

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

December 4, 2019

Elisabeth A. Shumaker
Clerk of Court

ALI MEHDIPOUR,

Plaintiff - Appellant,

v.

KEITH SWEENEY, an Oklahoma City Police Officer, individually,
J. LEFEBVRE, an Oklahoma City Police Officer, individually; R. HOLT, an Oklahoma City Police Lieutenant, individually,

Defendants - Appellees.

No. 19-6022
(D.C. No. 5:16-CV-00411-R)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before HARTZ, MORITZ, and EID, Circuit Judges.

Ali Mehdipour appeals the district court's denial of his motion to vacate the 2017 judgment in this action. In so doing, he also seeks to appeal the 2017 judgment itself. We dismiss the challenge to the 2017 judgment for lack of jurisdiction and,

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

exercising jurisdiction under 28 U.S.C. § 1291, affirm the district court's denial of the motion to vacate. Because Mr. Mehdipour is acting pro se on appeal, we construe his filings liberally but do not act as his advocate. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

Mr. Mehdipour, represented by counsel, filed this action under 42 U.S.C. § 1983, alleging that the defendants violated his constitutional rights by falsely arresting him.

After defendant-appellee Sweeney moved to dismiss on statute-of-limitations grounds, Mr. Mehdipour, represented by new counsel, conceded that his false-arrest claim was time-barred but asserted that his complaint included a timely filed malicious-prosecution claim. Sweeney replied that Mr. Mehdipour had failed to state a malicious-prosecution claim and in any event the applicable statute of limitations would bar such a claim. On January 19, 2017, the district court entered an order ruling that the malicious-prosecution claim was untimely and therefore dismissing it and this action. The court also agreed that Mr. Mehdipour had failed to state a malicious-prosecution claim but did not elaborate on this finding given its determination that the claim was time-barred. Mr. Mehdipour timely filed a motion to alter or amend judgment disputing this conclusion. The district court construed the motion as seeking relief under Fed. R. Civ. P. 60(b) and denied it on July 18, 2017.

More than a year later, on November 26, 2018, Mr. Mehdipour filed a pro se “Motion to Vacate Judgment.” R. at 74. The motion asked the court to vacate its January 2017 order dismissing his case because of alleged errors committed by his

Doc
21 1-19-17 order
22 7-18-17 order
32 1-18-19 order to Terminate counsel (Doc 30)
29 1-26-18 to mot to Vacate (denied 1-18-19)

counsel during the proceedings. On January 18, 2019, the district court denied the motion, concluding it was untimely and lacked merit.

On February 13, 2019, Mr. Mehdipour filed notice that he was appealing “the Order of dismissal of this action entered on January 18th, 2019.” R. at 86. Though the notice references the district court’s January 2019 order, his appellate briefs challenge only the 2017 order dismissing this action on statute-of-limitations grounds; they argue nothing regarding the 2019 order. We do not have jurisdiction to hear an appeal from the 2017 order, however, because Mr. Mehdipour did not file a timely notice appealing it.

“This court cannot exercise jurisdiction absent a timely notice of appeal.” *United States v. Smith*, 182 F.3d 733, 734 (10th Cir. 1999). Mr. Mehdipour’s February 13, 2019 notice of appeal was too late to challenge the 2017 dismissal order. The deadline for Mr. Mehdipour to appeal the January 2017 order was August 17, 2017, which was 30 days after the district court’s July 18, 2017 denial of his 2017 motion for relief. *See* Fed. R. App. P. 4(a)(4)(A). We therefore lack jurisdiction to review this order.

Mr. Mehdipour’s notice of appeal⁴ was, however, filed in time to challenge the district court’s ^{Jan. 18} 2019 order. *See* Fed. R. App. P. 4(a)(1)(A). But his briefs do not present any argument challenging this order or the district court’s conclusion in it that his motion to vacate was untimely. In fact, Mr. Mehdipour insists in his reply brief that the only issue on appeal is whether the district court erred in 2017 in dismissing his asserted malicious-prosecution claim as untimely. Aplt. Reply Br. at 1

(describing all other issues raised by defendants on appeal as “[i]ntentional muck, meant to distract from” his argument that the district court erred in its 2017 statute of limitations ruling). As a result, Mr. Mehdipour has forfeited appellate review of the district court’s 2019 order. *See Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) (“[T]he omission of an issue in an opening brief generally forfeits appellate consideration of that issue.”).

