

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

RAMEE K.D. GREEN : CIVIL ACTION
 :
 v. :
 :
 WILLIE ROBINSON : No. 97-3005

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

October 25, 2001

Plaintiff Ramee K.D. Green ("Green") alleges that Willie Robinson ("Robinson"), a Philadelphia police officer, maliciously initiated Green's prosecution for possession of a firearm by a felon. The criminal charges, filed in both state and federal court, resulted in an acquittal in May, 1995, in this court. Because this § 1983 malicious prosecution claim is time barred, the court will **grant defendant's motion for summary judgment.**

A. BACKGROUND¹

On October 28, 1992, Robinson arrested Green for possessing a firearm on the public streets of Philadelphia without a license. Green was placed in a squad car, transferred to a police station, questioned, and eventually released on his own recognizance the next day.

Green has consistently denied that he was in possession of a firearm. Robinson's partner, Officer Walter Bias ("Bias") was

¹As required in a motion for summary judgment, all facts are set forth in the light most favorable to the plaintiff as the non-moving party. See United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

not present at the scene when Robinson later recovered a gun: no independent witnesses saw Green with a firearm on October 28th.

While Green awaited prosecution on this firearm charge, the Commonwealth brought a second, more serious, charge against him: the intentional murder of Lashawn Whaley. On January 26, 1994, Green was arrested, taken into custody, and held on the murder charge.

On March 25, 1994, the state firearm charge arising from the October 28th arrest was dismissed for lack of prosecution. Green remained in state prison awaiting trial on the Whaley murder charge.

On November 2, 1994, a federal grand jury indicted Green for alleged violation of 18 U.S.C. § 922(g)(1): unlawful possession of a firearm by a felon. Robinson's police report and testimony is the only evidence of record to support this indictment.

In January, 1995, Green was tried on the firearm charge in this court. After three days, the court declared a mistrial: a juror revealed that she was aware of Robinson's general reputation in her neighborhood as an arrogant officer, and specifically recalled an incident of harassment involving her own son.

On February 13, 1995, Green was found guilty of the Whaley murder charges and sentenced to life in prison.

On May 8 and 9, 1995, Green was tried a second time in this court for violating 18 U.S.C. § 922(g)(1). Green defended himself, in part, with evidence Robinson was not credible. According to Green, Robinson lied during an internal police investigation about events taking place in July, 1993: Robinson denied holding a gun to a suspect's head and threatening to "blow your f---ing brains out." However, a recorded police radio transmission of this event contradicted Robinson's denial. The jury acquitted Green of firearm possession in violation of 18 U.S.C. § 922(g)(1).

Green remains incarcerated on the Whaley murder conviction: Robinson is still an officer with the Philadelphia Police Department.

B. **PROCEDURAL HISTORY**

Green filed his original complaint pro se on April 25, 1997. On May 6, 1997, the court dismissed the complaint for failure to pay the filing fee required by the Prison Litigation Reform Act, 28 U.S.C. 1915 ("PLRA"). On May 19 the action was reinstated after plaintiff agreed to pay the statutory fee.

Green's original complaint named Willie Robinson, John Doe (his unnamed police officer partner), and William J. Fisher ("Fisher")(the district attorney in the state case) as defendants. Plaintiff claimed Fisher suborned, and the officers committed, perjury in both state and federal trials.

On May 30, 1997, the court sua sponte dismissed the claims against Robinson and John Doe under 28 U.S.C. § 1915(e)(2)B(iii), providing a claim may be dismissed where the court determines that "the action or appeal - seeks monetary relief against a defendant who is immune from such relief." The Order explained that "[t]hese defendants are immune from liability for damages for testimony presented at plaintiff's criminal trial, regardless of the fact that they are police officers. Briscoe v. LaHue, 460 U.S. 325 (1983)."

