ALD-010

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-1433

JAMOR J. DEMBY,
Appellant

v.

COUNTY OF CAMDEN; CAMDEN COUNTY BOARD OF FREEHOLDERS; CITY OF CAMDEN; CAMDEN COUNTY JAIL; LOUIS CAPPELLI, JR.; EDWARD T. MCDONNELL; JEFFER L. NASH; CARMEN G. RODRIGUEZ; JOHNATHAN L. YOUNG, SR.; MELINDA KANE; BARBARA HOLCOMB; CAMDEN COUNTY CORRECTIONAL FACILITY; JOSEPH RIPA; CAMDEN COUNTY DEPARTMENT OF CORRECTIONS

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 1:20-cv-13892)
District Judge: Honorable Noel L. Hillman

Submitted for Possible Dismissal Pursuant to 28 U.S.C. § 1915(e)(2)(B) or
Summary Action Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6
October 14, 2021
Before: JORDAN, RESTREPO and SCIRICA, Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the District of New Jersey and was submitted for possible dismissal pursuant to 28 U.S.C. § 1915(e)(2)(B) or possible summary action pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6 on October 14, 2021. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered July 26, 2021, be and the same hereby is affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

DATED: October 26, 2021

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ALD-010 **NOT PRECEDENTIAL**

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COUNTY OF CAMDEN; CAMDEN COUNTY BOARD OF FREEHOLDERS; CITY OF CAMDEN; CAMDEN COUNTY JAIL; LOUIS CAPPELLI, JR.; EDWARD T. MCDONNELL; JEFFER L. NASH; CARMEN G. RODRIGUEZ; JOHNATHAN L. YOUNG, SR.; MELINDA KANE; BARBARA HOLCOMB; CAMDEN COUNTY CORRECTIONAL FACILITY; JOSEPH RIPA; CAMDEN COUNTY DEPARTMENT OF CORRECTIONS

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October 14, 2021
Before: JORDAN, RESTREPO and SCIRICA, Circuit Judges

(Opinion filed: October 26, 2021)

OPINION*

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

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PER CURIAM

Jamor J. Demby, a prisoner proceeding pro se and in forma pauperis, appeals the sua sponte dismissal of his civil action as untimely. We will affirm the District Court's judgment.

I.

Demby initiated this 42 U.S.C. § 1983 action in October 2020 and later filed the operative amended complaint against various defendants, asserting Fourteenth and Eighth Amendment claims relating to his July 2004 arrest and subsequent confinement in Camden County Correctional Facility ("CCCF"). Specifically, Demby alleged he was strip-searched during processing, despite being arrested on a municipal warrant, and, for approximately 20 to 21 months, forced to sleep on a thin mattress on the floor of a cell already at maximum capacity.

The District Court, screening Demby's amended complaint under 28 U.S.C. § 1915(e)(2)(B), dismissed it with prejudice as time barred. The District Court also denied a motion for appointment of counsel that Demby had filed. Demby filed a timely motion to alter or amend the judgment under Federal Rule of Civil Procedure 59(e) and a notice of appeal. While the Rule 59(e) motion was pending, Demby filed a letter in this Court in which he stated his intention to appeal the decision on the motion, whatever it might be, 3d Cir. ECF No. 13, and, less than 30 days after the District Court denied the

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Rule 59(e) motion, he filed an additional document to certify that he was taking an appeal in good faith, 3d Cir. ECF No. 16.

II.

As an initial matter, we must determine the scope of this appeal. As Demby timely appealed from the District Court's order dismissing his complaint and denying his motion for appointment of counsel, we have jurisdiction to review that order. We will also review the subsequent order denying the timely motion for reconsideration. Namely, Demby's filings with this Court—specifically, a letter indicating his intent to appeal the anticipated denial of his Rule 59(e) motion and subsequent document certifying that he takes an appeal in good faith—taken together and afforded liberal construction, cf. Gov't of the V.I. v. Mills, 634 F.3d 746, 751 (3d Cir. 2011), indicate his timely intent to appeal from that order, see Fed. R. App. P. 4(a)(1)(A) (describing 30-day deadline to appeal).

