

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

ARCHIE T. LEATHERBURY : CIVIL ACTION
 :
 v. :
 :
 CITY OF PHILADELPHIA, :
 on behalf of City of :
 Philadelphia Police Department : NO. 96-3377

M E M O R A N D U M

WALDMAN, J.

February 3, 1998

Plaintiff has asserted claims pursuant to 42 U.S.C. § 1983 against the City of Philadelphia "on behalf of the City of Philadelphia Police Department.

Plaintiff alleges that on January 30, 1982 police officers from the 39th district entered his house while no one was home and destroyed personal property. He alleges that following an investigation, a complaint he filed a month later with the District Attorney's Office was found to be "unsubstantiated." Plaintiff alleges that on April 8, 1982 he was falsely arrested for possession of narcotics with intent to distribute, held for 22 hours and "manhandled" by officers in the 39th district who thereafter "threatened" him for filing the complaint with the District Attorney's office. The charge against plaintiff was dismissed on June 15, 1984.

The essence of plaintiff's claims is that the defendant City "knowingly or recklessly allowed" and "conspired to permit" a "pattern and practice of violence in the 39th District" which

included the false arrest, manhandling and "false" prosecution of plaintiff and the destruction of his personal property.¹

Plaintiff seeks compensatory and punitive damages, "an Order declaring [his] arrest and prosecution was false," and injunctive relief requiring defendant to "cause to be expunged any records regarding plaintiff's false arrest and prosecution" and "to provide plaintiff with a letter of apology."²

The defendant City correctly asserts that insofar as plaintiff may be asserting claims against the Police Department, they must be dismissed since the Department is not an entity subject to suit under § 1983. See Irvin v. Borough of Darby, 937 F. Supp. 446, 450 (E.D. Pa. 1996); Johnson v. City of Erie, 834 F. Supp. 873, 878-79 (W.D. Pa. 1993); PBA Local No. 38 v. Woodbridge Police Dept., 832 F. Supp. 808, 825-26 (D.N.J. 1993). Defendant City also has moved for summary judgment on the grounds that plaintiff's claims are barred by the statute of limitations and that plaintiff also has failed to present evidence from which one reasonably could find the City liable for the acts of the

¹ Plaintiff does not elaborate on who conspired with whom or identify a policymaking official for whose conspiratorial conduct the City itself might be found liable for conspiracy. The court assumes that by alleging "false prosecution," plaintiff means to assert a § 1983 claim for malicious prosecution.

²Punitive damages, of course, may not be recovered from a municipality in a § 1983 case. Newport v. Fact Concerts, Inc., 453 U.S. 247, 267 (1981); Bolden v. Southeastern Pennsylvania Transp. Authy., 953 F.2d 807, 829-830 (3d Cir. 1991), cert. denied, 504 U.S. 943 (1992).

several police officers complained of.³

It is clear and uncontested that unless tolled, the applicable limitations period expired on June 15, 1986 for a malicious prosecution claim, on April 8, 1984 for false arrest, false imprisonment or excessive force claims and on January 30, 1984 for any claim related to the alleged destruction of personal property.⁴ Plaintiff contends that the limitations period should be tolled because of "duress" through March 1, 1995, the day a federal grand jury returned indictments against five police officers in the 39th district for illegally searching and robbing suspected drug dealers between 1988 and 1991.⁵ Plaintiff avers that until that time he feared that if he filed suit he might be harmed or falsely charged with a crime. This action was filed fourteen months after the return of those indictments.

In support of his duress argument plaintiff cites two cases. The first is Merchant v. Lymon, 828 F. Supp. 1048

³ Summary judgment is granted when it appears from the record viewed most favorably to the non-movant that there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). Only facts that may affect the outcome of a case under applicable law are "material." Id. at 248. Summary judgment may be used to determine the applicability of a pertinent statute of limitations. Rivera-Muriente v. Agosto-Alicea, 959 F.2d 349, 352 (1st Cir. 1992); Loffland Bros. Co., 626 F.2d 1228, 1231 (5th Cir. 1980), cert. denied, 452 U.S. 962 (1981); Gee v. CBS, Inc., 471 F. Supp. 600, 635 (E.D. Pa.) aff'd, 612 F.2d 572 (3d Cir. 1979).