The court granted plaintiff's motion to proceed in forma pauperis against Fisher and ordered the United States Marshall's Service to serve him. It appears that the Marshalls completed service by June 3, 1997. On August 1, 1997, Fisher moved to dismiss. Plaintiff, rather than responding to this motion on the merits, moved to stay the case pending resolution of a Post-Conviction Relief Act petition in state court. The court, granting plaintiff's request, suspended the case until September 30, 1998. After two further suspensions, and having appointed

Green counsel, the court removed the case from suspense on September 19, 2000.

On November 17, 2000, Green moved to reinstate Robinson as a defendant under Fed. R. Civ. Pro. 15(a), 15(c) and 21. He argued he had already pled the basic facts for a malicious prosecution claim in his original complaint (but had alleged the wrong cause of action). On December 14, 2000, the court granted Green leave to re-file against Robinson. On January 4, 2001, Green filed an amended complaint and he served Robinson the next day. On January 17, 2001, Green withdrew his claims against Fisher to proceed solely against Robinson for malicious prosecution regarding his federal trial.

The court held arguments on defendant's motion for summary judgment and motion in limine² to preclude evidence on October 10, 2001.

C. DISCUSSION

1. **Jurisdiction**

This claim arises under 42 U.S.C. § 1983 and the Fourth and Fourteenth Amendments to the United States Constitution. The court has jurisdiction over the subject matter under 28 U.S.C. § 1331. The court has personal jurisdiction: venue lies in this district.

²Robinson moves to exclude any evidence about the 1993 investigation as: (1) prior bad act testimony; or, (2) unfairly prejudicial. The court will not rule on the merits of these arguments.

2. Summary Judgment³

Robinson moves for summary judgment on multiple grounds, but his argument that Green's amended complaint is barred by the statute of limitations is dispositive. The court will not decide whether Green's complaint would otherwise have been sent to a jury.

The statute of limitations for malicious prosecution claims period is two years. It begins to run when criminal proceedings against the plaintiff terminate in his favor. See Rose v. Bartle, 871 F.2d 331, 348-49 (3d Cir. 1989). Plaintiff won an acquittal in his second federal trial on May 9, 1995. He filed this action originally on April 25, 1997. However, the court dismissed the case against Robinson on May 30, 1997 and no service was made on Robinson. The amended complaint, asserting a new cause of action against a party not then in the lawsuit, is time barred if it does not relate back to the timely filed original complaint. See Urrutia v. Harrisburg County Police Dep't., 91 F.3d 451, 457 (3d Cir. 1996).

Relation back is permitted where the amendment changes the party against whom the claim is brought if: (1) the claim or defense asserted in the amended pleading arose out of the same conduct, transaction or occurrence set forth or attempted to be

³Summary judgment is appropriate if there are no genuine issues of material fact and the evidence establishes that the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). A defendant moving for summary judgment bears the initial burden of demonstrating that there are no facts supporting the plaintiff's claim; then the plaintiff must introduce specific, affirmative evidence there is a genuine issue of material fact. See id. at 322-24. The non-movant must present evidence to support each element of its case for which it bears the burden at trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The court must draw all justifiable inferences in the non-movant's favor. See id. at 255.

set forth in the original pleading; and, (2) the party to be brought in by the amendment, within the period provided by Rule 4(m) for service of the summons and complaint: (a) has received such notice of the institution of the action such that he or she will not be prejudiced in maintaining a defense on the merits; and, (b) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him or her. Fed. R. Civ. Pro. 15(c)(3).

a. The Conduct, Transaction or Occurrence Test

Green's amended complaint against Robinson does arise out of the same conduct, transaction or occurrence he attempted to set forth in his original pleadings. In his 1997 complaint, Green alleged Fisher suborned Robinson's perjury in Green's federal trial because Fisher had been unable to secure Green's cooperation in an unrelated murder case. Identical factual bases undergird the amended complaint.

b. Notice and Mistake

(1) Did Robinson receive notice within the 120 day period provided by Rule 4(m)?