We have jurisdiction pursuant to 28 U.S.C. § 1291. We exercise plenary review over the District Court's sua sponte dismissal of the complaint, see Allah v. Seiverling, 229 F.3d 220, 223 (3d Cir. 2000), while we review the denial of Demby's motion for appointment of counsel and subsequent Rule 59(e) motion for abuse of discretion, see Parham v. Johnson, 126 F.3d 454, 457 (3d Cir. 1997); Lazaridis v. Wehmer, 591 F.3d 666, 669 (3d Cir. 2010) (per curiam). We may summarily affirm "on any basis supported by the record" if the appeal fails to present a substantial question. Murray v. Bledsoe, 650 F.3d 246, 247 (3d Cir. 2011) (per curiam); 3d Cir. L.A.R. 27.4; 3d Cir. I.O.P. 10.6.

III.

Although the statute of limitations is an affirmative defense, see Fed. R. Civ. P. 8(c), a court may dismiss claims sua sponte if a time-bar is obvious from the face of the complaint and no further development of the record is necessary. See Fogle v. Pierson, 435 F.3d 1252, 1258 (10th Cir. 2006); see also Jones v. Bock, 549 U.S. 199, 215 (2007); Vasquez Arroyo v. Starks, 589 F.3d 1091, 1097 (10th Cir. 2009). As the District Court recognized, New Jersey's two-year statute of limitations for personal injury claims applies to Demby's § 1983 claims, see Dique v. N.J. State Police, 603 F.3d 181, 185 (3d Cir. 2010); N.J. Stat. Ann. § 2A:14-2, and the limitations period began to run when Demby "knew or should have known of the injury upon which [the] action is based," Sameric Corp. of Del., Inc. v. City of Philadelphia, 142 F.3d 582, 599 (3d Cir. 1998). Here, the incidents giving rise to Demby's claims took place between 2004 and 2006, and Demby's complaint demonstrates that he was aware of the alleged injuries when they occurred. He did not, however, commence this action until October 2020, more than a decade after the limitations period expired. His action is thus clearly time barred.[1]

In his Rule 59(e) motion and related filings, Demby argued that his incarceration, as well as his membership in a class action challenging the conditions at CCCF, Dittimus-Bey v. Taylor, D.N.J. Civ. No. 05-cv-00063, warranted tolling of the limitations

[1] Given that it properly dismissed Demby's complaint, the District Court did not abuse its discretion in denying the motion for appointment of counsel. See Parham, 126 F.3d at 457; Tabron v. Grace, 6 F.3d 147, 155-58 (3d Cir. 1993).

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period. The District Court carefully considered these arguments, and we agree with its disposition for substantially the same reasons provided in its opinion. Notably, the generally applicable state tolling provisions do not provide for tolling due to confinement, see N.J. Stat. Ann. §§ 2A:14-21–14-26.2, and we do not perceive any basis to apply equitable tolling here, see Lake v. Arnold, 232 F.3d 360, 370 & n.9 (3d Cir. 2000) (describing circumstances justifying equitable tolling); Freeman v. State, 788 A.2d 867, 880 (N.J. Super. Ct. App. Div. 2002) (rejecting argument that plaintiffs were prevented from filing action due to incarceration where they failed to "offer any explanation as to how or who prevented them from exercising their right to file suit"). And even assuming Demby's participation in the Dittimus-Bey litigation could have tolled the limitations period, that case was closed for more than two years before Demby filed this action. As Demby did not otherwise raise arguments to demonstrate "an intervening change in controlling law[,] the availability of new evidence[,] or . . . the need to correct clear error of law or prevent manifest injustice," Lazaridis, 591 F.3d at 669, the District Court did not abuse its discretion in denying the Rule 59(e) motion to reconsider its dismissal with prejudice of Demby's claims. Cf. Grayson v. Mayview State Hosp., 293 F.3d 103, 108 (3d Cir. 2002) (explaining that leave to amend need not be granted if amendment would be futile).

