from any publication are unsubstantiated conjecture. Finally,

Pennsylvania has a one-year statute of limitations on defamation actions. 42 PA. CONS. STAT. ANN. § 5523(1). Benckini filed his original complaint on September 10, 2004, almost two years after the alleged defamation during his arrest occurred, and ten years after the alleged defamation perpetrated by Police Chief Coyle occurred.[1]

Accordingly, the Court grants summary judgment to Defendant on all claims arising out of Benckini's September 13, 2002 arrest.

B. The Dumping of Sewage onto Benckini's Land

Benckini contends that, for a number of years, a sewage plant owned by the Township dumped sewage onto his property, damaging his land and his business. (Am. Compl. ¶ 6; Pl.'s Opp'n to Mot. for Summ. J. at 2-3.) The dumping began in the fall of 1976, and although it is unclear exactly when it ended, the plant closed no later than 1993. (Benckini Dep. at 53, 253-54; Pl.'s Opp'n to Mot. for Summ. J. at 3.) Although it is not entirely clear what cause of action Benckini is asserting, the statute of limitations has long since passed on a § 1983 claim.

There is no express statute of limitations accompanying Section 1983. Accordingly, this Court will borrow the Pennsylvania statute of limitations related to personal injury actions. *See Knoll v. Springfield Twp. Sch. Dist.*, 763 F.2d 584, 585 (3d Cir. 1985) (noting that Supreme Court has adopted a bright-line approach that "even though constitutional claims alleged under § 1983 encompass numerous and diverse topics and subtopics, the state statute of limitations governing tort actions for the recovery of damages for personal injuries provides the appropriate limitation period."). In Pennsylvania, a two-year statute of limitations applies to personal injury actions. *See*

[1] Police Chief Coyle is not a party to this action and there is no basis for holding the Township liable for statements that the Police Chief might have uttered a decade ago.

id.; *see also Bartholomew v. Fischl*, 782 F.2d 1148, 1149 (3d Cir. 1986).

According to Benckini, he first noticed sewage on his property emanating from the plant in the fall of 1976. (Benckini Dep. at 50.) He further stated that the problem ended around 1989, when the plant was closed. (*Id*. at 53-54, 253-54.) The statute of limitations has long since passed on this cause of action. Therefore, the Court grants summary judgment on this claim.[2]

C. Condemnation and Taking of Benckini's Property

Plaintiff's next allegations arise from an alleged condemnation proceeding that the Township commenced against Benckini's property. The Amended Complaint asserts that the Township condemned 15.4 acres of land owned by Benckini and thereafter "took the valuable land for $412,000.00, when in fact the land was worth at least $125,000.00 per acre or $1,875,000.00 for 15.4 acres of commercial land . . . ." (Am. Compl. ¶ 7.) Benckini's summary judgment response on this issue consists of a series of rambling and unsupported allegations. He claims that Coopersburg Borough and the Coopersburg Police Department raided his home and took important documents and files, some of which were related to the condemnation of his property. (Pl.'s Opp'n to Def.'s Mot. for Summ. J. at 3-4.) He then asserts that Coopersburg Borough conspired with the Township to steal his property for an unfair price. (*Id*.)

The Court presumes that Benckini is attempting to bring an unconstitutional takings claim. As an initial matter, Benckini merely presents allegations of a condemnation in his Amended Complaint; no evidence is before the Court that Benckini's property was actually condemned. Furthermore, Tom Beil, the manager of Upper Saucon Township, has submitted an affidavit that

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[2] Even if this claim arose under the Pennsylvania law of nuisance, it would be time-barred. *See* 42 PA. CONS. STAT. ANN. § 5524(7); *see also Schatz v. Laidlaw Transp., LTD*, Civ. A. No. 96-7965, 1997 U.S. Dist. LEXIS 4967, at *4 (E.D. Pa. Apr. 10, 1997).

states that the Township never filed such an action against Benckini or the land at issue in this matter. (Beil Aff. ¶ 5.)

Benckini's takings claim must fail. The Fifth Amendment forbids the taking of private property for public use, without just compensation. U.S. CONST. amend. V; *see also Kelo v. City of New London*, 125 S. Ct. 2655, 2658 n.1 (2005). The takings clause applies to the states via the Fourteenth Amendment. *See Kelo*, 125 S. Ct. at 2658 n.1 (*citing Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897)). The Third Circuit has stated that if a state provides adequate procedures for seeking just compensation, a property owner must use those procedures before asserting a violation of the takings clause. *See Cowell v. Palmer Twp.*, 263 F.3d 286, 290 (3d Cir. 2001) (*citing Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985)); *see also Lindquist v. Buckingham Twp.*, Civ. A. No. 00-1301, 2003 U.S. Dist. LEXIS 8058, at *26 (E.D. Pa. Apr. 16, 2003) ("Landowners asserting a regulatory takings claim are subject to a strict ripeness requirement."). The Third Circuit has further noted that Pennsylvania law provides for procedures whereby a landowner may request that a taking be declared and just compensation be determined. *See Cowell*, 263 F.3d at 290, 290 n.2. Furthermore, "adjudication in federal bankruptcy court is not an appropriate alternative to the state inverse condemnation procedures." *Id*. at 291.

