

Former Grievance Coordinator at SCI-Rockview; Robert W. Meyers, Former Deputy Superintendent at SCI-Rockview; Lynn Eaton, Correctional Officer Lieutenant at SCI-Rockview; Bill Carver Correctional Officer Sergeant at SCI-Rockview; Laurence Reid, Former Executive Deputy Commissioner of the DOC; Stuart E. Boone, Mail Room Supervisor at SCI-Rockview; Jill Fluck, Staff attorney of the Pennsylvania DOC; Robin M. Lewis, Staff attorney of the Pennsylvania DOC; and William E. Fairall, Staff attorney of the Pennsylvania DOC.

On June 6, 2000, the Honorable Thomas M. Blewitt issued a Report and Recommendation ("R. & R." or "Report") advising that Plaintiff's complaint be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(b)(ii) for failure to state a claim upon which relief may be granted, because Plaintiff's action is barred by the statute of limitations. (See R. & R. at 3.) Under Local Rule 72.3, either party has ten (10) days to file objections to a Magistrate Judge's Report and Recommendation. Plaintiff timely filed a Notice of Objection and a memorandum of law supporting the notice of objection (Doc. No. 7) to the Report and Recommendation on June 15, 2000. I find Plaintiff's objections to be without merit and therefore will adopt the Report and Recommendation of the Magistrate Judge.

I BACKGROUND

Plaintiff brought a Section 1983 action against eighteen (18) Defendants, who are present or former employees of the Pennsylvania Department of

Corrections, in their official and individual capacities. (Doc. No. 1). Plaintiff's Complaint alleges seven separate counts against Defendants relating to deprivation of his rights to free speech and due process; deprivation of his property and right to own property under the Fourteenth Amendment; deprivation of his civil rights and property by state officials without due process under the Fourteenth Amendment; and deprivation of civil rights and due process by unlawful and unreasonable seizure.

Plaintiff alleges that during his term of incarceration, he was presented with a new television set from an independent vendor. (Doc. No. 1 ¶ 20). Due to an error on the part of the vendor, Plaintiff mistakenly received a repaired television set belonging to an inmate at another facility. (Doc. No. 1 ¶¶ 21 & 32).

Upon discovering the error, Plaintiff returned the set to Defendants and later filed a criminal complaint for fraud and theft with Captain Leather to be forwarded to Defendant Meyers because they delivered the wrong television and refused to allow Plaintiff to review his property file records. (Doc. No. 1 ¶ 24). Defendants conducted an investigation and contacted the vendor to resolve this matter (Doc. No. 1 ¶¶ 31-34). Regardless, Plaintiff filed two grievances against the Defendants for fraud, theft, and intimidation. (Doc. No. 1 ¶¶ 27-29). These grievances were denied initially and upon review. (Doc. No. 1 ¶¶ 38-40). Plaintiff also requested that Defendants schedule an appointment for him with the state's prosecuting attorney to file a criminal complaint with the state. (Doc.

No. 1 ¶¶ 37-38). Defendants refused Plaintiff's request, declining to set up such an appointment. (Doc. No. 1 ¶¶ 38, 40-41).

After final review of his grievances, Plaintiff sought the name of an attorney who was on the review committee in an effort to file a complaint. (Doc. No. 1 ¶¶ 48-51). The Defendants refused to provide Plaintiff with this information. (Doc. No. 1 ¶¶ 48 & 50). As a result, Plaintiff filed two civil actions under 42 U.S.C. § 1983 (No. CV-95-1218 and No. CV-96-1394) to seek recourse from Defendants for their actions in these two instances. (Doc. No. 1 ¶ 49). Both cases were dismissed.

II DISCUSSION

A. Standard of Review

When objections are filed to a Report and Recommendation of a Magistrate Judge, the court must make a de novo determination of those portions of the Report to which objections are made. See 28 U.S.C. § 636(b)(1)(C); Sample v. Diecks, 885 F.2d 1099, 1106 n.3 (3d Cir. 1989); Owens v. Beard, 829 F. Supp. 736, 738 (M.D. Pa. 1993). The court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the Magistrate Judge. See 28 U.S.C. § 636(b)(1); Owens, 829 F. Supp. at 738. Although the review is de novo, the court is permitted by statute to rely on the Magistrate Judge's proposed recommendations to the extent the court, in the exercise of sound discretion, deems proper. See 28 U.S.C. § 636 (b)(1); United States v. Raddatz, 447 U.S. 667, 676, 100 S.Ct. 2406, 2413 (1980); Goney v.

Clark, 749 F.2d 5, 7 (3d Cir. 1984); Ball v. United States Parole Commission, 849 F. Supp. 328, 330 (M.D. Pa. 1994).

