UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-6449

JAMES GREGORY ARMISTEAD,

Plaintiff - Appellant,

v.

JENNIE BOWEN; TIMOTHY WARE; ROGER SHACKLEFORD; MOSE DORSEY; SETH EDWARDS,

Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, District Judge. (5:17-ct-03281-BO)

Submitted: August 10, 2018 Decided: August 31, 2018

Before NIEMEYER, TRAXLER, and HARRIS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

James G. Armistead, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

James Gregory Armistead appeals the district court's order dismissing his 42 U.S.C. § 1983 (2012) complaint under 28 U.S.C. § 1915(e)(2)(B) (2012). We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *See Armistead v. Bowen*, No. 5:17-ct-03281-BO (E.D.N.C. Apr. 13, 2018). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:17-CT-3281-BO

JAMES GREGORY ARMISTEAD, Plaintiff, v. JENNIE BOWEN, TIMOTHY WARE, ROGER SHACKLEFORD, MOSE DORSEY, and SETH EDWARDS, Defendants.	)	ORDER

Plaintiff, a state inmate, filed this civil rights action *pro se* pursuant to 42 U.S.C. § 1983. The matter comes before the court for frivolity review pursuant to 28 U.S.C. § 1915. The matter also is before the court on plaintiff's motion to amend his complaint (DE 11). In this posture, the issues raised are ripe for adjudication.

The court begins with plaintiff's motion to amend his complaint to supplement his allegations. For good cause shown, the court GRANTS plaintiff's motion to amend. See Fed. R. Civ. P. 15(a).

The court now conducts a frivolity review of plaintiff's complaint and amended pleadings. A complaint may be found frivolous because of either legal or factual deficiencies. First, a complaint is frivolous where "it lacks an arguable basis . . . in law." Neitzke v. Williams, 490 U.S. 319, 325 (1989). Legally frivolous claims are based on an "indisputably meritless legal theory" and include "claims of infringement of a legal interest which clearly does not exist." Adams v. Rice, 40 F.3d 72, 74 (4th Cir. 1994) (quoting Neitzke, 490 U.S. at 327). Under this standard, complaints may

be dismissed for failure to state a claim cognizable in law, although frivolity is a more lenient standard than that for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Neitzke, 490 U.S. at 328. Second, a complaint may be frivolous where it "lacks an arguable basis . . . in fact." Id. at 325. Section 1915 permits federal courts "to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless." See Denton v. Hernandez, 504 U.S. 25, 32 (1992) (citing Neitzke, 490 U.S. at 327).

The court begins by determining whether this action is time-barred. There is no federal statute of limitations for actions brought under 42 U.S.C. § 1983. Instead, the state statute of limitations for personal injury actions governs claims brought under § 1983. See Wallace v. Kato, 549 U.S. 384, 387 (2007). North Carolina has a three-year statute of limitations for personal injury actions. N.C. Gen. Stat. § 1-52(5); see Brooks v. City of Winston-Salem, 85 F.3d 178, 181 (4th Cir. 1996). Although the limitations period for claims brought under § 1983 is borrowed from state law, the time for accrual of an action is a question of federal law. Wallace, 549 U.S. at 388; Brooks, 85 F.3d at 181. A claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action. Wallace, 549 U.S. at 391. Further, a court may raise a statute of limitations defense *sua sponte* when a complaint is filed *in forma pauperis* pursuant to 28 U.S.C. § 1915. Eriline Co. S.A. v. Johnson, 440 F.3d 648, 655 (4th Cir. 2006) (citation omitted).

Here, plaintiff's claims arise on or before his conviction for obtaining property by false pretenses on May 1, 2012. (Compl. p. 6). Accordingly, the statute of limitations for his claims would have accrued, at the latest, on May 1, 2012, when he was convicted. See, e.g., Wiggins v. Montgomery, No. 1:08cv13, 2008 WL 161303, at *2 n.3 (E.D. Va. Jan. 14, 2008). Plaintiff thereafter had three years, or until May 1, 2015, within which to file his claim against defendants.