Before the Court is a January 27, 2005 Order from the United States Bankruptcy Court for the Eastern District of Pennsylvania. That Order indicates that Benckini was removed as debtor in possession and the Trustee was vested with the power to sell any of Benckini's real estate. (Jan. 27, 2005 Bankr. Order ¶ 5.) The Order further indicates that a motion authorizing the Trustee to sell the relevant land for $412,000.00 to the Township was approved. (*Id*. ¶¶ 8, 11.) Benckini failed to file

a timely appeal or stay of the Sale Order. (*Id*. ¶ 13.) Furthermore, nothing before this Court indicates that Benckini sought just compensation under the appropriate Pennsylvania procedures. Benckini has only presented this Court with speculation regarding the value of the property sold to the Township. He has also failed to show that just compensation was not paid for the property or that the Township is an appropriate defendant for a takings clause claim. Furthermore, this matter appears long settled by the Bankruptcy Court. Therefore, summary judgment is appropriate and will be granted.

D. Hauling of Fill Soil onto Benckini's Land

Finally, the Court will address Benckini's claim that the Township hauled truck loads of fill soil onto the land where he had planted 5,000 trees to be used in his nursery business. (Am. Compl. ¶ 8.) This claim virtually defies definition, but the Court concurs with Defendant that Benckini is attempting to assert a substantive due process claim.

To succeed on his claim, Benckini must demonstrate that the Township's conduct in depriving him of a protected property interest "shocks the conscience." *County of Sacramento v. Lewis*, 523 U.S. 833, 846-48 (1998); *United Artist Theater Circuit, Inc. v. Twp. of Warrington*, 316 F.3d 392, 401 (3d Cir. 2003). Only the "most egregious official conduct" will meet this exacting standard. *Lindquist*, 2003 U.S. Dist. LEXIS 8058, at *23 (citations omitted).

There is no basis to support a claim that the Township's conduct "shocks the conscience." Although the Amended Complaint alleges that the Township hauled the fill soil "unto plaintiff's property," the only evidence regarding this allegation is an affidavit stating that a Lloyd

Lichtenwalter requested that the Township place the fill soil onto his property.[3] (Beil Aff. ¶ 9.) Benckini cannot argue that placing fill soil on land that does not belong to him violates his substantive due process rights. Accordingly, summary judgment must also be granted on this claim.

IV. CONCLUSION

In conclusion, Benckini has failed to present even a scintilla of evidence in support of any of his claims. *See Williams v. Borough of W. Chester*, 891 F.2d 458, 460 ("a nonmoving party must adduce more than a mere scintilla of evidence in its favor" to defeat a motion for summary judgment). Benckini has merely rehashed the allegations in his Amended Complaint and included a number of exhibits that fail to raise any genuine issue of material fact. *See Orsatti v. N.J. State Police*, 71 F.3d 480, 484 (3d Cir. 1995) ("A plaintiff cannot resist a properly supported motion for summary judgment merely by restating the allegations of his complaint, but must point to concrete evidence in the record that supports each and every essential element of his case.") For the above stated reasons, the Court grants the Township's motion for summary judgment in its entirety. An appropriate Order follows.

[3] On October 14, 2005, well after the date on which Benckini's summary judgment response was due, he submitted a notarized declaration from Lloyd Lichtenwalter, which states that Lichtenwalter did not authorize the Township to place fill soil on his land. Regardless of the veracity of this declaration, which Lichtenwalter failed to date, it fails to show that any actions taken by the Township against Benckini "shocks the conscience."

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GENE C. BENCKINI,	:	
Plaintiff,	:	**CIVIL ACTION**
	:	
v.	:	
	:	
UPPER SAUCON TOWNSHIP,	:	**No. 04-4304**
Defendant.	:	

ORDER

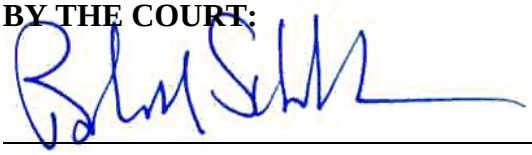
AND NOW, this **17th** day of **October**, **2005**, upon consideration of Upper Saucon Township's Motion for Summary Judgment, Plaintiff's response thereto, and for the foregoing reasons, it is hereby **ORDERED** that:

1. The Motion (Document No. 50) is **GRANTED**.

2. Plaintiff's Motion for Order (Document No. 40) is **DENIED as moot**.

3. The Clerk of Court is directed to close this case.

BY THE COURT:



Berle M. Schiller, J.