⁴ See 42 Pa. C.S.A. § 5524.

⁵ Ultimately, ten officers were convicted for such conduct.

(S.D.N.Y. 1993) which he states held that "threats to [plaintiffs] acted to toll the statute of limitations on the basis of duress." The Court in Merchant in fact did not so hold. To the contrary, it rejected a claim of tolling based on duress. Applying New York law, the Court in Merchant held that to toll a statute of limitations duress must constitute an "integral part of the underlying cause of action" and there must also be "proof that the relationship between the parties was characterized throughout by a continuing pattern of duress" which "deprived [plaintiffs] of their freedom of will." Id. at 1061-62.⁶ Plaintiff has not made such a showing.⁷ In any event, New York law is not applicable in this case.

Federal courts employ applicable state tolling rules in § 1983 actions. See Hardin v. Straub, 490 U.S. 536, 539 (1989); Board of Regents v. Tomanio, 446 U.S. 478, 484-85 (1980); Torres v. Sup't. of Police of Puerto Rico, 893 F.2d 404, 407 (1st Cir. 1990); Rubin v. O'Koren, 644 F.2d 1023, 1025 (5th Cir. 1981);

⁶ See also Overall v. Estate of Klotz, 52 F.3d 398, 404-05 (2d Cir. 1995) (to toll limitations period duress must be element of cause of action and tortious conduct "must continue uninterrupted"); Byrd v. Manning, 601 A.2d 770, 776 (N.J. Super.) (to toll limitations period for duress party must prove coercive acts deprived him of free will), certif. denied, 611 A.2d 656 (N.J. 1992).

⁷ See Day v. Moscow, 955 F.2d 807, 813 (2d Cir.) (duress not element of and thus cannot toll limitations period for illegal search and false arrest), cert. denied, 506 U.S. 821 (1992). Also, while plaintiff has described his fears, he has not specified precisely what threats of future harm actually were made or averred that he was subjected to a continuing pattern of coercion throughout the thirteen year period.

Ammlung v. City of Chester, 494 F.2d 811, 813 (3d Cir. 1974);
Thomas v. New York City, 814 F. Supp. 1139, 1153 (E.D.N.Y. 1993).
It is unquestioned that the two year Pennsylvania statute of
limitations for personal injury claims applies in this case, and
thus the applicable tolling principles are those of Pennsylvania.
See Wilson v. Garcia, 471 U.S. 261, 268-69 & n.17 (1985).

The other opinion cited by plaintiff referencing
tolling by duress is Williams v. Baird, 1997 WL 438495 (E.D. Pa.
July 23, 1997), another 39th district case. The Court in
Williams observed that "even assuming" Pennsylvania would
recognize tolling by duress, plaintiffs had failed to prove that
threats of police retaliation had caused them to delay filing
their § 1983 claims for five years. Id. at *2. Moreover, the
Court noted immediately thereafter the dearth of authority for
the proposition that "duress" can toll a statute of limitations.
Id. at *2 n.3.

There are no reported cases from which one could fairly
conclude that the Pennsylvania Supreme Court would recognize
tolling by duress, particularly on the record presented.
Somewhat instructive is the recent case of Dalrymple v. Brown,
701 A.2d 164 (Pa. 1997).

Plaintiff in Dalrymple sought to toll the two year
limitations period for personal injury claims on the ground that
she was so traumatized by the defendant's sexual assault she had
repressed any memory of it until two years prior to filing suit.
Plaintiff in that case cast her argument in terms of the

discovery rule, however, certain pertinent principles may be gleaned from the opinion in which the Court held that repression of memory from trauma caused by the alleged tortfeasor will not toll a statute of limitations.

