A Magistrate Report and Recommendations

IN THE UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION DWIGHT J. MITCHELL

v.

WILSON TAYLOR, et al.

NO. 3:15-1310

TO: Honorable Kevin H. Sharp, Chief District Judge

[File June 17, 2016]

REPORT AND RECOMMENDATIONS

By Order entered January 7, 2016 (Docket Entry No. 9), the Court referred this pro se action to the Magistrate Judge to enter a scheduling order for the management of the case, to dispose or recommend disposition of any pretrial motions under 28 U.S.C. §§ 636(b)(1)(A) and (B), and to conduct further proceedings, if necessary, under Rule 72(b) of the Federal Rules of Civil Procedure and the Local Rules of Court.

Presently pending are the separately filed motions to dismiss of Defendant Guardian Home Care Holdings, Inc. (Docket Entry Nos. 20 and 69), Defendants Mary Holder and the City of Hartsville (Docket Entry No. 22), Defendant Tommy Thompson, Jr. (Docket Entry No. 30), and Defendant Trousdale County Sheriff's Department (Docket Entry No. 62). For the reasons set out below, the Court recommends that the motions be granted and that this action be dismissed.

I. BACKGROUND

Dwight J. Mitchell ("Plaintiff") is a resident of Madison, Tennessee. On May 24, 2015, he filed this lawsuit pro se and in forma pauperis against Wilson Taylor ("Taylor"), Guardian Home Care Holdings, Inc. ("Guardian Home Care"), [1] Mary Holder ("Holder"), the City of Hartsville, Tommy Thompson, Jr. ("Thompson"), and the Trousdale County Sheriff's Department ("Sheriff's Department."). The lawsuit was also filed on behalf of Sun Valley Home for the Aged ("Sun Valley"). However, by Order entered January 7, 2016 (Docket Entry No. 9), the Court dismissed all claims brought by Sun Valley. [2]

Plaintiff's lawsuit is based upon events that occurred in 2007. See Amended Complaint (Docket Entry No. 8) at 10-12, ¶¶ 14-20. Plaintiff was the owner and operator of Sun Valley, a residential assisted living facility for the elderly that was located in Hartsville, Tennessee. In 2007, Sun Valley was facing a suspension of its operating license by the Tennessee Board for Licensing Health Care Facilities ("the Board") after the Tennessee Department of Health conducted a complaint and annual licensing survey of Sun Valley in early August. Plaintiff alleges that, on or about August 14-15, 2007, Defendant Thompson, who is the District Attorney for the City of Hartsville, along with members of the Sheriff's Department and the Department of Health, came to Sun Valley and served an order of suspension on Sun Valley. The residents of Sun Valley were thereafter removed, and Plaintiff alleges Thompson entered Sun Valley under the auspices of a warrant and seized both business records and personal property. Although on order of summary suspension was issued by the Board on

[1]This Defendant states that it was incorrectly identified as Guardian Home Care." See Docket Entry No. 20 at 1.

[2]Prior to the dismissal of Sun Valley, the Court had advised Plaintiff that Sun Valley, as a corporation or unincorporated business entity, could not appear in this Court unless represented by counsel and directed Sun Valley to have an attorney enter an appearance on its behalf or its claims would be dismissed. See Order entered December 3, 2015 (Docket Entry No. 3). Sun Valley did not obtain representation and was, thus, dismissed from the action. Despite the dismissal of Sun Valley, Plaintiff continues to include Sun Valley in his filings as if it was still a party to the lawsuit.

August 15, 2017, summarily suspending Sun Valley's license to maintain a home for the aged, ordering that it (i) discontinue operating, (ii) not accept any new patients pending resolution of the matter at a hearing, and (iii) refer all existing residents to other facilities, see Docket Entry No. 30-1, Plaintiff disputes that any warrant to enter Sun Valley and/or seize property ever existed.

Plaintiff contends that these actions caused him to lose the "tenant contracts" he had with the 13 residents at Sun Valley and also caused the cancellation or termination of vendor contracts. Plaintiff asserts that the closure of Sun Valley further rendered him unable to make payments on loans that he had obtained from Citizens Bank and that foreclosure proceedings occurred with respect to real property that had been used to secure these loans.

Plaintiff alleges that a conspiracy existed to shut down the operations of Sun Valley and to wrongfully obtain the real property securing the Citizen's Bank loans. He alleges that this conspiracy involved, among others, 1) Taylor, who was formerly a president at Citizens Bank, and, 2) Thompson, who was also a member of Citizens Bank's board of directors. He further alleges that Defendant Holder, who is the Register of Deeds for Trousdale County and is alleged to be married to a board member at Citizens Bank, and Taylor falsified documents and filings that were recorded pertaining to the real property at issue and that Taylor took steps to fraudulently conceal this conduct. Plaintiff alleges that Thompson also harbored racial animosity toward Plaintiff, who is black, and that this animosity influenced Thompson's actions. Plaintiff contends that Guardian Home Care became involved in the matter by presenting three witnesses at Sun Valley's license suspension proceedings. Asserting that his constitutional rights under the Fourth and Fourteenth Amendment have been violated, Plaintiff brings claims under 42 U.S.C. §§ 1981, 1983, and 1985(3), and

seeks nominal, compensatory, and punitive damages. See Amended Complaint at 13-29.[3] Plaintiff seeks a trial by jury.

In lieu of answers, Defendants Holder, the City Hartsville, the Sheriff's Department, Guardian Home Care, and Thompson have filed the pending dispositive motions.[4] Defendants Holder and the City of Hartsville raise a statute of limitations defense, see Memorandum in support (Docket Entry No. 23), and the Sheriff's Department argues that it is not a legal entity capable of being sued. See Memorandum in support (Docket Entry No. 63). Defendant Guardian Home Care argues that it has not been properly served with process, see Memorandum in support (Docket Entry No. 21), and, further, that the claims against it should be dismissed, 1) on the ground of res judicata because of a prior state court lawsuit against it that was dismissed on the merits, 2) because of the statute of limitations, and, 3) because of the doctrine of witness immunity. See Memorandum in support (Docket Entry No. 70). Defendant Thompson argues that the Eleventh Amendment bars any official capacity claims brought against him and that the individual capacity claims brought against him are barred by statute of limitations and are supported by only conclusory allegations of racial discrimination and a conspiracy. See Memorandum in support (Docket Entry No. 31). He further raised qualified immunity to any damage claims brought against him. Id.

