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

ROBERT GENE REGA, (SON), *et al.*, Plaintiffs, v. SOUTHWESTERN AREA AGENCY ON AGING, *et al.*, Defendants.	)	Civil Action No. 2:16-cv-1779 District Judge David Steward Cercone Magistrate Judge Lisa Pupo Lenihan

REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is respectfully recommended that this civil action be dismissed with prejudice pursuant to Federal Rule of Civil Procedure 41(b) for Plaintiff Joan Mary Rega's failure to prosecute.

II. REPORT

A. Background Facts[1]

Plaintiff Joan Mary Rega (hereafter, "Plaintiff") is a resident of Waynesburg, Pennsylvania. (Compl. ¶21.) In April 2016, Plaintiff became very depressed and began experiencing hallucinations, symptoms that were consistent with "pseudodementia," a non-psychotic disorder. (*Id.* ¶¶ 1, 53.) Plaintiff's son, Robert Gene Rega ("Robert")[2], subsequently

[1] The following facts are taken from the allegations in the complaint and attached exhibits.

[2] At all times relevant to this litigation, Robert was an incarcerated individual. He is currently housed at S.C.I.-Greene in Waynesburg, Pennsylvania. Although Robert was originally named as a plaintiff in this litigation, his motion for *in forma pauperis* status has been denied by this Court and his status as a plaintiff has been terminated.

wrote to the administration at Senior-Life Inc. (hereafter, "SL")[3] and Senior-Care Inc. ("SC"),[4] and indicated that his mother was in need of a psychiatric evaluation. (*Id.* ¶¶54-56.)

On or about June 25, 2016, Plaintiff was seen by a "Dr. Steibel," who misdiagnosed Plaintiff's condition and prescribed her Zyprexa (Olanzapine), an "inappropriate" antipsychotic drug. (Compl. ¶¶57-59.) The medication caused Plaintiff to suffer from disorientation and loss of balance -- symptoms which, in turn, caused Plaintiff to sustain a fall within her home or about July 5, 2016. (*Id.* ¶¶ 2, 3, 58-59.)

"As a means to cover their negligence," SL/SC and one of their physicians – Shawn Ewbank, M.D. ("Ewbank") – allegedly arranged for Plaintiff to be placed at Townview Nursing home. (Compl. ¶¶4, 26.) Plaintiff remained at that facility between July 5 and July 29, 2016. (*Id.* ¶¶58-59.) Plaintiff claims that, during her stay at Townview Nursing home, she was overmedicated and assaulted by staff members. (*Id.* ¶61.) Robert, acting on Plaintiff's behalf under a power-of-attorney, wrote to SL/SC and directed them to discharge Plaintiff from Townview and discontinue all anti-depressant/anti-psychotic medications. (*Id.* ¶¶61-62.) The letters were allegedly received and read by Melodee Hursey ("Hursey"), a social worker at SL/SC, but Robert's directives were ignored. (*Id.*)

At various times in July 2016, Robert spoke to Roberta Taylor ("Taylor"), a social worker at the Southwestern Pennsylvania Area Agency on Aging ("SWAAA"),[5] regarding his

[3] Senior-Life Inc. is alleged to be "a licensed Corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, and headquartered at 2114 North Franklin Drive, Washington, Pa 15301." (Compl. ¶22.)

[4] Senior-Care Inc. is alleged to be "a licensed Corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, and headquartered at 100 Evergreene Drive, Waynesburg, PA 15370." (Compl. ¶23.) The complaint often refers to these two corporations collectively and, where relevant, this Court will do the same (using the abbreviation "SL/SC").

[5] SWAAA is alleged to be "a licensed Corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, and headquartered at 305 Chamber Plaza, Charleroi, PA 15022." (Compl. ¶33.)

mother's situation. (Compl. ¶64.) As set forth in the Complaint, Taylor was "hostile" toward Robert and allegedly stated that she would "[n]ever let that miserable mother of yours out of the nursing home or the control of my office." (*Id.* ¶65.)

Plaintiff claims that, while she was at Townview Nursing Home, she was taken off Zyprexa. (Compl. ¶69.) At some point between July 5 and August 5, 2016, she was started on Celexa as a "step down drug" and then Cybalta. (*Id.* ¶70.) Plaintiff claims she was inappropriately placed on the maximum dosage of Cybalta, which was excessive for her condition and resulted in "chemical intoxication." (*Id.* ¶¶70-71.)

