

# Pro se case provides primer on timing

Today's case presents a helpful review of statute of limitations periods in a civil rights context (42 U.S.C. § 1983), and a malicious prosecution context, as well as an informative discussion of when the doctrine of equitable tolling of statutes of limitations is applicable. *Foryoh v. Hannah-Porter*, 428 F.Supp.2d 816 (N.D.Ill. 2006).

Prince Foryoh brought a section 1983 civil rights action and a malicious prosecution action against Regina Hannah-Porter, a Chicago police officer who stopped his vehicle and charged him with assault and traffic violations on July 16, 2001. Plaintiff charges he was wrongfully stopped in traffic, arrested, handcuffed, taken to a police station, held for several hours and then released after charges were brought against him.

The charges from the arrest were nolle prossed on May 20, 2003.

Hannah-Porter brought a motion to dismiss per Rule 12(b)(6), contending Foryoh's pro se complaint showed, on its face, his claims were time-barred. The U.S. District Court, Judge Mark R. Filip presiding, extending the required liberal interpretation of a pro se complaint, allowed the pleaded section 1983 claim for false arrest, illegal search and excessive force, and a claim for malicious prosecution. The court then granted the motion to dismiss the claims as barred by the appropriate statutes of limitations — two years for the section 1983 claim and one year for the malicious prosecution claim. And, considering whether the doctrine of equitable tolling could lengthen the limitations period, ruled it could not under the facts.

Filip began his discussion of the motion to dismiss, setting out the test for dismissal under Rule 12(b)(6):

"In moving to dismiss claims under Rule 12(b)(6), a party 'challenges the sufficiency of a complaint for failure to state a claim upon which relief may be granted.' *Johnson v. Rivera*, 272 F.3d 519 (7th Cir. 2001). A court ruling on a motion to dismiss must examine the case in the light most favorable to the plaintiff, accepting as true all facts alleged in the complaint."

Addressing the question of whether a Rule 12(b)(6) motion to dismiss was appropriate in ruling on a statute of limitations defense — an affirmative defense — and finding it was under the facts, the court reasoned:

"Defendant's motion to dismiss plaintiff's claims pursuant to Rule 12(b)(6) argues that both the federal and



## Federal Courts

By Jay S. Judge

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state law claims are barred by applicable statutes of limitations. (D.E. 23 at 3-4.) Motions to dismiss claims as time-barred under Rule 12(b)(6) are appropriate only in limited circumstances. The argument that plaintiffs claims are time-barred is an affirmative defense, see Fed.R.Civ.P. 8(c), and the [7th U.S. Circuit Court of Appeals] has established that '[c]omplaints need not anticipate or attempt to defuse potential defenses.' *United States Gypsum Co. v. Indiana Gas Co. Inc.*, 350 F.3d 623, 636 (7th Cir. 2003). Nevertheless, "when the existence of a valid affirmative defense is so plain from the face of the complaint that the suit can be regarded as frivolous, the district judge need not wait for an answer before dismissing the suit." *Walker v. Thompson*, 288 F.3d 1005, 1009 (7th Cir. 2002) (collecting cases)."

Filip next addressed the issue of the appropriate limitations statute in section 1983 actions — the two-year limitation:

"Plaintiff's federal claims arise under 42 U.S.C. § 1983. Defendant argues that these claims are time-barred. There is no express statute of limitations contained in section 1983; instead, the applicable statute of limitations is the forum state's statute of limitations for personal injury claims. See, e.g., *Williams v. Lampe*, 399 F.3d 867, 870 (7th Cir. 2005) (per curiam) (collecting cases). Thus, as established by Illinois law, the appropriate statute of limitations for plaintiff's federal claims is two years. 735 ILCS § 5/13-202. Federal law determines when a claim under section 1983 accrues, which is

"when the plaintiff knows or should know that his or her constitutional rights have been violated." *Behavioral*

*Inst. of Indiana LLC v. Hobart City of Common Council*, 406 F.3d 926 (7th Cir. 2005).

Concluding that the two-year statute of limitations was applicable and barred Foryoh's section 1983 claim, the court explained:

"Plaintiff's complaint states that the events giving rise to his putative claims for false arrest, illegal search, and excessive force took place on July 10, 2001. Plaintiff's section 1983 claims thus accrued on July 10, 2001, because at that time, plaintiff either knew or should have known of the defendant's alleged wrongdoing. Plaintiff filed his complaint with this court on May 18, 2005. Nearly four years had elapsed between the events of the complaint and its filing; the two-year statute of limitations had long since run. See 735 ILCS 5/13-202."

Teaching from the 7th Circuit, including teaching that is only a few weeks old, makes clear that *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), does not extend what would otherwise be the facially applicable statute of limitations date for plaintiff's Fourth Amendment claims for false arrest, illegal search, and excessive force under section 1983. *Heck* provides that certain putative constitutional claims that might arise in relation to a criminal arrest and/or prosecution cannot be raised, and thus do not accrue for statute of limitations purposes, until the conviction or sentence of the criminal defendant/putative civil plaintiff has been overturned or otherwise invalidated, or the prosecution relation to them concludes unsuccessfully. See, e.g., *Wallace v. City of Chicago*, 440 F.3d 421, 425 (7th Cir. 2006) (discussion *Heck*). In *Wallace*, the 7th Circuit reconfirmed that "a 'section 1983 unlawful arrest claim ... accrue[s] on the day of arrest.'"

Next, giving deference to Foryoh, as a pro se plaintiff, the court considered if the doctrine of equitable tolling could extend the statute of limitations:

"Substantial authority supports the dismissal of a suit under Rule 12(b)(6) where the facts alleged in the complaint make clear that the claims are time-barred. Thus, for example, in *Kauthar*, the 7th Circuit held that various federal securities claims were appropriately dismissed as time-barred pursuant to Rule 12(b)(6) where the facts alleged made clear that the claims arose beyond the statute of limitations period. "Nonetheless, in an abundance of

caution, the court will address the limited exceptions that can toll an applicable statute of limitations, and explain why those doctrines are clearly precluded by the plaintiff's averments in this case and other public records of which judicial notice can properly be taken. See *Henson v. CSC Credit Servs.*, 29 F.3d 280, 284 (7th Cir. 1994)."

Considering the doctrine of equitable tolling by fraudulent concealment and finding it unavailable, Filip noted:

"For example, in this section 1983 setting, it would be possible to toll the statute of limitations if Hannah-Porter could be said to have fraudulently concealed the existence of the cause of action. See, e.g., *Smith v. City of Chicago Heights*, 951 F.2d 834, 837 (7th Cir. 1992) (teaching that the Illinois fraudulent concealment statute (735 ILCS 5/13-215) has been 'unequivocally construed ... to reach only fraudulent concealment of the cause of action — not fraudulent concealment of the tortfeasor.' (collecting cases). Here, given that the putative claims are false arrest, excessive force, and an unlawful search of plaintiff's car, all in his presence, the fraudulent concealment doctrine is, on the facts pleaded, clearly inapplicable."

Next, considering equitable tolling of the limitations period due to mistake and ruling, no basis existed in this case to allow it, the court reasoned:

"Another putative tolling doctrine is that of equitable tolling. The state, rather than the federal, doctrine of equitable tolling governs cases such as this one in which a federal court has borrowed and applies a state statute of limitations. Under Illinois law, equitable tolling can be in play where a plaintiff 'has, in some extraordinary way, been prevented from asserting her rights in a timely manner; or the plaintiff asserted her rights mistakenly in the wrong forum.' *Weatherly v. Illinois Human Rights Comm'n*, 338 Ill.App.3d 433, 788 N.E.2d 1175, 1180 (Ill.App.Ct. 2003). Illinois precedent teaches that

'principles of equitable tolling must be applied with caution.' *Bloch v. Pepper Const. Co.*, 304 Ill.App.3d 809, 710 N.E.2d 85, 91 (Ill.App.Ct. 1999). In applying the Illinois doctrine of tolling, the 7th Circuit has noted that '[a]n essential element [of equitable tolling] is that the plaintiff have exercised due diligence; in other words that he have acted reasonably' despite failing to sue within the limitations period. *Shropshire v. Corp. Counsel of the City of Chicago*, 275 F.3d 593 (7th Cir. 2001).