Plaintiff has made multiple and lengthy filings in opposition to the motions. See Docket Entry Nos. 34, 35, 37, 38, 55, 60, 61, 65, 86, and 87. He disputes the legal grounds for dismissal raised by Defendants, contends that his claims are

[3]Although Plaintiff subsequently filed another amended complaint, see Docket Entry No. 32, this amendment has no legal significance. See Order entered March 1, 2016 (Docket Entry No. 33). Plaintiff's most recent amended complaint (Docket Entry No. 48) is merely a copy of his Amended Complaint (Docket Entry No. 8).

[4]4 Defendant Taylor has not filed a motion to dismiss or joined in the motions filed by the other Defendants.

timely, and disputes that any immunity applies. He further extensively argues the merits of his factual allegations and claims, and he disputes the factual basis for the 2007 suspension proceedings. Plaintiff attaches to his responses various forms of documentary and other evidence. See Docket Entry Nos. 34-1 to 34-8, Docket Entry Nos. 37-1 to 37-8; Docket Entry Nos. 38-1 to 38-5; Docket Entry No. 65-1 to 65-2; and Docket Entry No. 87-1 to 87-6.

II. STANDARD OF REVIEW

Defendants' motions to dismiss are reviewed under the standard that the Court must accept all of the well pleaded allegations contained in the Amended Complaint as true, resolve all doubts in Plaintiff's favor, and construe the Amended Complaint liberally in favor of the pro se Plaintiff. See Kottmyer v. Maas, 436 F.3d 684 (6th Cir. 2006); Boswell v. Mayer, 169 F.3d 384, 387 (6th Cir. 1999); Morgan v. Church's Fried Chicken, 829 F.2d 10, 11-12 (6th Cir. 1987). Although the Court is required to liberally construe the pro se pleadings, this does not require the Court to apply a more lenient application of the substantive law. Bennett v. Batchik, 1991 WL 110385 at *6 (6th Cir. 1991) (citing Wolfel v. United States, 711 F.2d 66, 67 (6th Cir. 1983)); Lyons v. Thompson, 2006 WL 463111 at *4 (E.D. Tenn. Feb. 24, 2006).

Plaintiff's pleadings must contain either direct or inferential factual allegations that are sufficient to sustain a recovery under a viable legal theory. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-61, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (abrogating Conley v. Gibson, 355 U.S. 41 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)); Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 436-37 (6th Cir. 1988). This "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." Twombly, 550 U.S. at 555. See also Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). Plaintiff must show "more than a sheer possibility that a defendant has acted

unlawfully." Mik v. Federal Home Loan Mortg. Corp., 743 F.3d 149, 157 (6th Cir. 2014) (quoting Iqbal, 556 U.S. at 678). The well pleaded factual allegations must "do more than create speculation or suspicion of a legally cognizable cause of action; they must show entitlement to relief." League of United Latin Am. Citizens v. Bredesen, 500 F.3d 523, 527 (6th Cir. 2007) (citing Twombly, 550 U.S. at 555). A complaint does not "suffice if it tenders âĂŸnaked assertions' devoid of âĂŸfurther factual enhancement.'" Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 557).

In reviewing the motions to dismiss, the Court has appropriately considered the prior written decisions of the state courts and state administrative agency, as well the filings in Plaintiff's prior federal lawsuits. See Jackson v. City of Columbus, 194 F.3d 737, 745 (6th Cir. 1999), overruled on other grounds by Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (in ruling on a Rule 12(b)(6) motion, the court may "consider public records, matters of which a court may take judicial notice, and letter decisions of governmental agencies"); Vaughn v. Metro. Gov't of Nashville & Davidson Cty., 2014 WL 234200, at *3 (M.D. Tenn. Jan. 22, 2014) (Trauger, J.); Lee v. Dell Products, L.P., 236 F.R.D. 358, 361 (M.D. Tenn. 2006).

III. CONCLUSION Before turning to the merits of any of the individual motions to dismiss, the Court notes that the instant action is merely the latest in a succession of unsuccessful federal and state lawsuits brought by Plaintiff in the aftermath of the closure of Sun Valley.

In 2010, Plaintiff filed a pro se lawsuit against Citizens Bank complaining about the foreclosure of his property and making allegations of discrimination, conspiracy, and fraudulent activity akin to the allegations made in the instant lawsuit. Dwight J. Mitchell, et al. v. Citizens Bank, 3:10-0569. That lawsuit was dismissed with prejudice on January 11, 2011. See Mitchell v. Citizen's

Bank, 2011 WL 101688 (M.D. Tenn. Jan. 11, 2011). In 2013, Plaintiff filed a lawsuit against the same defendants named in the instant action based on essentially the same allegations that he makes in the instant action. See Dwight J. Mitchell, et al. v. Wilson Taylor, et al., 3:13-0569. Upon Plaintiff's notice of voluntary dismissal, made in the face of several pending motions to dismiss, that lawsuit was dismissed without prejudice. See Order entered February 20, 2015 (Docket Entry No. 94) in Case 3:13-0569. Additionally, Plaintiff filed a pro se state court lawsuit against Defendant Guardian Home Care in 2010 that was based upon essentially the same allegations that are made against Guardian Home Care in the instant action. See Docket Entry No. 70-1. That lawsuit was dismissed with prejudice for failure to state a claim. See Docket Entry No. 70-3. Plaintiff has also filed numerous petitions in the United States Bankruptcy Court. See Case Nos. 3:08-bk-12244, 3:09-bk-01297, 3:09-bk-04976, 3:09-bk-10241, 3:10-bk-05141, 3:10-bk-06545, and 3:10-bk-09670.

A. Motion to Dismiss of Defendant Trousdale County Sheriff's Department

The Sheriff's Department should be dismissed from this action because it cannot be sued. A municipal agency, such as a sheriff's department, is not a legal entity that can be sued under the civil rights statutes. See Rhodes v. McDannel, 945 F.2d 117, 120 (6th Cir. 1991). See also Matthews v. Jones, 35 F.3d 1046, 1049 (6th Cir. 1994) (a police department is not an entity which can be sued under Section 1983); Mathes v. Metropolitan Gov't of Nashville & Davidson Cnty., 2010 WL 3341889, *1 (M.D. Tenn. Aug. 25, 2010) (Trauger, J.) ("[F]ederal district courts in Tennessee have frequently and uniformly held that police departments and sheriff's departments are not proper parties to a § 1983 suit."); Buchannan v. Williams, 434 F.Supp.2d 521, 529 (M.D. Tenn. 2006). In his response in opposition to the Sheriff's Department's motion, see Docket Entry No. 65, Plaintiff does not set out a valid legal argument that negates the

well-settled law holding that a sheriff's department is not a distinct legal entity that can be sued for civil rights violations.