Plaintiff filed the instant complaint on December 8, 2017. Because plaintiff filed this action well after the expiration of the three-year statute of limitations, this action is time-barred.

Alternatively, plaintiff's action fails on the merits. As stated, plaintiff's claims arise out of his criminal conviction for obtaining property by false pretenses. To recover damages for an allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, the plaintiff must show that the underlying conviction has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal, or called into question by a federal court's issuance of a writ of habeas corpus. Heck v. Humphrey, 512 U.S. 477, 486-87 (1994). The Supreme Court later clarified that § 1983 actions are barred, no matter the relief sought, "if success in that action would necessarily demonstrate the invalidity of confinement or duration." Wilkinson v. Dotson, 544 U.S. 74, 82 (2005). In Wilkinson, the Court again emphasized that habeas corpus was indeed the exclusive remedy for state prisoners who "seek to invalidate the duration of their confinement—either directly through an injunction compelling speedier release or indirectly through a judicial determination that necessarily implies the unlawfulness of the State's custody." Id. at 81–82; see also, Edwards v. Balisok, 520 U.S. 641, 648 (1997) (A "claim for declaratory relief and money damages . . . that necessarily imply the invalidity of the punishment imposed [ ] is not cognizable under § 1983.").

Plaintiff's claims fall within the purview of Heck because plaintiff's success on the merits would imply the invalidity of his conviction. See Rankin v. Cranford, No. 5:03CV99-2-V, 2005 WL 3279983, *3 (W.D.N.C. Apr. 11, 2005) (finding that claims predicated upon having been illegally investigated, prosecuted, and convicted are barred pursuant to Heck), aff'd, 142 F. App'x 166 (4th Cir. 2005); Ballenger v. Owens, 352 F.3d 842, 846 (4th Cir. 2003) ("When evidence derived from

an [allegedly] illegal search would have to be suppressed in a criminal case if the judgment in the § 1983 claim were to be applied to the criminal case and the suppression would necessarily invalidate the criminal conviction, the stated principle of *Heck* would apply, and the § 1983 claim would have to be dismissed; there would be no cause of action under § 1983."). Plaintiff's conviction has not been reversed, expunged, declared invalid, or called into question. Therefore, plaintiff's § 1983 claims are barred by Heck.[1]

To the extent plaintiff asserts that he has been denied work release, there is no constitutional right to work release. See, O'Bar v. Pinion, 953 F.2d 74, 85–86 (4th Cir.1991) (removing inmate from work release program did not violate his constitutional rights); Bliss v. United States Attorney General, No. 8:07-160-TLW-BHH, 2009 WL 3105257, at *5 (D.S.C. Sept. 23, 2009) (finding no federal right to a job assignment). Thus, plaintiff fails to state a claim.

To the extent plaintiff seeks release from incarceration, § 2254 "is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release, even though such a claim may come within the literal terms of § 1983." Heck, 512 U.S. at 481. Accordingly, to obtain release from imprisonment, plaintiff must bring his action in the form of a petition for a writ of habeas corpus pursuant to § 2254, after fully exhausting his administrative remedies. See 28 U.S.C. § 2254(b); O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999). Based upon the foregoing, plaintiff's complaint is DISMISSED without prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii).

[1] The court notes that plaintiff has a pending petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in this court. See Armistead v. McMillis, No. 5:18-HC-2063-D (E.D.N.C. filed Mar. 15, 2018).

In summary, the court ORDERS as follows:

(1) Plaintiff's motion to amend (DE 11) is GRANTED;

(2) Plaintiff's action is DISMISSED without prejudice;

(3) The clerk of court is DIRECTED to close this case.

SO ORDERED, this the 12 day of April, 2018.

TERRENCE W. BOYLE
United States District Judge

Additional material from this filing is available in the Clerk's Office.