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IV.

Accordingly, we will affirm the judgment of the District Court. See 3d Cir. L.A.R. 27.4; 3d Cir. I.O.P. 10.6.[2]

[2] Demby's motion for appointment of counsel is denied. See Tabron, 6 F.3d at 155-57.

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JAMOR J. DEMBY, Plaintiff, v. COUNTY OF CAMDEN, et al., Defendants.	No. 20-cv-13892 (NLH) ORDER

For the reasons stated in the accompanying Opinion,

IT IS this 25th day of February, 2021,

ORDERED that the complaint be, and the same hereby is, dismissed with prejudice for failure to state a claim, 28 U.S.C. § 1915(e)(2)(b)(ii) with leave to amend denied; and it is further

ORDERED that Plaintiff's motion for the appointment of counsel, ECF No. 14, be, and the same hereby is, denied; and it is finally

ORDERED that the Clerk of the Court shall serve Plaintiff with copies of the Opinion and this Order via regular mail and mark this case closed.

s/ Noel L. Hillman
NOEL L. HILLMAN, U.S.D.J.

At Camden, New Jersey

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JAMOR J. DEMBY, Plaintiff, v. COUNTY OF CAMDEN, et al., Defendants.	No. 20-cv-13892 (NLH) OPINION

APPEARANCE:

Jamor J. Demby
552013
East Jersey State Prison
Lock Bag R
Rahway, NJ 07065

Plaintiff Pro se

HILLMAN, District Judge

Plaintiff Jamor J. Demby, presently incarcerated in East Jersey State Prison in Rahway, New Jersey, seeks to bring an amended complaint pursuant to 42 U.S.C. § 1983, against Camden County and others alleging that he was subjected to unconstitutional conditions of confinement while detained in the Camden County Correctional Facility ("CCCF"). See ECF No. 10.[1]

[1] Plaintiff has submitted several amendments to his complaint and requests to withdraw his amended complaints. See ECF Nos. 6, 10, 11, 12, & 13. Plaintiff's most recent letter dated February 10, 2021 indicates he wishes the Court to review his amended complaint, Docket Entry 10. ECF No. 13.

He also moves for the appointment of pro bono counsel. ECF No. 14.

At this time, the Court must review the Complaint, pursuant to 28 U.S.C. § 1915(e)(2) to determine whether it should be dismissed as frivolous or malicious, for failure to state a claim upon which relief may be granted, or because it seeks monetary relief from a defendant who is immune from such relief. For the reasons set forth below, the Court will dismiss the complaint with prejudice and deny the motion for counsel.

I. BACKGROUND

Plaintiff states he was arrested on July 18, 2004 and taken to CCCF. ECF No. 10 at 3. He alleges that he was placed into a cell "with a very deteriated [sic] thin mattress and was forced to sleep on the floor inside a cell that was already at max capacity." Id. He states he slept on the floor for 20-21 months. Id. Plaintiff asserts he frequently complained about the bedding situation and sanitary concerns, which were exacerbated by the fact Plaintiff had a bullet lodged in his body from a shooting incident prior to his arrest. Id. The complaint further alleges he was strip searched during processing even though he was only arrested on a municipal warrant. Id. at 3-4.

Plaintiff claims Camden County, its freeholders, the CCCF warden, and others were responsible for the custom, policy, or

practice of housing detainees in overcrowded, unsanitary conditions. He seeks compensatory damages.

II. STANDARD OF REVIEW

Section 1915(e)(2) requires a court to review complaints prior to service in cases in which a plaintiff is proceeding in forma pauperis. The Court must sua sponte dismiss any claim that is frivolous, is malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. This action is subject to sua sponte screening for dismissal under 28 U.S.C. § 1915(e)(2)(B) because Plaintiff is proceeding in forma pauperis and is incarcerated.