We affirm the district court’s January 18, 2019 order denying Mr. Mehdipour’s motion to vacate, and we dismiss for lack of jurisdiction Mr. Mehdipour’s attempt to appeal the district court’s January 2017 order dismissing this action.¹

Entered for the Court

Harris L Hartz
Circuit Judge

¹ We note that Mr. Mehdipour filed a notice with this court regarding “Appellee Keith Sweeney’s[] Status,” on November 15, 2019, and that Mr. Sweeney has filed a response. We have not considered this filing because it is irrelevant to the issues presented on appeal.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

ALI MEHDIPOUR,)
Plaintiff,)
v.) Case No. CIV-16-411-M
KEITH SWEENEY, Oklahoma City)
Police Officer, in his individual capacity,)
J. BEFEBVRE, Oklahoma City)
Police Officer, in his individual capacity,)
R. HOLT, Oklahoma City Police)
Lieutenant, in his individual capacity,)
Defendants.)

ORDER

Before the Court is the Motion to Dismiss of Defendant Keith Sweeney (“Sweeney”) and Brief in Support, filed June 30, 2016. On October 13, 2016, plaintiff responded, and on October 20, 2016, Sweeney replied. Based on the parties’ submissions, the Court makes its determination.

I. Introduction¹

On March 21, 2014, the Oklahoma City Police Department (“OKCPD”) received an anonymous phone call reporting a possible drug buy at a Starbucks located at the corner of Northwest Expressway and N. Independence Ave. between a female named Paola Chunga (“Chunga”) and plaintiff, who was driving a black SUV. Sweeney, an OKCPD Officer, and defendants OKCPD Officer J. Lefebvre (“Lefebvre”) and Lieutenant R. Holt (“Holt”), drove through the Starbucks parking lot, but did not see plaintiff’s vehicle. Sweeney returned to the parking lot approximately three (3) minutes later and observed Chunga getting out of plaintiff’s SUV. Sweeney asked Chunga her name to which she replied Paola and then immediately left to

¹ Unless otherwise stated, the alleged facts set forth are taken from plaintiff’s Complaint.

follow plaintiff in his vehicle. Plaintiff turned left out of Starbucks parking lot, onto N. Independence Ave. Sweeney followed plaintiff for approximately 100 to 200 yards before activating his overhead lights and pulling plaintiff over for failing to signal the turn from Starbucks.

Plaintiff pulled over and got out of his vehicle to go to Sweeney, who immediately handcuffed plaintiff and placed him in the back of his patrol car. Lefebvre picked up Chunga and brought her to Sweeney. Sweeney and Lefebvre questioned Chunga about the alleged drug buy. Chunga told them she had not purchased drugs from plaintiff, and that he gave her \$15.00 to pay her cell phone bill. Lefebvre and Sweeney searched Chunga and determined that she did not have anything illegal in her possession. Further, plaintiff alleges that at this time, he had not committed an arrestable offense, and Sweeney was prepared to release him for failure to signal the turn from Starbucks parking lot.

However, before Sweeney would release plaintiff, plaintiff alleges that Sweeney asked him to consent to a search of his vehicle. Plaintiff refused to give Sweeney consent. Plaintiff alleges that despite his refusal to give consent, Sweeney without a warrant, proceeded to search his vehicle anyway, under the pretext of officer safety, while plaintiff was handcuffed in the back of Sweeney's patrol car. Plaintiff alleges that Sweeney found cash and a prescription pill bottle of oxycodone with plaintiff's name on the bottle. The bottle had several oxycodone pills and a paper receipt with six (6) Lortab pills wrapped up inside of it.

Sweeney placed plaintiff under arrest for possession of a controlled and dangerous substance with intent to distribute and possession of proceeds derived from a violation of the Uniform Controlled Dangerous Substance Act. Plaintiff further alleges that even though Sweeney had detained plaintiff, questioned him about a possible drug transaction, and arrested

him, Sweeney failed to read or advise plaintiff of his *Miranda* rights. Further, plaintiff alleges that Holt signed off on Sweeney's Probable Cause Affidavit that there was probable cause to arrest plaintiff. On December 31, 2013, plaintiff, in his state court criminal case, filed a motion to suppress, motion to quash, and motion to dismiss and brief in support based on the illegal search and seizure in violation of plaintiff's constitutional rights. According to the court record in plaintiff's state court case, on March 19, 2014, Judge Glen Jones sustained plaintiff's motion to suppress and dismissed the criminal action against plaintiff.² See Sweeney's Reply, Exhibit 1, Court Record for Case No. CF-2013-3877.

On April 22, 2016, plaintiff filed this action alleging his Fourth and Fourteenth Amendment Constitutional rights were violated, pursuant to 42 U.S.C. § 1983 ("§ 1983") and, further, alleging punitive damages. Plaintiff brings this action against Sweeney, Lefebvre, and Holt in their individual capacities. Sweeney now asserts that plaintiff's claims are barred by the statute of limitations and, therefore, should be dismissed, pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief can be granted.³

II. Standard for Dismissal

Regarding the standard for determining whether to dismiss a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), the United States Supreme Court has held:

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the

² While plaintiff alleges that the criminal action was not disposed of until April 25, 2014, when Judge Jones entered the Order dismissing the case, pursuant to the court record, plaintiff's state court criminal action was disposed of and closed on March 19, 2014.