B. Motion to Dismiss of Defendants Mary Holder and the City of Hartsville

Plaintiff brings a claim against Defendant Holder under 42 U.S.C. § 1983, see First Amended Complaint at 15, and claims against the City of Hartsville under 42 U.S.C. §§ 1981 and 1983. Id. at 17-18, and 22-23. The motion to dismiss of these two Defendants should be granted. Plaintiff's Section 1983 claims are barred by the statute of limitations, and he fails to state a viable Section 1981 claim against the City of Hartsville.

Congress did not establish a limitations period for civil rights actions under 42 U.S.C. § 1983 and, thus, federal courts look to analogous state statutes of limitations to determine the applicable statute of limitations. See Wilson v. Garcia, 471 U.S. 262, 268-71, 276, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985); Southerland v. Hardaway Mgmt. Co., Inc., 41 F.3d 250, 253 (6th Cir. 1995). For Section 1983 actions, federal courts apply the personal injury statute of limitations that would apply under state law, Wilson, 471 U.S. at 280; Eidson v. State of Tennessee Dep't of Children's Servs., 510 F.3d 631, 634 (6th Cir. 2007), and for civil rights claims arising in Tennessee, the one year statute of limitations set out at Tenn. Code Ann. § 28-3-104(a)(3) is the applicable statute of limitations period. Merriweather v. City of Memphis, 107 F.3d 396, 398 (6th Cir. 1997); Jackson v. Richards Med. Co., 961 F.2d 575, 578 (6th Cir. 1992); Berndt v. Tennessee, 796 F.2d 879, 883 (6th Cir. 1986). Accordingly, Plaintiff's Section 1983 claims against Defendants Holder and the City of Hartsville must have been brought within one year of when the claims accrued. See Roberson v. Tennessee, 399 F.3d 792, 794 (6th Cir. 2005); Merriweather, supra. Plaintiff's claims accrued and the statute of limitations period began to run when he knew or has reason "to know of the injury which is the basis of his action." Roberson,

supra; Ruff v. Runyon, 258 F.3d 498, 500 (6th Cir. 2001); Collyer v. Darling, 98 F.3d 211, 220 (6th Cir. 1996).

Plaintiff's own allegations are that the events supporting his claims against the City of Hartsville occurred in 2007. See Amended Complaint at 17 and 22-23. Plaintiff was clearly aware of these events and the injuries he suffered at that time. However, Plaintiff did not file his first lawsuit raising federal claims against the City of Hartsville until 2013, well beyond the expiration of the one year statute of limitations. Similarly, although the time frame of the allegations against Defendant Holder are not clearly alleged in his First Amended Complaint, the Court takes judicial notice that Plaintiff's prior federal lawsuit against Defendant Holder suggests that the events upon which his claim against Defendant Holder is based occurred during the 1990s and early 2000s. See Complaint in Case 3:13-0569. The Section 1983 claim against Defendant Holder was brought well beyond the applicable one year statute of limitations.

None of Plaintiff's arguments compel a different conclusion. See Docket Entry No. 38. Plaintiff's contention that longer statutes of limitations apply to his Section 1983 claims is erroneous. Contrary to Plaintiff's assertion, see Amended Complaint at ¶ 12, the four year "catch all" statute of limitations set out in 28 U.S.C. § 1658 does not apply to his Section 1983 claims. See Delk v. Home Quality Mgmt., Inc., 2006 WL 2503711 at *2 (M.D. Tenn. Aug. 28, 2006) (Haynes, J.) ("By its terms, the four year statute of limitations in Section 1658 applies to laws enacted by Congress after 1990. Thus, Section 1658 cannot apply to claims under the Section 1983 that was enacted in 1871"). The various Tennessee statutory provisions Plaintiff refers to in his responses in opposition also do not apply. Additionally, although Plaintiff refers to numerous legal doctrines for tolling a statute of limitations or for delaying the accrual of his

cause of action, he has not shown that any of these doctrines actually apply, and he has not met his burden to show that he is entitled to equitable tolling. See McClendon v. Sherman, 328 F.3d 490, 494 (6th Cir. 2003).

Finally, the Section 1981 claim against the City of Hartsville is legally deficient. The Sixth Circuit has expressly disavowed the use of Section 1981 as an independent vehicle for claims against a municipality based on alleged civil rights violations and directed that such claims must be brought under Section 1983. See Carmichael v. City of Cleveland, 571 Fed.App'x. 426, 431-32 (6th Cir. 2014); Arendale v. City of Memphis, 519 F.3d 587, 598-99 (6th Cir. 2008); Lilly v. City of Clarksville, 2012 WL 1514875 at *3 (M.D. Tenn. May 1, 2012) (Campbell, J.). Accordingly, Plaintiff does not have a viable claim against the City of Hartsville that can be brought under Section 1981.

C. Motion to Dismiss of Defendant Guardian Home Care Holdings, Inc.

Plaintiff brings a claim against Defendant Guardian Home Care under 42 U.S.C. § 1983. See First Amended Complaint at 15-16. [5] The motion to dismiss should be granted for several reasons.

The claim Plaintiff is now pursuing against Guardian Home Care is precluded by the doctrine of res judicata because of his prior state court action against this Defendant. The doctrine of res judicata provides that a final judgment on the merits of an action precludes the "parties or their privies from relitigating issues that were or could have been raised" in a prior action. Rawe v. Liberty Mut. Fire Ins. Co., 462 F.3d 521, 528 (6th Cir. 2006); Jackson v. Smith, 387 S.W.3d 486, 491 (Tenn. 2012). The federal courts "must give the same preclusive effect, under the doctrine of res judicata and collateral estoppel,

[5] Although Plaintiff briefly refers to Section 1981 in his initial paragraph that lists Guardian Home Care as a defendant, see First Amended Complaint at 8, he specifically brings a claim against Guardian Home Care under only Section 1983 in the section of his Amended Complaint in which he sets out his claims. Id. at Section IV.

to state court judgments that those judgments would receive in courts of the rendering state." Ingram v. City of Columbus, 185 F.3d 579, 593 (6th Cir. 1999).

Under Tennessee law, a party asserting that a prior judgment should bar a subsequent lawsuit because of res judicata must show: (1) that a court of competent jurisdiction rendered a prior judgment; (2) that the prior judgment was final and on the merits; (3) that the same parties or their privies were involved in both proceedings; and (4) that both proceedings involved the same cause of action. Hooker v. Haslam, 393 S.W.3d 156, 165 n.6 (Tenn. 2012) (citing Lee v. Hall, 790 S.W.2d 293, 294 (Tenn.Ct.App.1990)); Richardson v. Tennessee Bd. of Dentistry, 913 S.W.2d 446, 459 (Tenn. 1995). Plaintiff's prior state court action, 1) was brought against Guardian Home Care, 2) was based upon the events that surrounded the administrative license suspension proceedings against Sun Valley that occurred in 2007, and, 3) was finally concluded against Plaintiff on the merits by a state court of competent jurisdiction. See Docket Entry Nos. 70-1 to 70-4. Each of the requirements necessary for the application of res judicata is satisfied. Accordingly, the federal claim Plaintiff now seeks to bring against Guardian Home Care is barred because the claim could have been litigated in the prior state court action. See Jackson, 387 S.W.3d at 491; Brown v. Shappley, 290 S.W.3d 197, 200âĂŞ01 (Tenn.Ct.App. 2008).