To survive sua sponte screening for failure to state a claim, the complaint must allege "sufficient factual matter" to show that the claim is facially plausible. Fowler v. UPMC Shadyside, 578 F.3d 203, 210 (3d Cir. 2009). "'A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" Fair Wind Sailing, Inc. v. Dempster, 764 F.3d 303, 308 n.3 (3d Cir. 2014) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). "[A] pleading that offers 'labels or conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'"

Iqbal, 556 U.S. at 678 (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

III. DISCUSSION

Plaintiff's complaint is barred by the statute of limitations, which is governed by New Jersey's two-year limitations period for personal injury.[2] See Wilson v. Garcia, 471 U.S. 261, 276 (1985); Dique v. N.J. State Police, 603 F.3d 181, 185 (3d Cir. 2010). The accrual date of a § 1983 action is determined by federal law, however. Wallace v. Kato, 549 U.S. 384, 388 (2007); Montanez v. Sec'y Pa. Dep't of Corr., 773 F.3d 472, 480 (3d Cir. 2014).

"Under federal law, a cause of action accrues when the plaintiff knew or should have known of the injury upon which the action is based." Montanez, 773 F.3d at 480 (internal quotation marks omitted). Plaintiff states he was detained at CCCF beginning on July 18, 2004 and was subjected to allegedly unconstitutional conditions of confinement for approximately 21 months, or until roughly April 2006. The conditions at CCCF would have been immediately apparent to Plaintiff at the time of

[2] "Although the running of the statute of limitations is ordinarily an affirmative defense, where that defense is obvious from the face of the complaint and no development of the record is necessary, a court may dismiss a time-barred complaint sua sponte under § 28 U.S.C. § 1915(e)(2)(B)(ii) for failure to state a claim." Ostuni v. Wa Wa's Mart, 532 F. App'x 110, 111-12 (3d Cir. 2013) (per curiam).

his detention, and were in fact apparent as demonstrated by his allegation that he submitted several grievances regarding the conditions. "His claims accrued as he endured the circumstances while confined." McCargo v. Camden Cty. Jail, 693 F. App'x 164, 166 (3d Cir. 2017) (per curiam). Therefore, the statute of limitations for Plaintiff's conditions of confinement claim expired April 30, 2008 at the latest. Plaintiff's complaint is more than a decade late.

The strip search occurred during processing on July 18, 2004. ECF No. 10 at 4. This claim would have been apparent to Plaintiff at the time of the search, making his complaint due July 18, 2006. This claim is likewise barred by the statute of limitations.

Generally, "plaintiffs who file complaints subject to dismissal under [§ 1915] should receive leave to amend unless amendment would be inequitable or futile." Grayson v. Mayview State Hosp., 293 F.3d 103, 114 (3d Cir. 2002). This Court will deny leave to amend as Plaintiff cannot remedy the expiration of the statute of limitations. Ostuni v. Wa Wa's Mart, 532 F. App'x 110, 112 (3d Cir. 2013) (per curiam) (affirming dismissal with prejudice due to expiration of statute of limitations); McCargo, 693 F. App'x at 166 ("We therefore agree with the District Court's assessment that amendment of the complaint

would be futile because the statute of limitations clearly had expired when [plaintiff] filed this complaint.").

As the Court will dismiss the amended complaint with prejudice, the motion to appoint counsel will be denied. Appointment of counsel is a privilege, not a statutory or constitutional right, Brightwell v. Lehman, 637 F.3d 187, 192 (3d Cir. 2011), and is governed by the factors enumerated in Tabron v. Grace, 6 F.3d 147 (3d Cir. 1993). "As a threshold matter, the indigent plaintiff's case must have some arguable merit in fact and law." Cuevas v. United States, 422 F. App'x 142, 144 (3d Cir. 2011). As Plaintiff's complaint is barred by the statute of limitations, the appointment of counsel is unwarranted.

IV. CONCLUSION

For the reasons stated above, the amended complaint will be dismissed with prejudice for failure to state a claim. Leave to amend will be denied.

An appropriate order follows.

Dated: February 25, 2021
At Camden, New Jersey

s/ Noel L. Hillman
NOEL L. HILLMAN, U.S.D.J.