

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

GEORGE V. KUBIS, : CIVIL ACTION
Plaintiff, :
 :
v. : NO. 95-5875
 :
PENNSYLVANIA BOARD OF PROBATION :
AND PAROLE, et al., :
Defendants. :

M E M O R A N D U M

BUCKWALTER, J.

July 15, 1998

Plaintiff, George V. Kubis ("Kubis"), filed pro se an Amended Complaint ("Amended Complaint") alleging civil rights violations under 42 U.S.C. § 1983. Presently before the Court are: Defendants' motion to dismiss Kubis' Amended Complaint for failure to prosecute pursuant to Rule 41(b) of the Federal Rules of Civil Procedure ("Motion to Dismiss") (Dkt. No. 8); Plaintiff's motion to strike Defendants' Motion to Dismiss and Plaintiff's brief in opposition to Defendants' Motion to Dismiss ("Motion to Strike")(Dkt. No. 9); and Defendants' response (Dkt. No. 10).¹ For the following reasons, Plaintiff's Motion to Strike will be denied and Defendants' Motion to Dismiss will be granted.

1. The following nine defendants are listed in the caption of Kubis' Amended Complaint: Mark Nevadonski (agent of the Pennsylvania Board of Probation and Parole), Mark Carey (same), Carl Christian (same), John Doe (same), Edward Jones (Sub-office Supervisor of the Pennsylvania Board of Probation and Parole), Thomas Goodwin (Regional Supervisor of the Pennsylvania Board of Probation and Parole), Syed Ali (Parole Staff Specialist), Mary Anne Tillman (Parole Representative), and Lawrence Roth (Warden of Montgomery County Correctional Facility). The use of the plural "defendants" will refer to the nine listed by Kubis; otherwise specific names will be used.

I. FACTUAL BACKGROUND

In January 1993, Kubis was arrested for driving under the influence while on parole for two prior burglary convictions. On March 11, 1993, the Pennsylvania Board of Probation and Parole ("Parole Board") issued a warrant to commit and detain Kubis in connection with the DUI charge. On March 19, 1993, the Parole Board cancelled the warrant and instead issued a second parole violation warning to Kubis.

Kubis was arrested again in September 1993 and charged with robbery and other related offenses. Although Kubis posted bail, he was detained by the Parole Board for violation of parole. Kubis states that his parole term stemming from the previous two burglaries expired in June 1993, three months prior to his September 1993 arrest. Thus, according to Kubis, his 1993 detainment was illegal and constituted a violation of his civil rights, because the Parole Board lacked authority and jurisdiction to detain him. Furthermore, Kubis claims that while he was illegally imprisoned, his letters to several Parole Board officials explaining his situation were ignored. No action was taken to either release him or further investigate his situation. Kubis was detained at least through June 1994.

In September 1995, Kubis filed this § 1983 action asserting several claims, including false arrest and false imprisonment, against the Parole Board, Mark Nevadonski ("Nevadonski"), and Mark Carey ("Carey"). In the original

Complaint, Kubis was assisted by counsel, Theodore Q. Thompson ("Thompson"). By an Order dated May 14, 1996, this Court dismissed the Complaint against Nevadonski and Carey in their official capacities and held that the Parole Board was not a person within the meaning of § 1983, and therefore, was not subject to suit. Kubis, however, was granted leave to file an amended complaint against Nevadonski and Carey in their individual capacities. The Order did not include a filing deadline.

Now, two years later, Kubis seeks to file pro se an Amended Complaint. Kubis' Amended Complaint now includes both Nevadonski and Carey in their individual capacities, and adds seven additional defendants. Kubis claims that all nine defendants were involved in his alleged false arrest and imprisonment. He seeks a declaratory judgment stating that the defendants violated his civil rights, and also seeks compensatory and punitive damages. Defendants seek dismissal of Kubis' Amended Complaint pursuant to Rule 41(b) of the Federal Rules of Civil Procedure.

II. DISCUSSION

A. 41(b) Motion to Dismiss

Defendants claim that Kubis' delayed filing will unduly prejudice them and that the statute of limitations bars the addition of the seven Parole Board agents and officers as new defendants. Moreover, Defendants state that no additional facts are alleged in the Amended Complaint, and therefore, Kubis' Amended Complaint should be dismissed as futile. Rule 41(b) states in part:

(b) Involuntary Dismissal: Effect Thereof

For failure of the plaintiff to prosecute or to comply with these rules or any other order of the court, a defendant may move for dismissal of an action or of any claim against the defendant. ...

It is within a district court's discretion to dismiss a plaintiff's action with prejudice for lack of prosecution. Link v. Wabash R.R. Co., 370 U.S. 626, 629-30 (1961). This discretion is necessary to allow district courts to prevent undue delays and "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." Id; see also Mindek v. Rigatti, 964 F.2d 1369, 1373 (3rd Cir. 1992).

