

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

MIGUEL MONTANEZ	:	CIVIL ACTION
Plaintiff	:	
v.	:	NO. 03-6713
	:	
PAT THOMPSON, et. al.	:	
Defendants	:	

MEMORANDUM AND ORDER

Juan R. Sánchez, J.

November 19, 2004

Plaintiff Miguel Montanez is suing prison officials for damages under 42 U.S.C. § 1983, alleging 311 days unlawful incarceration. Montanez claims Defendants Pat Thompson, Robert Durison, and three unnamed individuals, in their official and individual capacities, violated his Eighth and Fourteenth Amendment rights. Defendants Thompson and Durison ask this Court to dismiss Montanez’s claims under a statute of limitations claim and Fed.R.Civ.P. 12(b)(1), (5), and (6). This Court denies those motions.

FACTS

On February 8, 1996, Montanez was arrested. On April 30, 1996, Judge Joseph Bruno sentenced him to a prison term of 2 ½ - 5 years. After a negotiated plea, Judge Gregory Smith reduced the sentence to 2-5 years on June 9, 1997. Montanez claims his maximum sentence ended on February 7, 2001, not on December 15, 2001, the date prison officials actually released him.

On August 14, 1996, the Pennsylvania Board of Probation and Parole (“Board”) recommitted Montanez for a parole violation following his February 8th arrest. The Board, however, rescinded

that recommitment on January 8, 1998. Since that rescission, Montanez frequently informed all defendants of the Board's rescission, asserting his release date is February 7, 2001. Initially, defendants ignored Montanez's argument. On December 10, 2001, Defendant Robert Durison wrote Montanez a memo acknowledging the Board's rescission, but did not change Montanez's release date. On December 15, 2001, prison officials released Montanez.

Montanez claims he was unlawfully detained an additional 311 days in prison. He argues the wrongful and excessive detention violated his Eighth Amendment right against cruel and unusual punishment, and his Fourteenth Amendment right to due process of law. Montanez claims all defendants acted under color of state law during this wrongful detention and seeks damages and attorney's fees for this deprivation of civil rights under 42 U.S.C. § 1983.

After filing Montanez's complaint, his counsel's attempt to serve the complaint failed several times. Judge Timothy Savage extended the service of process deadline from April 12, 2004 to August 6, 2004. Montanez's attorney served the complaint before the August 6th deadline.

DISCUSSION

Both Defendants Thompson and Durison move to dismiss Montanez's complaint arguing Pennsylvania's two-year statute of limitations for personal injury, which is applicable to civil rights actions, expired in 2000. They also move to dismiss pursuant to Fed.R.Civ.P. 12(b)(5) for his attorney's failure to serve opposing counsel within the 120-day limit required by Fed.R.Civ.P. 4(m).

Thompson moves to dismiss for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1), claiming Eleventh Amendment immunity in her official capacity. She also argues in her official capacity that she is not a person under 42 U.S.C. § 1983. Additionally, Thompson claims she cannot be held liable as an individual because she lacked personal involvement in Montanez's

complaint. Thus, she also moves to dismiss under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted.

Durison claims 53 P.S. § 16257¹ prevents Montanez from suing Philadelphia Prison System (“PPS”), and thus, his claim against PPS should also be dismissed under Rule 12(b)(6). This Court finds neither Thompson nor Durison are entitled to dismissal on any of their motions for the reasons that follow.

Motion to Dismiss Due to Expiration of Statute of Limitations

When deciding a motion to dismiss, the Court may look only to the facts alleged in the complaint and its attachments, and accepts as true all well-pleaded allegations. *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994).

Both Durison’s and Thompson’s motions to dismiss based on the statute of limitations fail as a matter of law because the continuing violations doctrine applies to this case. *Nicolette v. Caruso*, 315 F. Supp. 2d 710, 723-24 (W.D. Pa. 2003); *See also Cowell v. Palmer Tp.*, 263 F.3d 286, 291-94 (3d Cir. 2001) (describing and applying continuing violations doctrine). The continuing violations doctrine “permits a civil rights plaintiff, under certain circumstances to raise civil rights claims that otherwise would be barred by the statute of limitations.” *Nicollette*, 315 F.Supp. 2d at 723. In the continuing violations doctrine, the *Nicolette* Court examined three prongs: 1) **subject matter** (whether the violations constitute the same type of discrimination, tending to connect them in a continuing violation); 2) **frequency** (whether the acts are recurring or more in the nature of isolated incidents); and 3) **degree of permanency** (whether the act had a degree of permanence which should trigger the plaintiff’s awareness of and duty to assert his/her rights and whether the consequences

¹Act of April 21, 1855, P.L. 264, § 11.

of the act would continue even in the absence of a continuing intent to discriminate). *Id.* at 724 (noting key consideration is degree of permanency).

Montanez met *Nicolette*'s three prong test by frequently reminding Durison, Thompson and other state correctional officers of his prolonged sentence and their continuing dismissal of those claims. Montanez satisfies the subject matter prong because his continuous and ignored requests all concerned his erroneous release date, making it a single type of discrimination. Montanez's constant attempts to correct his release date satisfy the frequency prong. Montanez also meets the permanency prong. Degree of permanency requires plaintiff to demonstrate defendant's affirmative acts prevented him from asserting his rights. *Nicolette*, 315 F. Supp. 2d at 724. On December 10, 2001, Durison sent Montanez a letter acknowledging the Board's rescission, but claiming Montanez still had to remain in prison because parole backtime and sentence time could not run concurrently. Letter from Robert Durison, Philadelphia Prison System, Philadelphia, to Miguel Montanez (May 28, 1998). This letter, combined with Montanez's detention for four more days, satisfy the permanency prong because they show the defendants' affirmative act which obscured the claims Montanez now asserts.