Plaintiff's Section 1983 claim against Defendant Guardian Home Care also suffers from several fatal deficiencies. The claim is barred by the statute of limitations based upon the same analysis set out supra because Plaintiff's own allegations are that the events upon which his claims against Defendant Guardian Home Care are based upon events that occurred in 2007 when three of its employees testified in the administrative suspension proceedings against Sun Valley. See First Amended Complaint at 15-16. However, Plaintiff failed to file a lawsuit raising this federal claim until 2013, well beyond the expiration of the

applicable statute of limitations. Further, there must be plausible allegations showing that the defendant acted under the color of state law in order to state a Section 1983 claim. Flagg Bros. v. Brooks, 436 U.S. 149, 155, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978). However, Plaintiff's theory of why Guardian Home Care, a private entity, should be viewed as having acted under the color of state law is not well-founded and is based upon conclusory allegations. Additionally, the theory of respondeat superior will not support a claim under Section 1983, Rizzo v. Goode, 423 U.S. 362, 371-72, 375-77, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976), and Plaintiff has not alleged facts that support a claim against Guardian Home Care based upon anything other than a theory of respondeat superior liability for the actions of its employees. Finally, absolute witness immunity applies to any claim brought by Plaintiff seeking damages based upon testimony provided during the administrative license suspension proceedings. See Briscoe v. LaHue, 460 U.S. 325, 330-31, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983); Spurlock v. Satterfield, 167 F.3d 995, 1001 (6th Cir. 1999); Kogan v. Tennessee Bd. Of Dentistry, 2008 WL 842462, *5 (M.D.Tenn. March 28, 2008) (Haynes, J.) (Witness immunity applies to testimony before medical licensing board).

Plaintiff's arguments in opposition to the motion to dismiss do not provide a valid legal basis that rebuts Defendant's grounds for dismissal. See Docket Entry Nos. 37, 86, and 87. Because the Court finds that the dismissal of Defendant Guardian Home Care is clearly warranted for the reasons set forth supra, it is not necessary to address Defendant's alternative argument for dismissal based on improper service of process.

D. Motion to Dismiss of Defendant Tommy Thompson, Jr.

Plaintiff brings claims against Defendant Thompson under 42 U.S.C. §§ 1981, 1983, and 1985(3). See First Amended Complaint at 13-14, 21-22, and 26-27. These claims warrant dismissal for a variety of reasons.

The Eleventh Amendment bars Plaintiff's claims for damages against Defendant Thompson to the extent that he is sued in his official capacity as a state official. See Kentucky v. Graham, 473 U.S. 159, 169, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985); Turker v. Ohio Dept. of Rehab. & Corr., 157 F.3d 453, 456 (6th Cir. 1998). Additionally, Plaintiff cannot pursue claims under Section 1981 against Defendant Thompson to the extent that Thompson is sued in his official capacity as a state official. Grinter v. Knight, 532 F.3d 567, 577 (6th Cir. 2008).

With respect to the claims seeking individual liability against Defendant Thompson, the claims under Sections 1981[6] and 1983 are barred by the statute of limitations based upon the same analysis set out supra. Plaintiff's own allegations are that the events upon which his claims against Defendant Thompson are based occurred in 2007 when Thompson came to Sun Valley, entered the property, and removed residents and property. Even Plaintiff's allegations that Defendant Thompson was involved in a conspiracy to violate Plaintiff's civil rights are based upon events occurring in or around 2007. However, Plaintiff failed to file a lawsuit seeking relief against Defendant Thompson under these federal provisions until 2013, well beyond the expiration of the applicable statutes of limitations. [7]

[6]Plaintiff intertwines allegations of conduct by Defendant Thompson as the District Attorney General with allegations of conduct by him as a private individual and an officer of Citizen's Bank. To the extent that Plaintiff brings a Section 1981 claim based upon conduct taken by Thompson as the District Attorney General, Plaintiff cannot proceed under Section 1981 against Thompson as a state actor sued in his individual capacity. McCormick v. Miami University, 693 F.3d 654, 661 (6th Cir. 2012).

[7]The one-year statute of limitations applicable to Section 1983 claims generally applies Section 1981 claims. See Anthony v. B.T.R. Automotive Sealing Systems, Inc., 339 F.3d 506, 512-14 (6th Cir. 2003); Williams v. Western Union Co., 2007 WL 1849963 at *1 (M.D. Tenn. June 25, 2007) (Trauger, J.). Plaintiff has not made a persuasive legal argument that the longer 4 year statute of limitations set out in 28 U.S.C. § 1658 applies to his Section 1981 claim under the holding of Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, 372, 124 S. Ct. 1836, 158 L. Ed. 2d 645 (2004).

With respect to Plaintiff's claim under Section 1985(3), Plaintiff alleges that Defendant Thompson was involved in a conspiracy to deprive Plaintiff of the equal protection of the law because of racial animus against Plaintiff. Plaintiff's allegations must show "(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities of the laws; (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States." Ctr. for BioâĂŞEthical Reform, Inc. v. City of Springboro, 477 F.3d 807, 832 (6th Cir. 2007). The Court finds that Plaintiff's supporting allegations are based upon unsupported conclusions and speculation. Such allegations are not sufficient to support a claim. Furthermore, a claim against Defendant Thompson under Section 1985(3) has likewise not been pursued in a timely manner given Plaintiff's allegations of when the unlawful conduct is alleged to have occurred. See Carver v. U-Haul Co., 830 F.2d 193 (6th Cir. 1987) (applicable statute of limitations for Section1985 claim is Tennessee's one year statute of limitations); Brown v. Metro. Gov't of Nashville, 2011 WL 465855 at *7 (M.D. Tenn. Feb. 3, 2011) (Haynes, J.) (same). The Court is unpersuaded by any of Plaintiff's arguments that one of a multitude of legal doctrines apply to this lawsuit and render his claims timely filed. See Docket Entry Nos. 34, 35, and 57.