On August 5, 2016, "[a]s a direct and proximate result of the above prescribed drugs," Plaintiff sustained another fall in her home. (Compl. ¶71.) Thereafter, she was allegedly committed "against her will" to Golden Living Center Inc. ("GLC")[6] at the hands of SL/SC, Hursey, and Dr. Ewbank. (*Id.* ¶72.)

Robert subsequently issued written directives to SL/SC and GLC to disenroll Plaintiff from their services, discontinue the use of any anti-psychotic and/or anti-depressive medications, and discharge Plaintiff from GLC. (*Id.* ¶¶ 73, 75.) The directives were allegedly reviewed and ignored by Hursey and by Rachel Estle ("Estle"), a social worker for GLC. (*Id.* ¶¶ 73-76.)

On August 29, 2016, Robert forwarded a similar directive to Jackie Hainer ("Hainer"), the Director of GLC. (Compl. ¶¶79, 29.) By response dated September 1, 2016, Hainer "refused to comply with any of the directives issued, sua sponte determined [that Robert] was unsuitable to act as Agent for Plaintiff [ ], and in turn declared that all communications involving [Plaintiff] would be directed toward (acquiescent) . . . Victoria Marcum." (*Id.* ¶80.)

[6] Golden Living Center Inc. is alleged to be "a licensed Corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, and headquartered at 300 Center Avenue, Waynesburg, PA 15370. (Compl. ¶27.)

On September 7, 2016, Robert received notification of Plaintiff's disenrollment from SL/SC services, effective September 30, 2016. Despite this disenrollment, Plaintiff was not discharged from GLC, and she allegedly continued to receive anti-depressant/anti-psychotic medication. (Compl. ¶84.) Two days after receiving the disenrollment notification, Robert and his mother commenced litigation against SL, SC, Dr. Ewbank, and GLC in the Greene County Court of Common Pleas. (*Id.* ¶86.)

At some point in or around September 2016, GLC changed ownership and became known as "Guardian Elder Care d/b/a/ Waynesburg Healthcare and Rehabilitation Center" (hereafter, "GEC") (Id. ¶¶ 10, 87.) That same month, beginning on September 13, 2016, staff at GLC/GEC refused to allow Robert to speak with his mother on the telephone, resulting in Robert and his mother issuing cease-and-desist letters to GLC/GEC's legal counsel. (Compl. ¶¶87-88.)

Plaintiff claims that from "behind the scenes," SWAAA, Taylor, and various other unidentified agents of SWAAA conspired with GLC/GEC and its owners to "fight" her discharge by submitting "contrived and/or specious competency evaluations generated by [SL/SC] so as to feign [Plaintiff's] true mental health." (Compl. ¶96.) Given the parties' dispute in the state court litigation concerning Plaintiff's competence, the Honorable Farley Toothman conducted an in person voir dire of Plaintiff at GEC on October 13, 2016, after which he determined that Plaintiff was a competent individual and ordered that she be discharged from GEC. (*Id.* ¶¶97-98; *see also* ECF No. 7-1 at pp. 1-2.)

Plaintiff was finally discharged on October 20, 2016. (Compl. ¶106.) However, after she was home for less than an hour, an ambulance paramedic knocked on her door without having been summoned by her. (*Id.* ¶¶108-109.) The paramedic persuaded Plaintiff, a type 2 diabetic, to step into the ambulance so that he could measure her blood sugar, and he assured Plaintiff that

if her blood sugar levels were alright, he would help her back inside her home. (*Id.* ¶¶111-112.) Plaintiff claims that, once she was inside the ambulance, the doors were closed and she was unwittingly taken to the local hospital. (*Id.* ¶114.) The following day Plaintiff was transported to Rolling Meadows Nursing Home "under the care, custody, and control" of SWAAA. (*Id.* ¶120.)

According to the Complaint, SWAAA was able to provide protective services without Plaintiff's consent because of a court order issued by Judge Toothman around the same time that Plaintiff was discharged from GEC. (Compl. ¶¶115, 119; *see also* ECF No. 7-1 at p. 4.) Specifically, Plaintiff claims that SWAAA, its executive director – Leslie Greenfell ("Greenfell"), Taylor, and/or various other SWAAA agents falsely informed the court that Plaintiff's apartment had no furnishings and was inhabitable, leading Judge Toothman to issue an order that granted SWAAA temporary guardianship of Plaintiff on the premise that Plaintiff was in imminent danger of injury or death. (*Id.* ¶¶115-117.)