The Court rejected the majority view recognizing such a basis for tolling because, unlike Pennsylvania, "those jurisdictions generally do not favor a strict application of limitation periods." Id. at 171. The Court stressed that a limitations period is not tolled under Pennsylvania law because of any incapacity of the plaintiff. Id. at 169.⁸ The Court reiterated that even where tolling is permitted by the discovery rule, the applicable standard is an objective one, i.e., what would a "reasonable person" have done in the circumstances. Id. at 167.

One cannot confidently predict that a state favoring "strict application" of its limitation periods would adopt a tolling principle for which there is scant authority. One cannot confidently predict that a state which precludes tolling for literal incapacitation, including insanity or an inability to remember because of trauma induced by the tortfeasor, would recognize apprehension or duress as a basis for tolling.

Further, even if Pennsylvania were to recognize tolling by duress, it would almost certainly utilize an objective standard, i.e., whether a plaintiff was faced with threats of

⁸ See also 42 Pa. C.S.A. § 5533(a) (insanity will not toll limitations period).

serious impending harm in circumstances which would cause a reasonable person with an ordinarily firm mind to conclude that there was no practical recourse but to relinquish his legal rights. Accepting the averments in plaintiff's affidavit, a reasonable person in the circumstances described would not assume there was no recourse for harassment or other illegal retaliatory acts by rogue police officers. Even if plaintiff distrusted all local law enforcement authorities, there is no basis reasonably to conclude that resort to state or federal authorities for assistance was foreclosed.⁹

Plaintiff's claims are barred by the statute of limitations.¹⁰

Moreover, plaintiff has failed to present evidence sufficient to sustain his claim against the City in any event.

Plaintiff asserts that the offending police officers were "operating within their course of employment and scope of

⁹ Indeed, it appears from plaintiff's own submissions that Arthur Colbert, a similarly situated individual who had been threatened with death, promptly lodged a complaint with authorities which triggered an investigation resulting in indictments of the offending officers.

¹⁰ Equitable relief also is unavailable where concurrent legal relief is barred by the applicable statute of limitations. See Algrant v. Evergreen Valley Ltd. Partnership, 126 F.3d 178, 181-82 (3d Cir. 1997) (citing cases). There is, in any event, no constitutional right to an apology. Plaintiff also fails to specify any recognized property or liberty interest impinged by the existence of a record of his arrest or prosecution, and cannot allege that Pennsylvania fails to provide adequate process to limit dissemination of or expunge records of arrests or prosecutions which do not result in convictions. See 18 Pa. C.S.A. §§ 9121(b)(2) & 9122(a); Com. v. D.M., 695 A.2d 770, 772-73 (Pa. 1997).

duties" with the defendant City. There is, however, no respondeat superior liability under § 1983. Rizzo v. Goode, 423 U.S. 362, 370-73 (1976); Losch v. Borough of Parkesburg, Pa., 736 F.2d 903, 910 (3d Cir. 1984).

To sustain a § 1983 claim against a municipality, a plaintiff must present evidence from which one may reasonably find that a municipal official with requisite policymaking authority intentionally or with deliberate indifference established or acquiesced in a practice, policy or custom which deprived plaintiff of a constitutional right. See Monnell v. Department of Social Services, 436 U.S. 658, 690-91 (1978); Simmons v. City of Philadelphia, 947 F.2d 1042, 1064 (3d Cir. 1991). Proof of deliberate indifference requires scienter-like evidence. Id. at 1064 n.19. "Congress did not intent municipalities to be held liable unless deliberate action attributable to the municipality directly caused a deprivation of federal rights." Bd. of County Com'rs. of Bryan County, Okl. v. Brown, 117 S. Ct. 1382, 1394 (1997). Where a § 1983 plaintiff seeks to impose liability on a municipality for allegedly causing an injury inflicted by an employee "rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee." Id. at 1389.

The City contends with force that plaintiff has failed to present evidence to sustain a Monnell claim, and represents that plaintiff failed even to conduct the type of discovery

ordinarily required to elicit the kind of evidence which might support such a claim. In response, plaintiff essentially makes three arguments.