Durison's and Thompson's motions to dismiss based on the statute of limitations also fail as a matter of law because damages attributable to an unconstitutional conviction do not accrue for purposes of the statute of limitations until the conviction or sentence has been invalidated. *Heck v. Humphrey*, 512 U.S. 477, 490 (1994). Even though Montanez does not claim his entire conviction is unconstitutional, the same reasoning applies to an unconstitutional detention claim. Like the conviction, the detention cannot accrue until the detention is invalidated, which arguably did not happen until Montanez's release on December 15, 2001. Thus, the statute of limitations did not start

until December 15, 2001 and did not expire until December 15, 2003. Since Montanez filed this complaint on December 14, 2003, the two-year-statute of limitations does not bar his complaint.

Motion to Dismiss due to Insufficiency of Service of Process

When a party moves to dismiss under Fed. R. Civ. P. 12(b)(5) (insufficiency of service of process), “the party making the service has the burden of demonstrating its validity” *Grand Entm't Group, Ltd. v. Star Media Sales, Inc.*, 988 F.2d 476, 488-89 (3d Cir. 1993). Thompson and Durison’s motion to dismiss Montanez’s complaint under 12(b)(5) fails as a matter of law because Montanez demonstrated “excusable neglect” and/or “good cause” for his service of process beyond the 120-day limit. *MCI Telecommunications Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1097 (3d Cir. 1995), *cert. denied*, 519 U.S. 815 (1996). Judge Savage extended Montanez’s deadline for service of process to August 6, 2004.

Judges sitting in coordinate jurisdictions should not review each other’s decisions. *State Auto Ins. Ass'n v. Young Men's Republican Club of Allegheny County, Inc.*, 663 F. Supp. 1077, 1080 (1987); *Yamulla Trucking & Excavating Co., Inc. v. Justofin*, 771 A.2d 782, 784 (Pa. Super. Ct. 2001).² Because Judge Savage represents a coordinate jurisdiction, this Court will not question the extension of service of process. Thus, August 6, 2004 establishes the deadline for service of process, and accordingly, Durison’s and Thompson’s Rule 12(b)(5) motion to dismiss is denied.

Motion to Dismiss due to Official’s Eleventh Amendment Immunity

²“We note that this rule is not a matter of jurisdiction *per se*. Rather, it is a rule of sound jurisprudence based on the policy of fostering finality of pre-trial applications so that judicial economy and efficiency can be maintained.” *Yamulla Trucking & Excavating Co., Inc. v. Justofin*, 771 A.2d 782, 784 (Pa. Super. Ct. 2001).

The Court may treat a Rule 12(b)(1) motion as either a facial or factual challenge to the court's subject matter jurisdiction. *See Mortensen v. First Fed. Sav. and Loan Ass'n*, 549 F.2d 884, 891 (3d Cir.1977). In reviewing a facial attack, the court considers only the allegations in the complaint and documents. *See id.*; *PBGC v. White*, 998 F.2d 1192, 1196 (3d Cir.1993). Defendant Thompson's 12(b)(1) motion to dismiss fails as a matter of law because "the Eleventh Amendment does not erect a barrier against suit to impose individual and personal liability on state officials under § 1983." *Hafer v. Melo*, 502 U.S. 21, 31 (1991) (internal citations omitted). In regards to Thompson's status as a person under § 1983, *Hafer* holds "state officials, sued in their individual capacities, are persons within the meaning of § 1983." *Id.* (internal citations omitted). Therefore, Thompson is a person under § 1983. This Court has jurisdiction in this case, and therefore, Thompson's 12(b)(1) motion to dismiss is denied.

Motion to Dismiss Due to Official's Lack of Personal Involvement

A court will grant a Rule 12(b)(6) motion only when it is certain that no relief could be granted under any proven set of facts. *Ransom v. Marrazzo*, 848 F.2d 398, 401 (3d Cir. 1988).

Defendant Thompson's motion to dismiss based on her lack of involvement in any civil rights violation fails as a matter of law because *Hafer* only requires individuals act under the color of state law. 502 U.S. 21, 25 (1991). "[T]o establish *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right." *Id.* (emphasis in original). In his complaint, Montanez alleges Thompson acted under color of state law. This is sufficient to satisfy the *Hafer* requirement. A plaintiff may prove personal involvement by stating time, place and persons responsible. *See Boykins v. Ambridge Area School*

Dist., 621 F.2d 75, 80 (3d Cir. 1980) (deciding statement of time, place and persons responsible sufficed in demonstrating defendant's personal involvement). Montanez stated the time, place and persons responsible, satisfying the requirement of personal involvement. Accordingly, Thompson's 12(b)(6) motion to dismiss is denied.

Motion to Dismiss because Philadelphia Prison System Cannot be Sued

Durison bases his motion to dismiss on a Pennsylvania statute prohibiting suits against the Philadelphia Prison System. *Griffith v. City of Philadelphia*, No. 99-6638, 2001 WL 876804 at *1 (E.D.Pa. May 18, 2001).³ His argument fails as a matter of law because Montanez is suing a superintendent and agents of PPS, not the entity. Consequently, the statute and case law do not apply. Accordingly, we enter the following:

ORDER

AND NOW, this 19th day of November, 2004, it is ORDERED that Defendants' Motions to Dismiss (documents 6 and 9) are DENIED.

BY THE COURT:

_____\s\ Juan R. Sanchez_____
Juan R. Sánchez, J.

³All claims against this entity must be made against the City of Philadelphia. See 53 P.S. § 16257 (2004)); *Griffith v. City of Philadelphia*, No. 99-6638, 2001 WL 876804 at *1 (E.D. Pa. May 18, 2001).