The Magistrate Judge recommended that the plaintiff's complaint be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(b)(ii) for failure to state a claim upon which relief may be granted, in that Plaintiff's action is barred by the statute of limitations. (See R. & R. at 3.)

Since Plaintiff filed objections to the Magistrate Judge's Report and Recommendation, the Court shall make a de novo determination of those parts of the Report to which Plaintiff has objected. See 28 U.S.C. § 636(b)(1)(C); Sample v. Diecks, 885 F.2d 1099, 1106 n.3 (3d Cir. 1989); Owens v. Beard, 829 F. Supp. 736, 738 (M.D. Pa. 1993).

B. Statute of Limitations

Since 42 U.S.C. § 1983 does not contain a specific statute of limitations period, courts apply the statute of limitations period applicable to personal injury actions in the state in which they sit. Wilson v. Garcia, 471 U.S. 261, 276-78, 105 S.Ct. 1938, 1947-48, 85 L.Ed.2d 254 (1985); 287 Corporate Ctr. Assocs. v. Township of Bridgewater, 101 F.3d 320, 323 (3d Cir.1996). Pennsylvania statute, 42 Pa. Cons. Stat. Ann. § 5524(2) (West Supp. 1997), imposes a two-year limitations period on § 1983 actions. Fitzgerald v. Larson, 769 F.2d 160, 162 (3d Cir. 1985); Smith v. City of Pittsburgh, 764 F.2d 188, 194 (3d Cir. 1985). The civil rights action begins to accrue when the plaintiff knows or should have known of the injury which his action is based. Sandutch v. Muroski, 684 F.2d

252, 254 (3d Cir. 1982). See de Botton v. Marple Township, 689 F.Supp. 477, 480 (E.D. Pa.1988). Therefore, the plaintiff must allege an unlawful act which is actionable under § 1983 that occurred in the two-year period prior to the filing of the complaint. Bougher v. Univ. of Pittsburgh, 882 F.2d 74, 79 (3d Cir. 1989). Upon review of the Plaintiff's Complaint and Notice of Objection, I agree with the Magistrate Judge that the defendant has failed to allege or plead any unlawful act within the two-year period prior to the filing of the complaint.

C. Plaintiff's Objections to the Report and Recommendation

Plaintiff argues in his Notice of Objection (Doc. No. 8) that he had already filed a Complaint in the Commonwealth Court (97-3186) on December 18, 1997 alleging the same course of conduct. Plaintiff contends that (a) since the matter was ongoing and (b) by filing a Complaint in the Commonwealth Court, the statute of limitations for this case was tolled.

Plaintiff's argument is unpersuasive. An action in state court does not toll the running of statute of limitations against a subsequent action in federal court. Falsetti v. Local Union No. 2026, United Mine Workers of Am., 355 F.2d 658, 662 (3d Cir. 1966), Royal-Globe Ins. Cos. v. Hauck Mfg. Co., 335 A.2d 460, 462, 233 Pa. Super. 248, 253 (1975). Regardless of the timely filing of Plaintiff's Complaint with the Common Pleas Court, the state filing does not toll the statute of limitations for the action before this Court.

Secondly, Plaintiff's previous action under the same series of events (Evans v. Horn, No. CV-96-1394) alleged Defendants denied Plaintiff access to

the courts in failing to provide the name of one of the parties identified as John Doe. Plaintiff claims that the language of the Magistrate Judge's Report and Recommendation from that matter (Doc. No. 4, July 31, 1996) ("1996 Report") permitted re-filing of Plaintiff's Complaint when John Doe's identity was determined. Plaintiff argues there is a presumption this re-filing is timely and that the statute of limitations was tolled until determination of John Doe's identity was made.

I disagree with Plaintiff's interpretation of the 1996 Report. The 1996 Report provides for no such open-ended time extension for Plaintiff to file his Complaint once John Doe's identity was determined. The 1996 Report states that

Inasmuch as the claim relates to a previous federal court action, as John Doe was dismissed pursuant to Rule 4(m) of the Federal Rules of Civil Procedure, the Plaintiff's claim is not cognizable, in that said dismissal was without prejudice to the Plaintiff's right to refile the action upon determining the identity of John Doe. (1996 Report at 2).

Furthermore, the 1996 Report did not toll the statute of limitations; Plaintiff still had the obligation to commence suit against an identified John Doe within the period of limitation. Trautman v. Lagalski, 28 F. Supp.2d 327, 329 (W.D. Pa. 1998) (citing Talbert v. Kelly, 799 F.2d 62, 66 n. 1 (3d Cir. 1986)).

III CONCLUSION

Upon consideration of Plaintiff's Notice of Objection, I find that the Magistrate Judge's decision is not clearly erroneous or contrary to law.

