

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF PENNSYLVANIA

KEITH BARTELLI,

Plaintiff

-vs-

CIVIL NO. 3:CV-04-0905

(Judge Kosik)

SERGEANT CLARK and  
CO GALABINSKI,

Defendants :

**ORDER**

AND NOW, this 29<sup>th</sup> day of October, 2004, IT IS HEREBY ORDERED THAT:

- (1) The Report and Recommendation of the Magistrate Judge dated June 3, 2004 (Document 7) is **ADOPTED**;
- (2) The plaintiff's request to file an amended complaint is **DENIED**;
- (3) The above-captioned action is **DISMISSED** for failure to state a claim pursuant to 28 U.S.C. §1915(e)(2)(B)(ii); and,
- (4) The Clerk of Court is directed to **CLOSE** this case and to forward a copy of this Memorandum and Order to the Magistrate Judge.

s/Edwin M. Kosik  
United States District Judge

UNITED STATES DISTRICT COURT  
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KEITH BARTELLI,

Plaintiff

CIVIL NO. 3:CV-04-0905

-vs-

(Judge Kosik)

SERGEANT CLARK and  
CO GALABINSKI,

:  
:  
:

Defendants :

**MEMORANDUM**

\_\_\_\_\_ Before the court are plaintiff's objections to the Report and Recommendation of Magistrate Judge Thomas M. Blewitt dated June 3, 2004. For the reasons which follow, we will adopt the Report and Recommendation of the Magistrate Judge.

**Background**

\_\_\_\_\_ Plaintiff, Keith Bartelli, an inmate at the State Correctional Institution at Dallas filed the instant civil rights action pursuant to 42 U.S.C. §1983 on April 26, 2004. In his complaint, plaintiff names as defendants, Sergeant Clark and CO Galabinski. Plaintiff seeks declaratory and injunctive relief and compensatory and punitive damages.

On June 3, 2004, the Magistrate Judge issued a Report and Recommendation in which he recommended that the plaintiff's two claims be dismissed as time-barred and that the defendants be dismissed for failure to state a claim against them pursuant to 28 U.S.C. §1915 (e)(2)(B)(ii). On June 17, 2004, plaintiff filed objections to the Report and Recommendation of the Magistrate Judge. Plaintiff filed a second objection to the Magistrate Judge's Report and Recommendation on August 17, 2004. In his objections, plaintiff argues that the claims were not time-barred. Plaintiff also argues that he can establish conspiracy on the part of the defendants and seeks to amend his complaint.

## Discussion

When objections are filed to a Report and Recommendation of a Magistrate Judge, we must make a *de novo* determination of those portions of the Report to which objections are made. 28 U.S.C. §636(b)(1)(C); *see Sample v. Diecks*, 885 F.2d 1099, 1106 n.3 (3d Cir. 1989). In doing so, we may accept, reject or modify, in whole or in part, the findings or recommendations made by the Magistrate Judge. 28 U.S.C. §636(b)(1); Local Rule 72.3. Although our review is *de novo*, we are permitted by statute to rely upon the Magistrate Judge's proposed recommendations to the extent we, in the exercise of sound discretion, deem proper. *United States v. Raddatz*, 447 U.S. 667, 676 (1980); *Goney v. Clark*, 749 F.2d 5, 7 (3d Cir. 1984).

As we indicated earlier, the Magistrate Judge discussed the two claims set forth by plaintiff in the complaint. Specifically, the Magistrate Judge states the plaintiff's two claims against the defendants are barred by the two year statute of limitations. The Magistrate Judge also finds that as to defendant Clark, the complaint does not state a claim against him either directly or in his supervisory capacity. Additionally, the Magistrate Judge found that plaintiff's vague allegation of conspiracy against defendants Clark and Galabinski was inadequate to set forth a claim.

Initially, the Magistrate Judge determined that the two claims against the defendants were time-barred by the two year statute of limitations. Plaintiff objects to this finding alluding to earlier actions filed with this court. However, we believe it premature to address the statute of limitations issue at this time in that we find the statute of limitations to be an affirmative defense which must be raised by the defendant. *See, Ray v. Kertes*, 285 F.3d 287 (3d Cir. 2002).

The Magistrate Judge also states that the second claim in the complaint fails to state a claim against defendant Clark in that the plaintiff has not alleged any personal involvement by defendant Clark as to any specific constitutional violation. As the Magistrate Judge points out, a defendant prison official cannot be held liable for the

actions of others since the doctrine of *respondeat superior* is not an acceptable basis for liability under §1983. Plaintiff's allegation that "the defendant as a supervisor failed to order C/O Galabinski from reframing (sic) from unethical and unprofessional acts" is not sufficient to state a cognizable §1983 claim against defendant Clark.

After reviewing the Magistrate Judge's Report and Recommendation in light of plaintiff's objections, we agree with the Magistrate Judge that the plaintiff's complaint fails to set forth a cause of action pursuant to §1983. While plaintiff's first allegation uses the word "conspire," the plaintiff does not present sufficient allegations to set forth any claim.

While plaintiff requests an opportunity to file an amended complaint, we will deny his request. As the Magistrate Judge points out, plaintiff has already been allowed to amend his complaint once and he has several cases pending before this court. Moreover, prior to filing this action, plaintiff was fully advised by the court of the requirements for filing a civil rights action under §1983. Finally, while we recognize that the statute of limitations is an affirmative defense that must be raised, see *Ray v. Kertex*, 285 F.3d 287 (3d Cir. 2002), we consider this issue moot since we agree the complaint should be dismissed for failure to state a claim. Accordingly, we will adopt the Report and Recommendation of the Magistrate Judge.