"The averments in the complaint and other public documents in the official records of the Clerk of the District Court for the Northern District of Illinois make clear that plaintiff was not prevented from filing a federal lawsuit, nor was he mistaken about where such a claim could be asserted."

Filip also considered whether Foryoh had been affirmatively misled concerning the statute of limitations, which could cause equitable tolling, and found there was no deceptive conduct misleading him and preventing him from filing his action sooner.

Filip next addressed the limitations period for filing a malicious prosecution action — the one-year statute:

"7th Circuit precedent teaches that there is no federal cause of action for malicious prosecution — at least where, as is the case in Illinois, state law provides a cause of action to address a malicious prosecution. See, e.g., *Smith v. Lamz*, 321 F.3d 680 (7th Cir. 2003). (We begin by noting that ... [the plaintiff] may not maintain an action under section 1983 for malicious prosecution.) Nonetheless, there is a cause of action in Illinois law for malicious prosecution, and such a claim in the instant case is also properly subject to dismissal as time-barred."

Noting the elements of a malicious prosecution action and the limitations period in the Illinois Tort Immunity Act, the court explained:

"Under Illinois law, '[i]n order to establish a malicious prosecution action, the plaintiff must allege facts showing: (1) the commencement or continuance of an original criminal or civil judicial proceeding by the defendant; (2) the termination of the proceeding in favor of the plaintiff; (3) the absence of probable cause for such proceeding; (4) the presence of malice; and (5) damages resulting to the plaintiff.' *Swick v. Liutaud*, 169 Ill.2d 504, 662 N.E.2d 1238, 1242 (Ill. 1996). As with plaintiff's section 1983 claims, defendant has moved to dismiss the malicious prosecution claim based on failure to file within the appropriate statute of limitations.

"The Illinois Tort Immunity Act

states that '[n]o civil action ... may be commenced in any court against a local entity or any of its employees for any injury unless it is commenced within one year from the date that the injury was received or the cause of action accrued.' 745 ILCS § 10/8-101(a). This one-year statute of limitations concerning state law claims against a law enforcement officer applies in the instant case."

The court then determined that the statute of limitations for malicious prosecution begins to run upon termination of the criminal charges — the nolle prosequi dismissal in this case:

"In Illinois, '[a] cause of action for malicious prosecution does not accrue until the criminal proceeding on which it is based has been terminated in the plaintiff's favor. *Ferguson v. City of Chicago*, 213 Ill.2d 94, 820 N.E.2d 455, 459 (Ill. 2004). In the case sub judice, plaintiff's underlying criminal case was dismissed by order of nolle prosequi on May 20, 2003. 'A nolle prosequi is a formal entry of record whereby the prosecuting attorney declares that he is unwilling to prosecute a case.'"

Finding Foryoh's complaint was filed beyond the one-year limitation, requiring dismissal, Filip stated:

"Under Illinois law, it is beyond dispute that an order of nolle prosequi terminates a criminal proceeding. Plaintiff filed his complaint on May 18, 2005, nearly two years after the order of nolle prosequi terminated his criminal case and triggered the statute of limitations (assuming in plaintiff's favor that the termination was on grounds favorable to plaintiff), and almost a year after the statute of limitations on state law claims against Hannah-Porter had expired. See 745 ILCS § 10/8-101(a) (stating that claims such as malicious prosecution actions may not be commenced 'in any court against a local entity or any of its employees unless it is commenced within one year from the date that the injury was received or the cause of action accrued.'). Thus the putative malicious prosecution action against defendant is facially untimely."

"Therefore, the court granted defendant's motion to dismiss.

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