Plaintiff claims that her rights were violated in connection with the guardianship proceedings in various ways. She contends that SWAAA, Greenfell, Taylor and/or other SWAAA agents violated numerous provisions of the Pennsylvania Administrative Code when, among other things, they: (i) failed to ensure that Plaintiff's interests were represented through appointment of her own counsel (Compl. ¶¶121-23); (ii) failed to serve a copy of the emergency order on Plaintiff and her counsel within twenty-four (24) hours of its issuance (*id.* ¶124); (iii) failed to request that the court hold a hearing upon the expiration of the emergency order (*id.* ¶125); (iv) failed to provide Plaintiff with the least restrictive plan (*id.* ¶126); (v) essentially "imprison[ed]" Plaintiff in a nursing home against her will "as a means of retaliation for her success in being discharged from [GEC/GLC]," (*id.* ¶127); (vi) failed to ensure that Plaintiff's

apartment and belongings were secure (*id.* ¶128); (vii) failed to notify Plaintiff during the course of the investigation that "a report of need for protective services ha[d] been made" and failed to provide a "brief summary of the nature of the report," (*id.* ¶129); and (viii) failed to receive a signed statement refusing protective services from Plaintiff (*id.* ¶130). It is further alleged that, at the guardianship hearing, the Defendants introduced as exhibits "pre-dated and Contrived/ Feigned Competency Evaluations" that were prepared by SL/SC and obtained by GLC/GEC. (*Id.* ¶134.) According to Plaintiff, the evaluations were outdated, as they had been prepared when she had been plied with anti-depressant/anti-psychotic medications that caused her to appear delirious; nevertheless, they were used by Defendants to demonstrate her incompetence. (*Id.*)

Plaintiff alleges that Taylor "shopped" all of her estranged children "to see which one would acquiesce to, and/or assist . . . in confining [Plaintiff] to a nursing home; [a]ll declined to assist [ ] Taylor except for Russell Rega." (Compl. ¶136.) According to Plaintiff, her son Russell (hereafter, "Russell"), agreed to become Plaintiff's executor and guardian "for the sole purpose of placing [Plaintiff] in a nursing home against her will, and under the guise [Plaintiff] was incompetent." (*Id.* ¶¶133, 136.) To that end, Taylor allegedly conspired with Russell "so that he may for personal vengeance, take control over [Plaintiff's] person and estate for malicious reasons." (*Id.* ¶135.)

B. Procedural History

On November 28, 2016, Plaintiff and her son Robert commenced this *pro se* civil action with the filing of separate applications for leave to proceed *in forma pauperis*. (*See* ECF Nos. 1 and 2). Two days later, Plaintiff filed a motion for counsel. (*See* ECF No. 3). Robert's *in forma pauperis* application was denied on December 14, 2016, as it appeared to the Court that Robert

was attempting simply to prosecute the claims of his mother on a *pro se* basis. (*See* Order dated 12/14/16, ECF No. 4.) The court granted Plaintiff's *in forma pauperis* motion on December 16, 2016, (*see* Order dated 12/16/16, ECF No. 5), and the Complaint (ECF No. 7) was filed that same day.

The named Defendants in this action include SWAAA, Greenfell, Taylor, various John and Jane Doe agents of SWAAA, SL, SC, Dr. Ewbank, Megan Detwilter (the Executive Director of SL/SC), Hursey, GLC, GEC, Hainer, Estle, Russell, and the John and Jane Doe owners of GLC and/or GEC. The Complaint sets forth six separate counts. Count I asserts claims under 42 U.S.C. §1983 against all Defendants for the alleged violation of Plaintiff's rights under the First, Fourth, Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution, as well as rights afforded under Pennsylvania's Constitution. Count II asserts a §1983 claim against all Defendants for alleged retaliation against Plaintiff after she exercised her "rights under common law." (Compl. ¶149.) Count III sets forth a claim against all Defendants pursuant to 42 U.S.C. §1985(3) for alleged conspiracy. Count IV asserts a claim under 42 U.S.C. §1986 against Greenfell for alleged conspiracy. Count V asserts a claim against GLC/GEC, Hainer, and GLC/GEC's owners/operators for failure to prevent injuries caused by third parties. Finally, Count VI asserts a claim against all Defendants for allegedly violating 20 Pa. Cons. Stat. Ann. §5608.1(c) by failing to comply with Plaintiff's P.O.A. directives.