There is no contention that Robinson received actual notice of the filing of any complaint against him within the 120 day period provided by Rule 4(m). It is true that this period did not begin to run until after the court authorized service on May 30, 1997. See Urrutia, 91 F.3d at 459 (ruling that both statute of limitations and Rule 4(m) service requirements are suspended during pendency of an in forma pauperis motion). However, 120

days from May 30, 1997, is September 27, 1997: Robinson was not served with any papers in this case until January 5, 2001.⁴

The Court of Appeals recently held constructive notice satisfies the Rule 15(c)3(a) requirement under limited circumstances. Singletary v. Pennsylvania Department of Corrections et al., ___ F.3d ___, 2001 WL 1110369, 2001 U.S. App. LEXIS 20724, No. 00-3579 (3d Cir. September 21, 2001). In Singletary, the Court analyzed the claims of a plaintiff who, like Green, did not give a defendant "formal or even actual" notice of the action instituted against him within the 120 day period. Constructive notice nonetheless would have satisfied the Rule 15(c)3 requirement either through: (1) a shared attorney; or, (2) an identity of interest. Singletary, 2001 WL 1110369, at *6, 2001 U.S. App. LEXIS 20724, at *19-20. The court must analyze whether Robinson received adequate notice for either of these reasons.

(a) The Shared Attorney

When an originally named party and the party sought to be added are represented by the same attorney, a court may impute notice to the latter party. See Heinly v. Queen, 146 F.R.D. 102, 107 (E.D.Pa. 1993). Here, Fisher (the party who received actual notice), was represented by Beth Grossman, of the Philadelphia

⁴Green might have argued the 120 day period should not run while his case was in suspense: September 19, 1997 through September 20, 2000. If this argument were accepted, Green would have had seven days from September 20, 2000, to provide Robinson notice of the potential claims against him. However, Green could not possibly have known that this notice of a potential amendment was necessary. The incongruity of this result flows from a misreading of the Rule 4(m) period's role in the Rule 15(c)3 analysis. Rather than simply track service, the period is meant to create a fixed and certain time within which potential defendants must either receive notice or be thereafter free from the threat of suit. Even though the case was in suspense, and Green could not have served Robinson, this window of uncertainty closed on September 27, 1997.

District Attorney's Office. Robinson, who received no notice, is represented by the Philadelphia City Solicitor's Office. For shared attorney notice, there must be an attorney whose services were shared with both defendants. Cf. Frazier v. City of Philadelphia, 927 F. Supp. 881, 885 n.7 (E.D.Pa. 1996) (refusing to find constructive notice when solicitor did not represent later added defendants).

(b) The Identity of Interest

Constructive notice may also arise when the "parties are so closely related in their business operations or other activities that the institution of an action against one serves to provide notice to the other." Charles A. Wright et al., Federal Practice and Procedure § 1499, at 146 (2d ed. 1990), cited in Singletary, 2001 WL 1110369, at *8, 2001 U.S. App. LEXIS 20724, at *24. The test is whether the working relationship between the new defendant and the old one is such that notice may be reasonably implied. Id. 2001 WL 1110369, at *9-10, 2001 U.S. App. LEXIS 20724, at *31-33.

There was some identity of interest between Fisher and Robinson in the spring and summer of 1997: Fisher and Robinson were both employees of the Commonwealth; they worked together on Green's prosecution in state court; and Fisher was said to have suborned Robinson's perjury in Green's original complaint. However, there is no reason to assume that Robinson was notified, or knew, of the filing of the original complaint against him or against Fisher by virtue of this casual contact. Not only was Robinson dismissed from the action before service on Fisher, but Fisher's defense was delayed because of Green's requests to place the case in administrative suspense. Fisher would have had no reason, either professionally or legally, to have contacted Robinson about this suit by September 27, 1997. "[A]bsent other circumstances that permit the inference that notice was actually received," Singletary, 2001 WL 1110369, at *10, 2001 U.S. App.

LEXIS 20724, at *33, Green can not demonstrate Robinson and Fisher have an identity of interest.

- (2) Could Robinson have known that "but for a mistake concerning the identity of the proper party" he would have been served with a malicious prosecution claim in 1997?