E. Defendant Wilson Taylor

Plaintiff brings claims against Defendant Taylor under 42 U.S.C. §§ 1981, 1983, and 1985(3), as well as a claim for fraudulent concealment under state law. See First Amended Complaint at 13, 19-20, 25-26, and 27-28. Although Defendant Taylor has not filed a motion to dismiss, the federal claims brought against him are clearly subject to dismissal based upon the same arguments

for dismissal made by the other Defendants in this action. The statute of limitations would bar the federal claims brought against Defendant Taylor, claims that are based upon events occurring in 2007 or before. Additionally, to the extent that Defendant Taylor is sued under Section 1983, there are no facts alleged supporting a viable conclusion that he acted under color of state law as is required for such a claim. Additionally, to the extent that Plaintiff alleges that Defendant Taylor acted with the a racial animus against Plaintiff, as is necessary for the Section 1981 and Section 1985(3) claims, Plaintiff's allegations are wholly conclusory and are unsupported by factual allegations. Such allegations do not support a viable claim for relief. This Report and Recommendation and the fourteen day period for objections to be filed by Plaintiff satisfy the procedural requirements for a sua sponte dismissal under Rule 12(b)(6) for failure to state a claim. See Morrison v. Tomano, 755 F.2d 515, 516-17 (6th Cir. 1984).

Plaintiff's final claim against Defendant Taylor is a claim under state law for fraudulent concealment. See Amended Complaint at 27-28. Upon the dismissal of Plaintiff's federal claims, the Court no longer has original jurisdiction over the lawsuit and the provisions of 28 U.S.C. § 1367(c) apply. Section 1367(c)(3) provides that the Court may decline to exercise supplemental jurisdiction over a claim if the district court has dismissed all claims over which it has original jurisdiction. The decision of whether to retain jurisdiction over state law claims is left to the broad discretion of the Court. See Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350-52, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988); Musson Theatrical, Inc. v. Federal Express Corp., 89 F.3d 1244, 1254 (6th Cir. 1996). There is a "strong presumption" against the exercise of supplemental jurisdiction once all federal claims have been dismissed, Packard v. Farmers Inc. Co. of Columbus, 423 Fed.App'x. 580, 584 (6th Cir. 2011). See also Moon v.

Harrison Piping Supply, 465 F.3d 719, 728 (6th Cir. 2006); Musson, 89 F.3d at 1254-55.

In considering whether to exercise supplemental jurisdiction over state law claims, the Court must consider the provisions of Section 1367(c) and the factors the United States Supreme Court outlined in Cohill, 484 U.S. at 350-51, and United Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). These factors include judicial economy, convenience, fairness, and comity. Cohill, 484 U.S. at 350. In the instant action, the balance of factors weighs in favor of dismissal of Plaintiff's state law claim against Defendant Taylor. Although the Court views the merits of such a claim with a considerable amount of skepticism, the claim should be heard by the state courts if Plaintiff wishes to pursue the claim.

RECOMMENDATION

Based on the foregoing, the Court respectfully RECOMMENDS that:

1) the motions to dismiss of Mary Holder and the City of Hartsville (Docket Entry No. 22), Tommy Thompson, Jr. (Docket Entry No. 30), Trousdale County Sheriff's Department (Docket Entry No. 62), and Guardian Home Care Holdings, Inc. (Docket Entry No. 69) be GRANTED and that the claims against these Defendants be DISMISSED WITH PREJUDICE;

2) the motion to dismiss of Guardian Home Care Holdings, Inc. (Docket Entry No. 20) be DENIED as moot;

3) the federal claims against Wilson Taylor be DISMISSED; and

4) the Court decline to exercise supplemental jurisdiction under 28 U.S.C. § 1367 over Plaintiff's state law claim against Wilson Taylor.

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Court within fourteen (14) days of service of the Report and Recommendation upon the party and must state with particularity the specific portions of this Report and Recommendation to which objection is made. Failure to file written objections within the specified time can be deemed a waiver of the right to appeal the District Court's Order regarding the Report and Recommendation. See Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); United States v. Walters, 638 F.2d 947 (6th Cir. 1981).

Respectfully submitted,

BARBARA D. HOLMES

United States Magistrate Judge

B District Court Order

IN THE UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION DWIGHT J. MITCHELL

v.

WILSON TAYLOR, et al.

NO. 3:15-1310

[Filed August 8, 2016]

MEMORANDUM OPINION AND ORDER

The Magistrate Judge has issued a Report and Recommendation that recommends granting four of the pending Motions to Dismiss, denying the fifth as moot, and dismissing this action with prejudice, except for Plaintiff Dwight J. Mitchell's state law claim against Defendant Wilson Taylor. Having undertaken de novo review in accordance with Rule 72(b) the Court agrees with the recommended dispositions and will accept the R & R.

As the Magistrate Judge pointed out, Plaintiff's federal claims are time-barred. Federal civil rights claims in Tennessee are governed by a one-year statute of limitations. Robertson v. Tennessee, 399 F.3d 792, 794 (6th Cir. 2005). Plaintiff complains about events surrounding the license suspension of Sun Valley Home for the Aged, which occurred in August 2007, yet he did not file suit against these same Defendants raising essentially the same allegations until June 2013. While he voluntarily dismissed that action before filing this one, that original action came years too late. Moreover, Trousdale County Sheriff's Department is not a suable entity under the civil rights statutes, and the claims against the other Defendants fail because, not only are they untimely, they are

barred by the doctrine of res judicata, fail to show action under color of state law, fail to show respondeat superior liability and/or are bared by the doctrine of witness immunity.

Plaintiff has filed a 38-page "Response" to the R & R, which the Court deems to be objections. The Court has considered all of the arguments raised and finds none to be persuasive. Even if Plaintiff could take issue with the analysis regarding such things as witness immunity, res judicata, and actions under color of state law, a fundamental hurdle remains - his federal claims were filed long after the statute of limitations passed. Plaintiff states that he has a 15-year-old daughter who is his heir, points out that the statute of limitations does not begin to on minor's claims until they reach the age of majority, and argues that the statute of limitations has therefore not run. This proposed syllogism would produce absurd results, even ignoring the fact that "42 U.S.C. § 1983 claims are personal." Doe v. Providence Cmty. Corr., No. 3:09-0671, 2010 WL 424653, at *1 (M.D. Tenn. Jan. 26, 2010); see also Purnell v. Akron, 925 F.2d 941, 948 n. 6 (6th Cir.1991) ("[S]ection 1983 provides a cause of action which is personal to the injured party").