On December 20, 2016, this Court entered an order staying and administratively closing the case in light of competency proceedings that were then pending in the Greene County Court of Common Pleas. (ECF No. 6.) On February 27, 2017, while the case was still stayed, this Court entered a text order denying Plaintiff's motion for counsel. In pertinent part, the Text Order stated:

> The Court is aware that the Court of Common Pleas of Greene County is actively involved in a determination of whether Joan Rega is incompetent. If it is determined that she is, the Court will not appoint counsel but will, in compliance with Powell v. Symons, 680 F.3d 301 (3rd Cir. 2012), appoint a guardian for Joan Rega to determine whether this action should be pursued. Once a determination has been made by the Court in Greene County, the Court will permit Mr. John Rega to notify it, provide a copy of the incompetency ruling, and request that a guardian be appointed for Joan Rega.

(Text Order Dated 2/27/17, ECF No. 11.)

Thereafter, on March 2, 2017, this Court received notification from Judge Toothman's chambers that Judge Toothman had entered an order on February 21, 2017 finding Plaintiff to be a capacitated person without the necessity of a guardian over her person or her estate. (*See* ECF No. 7.) Pursuant to Judge Toothman's order, Russell Rega was removed as Plaintiff's temporary guardian. (*Id.*)

The following day, March 3, 2017, this Court entered an Order directing Plaintiff to advise the Court no later than March 30, 2017 whether she intends to proceed with this lawsuit. (*See* Order dated 3/3/17, ECF No. 13.) Plaintiff was expressly advised that "[i]f nothing is received from Mrs. Rega, the Court will issue a Report and Recommendation that this matter be dismissed for failure to prosecute." (*Id.*)

Plaintiff failed to respond to the Court's order as of the March 30, 2017 deadline. To date, no response of any kind has been received by the Court.

C. Discussion

Rule 41(b) of the Federal Rules of Civil Procedure addresses the involuntary dismissal of an action or a claim. It provides that:

> [i]f the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule -- except one for lack of jurisdiction, improper

> venue, or failure to join a party under Rule 19 -- operates as an adjudication on the merits.

"Under Rule 41(b), a district court has authority to dismiss an action sua sponte if a litigant fails to prosecute or to comply with a court order." *Qadr v. Overmyer*, No. 15-3090, 642 F. App'x 100, 102 (3d Cir. 2016) (*per curiam*) (citing Fed. R. Civ. P. 41(b)); *see also Adams v. Trustees of New Jersey Brewery Employees' Pension Trust Fund*, 29 F.3d 863, 871 (3d Cir. 1994) (recognizing that a court can dismiss a case *sua sponte* under Rule 41(b)) (discussing *Link v. Wabash R.R.*, 370 U.S. 626, 632 (1962)).

In deciding whether to dismiss a case for failure to prosecute, courts consider several factors, including: (1) the extent of the party's personal responsibility; (2) the prejudice to the opposing party caused by the failure to meet scheduling orders and respond to discovery; (3) any history of dilatoriness; (4) whether the conduct of the party or the attorney has been willful or in bad faith; (5) whether effective alternative sanctions are available; and (6) the merits of the claim or the defense. *Qadr*, 642 F. App'x at 102 (citing *Poulis v. State Farm Fire & Cas. Co*., 747 F .2d 863, 868 (3d Cir.1984)). "There is no 'magic formula' or 'mechanical calculation' for balancing the *Poulis* factors, and a District Court need not find all of the factors satisfied in order to dismiss a complaint." *Id*. at 102-03 (citing *Briscoe v. Klaus*, 538, F.3d 252, 263 (3d Cir. 2008)). The decision to dismiss for failure to prosecute is committed to the district court's sound discretion. *See Collinsgru v. Palmyra Bd. of Educ*., 161 F.3d 225, 230 (3d Cir.1998) (reviewing the district court's dismissal for failure to prosecute pursuant for abuse of discretion), *abrogated on other grounds by Winkelman ex rel. Winkelman v. Parma City School Dist*., 550 U.S. 516 (2007).

Based on its review of the aforementioned *Poulis* factors, this Court concludes that a dismissal of the instant civil action is warranted. The Court's analysis of each factor follows.