Plaintiff argues that the processing by the District Attorney's Office of a warrant to search plaintiff for illegal drugs "acts to meet the scienter test of an official with policy making authority." There is no evidence of record from which one reasonably can find that the then District Attorney or anyone in his office processing such a warrant in 1982 knew or should have known that the verifying officer was lying or was or should have been aware of the prospect of an accompanying illegal arrest.

Plaintiff argues that "[i]f it stinks today, it can be presumed to have stunk yesterday" and thus "the illicit policy" in place in the 39th district from 1988 to 1994 may be presumed to have existed in 1982 when plaintiff was arrested. There is not an iota of evidence that prior to the termination of plaintiff's prosecution in 1984 any official whose conduct may be attributed to the City itself intentionally or with deliberate indifference initiated or acquiesced in the type of rogue police conduct later found in the 39th district.

To presume the existence of police misconduct and concomitant deliberate indifference or knowing acquiescence by responsible policymakers from evidence that such occurred several years later would subject municipalities to substantial liability based on pure conjecture. We do not presume that a defendant in a non-constitutional tort case knew or ignored the likelihood

that a dangerous condition existed at a particular time from a showing that it existed four or six years later. We do not presume that an employer in a Title VII case failed to take appropriate remedial action to cleanse a hostile work environment at the time complained of by the plaintiff employee from evidence of actual or constructive notice of harassment several years later. Having presumed the existence of a practice and the deliberate indifference of a policymaker thereto in 1982 from evidence of such in 1988, may we find such a practice and indifference in 1978 from their presumed existence in 1982?

Plaintiff argues that even absent present evidence, he should be allowed to proceed because "there is no bar to plaintiff's subpoenaing relevant officials with 'policy making authority' to be required to testify at trial in regard to the illicit treatment of plaintiff." Aside from plaintiff's failure timely to identify such persons on a witness list as required by the court's scheduling order, there is no bar to calling as a witness someone who was not deposed during discovery.

A plaintiff, however, may not avert summary judgment with an assumption, hope or promise that evidence necessary to sustain his claim will be forthcoming at trial. Garside v. Osco Drug, Inc., 895 F.2d 46, 49 (1st cir. 1990) (mere promise to produce evidence at trial cannot thwart summary judgment); DF Activities Corp. v. Brown, 851 F.2d 920, 922 (7th Cir. 1988) ("[a] plaintiff cannot withstand summary judgment by arguing that although in pretrial discovery he has gathered no evidence of the

defendant's liability, his luck may improve at trial"); Neely v. St. Paul Fire & Marine Ins. Co., 584 F.2d 341, 344 (9th Cir. 1978) (non-moving party's hope that further evidence may be developed at trial does not justify denial of summary judgment); King v. National Industries, Inc., 512 F.2d 29, 33-34 (6th Cir. 1975) (party may not resist summary judgment by referencing "proposed testimony of possible witnesses"); Denman v. Mississippi Power & Light Co., 906 F. Supp. 379, 382 (S.D. Miss. 1995) (non-movant cannot avoid summary judgment with a "promise to prove at trial a matter properly challenged by Rule 56"). A party cannot resist summary judgment with allegations or vagaries. Trapp Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992). The non-movant must come forward with competent evidence sufficient to establish the existence of each element he must prove to sustain his claim. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

Plaintiff has failed to present evidence from which one reasonably could find the City itself liable for the events in 1982 of which he complains.

For the foregoing reasons, defendant's motion will be granted. An appropriate order will be entered.

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O R D E R

AND NOW, this day of February, 1998, upon consideration of the motion of defendant City of Philadelphia for summary judgment and to dismiss claims, and plaintiff's response thereto, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and accordingly, insofar as plaintiff has attempted to assert claims against the Philadelphia Police Department such claims are **DISMISSED**, and **JUDGMENT is ENTERED** in the above action for the defendant City and against plaintiff.

BY THE COURT:

JAY C. WALDMAN, J.