Fed.R.Civ.P. 72(a). Accordingly, Plaintiff's objection will be denied and the Court will adopt the Magistrate Judge's Report and Recommendation. Consequently, Plaintiff's Complaint will be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii).

An appropriate Order will follow.

Date: September 28, 2000



A. Richard Caputo
United States District Judge

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

7

FREDERICK EVANS, : CIVIL ACTION NO. 3:CV-00-0981
: :
Plaintiff : (Judge Caputo)
: :
v. : (Magistrate Judge Blewitt)
: :
MARTIN F. HORN, et al., : :
: :
Defendants : :

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SCRANTON

JUN 6 2000

PER 
DEPUTY CLERK

REPORT AND RECOMMENDATION

Plaintiff, an inmate at the State Correctional Institute at Rockview ("SCI-Rockview"), filed this civil rights action pursuant to 42 U.S.C §1983 on June 2, 2000. (Doc. 1). Along with his complaint, the Plaintiff submitted an application requesting leave to proceed *in forma pauperis* under 28 U.S.C. § 1915.

The Prison Litigation Reform Act of 1995,¹ (the "Act"), obligates the Court to engage in a screening process when a prisoner wishes to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915.² Specifically, § 1915(e)(2), which was created by § 805(a)(5) of the Act, provides:

(2) Notwithstanding any filing fee, or any
portion thereof, that may have been paid, the

1. Pub. L. No. 104-134, 110 Stat. 1321 (April 26, 1996).

2. The Plaintiff completed an application to proceed *in forma pauperis* and authorization to have funds deducted from his prison account. The court then issued an administrative order directing the warden to commence the withdrawal of the full filing fee due the court from the Plaintiff's prison trust fund account.

court shall dismiss the case at any time if the court determines that (A) the allegation of poverty is untrue; or (B) the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief.

For the reasons set forth below, the instant action will be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii).

The statute of limitations for a 42 U.S.C. § 1983 action is the state statute that limits actions for personal injuries. *Wilson v. Garcia*, 471 U.S. 261 (1985). In Pennsylvania, the applicable statute is 42 Pa.C.S.A. §5524(2), which defines a two-year limitations period. *Fitzgerald v. Larson*, 769 F.2d 160 (3d Cir. 1985). 42 Pa.C.S.A. §5524 governs all §1983 actions brought in Pennsylvania. *Smith v. City of Pittsburgh*, 764 F.2d 188 (3d Cir. 1985). The limitations period begins to run when the plaintiff knows or had reason to know of the injury that constitutes the basis of the action. *Sandutch v. Muroski*, 684 F.2d 252 (3d Cir. 1982). The Plaintiff must allege an unlawful act actionable under §1983 that occurred in the two-year period prior to the filing of the complaint. *Bougher v. University of Pittsburgh*, 882 F.2d 74 (3d Cir. 1989).

A review of the Plaintiff's complaint reveals that it is subject to dismissal. The allegations of the complaint center around the Plaintiff's contention that he was wrongfully deprived of his

personal television set in December of 1993. Count 2 of the Complaint addresses the failure of certain named Defendants to release the television set that was seized in December 1993. Counts 3 through 5 involve the Plaintiff's dissatisfaction with the manner in which his grievances were handled. Count 1 contains allegations of tampering with correspondence dated January 22, 1995; March 29, 1995; April 12, 1995; and April 17, 1995. (Doc. 1). As stated above, the Plaintiff's complaint was filed on June 2, 2000. As the Plaintiff has failed to allege that any unlawful act that would be actionable under the civil rights statute took place in the two-year period prior to the filing of the complaint, the complaint is subject to dismissal.

Based on the foregoing, it is recommended that the complaint be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) for failing to state a claim upon which relief may be granted, in that Plaintiff's action is barred by the statute of limitations.



THOMAS M. BLEWITT
United States Magistrate Judge

Dated: June 6, 2000

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

FREDERICK EVANS,	:	CIVIL NO. 3:CV-00-0981
	:	
Plaintiff	:	
	:	(Judge Caputo)
v.	:	
	:	(Magistrate Judge Blewitt)
MARTIN F. HORN, et al.,	:	
	:	
Defendants	:	

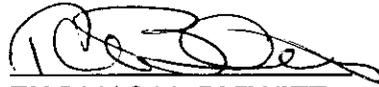
NOTICE

NOTICE IS HEREBY GIVEN that the undersigned has entered the foregoing **Report and Recommendation** dated **June 6, 2000**.

Any party may obtain a review of the Report and Recommendation pursuant to Rule 72.3, which provides:

Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within ten (10) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the

magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

A handwritten signature in black ink, appearing to read 'Thomas M. Blewitt', written over a horizontal line.

THOMAS M. BLEWITT
United States Magistrate Judge

Dated: June 6, 2000