The second conjunctive requirement of Rule 15(c)3 requires the proposed new party knew or should have known the original complaint's omission of a claim against him was mistaken. The original complaint did name Robinson, but Green mistakenly failed to allege a viable legal cause of action. It would stretch the language of the Rule to equate mistakenly asserting a cause of action with mistakenly naming the wrong party on an otherwise viable claim. On the other hand, Green's decision to sue Robinson for false testimony was not a "deliberate strategy" to engage in "piecemeal litigation." Mathai v. Catholic Health Initiatives, Inc., 2000 WL 1716747, at *3, 2000 U.S. Dist. LEXIS 16555, at *8 (E.D.Pa. Nov. 16, 2000) (citing cases). Rather, it was a mistake of a kind made in pro se civil rights litigation. Unfortunately, this mistake is not one that can now be corrected by misinterpreting the Federal Rules.

Had this mistake been one of identity, it is still unclear whether Robinson could have acquired the requisite knowledge. The inquiry merges with the notice problem. Cf Singletary, 2001 WL 1110369, at *12, n.5, 2001 U.S. App. LEXIS 20724, at *37, n.5 (the mistake element of Rule 15(c)3(b) "would be dispositive in disallowing relation back only when the to-be-added defendants had timely notice of the lawsuit and knew that the lawsuit was really meant to be directed at them.").

- c. **Plaintiff's argument that Rule 15(c)2 should apply instead of Rule 15(c)3**

Through his counsel, Green makes an interesting argument.⁵ He believes that if only the court would extend the service deadline under Rule 4(m) from 120 days to a little under three years, there would be no need to engage in the Rule 15(c)3 inquiry as Robinson's complaint would relate back under Rule 15(c)2. Green's arguments to extend the service deadline for good cause are persuasive, but they miss the point. The court dismissed Robinson from the case entirely: the deadline under Rule 4(m) can not be tolled because it did not begin to run. Green could not have served Robinson because Robinson was not a defendant in the case: any later attempt to bring him back into the case after the limitations period has run must face the strictures of Rule 15(C)3.

Green's implicit argument is that it is unfair to punish him for failure to serve Robinson when that failure was caused, in a sense, by the court's decision to dismiss his original complaint. This sua sponte dismissal, when considered in light of Green's pro se status and his later decision to put the case in administrative suspense, did lead to today's adverse result. However, Green has not moved for reconsideration of that decision, and even if he had, it is unlikely that the court would reverse itself: Green's original complaint, even read expansively, simply did not state a claim for malicious prosecution against Robinson.

D. **CONCLUSIONS OF LAW**

⁵The Court thanks Daniel Rhynhart and George Krueger, Plaintiff's appointed counsel, for their service in this case. If this opinion can say little about the merits of Green's claim, it also cannot reflect on the merits of his present attorneys, who provided excellent briefing and made a compelling case in oral arguments.

1. This claim arises under 42 U.S.C. § 1983 and the Fourth and Fourteenth Amendments to the United States Constitution. The court has jurisdiction over the subject matter under 28 U.S.C. § 1331. The court has personal jurisdiction: venue lies in this district.

2. The statute of limitations for malicious prosecution under § 1983 is two years.

3. Green's claim against Robinson is time-barred. The two year statute of limitations began to run on May 9, 1995. Green's amended complaint does not relate back to his April 25, 1997 original complaint under Fed. R. Civ. Pro. 15(c)3 because Robinson had no formal, actual, or implied notice of the institution of any action in this case until January, 2001.

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

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ORDER

AND NOW, this 25th day of October, 2001, in consideration of defendant's Motion for Summary Judgment and Motion in Limine, plaintiff's responses thereto, defendant's reply, after holding a hearing on October 10, 2001, in which all parties had an opportunity to be heard, and for the reasons stated in the foregoing memorandum, it is **ORDERED** that:

1. Defendant's Motion for Summary Judgment (#41) is **GRANTED. JUDGMENT IS ENTERED** in favor of defendant Willie Robinson and against plaintiff Ramee Green.

2. Defendant's Motion in Limine to Preclude Evidence (#43) is **DENIED AS MOOT.**

Norma L. Shapiro, S.J.