1. The Extent of the Party's Personal Responsibility

Plaintiff is proceeding in this matter *pro se*. As of February 21, 2017, she was adjudicated competent by the Court of Common Pleas for Greene County. There is no indication that Plaintiff's current address of record is inaccurate or that she otherwise failed to receive, at that address, the Court's prior order directing her to advise whether she intends to proceed with this lawsuit. Plaintiff is therefore solely responsible for her failure to comply with the Court's directives.

2. A History of Dilatoriness

As noted, Plaintiff was directed to advise the Court no later than March 30, 2017 whether she intends to proceed with this lawsuit. (ECF No. 11.) Plaintiff was expressly advised that, if she failed to respond, the Court would recommend that the within matter be dismissed for failure to prosecute. Plaintiff did not comply with the Court's directive, nor did she articulate any just cause for an extension of the March 30 deadline. In this Court's estimation, Plaintiff's dilatoriness demonstrates that she does not intend to proceed with this case in a timely fashion.

3. Prejudice to the Adversary

In *Poulis*, prejudice was found to exist where the adversary was required to prepare and file motions to compel answers to interrogatories. In this case, civil claims have been pending against the named Defendants for over six months, and they have yet to be served with the Complaint. The Defendants have been prejudiced to the extent that Plaintiff's noncompliance with the Court's March 3, 2017 order has impeded the Court's ability to move this litigation forward toward a timely adjudication on the merits.

4. Whether the Party's Conduct Was Willful or in Bad Faith

As noted, there is no indication on this record that Plaintiff's failure to comply with the Court's prior order was the result of any lack of notice or other excusable neglect. Thus, it appears that her failure in this regard is willful.

5. Alternative Sanctions

Plaintiff is proceeding *pro se* and *in forma pauperis* in this action. It is therefore likely that any sanction imposing costs or fees upon her would be ineffective.

6. Meritorious of the Claim or Defense

Under Federal Rule of Civil Procedure 12(b)(6), a complaint should be dismissed if, accepting all well-pled averments and reasonable inferences as true, it fails to state a claim upon which relief can be grounded. *See* Fed. R. Civ. P. 12(b)(6); *Fowler v. UPMC Shadyside*, 578 F.3d 203, 206 (3d Cir. 2009) (discussing the applicable standard of review). The facts pled must be sufficient to state a facially plausible claim for relief. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007); *see also* Fed. R. Civ. P. 8(a). Where the complainant is proceeding *pro se,* the court must construe the complaint liberally. *See Huertas v. Galaxy Asset Mgmt*., 641 F.3d 28, 32 (3d Cir. 2011) (citing *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)).

At this early stage of the litigation, it is impossible to definitively assess the merits of all Plaintiff's claims. Defendants have not yet been served with the Complaint, much less have they answered or otherwise defended Plaintiff's claims. Nevertheless, a preliminary assessment of Plaintiff's claims suggests that at least some of her theories lack merit and others would be subject to dismissal for failure to satisfy the federal pleading standard.

As noted, Counts I and II of the Complaint set forth claims under 42 U.S.C. §1983. To obtain relief under this statute, a plaintiff must demonstrate "that the defendants, acting under color of law, violated the plaintiff's federal constitutional or statutory rights, and thereby caused the complained of injury." *Elmore v. Cleary*, 399 F.3d 279, 281 (3d Cir. 2005)(citing *Sameric Corp. of Del., Inc. v. City of Phila*., 142 F.3d 582, 590 (3d Cir.1998)). "The requirement that a defendant act under color of state law is essential in order to establish a claim under §1983." *Sapp v. Vartan Grp*., No. 1:16-CV-00161, 2017 WL 2772105, at *3 (M.D. Pa. June 1, 2017), *report and recommendation adopted*, No. 1:16-CV-161, 2017 WL 2734383 (M.D. Pa. June 26, 2017)(citing *Adickes v. S.H. Kress & Co*., 398 U.S. 144, 150 (1970)). Here, however, Plaintiff has seemingly failed to properly allege the required state action. According to the Complaint, SWAAA, GLC/GEC, SL and SC are all corporate entities (*see, e.g.,* Compl. ¶¶22, 23, 27, 31, and 33), and their agents and employees are therefore private actors. In an attempt to show state action, Plaintiff alleges that the various Defendants acted under the direction of and/or conspired with SWAAA (*see id.* ¶¶42, 105), which Plaintiff refers to as a "state agency." (*Id.* ¶42.) *See Goodson v. Maggi,* 797 F. Supp. 2d 624, 638 (W.D. Pa. 2011) (noting that "private action may be converted into state action if a state actor conspires with a private individual to deprive a plaintiff of his constitutional rights")(citing *Dennis v. Sparks,* 449 U.S. 24, 27-29 (1980)). However, any assertion that SWAAA is a state agency is belied by Plaintiff's admission that SWAAA "is a licensed Corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania . . . ." (*Id.* ¶33.)