Plaintiff next claims that he "was in bankruptcy from 2008-2013" and argues that "the one year limitations period . . . can be extended by two years under § 108 of the Bankruptcy Code if the debtor files for bankruptcy before the one year period has expired." (Docket No. 93 at 13). That bankruptcy provision, however, relates to when "the trustee may commence such action," 11 U.S.C.A. § 108, not the debtor. Plaintiff further asserts that "[t]he Magistrate did not give proper consideration to the issue raised of the lack of funds for legal counsel and its affect on the Statute of Limitation." (Docket No. 93 at 13). But "a civil litigant has no constitutional right to the appointment of counsel," Stockman v. Berghuis, 627 F. App'x 470, 475 (6th Cir. 2015), and Plaintiff could have filed

suit pro se, just as he did in 2013 and again in 2015. Besides, even if a plaintiff shows the exceptional circumstances necessary for the appointment of counsel in a civil case, that appointment only comes after suit has been filed.

Plaintiff next argues that the Magistrate Judge "did not give proper consideration to the doctrine of fraudulent concealment." (Id.). "[T]he propriety of equitable tolling is determined on a case-by-case basis and is to be narrowly applied." Egerer v. Woodland Realty, Inc., 556 F.3d 415, 424 (6th Cir. 2009). "Parties who rely on equitable tolling through fraudulent concealment have the burden of demonstrating its applicability." Hill v. U.S. Dep't. of Labor, 65 F.3d 1331, 1336 (6th Cir. 1995). Plaintiff must plead and prove that "1) the defendant concealed the underlying conduct, 2) the plaintiff was prevented from discovering the cause of action by that concealment, and 3) the plaintiff exercised due diligence to discover the cause of action." Huntsman v. Perry Local Schs. Bd. of Educ. 379 F. App'x 456, 461 (6th Cir. 2010).

Plaintiff does not come close to making such a showing. In his response, he claims that "Defendants hid material facts from Plaintiff," including that "there was no warrant despite the fact that the Defendants told Plaintiff that they had a warrant on August 15, 2007," that "the address on Plaintiff's property was fraudulently changed from 700 McMurry Blvd Hartsville, TN to 802 McMurry Blvd Hartsville Tenn," and then back again, and that "the August 15, 2007 order was stamped after 4 pm even though the action against Plaintiff's business was taken prior to that time on August 15, 2007." (Id. at 15).

Whether a warrant was issued or not, and whether an order was improperly time-stamped later are both things that were discoverable, or through due diligence should have been discovered at or near the time of the event. Plaintiff's assertion that the property address changes were not discovered by him until September 19, 2012 and "the end of 2013" (id. at 15) - convenient

dates because they fall within the limitation period point to discrete events, as do his other claims, such as that Defendants committed fraud on the court and unlawfully placed him on the Tennessee Abuse Registry. Thus, he cannot, as he argues, avail himself of the continuing violations doctrine to save what is his real claim, i.e. that Defendants took action to close Sun Valley Home for the Aged, which then led to the loss of money and property.

"A 'continuous violation' occurs, and will extend the limitations period, if the defendant engages in continuing wrongful conduct; injury to the plaintiff accrues continuously; and had the defendant at any time ceased its wrongful conduct, further injury would have been avoided." Hensley v. City of Columbus, 557 F.3d 693, 697 (6th Cir.2009). It "applies most frequently in the context of Title VII cases, and is rarely extended to § 1983 actions." Goldsmith v. Sharrett, 614 F. App'x 824, 828 (6th Cir. 2015) (citing Sharpe v. Cureton, 319 F.3d 259, 267 (6th Cir.2003)). Even so, "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002).

Finally, Plaintiff's fraud on the court theory fails to save his claims. Leaving aside that the alleged fraud laid out by Plaintiff has to do with testimony at August 2007 and September 2009 hearings, "'[f]raud on the court' may be a basis for granting a motion for relief from final judgment under Federal Rule of Civil Procedure 60(b), but it has little relevance to the question of whether a cause of action was timely filed." Easterling v. Gorman, 2014 WL 2580657, at *1 (S.D. Ohio June 9, 2014). In fact, Plaintiff himself acknowledges that "[f]raud on the court under Rule 60(d)(3) is intended to protect the integrity of the judicial process," (id. at 19), yet the alleged fraud was not on this Court.

In addition to his objections, Plaintiff has filed a Motion for Leave to File an Amended Complaint. That Motion will be denied.

"Federal Rule of Civil Procedure 15(a)(2) directs that leave to amend the pleadings should be 'freely give[n],' 'when justice so requires.' Justice may not require leave to amend, however, in cases of undue delay, prejudice to the nonmovant, bad faith, dilatory motive, or where the proposed amendment is futile." Seigner v. Twp. of Salem, 2016 WL 3426092, at *3 (6th Cir. June 22, 2016) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)).

Here, allowing Plaintiff to file yet another Complaint would be futile. Not only would such a complaint be barred by the statute of limitations, the other problems identified by the Magistrate Judge would likewise exist.

Moreover, Plaintiff's request smacks of bad faith and would be prejudicial to Defendants given the number of times Plaintiff has aired complaints about the events of August 2007. As the Magistrate Judge observed:

> In 2010, Plaintiff filed a pro se lawsuit against Citizens Bank complaining about the foreclosure of his property and making allegations of discrimination, conspiracy, and fraudulent activity akin to the allegations made in the instant lawsuit. Dwight J. Mitchell, et al. v. Citizens Bank, Case 3:15-cv-01310. That lawsuit was dismissed with prejudice on January 11, 2011. See Mitchell v. Citizen's Bank, 2011 WL 101688 (M.D. Tenn. Jan. 11, 2011). In 2013, Plaintiff filed a lawsuit against the same defendants named in the instant action based on essentially the same allegations that he makes in the instant action. See Dwight J. Mitchell, et al. v. Wilson Taylor, et al., 3:13-0569. Upon Plaintiff's notice of voluntary dismissal, made in the face of several pending motions to dismiss, that lawsuit was dismissed without prejudice. See Order entered February 20, 2015 (Docket Entry No. 94) in Case 3:13-0569. Additionally, Plaintiff filed

a pro se state court lawsuit against Defendant Guardian Home Care in 2010 that was based upon essentially the same allegations that are made against Guardian Home Care in the instant action. See Docket Entry No. 10-1. That lawsuit was dismissed with prejudice for failure to state a claim. See Docket Entry No. 10-3. Plaintiff has also filed numerous petitions in the United States Bankruptcy Court. See Case Nos. 3:08-bk-15544, 3:09-bk-01597, 3:09-bk-04917, 3:09-bk-10341, 3:10-bk-02141, 3:10-bk-08242, and 3:10-bk-03670. (Docket No. 88 at 6-7). Plaintiff has had more than enough price at the apple.