³ In his response, plaintiff concedes that any claim for false arrest, pursuant to the Fourth and Fourteenth Amendments, are barred by the statute of limitations. Plaintiff contends that his § 1983 claim stems from malicious prosecution.

³ Plaintiff alleges Judge Jones' Order dismissing the criminal case against him is dated March 19, 2014. Plaintiff is simply wrong, and the District Court misapplied the facts of the case by accepting Plaintiff's version of facts in clear contradiction of the real fact: the date on Judge Jones' order is April 23, 2014 (Filed April 25, 2014).

There are two additional fallacies in Plaintiff's argument in District Court. Where it is true that Judge Jones announced his dismissal in open court on March 19th, 1) The state announced its Notice of Intent to Appeal in the same March 19th hearing, and 2) Oklahoma law requires all orders to be reduced to writing, which did not occur until April 23, 2014 at the earliest, but possibly not until April 25, 2014, when the clerk on April 25, 2014.

reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal quotations and citations omitted). Further, “where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not shown – that the pleader is entitled to relief.” *Id.* at 679 (internal quotations and citations omitted). Additionally, “[a] pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement.” *Id.* at 678 (internal quotations and citations omitted). “While the 12(b)(6) standard does not require that Plaintiff establish a *prima facie* case in her complaint, the elements of each alleged cause of action help to determine whether Plaintiff has set forth a plausible claim.” *Khalik v. United Air Lines*, 671 F.3d 1188, 1192 (10th Cir. 2012). Finally, “[a] court reviewing the sufficiency of a complaint presumes all of plaintiff’s factual allegations are true and construes them in the light most favorable to the plaintiff.” *Hall v. Bellmon*, 935 F.2d 1106, 1109 (10th Cir. 1991).

III. Discussion

In his reply, Sweeney asserts that plaintiff’s malicious prosecution claim is deficient, pursuant to Rule 12(b)(6), and also barred by the statute of limitations.⁴ Specifically, Sweeney claims that plaintiff’s criminal case was dismissed as of March 19, 2014, and, therefore,

⁴ The Court would note that plaintiff made no effort to respond to Sweeney’s assertions that his malicious prosecution claim is untimely and deficient pursuant to Rule 12(b)(6).

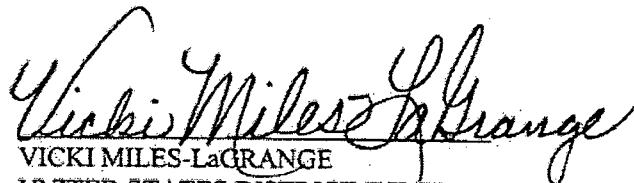
plaintiff's time to file his malicious prosecution claim commenced on that date. Further, Sweeney asserts that plaintiff has failed to establish a plausible claim for malicious prosecution.

Having carefully reviewed plaintiff's Complaint, and presuming all of plaintiff's factual allegations are true and construing them in the light most favorable to plaintiff, the Court finds that plaintiff's malicious prosecution claim is barred by the statute of limitations.⁵ Plaintiff's state court criminal case was dismissed and disposed of as of March 19, 2014. Plaintiff had until March 19, 2016, to file his malicious prosecution claim; however, plaintiff did not file this action until April 22, 2016, after his malicious prosecution claim had expired. Therefore, the Court finds plaintiff's malicious prosecution claim is untimely and should be dismissed.

IV. Conclusion

Accordingly, for the reasons set forth above, the Court GRANTS the Motion to Dismiss of Defendant Keith Sweeney and Brief in Support [docket no. 5] and DISMISSES this action.

IT IS SO ORDERED this 19th day of January, 2017.



VICKI MILES-LAGRANGE
UNITED STATES DISTRICT JUDGE

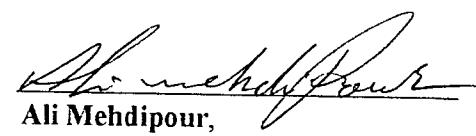
⁵Further, the Court finds that plaintiff has failed to allege sufficient facts to establish a claim for malicious prosecution, pursuant to Rule 12(b)(6); however, since the Court has determined plaintiff's § 1983 claim is untimely, the Court finds there is no need for a Rule 12(b)(6) analysis.

CERTIFICATE OF MAILING

On this 8th days of November 2019, a true and correct copy of foregoing was mailed to the following:

Susan A. Knight
211 N. Robinson Ave Ste. 800 N.
Oklahoma City, OK, 73102

Stacy Haws Felkner
429 N. E 50th Street 2nd floor
Oklahoma City, OK, 73105


Ali Mehdipour,