To be viable, a §1983 claim must also establish that the state actor deprived the plaintiff of federally guaranteed rights. *Elmore,* 399 F.3d at 281. In this case, Plaintiff alleges that the Defendants violated her rights under the First, Fourth, Fifth, Sixth, and Fourteenth Amendments

to the U.S. Constitution, as well as "rights afforded by Article 1, §1 & §8, of the Pennsylvania Constitution . . . ." (Compl. ¶144.) Insofar as Count I is predicated on alleged violations of Plaintiff's rights under the Pennsylvania Constitution, the claim fails to state a viable cause of action because §1983 does not provide a right of redress for the violation of state-based rights. *See Collins v. City of Harker Heights, Tex.,* 503 U.S. 115, 118 (1992) ("Although [§1983] provides the citizen with an effective remedy against those abuses of state power that violate federal laws, it does not provide a remedy for abuses that do not violate federal law . . . .") (citations omitted); *Moore v. Darlington Twp*., 690 F. Supp. 2d 378, 385 n.4 (W.D. Pa. 2010) ("[S]ince §1983 protects only the 'rights, privileges, or immunities secured by the Constitution and laws of the United States,' it is inapplicable to any rights protected by state statutes or the state constitution.").

Plaintiff's §1983 claim is also untenable to the extent it is predicated on alleged violations of the Fifth and Sixth Amendments. "'The Fifth Amendment only applies to actions taken by the federal government, not state or local governments.'" *Summers v. City of Phila.*, No. CV 17-191, 2017 WL 2734277, at *4 (E.D. Pa. June 26, 2017)(quoting *Duffy v. County of Bucks*, 7 F. Supp. 2d 569, 576 (E.D. Pa. 1998)). The Sixth Amendment applies only in the criminal setting. *See Kirby v. Illinois*, 406 U.S. 682, 690 (1972) (holding that Sixth Amendment guarantees only apply to "criminal prosecutions"). Here, Plaintiff has not pled facts that implicate rights under the Fifth or Sixth Amendments.

Count II of the Complaint appears to assert a claim under §1983 for unlawful retaliation. Specifically, Plaintiff alleges that the Defendants "chilled" her "right to seek redress from the courts" by retaliating against her for "exercising her rights under common law to refuse medical

treatment, and/or to be discharged from a corporate nursing home[,] Namely, (G.L.C./G.E.C.), and/or to disenroll from (S.C./S.L.) . . . ." (Compl. ¶149.)

As currently pled, Count II fails to state a claim upon which relief could be granted. In order to plead a retaliation claim under §1983, a plaintiff must establish: "(1) constitutionally protected conduct, (2) retaliatory action sufficient to deter a person of ordinary firmness from exercising his constitutional rights, and (3) a causal link between the constitutionally protected conduct and the retaliatory action." *Thomas v. Independence Twp*., 463 F.3d 285, 296 (3d Cir. 2006)(citation omitted). Here, Plaintiff's allegations fail to satisfy the first element of her retaliation claim because she appears to be claiming that she was retaliated against for engaging in conduct protected under Pennsylvania common law, not conduct protected under the U.S. Constitution. As noted above, §1983 does not provide a right of redress for the violation of state-based rights.