Accordingly, the Court rules as follows: (1) The Report and Recommendation (Docket No. 88) is hereby ACCEPTED and APPROVED:

(2) Plaintiff's Response, construed as an Objection to the Report and Recommendation (Docket No. 89) is OVERRULED:

(3) The Motions to Dismiss filed by Mary Holder and the City of Hartsville (Docket No. 55), Tommy Thompson, Jr. (Docket Entry No. 30), Tronsdale County Sheriff's Department (Docket Entry No. 63), and Guardian Home Care Holdings, Inc. (Docket Entry No. 68) are hereby GRANTED and the claims against these Defendants are DISMISSED WITH PREJUDICE:

(4) The federal claims against Defendant Wilson Taylor are DISMISSED WITH PREJUDICE, but the Court declines to exercise supplemental jurisdiction under 28 U.S.C. § 1367 over Plaintiff's state law claim against Wilson Taylor:

(5) Plaintiff's Motion for Extension of Time for Review, Filing Brief, to Amend Complaint, File Interrogatories and Request for Documents (Docket No. 95): Plaintiff's Motion for Review of Magistrate Judge's Order (Docket No. 96): Defendant Guardian Home Care Holding Inc.'s Motion to Strike Plaintiff's Second Amended Complaint (Docket No. 43): and Defendant Guardian Home

Care Holdings, Inc.'s Motion to Dismiss for Insufficient Service of Process (Docket Entry No. 20) are all DENIED AS MOOT;

(6) Plaintiff's Motion for Leave to File an Amended Complaint (Docket No. 95) is DENIED. The Clerk of the Court shall enter final judgment in accordance with Rule 58 of the Federal Rules of Civil Procedure.

It is SO ORDERED.

KEVIN H. SHARP UNITED STATES DISTRICT JUDGE

C Sixth Circuit Court Order

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 16-6335

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DWIGHT MITCHELL,

Plaintiff-Appellant,

v.

WILSON TAYLOR, et al., Defendants-Appellees,

and

TROUSDALE COUNTY SHERIFF'S DEPARTMENT,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

[Filed April 16, 2018]

ORDER

Before: NORRIS, ROGERS, and STRANCH, Circuit Judges.

Dwight Mitchell, a pro se litigant, appeals the district court's judgment dismissing his complaint filed under 42 U.S.C. §§ 1981, 1983, and 1985, as well as state law. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. See Fed. R. App. P. 34(a).

In 2007, Mitchell owned and operated Sun Valley Home for the Aged ("Sun Valley"), a licensed residential home for the elderly in Hartsville, Tennessee. On August 15, 2007, the Tennessee Board for Licensing Health Care Facilities suspended Mitchell's license to maintain Sun Valley. In 2015, Mitchell filed a complaint and a first amended complaint, on behalf of himself and Sun Valley, against Wilson Taylor; Guardian Home Care Holdings, Inc. ("Guardian Home Care"); Mary Holder; the City of Hartsville; Tommy Thompson, Jr.; and the Trousdale County Sheriff's Department. Mitchell alleged that, in the course of their involvement in the 2007 closure of Sun Valley, the defendants violated his rights under the Fourth and Fourteenth Amendments. Mitchell also asserted a state-law claim against Taylor for fraudulent concealment.

The district court dismissed Mitchell's claims on behalf of Sun Valley without prejudice for lack of standing. The defendants thereafter filed motions to dismiss Mitchell's complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. The magistrate judge entered a report recommending that the defendants' motions to dismiss be granted. Mitchell filed objections to the report and recommendation, and moved for leave to file a second amended complaint. The district court adopted the report and recommendation after conducting a de novo review thereof, dismissed Mitchell's federal claims with prejudice, dismissed his state-law claim without prejudice, and denied as futile his motion for leave to amend. The district court explained in part that Mitchell's federal claims were time barred and, in the alternative, were "barred by the doctrine of res judicata, fail[ed] to show action under color of state law, fail[ed] to show respondeat superior liability and/or [were] bar[r]ed by the doctrine of witness immunity."

Guardian Home Care later filed a motion for attorney's fees and sanctions. The district court granted the motion insofar as it requested that Mitchell be

deemed a vexatious litigant in relation to the 2007 closure of Sun Valley but denied the motion insofar as it requested attorney's fees or other sanctions. Mitchell filed a timely motion under Federal Rule of Civil Procedure 59(e) to alter or amend the district court's order, which the district court denied. Mitchell's appeal from the district court's order denying Rule 59(e) relief is currently pending in Case No. 17-5319.

In this appeal, Mitchell challenges the district court's dismissal of his federal claims as time-barred, as well as the district court's alternative grounds for dismissing these claims. Mitchell also argues that the district court erred in denying him leave to amend his complaint.

We review de novo the district court's dismissal of Mitchell's federal claims as barred by the applicable statute of limitations. See Sierra Club v. Slater, 120 F.3d 623, 630 (6th Cir. 1997).

Congress enacted a four-year statute of limitations, 28 U.S.C. § 1658(a), for causes of action arising under an Act of Congress enacted after December 1, 1990, and that statute applies "if the plaintiff's claim . . . was made possible by a post-1990 enactment." Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, 382 (2004). Congress has not enacted a statute of limitations for claims brought under the pre-December 1, 1990, versions of §§ 1981, 1983, 1985. Therefore, for all claims raised under the pre-December 1, 1990, versions of these statutes, federal courts apply the forum state's personal-injury statute of limitations. See id. at 378, 383-84. None of Mitchell's claims was "made possible" by a post-1990 amendment to §§ 1981, 1983, or 1985, and-despite Mitchell's protestations to the contrary-his claims are thus governed by Tennessee's one-year personal-injury statute of limitations. See id. at 383; Merriweather v. City of Memphis, 107 F.3d 396, 398 (6th Cir. 1997). Because Mitchell complained about events occurring

no later than 2007, the district 7court properly concluded that his federal claims were filed after the limitations period expired.

Mitchell argues that the district court erred in refusing to toll the limitations period on five bases. [1] First, Mitchell argues that he is entitled to tolling under the doctrine of fraudulent concealment. "Under [Tennessee's] fraudulent concealment doctrine, the statute of limitations is tolled when 'the defendant has taken steps to prevent the plaintiff from discovering he [or she] was injured.'" Redwing v. Catholic Bishop for the Diocese of Memphis, 363 S.W.3d 436, 462 (Tenn. 2012) (quoting Fahrner v. SW Mfg., Inc., 48 S.W.3d 141, 146 (Tenn. 2001)). "The plaintiff invoking the fraudulent concealment doctrine must allege and prove," among other elements, "that the plaintiff could not have discovered the injury . . . despite reasonable care and diligence." Id. at 462-63. In other words, "[t]he statute of limitations is tolled until the plaintiff discovers or, in the exercise of reasonable diligence, should have discovered the defendant's fraudulent concealment or sufficient facts to put the plaintiff on actual or inquiry notice of his or her claim." Id. at 463. Mitchell claimed that he could "show diligence to find out material facts that were hidden from him by" the defendants until as late as 2013. But because he failed to offer any meaningful factual support for this assertion, the district court properly concluded that Mitchell failed to establish that he could not have discovered his injury sooner through due diligence. See Thornton v. Miles, 65 F. App'x 997, 998 (6th Cir. 2003).