Dismissal is a harsh sanction. See Poulis v. State Farm Fire and Cas. Co., 747 F.2d 863, 868-69 (3rd Cir. 1984). A review of the six Poulis factors suggests that plaintiff has been dilatory resulting in possible prejudice to defendants and, as discussed later, that his amended claim lacks merit.

While allowing Kubis' Amended Complaint to proceed after two years undermines notions of stability and closure, basic tenants of our legal system (See Nelson v. County of Allegheny, 60 F.3d 1010, 1014 (3rd Cir. 1995)), the defendants have not really succinctly stated the exact nature of the prejudice they would suffer if the complaint were allowed to proceed. It is of course true that in a general sense, the passage of time may affect the accuracy of one's recollection and the ability to find documents, among other adverse effects.

As to dilatoriness, this Court's May 14, 1996 Memorandum and Order did not list a deadline for refiling. Under the circumstances, however, 23 months (until April 20, 1998) is an unreasonable time to wait to refile. Compare Wallace v. Systems & Computer Tech. Corp., 1997 WL 602808, at *6 n.18 (E.D.Pa. Sept. 23, 1997)(Ten months is not unreasonable when order granting leave to amend set no deadline.) Kubis needed only to amend the status of the defendants he was suing, a feat easily accomplished. He made no effort to file earlier, however, and this Court received no information indicating that Kubis was planning to reopen the case, prior to April 1998.

Kubis offers two reasons excusing his delay in filing the Amended Complaint: (1) an alleged agreement between his prior counsel and defense counsel, and (2) reliance on his attorney to file an amended complaint. A closer look at those reasons reveals the following.

First, Kubis asserts that his original counsel, Thompson, and Defendants' counsel for the Commonwealth agreed to delay filing the Amended Complaint until after Kubis' criminal appeals were exhausted. This Court, however, did not receive notice of any such agreement to delay refiling.²

Second, Kubis claims that Thompson assured him that he would file an amended complaint, and Kubis attached, to the Amended Complaint, a letter from Thompson dated May 15, 1996, stating that he would forward a copy of an amended complaint to Kubis once completed. Nonetheless, Thompson never filed an amended complaint and according to Kubis, failed to forward Kubis' records. Thus, Kubis waited until his criminal appeals had concluded, as per the alleged agreement, before filing the Amended Complaint pro se. Although Kubis placed his faith and expectations in his counsel, he is unfortunately bound by his counsel's inaction. As the Supreme Court stated, "[K]eeping this suit alive merely because plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of the plaintiff's lawyer upon the defendant." Link, 370 U.S. at 634 n.10 (1961) (emphasis in original). Kubis may have a malpractice claim against his former attorney if Thompson's conduct fell below what is reasonable under the

2. Additionally, Defendants claim they did not know that Kubis still had any intention of refiling his claim and denied being party to any such agreement.

circumstances, but such a claim does not affect this Court's dismissal of Kubis' Amended Complaint. See id.

B. Futility of Plaintiff's Claim

Even if this Court did not dismiss Kubis' Amended Complaint pursuant to Rule 41(b), his proposed amendment would be futile for three reasons.

First, Kubis' claims against the seven new defendants are time-barred. Federal courts should look to the forum state's statute of limitations for personal injury actions when deciding the statute of limitations for § 1983 actions. Wilson v. Garcia, 471 U.S. 261, 280 (1985). In Pennsylvania, the statute of limitations for personal injury actions is two years. See Bougher v. University of Pittsburgh, 882 F.2d 74, 78-79 (3rd Cir. 1989) (citing 42 Pa.Cons.Stat.Ann. § 5524 (Purdon Supp.1989)). Here, the statute of limitations for § 1983 actions has expired because nearly five years have passed since the alleged constitutional violations.

Kubis contends that the statute of limitations does not preclude him from adding the additional seven defendants because his Amended Complaint relates back to the original September 1995 complaint under Federal Rule of Civil Procedure 15(c). To add additional parties to a complaint after the statute of limitations period has run, Rule 15(c)(3) requires that the party to be brought in by the amendment: (A) has received such notice of the

institution of the action that the party 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 the party.

I am not persuaded by Kubis' Rule 15(c) argument for several reasons, and therefore, Kubis cannot rely on that Rule's relation back provision to escape the statute of limitations. "Rule 15(c) was intended to protect a plaintiff who mistakenly names a party and then discovers, after the relevant statute of limitation has run, the identity of the proper party." Kilkenny v. Arco Marine Inc., 800 F.2d 853, 857 (9th Cir. 1986). The rule was not intended to assist a plaintiff who fails to amend in a reasonable fashion after receiving notice of the correct or additional parties. Id. at 858; see also Shirsat v. Mutual Pharmaceutical Co., Inc, 1996 WL 273674, at *2 (E.D.Pa. May 15, 1996).

Additionally, for Rule 15(c) to apply, the new defendants needed actual notice of Kubis' claims within the statute of limitations. See Moore v. State of Indiana, 999 F.2d 1125, 1130 (7th Cir. 1993) (citing Williams v. United States Postal Service, 873 F.2d 1069, 1073 (7th Cir. 1989) (adding defendant after statute of limitations ran without providing actual notice was prejudicial because it deprived defendant of defense of statute of limitations and

prejudiced defense on merits)). Neither party disputes that the additional seven defendants did not receive actual notice of Kubis' suit. Thus, Rule 15(c) does not allow Kubis to add their names to his lawsuit. Furthermore, this Court's Order allowing Kubis to refile an Amended Complaint as to Nevadonski and Carey's individual capacities in no way informed the additional seven defendants that a mistake had been made and they too would become parties to the lawsuit. Additionally, their positions as employees of the Parole Board does not render the seven additional defendants knowledgeable of their potential liability. This Court can not "assume that state employees would know that whenever a state entity has been sued, a mistake has been made and they were the proper parties." Woods v. Indiana Univ.- Purdue Univ. at Indianapolis, 996 F.2d 880, 891 (7th Cir. 1993)(Rovner, J., concurring) (rejecting notion that actual knowledge can be derived from state entity's sovereign immunity).

Second, as to the two original defendants whom Kubis now seeks to sue in their individual capacities, such suits would be futile. Although Kubis lists Carey in the caption of his Amended Complaint, he makes no mention of Carey's role in the alleged incident. Because no allegations are made against Carey, Carey is not a defendant in this action.

Third, Kubis' case against Nevadonski is also futile. Kubis fails to state a sufficient claim against the Parole Board agent. Kubis' detention was legal at the time of his September 1993 arrest.³ In September 1993, when Kubis claims the false imprisonment began, his official parole date, stemming from the two burglary convictions in 1983, was not set to expire until October 1994. Thus, the 1993 robbery did violate his parole and Kubis was legally detained by the Parole Board.

At a Montgomery County Court hearing in June 1994, Kubis successfully petitioned for post conviction collateral relief. The Order that followed, issued by Montgomery County Common Pleas Court Judge William Vogel, set a retroactive parole expiration date of May 15, 1993. (Plaintiff's Reply Memorandum, Exhibit O). Thus, it was only after June 1994 that his detention became invalid. At the time the detention was entered, in September 1993, until the June 1994 court decision changing the release date, Kubis was still on parole and under the jurisdiction and authority of the Parole Board. At the time Nevadonski validly served the detainer on Kubis, he had no way of knowing that Kubis' expiration date would later be retroactively changed. Thus, Kubis' claim against his sole

3. The documents this court examined to reach this decision are found in the exhibits attached to Plaintiff's Reply Memorandum ("Reply Memorandum") to Defendants' Motion to Dismiss filed in December 1995 (Dkt. No. 5). Because these attachments were submitted by Kubis, presumably in support of his position, review of such documents in the current context is not prejudicial.

remaining defendant is futile as he does not have a valid §
1983 claim.

Based upon the foregoing, defendants' motion to
dismiss will be granted.⁴

An appropriate order follows.

4. Kubis' Motion to Strike is denied as defendants' Motion to Dismiss meets Rule 7.1 of the Local Rules of Civil Procedure. Additionally, Kubis has filed a motion to proceed In Forma Pauperis for purposes of service (Dkt. No. 11). Because Kubis' Amended Complaint is dismissed, his motion to proceed In Forma Pauperis is also denied.

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O R D E R

AND NOW, this 15th day of July, 1998, upon consideration of Defendants' Motion to Dismiss the Amended Complaint for failure to prosecute (Docket No. 8); Plaintiff's Unopposed Motion to Strike (Docket No. 9); Plaintiff's response to Defendant's Motion to Dismiss (Docket No. 9); Defendants' reply (Docket No. 10); and Plaintiff's Motion to Proceed In Forma Pauperis (Docket No. 11); it is hereby **ORDERED** as follows:

(1) Defendants' Motion to Dismiss is **GRANTED** and Plaintiff's Amended Complaint is **DISMISSED**;

(2) Plaintiff's Motion to Strike is **DENIED**; and

(3) Plaintiff's Motion to Proceed In Forma Pauperis is **DENIED**.

The Clerk is directed to mark this case **CLOSED**.

BY THE COURT:

RONALD L. BUCKWALTER, J.