In Count III of the Complaint, Plaintiff purports to assert a claim under 42 U.S.C. §1985(3), which prohibits conspiracies to deprive persons of their rights or liberties under federal law. *See* 42 U.S.C. § 1985(3). This statute applies only where the conspiracy is motivated by racial discrimination or some other class-based, invidiously discriminatory animus. *See Rivera v. Wesley*, No. CV 16-400-LPS, 2017 WL 936627, at *3 (D. Del. Mar. 9, 2017) ("It is a well-settled constitutional interpretation that 'intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.'") (quoting *Kush v. Rutledge*, 460 U.S. 719, 726 (1983)). Here, Plaintiff alleges that she is an 80 year-old Caucasian female. (Compl. ¶38.) "Due to age, gender and race," Plaintiff considers herself to be in "a protected class and/or group pursuant to state and federal law." (*Id.* ¶39.) Even if this assertion is

accepted at face value, however, the viability of Count III is still dubious because Plaintiff has not pled facts that plausibly suggest she was discriminated against on the basis of these factors. (*See* Compl. ¶¶154-160.) On the contrary, the Complaint states that the Defendants conspired "with the intent to maintain Plaintiff in their nursing home(s) for as long as possible, and did so for profit and contractual benefit, or in the case of defendant Russell Rega, did so as personal vengeance to obtain control of Plaintiff's person and property." (*Id.* ¶156.)

Count IV of the Complaint purports to state a claim against Greenfell pursuant to 42 U.S.C. §1986. This statute provides a right of relief against "[e]very person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do...." 42 U.S.C. §1986. In order to state a claim under §1986, Plaintiff must first demonstrate the existence of a §1985 conspiracy. *See Clark v. Clabaugh*, 20 F.3d 1290, 1295 (3d Cir. 1994) ("[T]ransgressions of §1986 by definition depend on a preexisting violation of § 1985[.]") (citation and internal quotation marks omitted). Thus, the present deficiencies in Plaintiff's §1985(3) claim preclude her from stating a viable claim under §1986. *See Heath v. Shannon*, 442 F. App'x 712, 718 (3d Cir. 2011) (*per curiam*) ("Because [the plaintiff] failed to state a conspiracy claim under § 1985, the District Court properly ruled that his related §1986 claims also failed.") (citation omitted).

In sum, as currently pled, each one of Plaintiff's federal claims appears to be vulnerable to a Rule 12(b)(6) challenge, either on the merits or for failure to satisfy the federal pleading standard. In the event Plaintiff would be unable to cure the existing deficiencies in the Complaint, her federal claims would be subject to a dismissal with prejudice. *See Alston v. Parker*, 363 F.3d 229, 236 (3d Cir. 2004) (indicating that a court need not grant leave to further

amend a complaint where amendment would be futile). If this were to occur, of course, Plaintiff's state law claims would be subject to discretionary dismissal as well. *See* 28 U.S.C. §1367(c)(3) (providing that district courts may decline to exercise supplemental jurisdiction over state law claims if the district court has dismissed all claims over which it had original jurisdiction).

7. Summary of the *Poulis* Factors

On balance, this Court finds that the *Poulis* factors weigh in favor of a recommendation of dismissal. The Third Circuit Court of Appeals has stated that "a district court dismissing a case *sua sponte* 'should use caution in doing so because it may not have acquired knowledge of the facts it needs to make an informed decision.'" *Qadr*, 642 F. App'x at 103 (citing *Briscoe*, 538 F.3d at 258). Before engaging in a *sua sponte* dismissal, "the district court 'should provide the plaintiff with an opportunity to explain his reasons for failing to prosecute the case or comply with its orders.'" *Id*. (quoting *Briscoe*, 538 F.3d at 258). Here, Plaintiff has been advised that, if she did not affirmatively indicate her desire to proceed with the litigation on or before March 30, 2017, the Court would recommend that the case be dismissed with prejudice. Having been given ample opportunity to express her intentions, Plaintiff has failed to provide any response or information that would account for her failure to move this litigation forward. Accordingly, a *sua sponte* dismissal of the Plaintiff's claims is warranted.

III. CONCLUSION

For the foregoing reasons, it is respectfully recommended that this civil action be dismissed with prejudice pursuant to Federal Rule of Civil Procedure 41(b) based on the Plaintiff's failure to prosecute.

In accordance with the Federal Magistrate Judge's Act, 28 U.S.C. §636(b)(1)(B) and (C), and Rule 72.D.2 of the Local Rules of Court, the parties are allowed fourteen (14) days from the date of service of this Report and Recommendation to file written objections thereto. Any party opposing such objections shall have fourteen (14) days from the date of service of objections to respond thereto. Failure to file timely objections will constitute a waiver of any appellate right.

Dated: July 6, 2017

BY THE COURT:

/s/ Lisa Pupo Lenihan
LISA PUPO LENIHAN
United States Magistrate Judge

cc: JOAN MARY REGA
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