Second, Mitchell argues that he is entitled to tolling based on fraud on the court. In rejecting this argument, the district court explained that "'[f]raud on the court' may be a basis for granting a motion for relief from final judgment

[1]To the extent that Mitchell asserted additional bases for tolling below, he has forfeited review of the district court's rejection thereof by failing to argue these additional bases on appeal. See Radvansky v. City of Olmsted Falls, 395 F.3d 291, 311 (6th Cir. 2005).

under Federal Rule of Civil Procedure 60(b), but it has little relevance to the question of whether a cause of action was timely filed." R.E. 98, PageID 986 (quoting Easterling v. Gorman, No. 3:14-cv-96, 2014 WL 2580657, at *1 (S.D. Ohio June 9, 2014)). Mitchell does not dispute this determination on appeal.

Third, Mitchell argues that he is entitled to tolling under 11 U.S.C. § 108(a), which extends the time for a bankruptcy trustee to file an action to the later of "two years after the order for relief" or "the end of such period," if "such period has not expired before the date of the filing of the petition." Mitchell alleged that he "was in bankruptcy from 2008 - 2013" and "filed for bankruptcy before the one year period had expired." He further alleged that, when his "bankruptcy was finalized in 2013[,] he . . . was acting as trustee." Even accepting Mitchell's allegations as true, § 108(a) at most entitled him to a two-year extension from the commencement of the bankruptcy case in 2008. See 11 U.S.C. § 301. Mitchell fails to cite any authority holding that § 108 permits the time for filing a civil rights action to be tolled throughout the duration of a bankruptcy. See Roberson v. Macnicol, 698 F. App'x 248, 251 (6th Cir. 2017).

Fourth, Mitchell argues that he is entitled to tolling because his daughter was a minor at the time of the district court's judgment. Tennessee law provides that a minor or her representatives may commence an action "after legal rights are restored, within the time of limitation for the particular cause of action, unless it exceeds three (3) years, and in that case within three (3) years from restoration of legal rights." Tenn. Code Ann. § 28-1-106(a). But Mitchell did not bring this action as his daughter's representative. The district court therefore properly concluded that Mitchell could not avail himself of § 28-1-106(a).

Fifth, Mitchell argues that he is entitled to tolling under the doctrine of continuing violation. For the continuing violation doctrine to toll the time for filing an action, "[f]irst, the defendant's wrongful conduct must continue

after the precipitating event that began the pattern. . . . Second, injury to the plaintiff must continue to accrue after that event. Finally, further injury to the plaintiff[] must have been avoidable if the defendants had at any time ceased their wrongful conduct." Eidson v. Tenn. Dep't of Children's Servs., 510 F.3d 631, 635 (6th Cir.2007) (quoting Tolbert v. Ohio Dep't of Transp., 172 F.3d 934, 940 (6th Cir. 1999)). "[A] continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation." Id. (alteration in original) (quoting Tolbert, 172 F.3d at 940).

Mitchell alleged the following "continuing violations": In 2011, Citizen's Bank, the defendants, and an officer of the court committed fraud on the district court by stating that Mitchell did not live on his property; in 2011, Susan Cooper illegally placed Mitchell on the Tennessee Abuse Registry; in 2011, the address on the deed to Mitchell's property was illegally changed; in 2012, Mitchell found out that Holder was on the zoning board that rezoned his property in someone else's name; in 2012, Mitchell tried unsuccessfully to file a warrant to get Michael Townsend off his property; in 2013, Mitchell received new evidence that Citizen's Bank failed to secure proper liens; in 2013, Mitchell received notice that no warrant supported the defendants' August 15, 2007, action; and from 2013 to 2015, his property's address was changed. At most, these alleged actions constitute "continual ill effects from" the 2007 closure of Sun Valley. Id. (quoting Tolbert, 172 F.3d at 940).

Because the district court properly concluded that Mitchell's federal claims were time barred, this court need not address the district court's alternative grounds for dismissing these claims. See Seaton v. TripAdvisor LLC, 728 F.3d 592, 601 n.9 (6th Cir. 2013). And, because Mitchell's federal claims did not survive dismissal, the district court did not abuse its discretion in declining

to exercise supplemental jurisdiction over his state-law claim. See 28 U.S.C. § 1367(c)(3); Gamel v. City of Cincinnati, 625 F.3d 949, 951-52 (6th Cir. 2010).

Finally, Mitchell argues that the district court erred in denying him leave to amend his complaint to add additional facts, claims, and defendants. A district court should "freely" grant a party leave to amend his complaint "when justice so requires." Fed. R. Civ. P. 15(a). "A court need not grant leave to amend, however, where amendment would be 'futile.'" Miller v. Calhoun County, 408 F.3d 803, 817 (6th Cir. 2005) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)). "[O]ur review of the denial of a motion for leave to amend a complaint ordinarily is for an abuse of discretion." Williams v. City of Cleveland, 771 F.3d 945, 949 (6th Cir. 2014). But where, as here, the district court denied leave to amend based on its legal conclusion that an amendment would be futile, we review de novo whether the proposed amended complaint "contains 'sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" Id. (quoting D'Ambrosio v. Marino, 747 F.3d 378, 383 (6th Cir. 2014)).

In his proposed second amended complaint, Mitchell sought to add allegations undergirding his claim that he is entitled to tolling of the limitations period under the doctrines of fraudulent concealment and continuing violation. Because Mitchell's allegations are insufficient to establish entitlement to relief under either doctrine, and because Mitchell's proposed second amended complaint did not otherwise cure the untimeliness of his action, the district court properly concluded that his proposed amendment would be futile. For these reasons, we AFFIRM the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

D En Banc Order

No. 16-6335

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DWIGHT MITCHELL,

Plaintiff-Appellant,

v.

WILSON TAYLOR, et al., Defendants-Appellees,

and

TROUSDALE COUNTY SHERIFF'S DEPARTMENT,

Defendant.

[Filed June 05, 2018]

ORDER

Before: NORRIS, ROGERS, and STRANCH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc. Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk