Not Reported in F.Supp.2d, 2006 WL 2290505 (S.D.Fla.)
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United States District Court,
S.D. Florida.
Biven HUDSON, Jr., Plaintiff,
v.
Officer D. NYE, et al., Defendants.
No. 05-22696-CIV.

Aug. 3, 2006.

Biven Hudson, Jr., No. 423535, Columbia Correctional Institution, Lake City, FL, pro se.

Craig Edward Leen, Jeffrey Paul Ehrlich, Assistant County Attorneys, Miami-Dade County Attorney's Office, Miami-Dade County, FL, for Officer Nye.

ORDER AFFIRMING AND ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

ALTONAGA, J.

***1** THIS CAUSE came before the Court on Magistrate Judge Patrick A. White's Report and Recommendation, issued on July 11, 2005 [D.E. 27]. Plaintiff, Biven Hudson, Jr., filed a *pro se* civil rights complaint pursuant to 42 U.S.C. § 1983 for monetary damages and other relief [D.E. 1]. Magistrate Judge White recommends that: 1) Defendant, D. Nye's Motion to Dismiss [D.E. 18], treated as a motion for summary judgment, be granted, as to all claims against him; 2) Defendants, "John Doe Sergeant" and "John Doe K-9 Officers," be dismissed, *sua sponte,* as frivolous, pursuant to 28 U.S.C. § 1915(e)(2)(B)(i), and pursuant to *Miller v. Woodham,* No. 05-12425, 2006 WL 955748 at ***1** (11th Cir. Apr.12, 2006); *Wayne v. Jarvis,* 197 F.3d 1098 (11th Cir.1999); and *Moreland v. Wharton,* 899 F.2d 1168 (11th Cir.1990); and 3) if Plaintiff has not provided a full name and current address, and if possible, title and badge number for the Defendant, Miami-Dade County Police Officer Hernandez, within 45 days of the entry of the July 11, 2006 Report of Magistrate Judge, the Complaint against Defendant Hernandez should be dismissed pursuant to Fed.R.Civ.P. 4(m), and this case be closed.

Plaintiff filed Objections to the Magistrate Judge's Report on July 26, 2006 [D.E. 28]. In his Objections, Plaintiff concedes that Defendant, D. Nye, is entitled to the entry of summary judgment. He also provides sufficient identifying information to effectuate service of process on Defendant, Miami-Dade County Police Officer Hernandez. While Plaintiff contests dismissal of Defendants, "John Doe Sergeant" and "John Doe K-9 Officers," he does not controvert the Magistrate Judge's legal analysis.

Magistrate Judge White found:

> It is apparent from the face of the pleadings in this case, that as to the defendants Doe, the four year period of limitations expired on the very day that the complaint was received by the Clerk of Court.... The plaintiff, rather than waiting until the last days of the four year period of limitations to file his complaint, could have filed his pleading ... earlier, but did not. If he had done so, he might have had adequate time to discover the names of the defendants Doe. That, however, did not happen in this case.

[D.E. 27 at 6]. As the Magistrate Judge found, *Wayne* directly controls the outcome here.

> In this case, Wayne's problem was not that he drafted his complaint without a lawyer, but that he drafted and filed it close to the expiration of the statute of limitations and thereby waited too long before setting about to find crucial information he needed to make his claim against the deputies. Wayne bears the consequences of his own delay. Had he filed earlier, he could have learned the deputy sheriffs' identities in time to amend his complaint before the statute of limita-

tions ran.

Wayne, 197 F.3d at 1104.

The Court has considered *de novo* Mr. Hudson's Complaint, Magistrate Judge White's Report and Recommendation and Mr. Hudson's Objections. Upon independent review of the file, it is

***2** ORDERED AND ADJUDGED that Magistrate Judge White's July 11, 2006 Report and Recommendation [D.E. 27] is AFFIRMED AND ADOPTED as follows:

(1) Defendant, D. Nye's Motion to Dismiss [D.E. 18], treated as a motion for summary judgment, is GRANTED. Plaintiff's Compliant [D.E. 1] is DISMISSED as to Defendant, D. Nye.

(2) Plaintiff's Complaint [D.E. 1] is DISMISSED as to Defendants, "John Doe Sergeant" and "John Doe K-9 Officers," pursuant to 28 U.S.C. § 1915(e)(2)(B)(i).

(3) In light of the identifying information provided in Plaintiff's Objections, the Magistrate Judge shall expeditiously order service of process on Defendant, Miami-Dade County Police Officer Hernandez.

REPORT OF MAGISTRATE JUDGE

The plaintiff Biven Hudson, Jr., filed with the Clerk a *pro se* civil rights complaint for damages and other relief, pursuant to 42 U.S.C. § 1983, alleging the use of excessive force on arrest. (DE # 1, dated and signed October 6, 2005, received for mailing by prison authorities at Columbia C.I., 10/6/05, and received by the Clerk on October 11, 2005). Hudson's claims stem from his October 10, 2001 arrest by Miami-Dade County Police Department officers, who allegedly made use of a K-9 police dog to subdue him. Officers D. Nye, Hernandez, and John Doe, were named as defendants.

Following a Preliminary Report (DE# 6, entered November 7, 2005), which was adopted by the Court on November 29, 2005 (Order, DE# 9), the § 1983 complaint remained pending, and steps were taken to obtain service of the complaint only for Officer D. Nye.

The November 7, 2005 Report (DE# 6) informed plaintiff Hudson that it was his responsibility to provide additional identifying information regarding Hernandez and defendants Doe, so that service of process might be effectuated. An October 18, 2005 Order of Instructions (DE# 5) had specifically admonished Hudson that it was his responsibility, as plaintiff, to provide the full name, title, if any, and address of all defendants; and specifically cautioned that if service could not be accomplished upon a defendant due to lack of information provided the plaintiff, the case is subject to dismissal as to that defendant, and that if there is only one defendant in the case, if service cannot be achieved, the entire case is subject to dismissal. (DE# 5, pp. 1-2, Order at ¶ 2).

Defendant Nye was served (DE# s 11-13), and filed a motion to dismiss, with exhibits (DE# 18) which was treated as a motion for summary judgment, and upon which this Cause is presently before the Court. By Order of Instructions (DE # 20) Hudson was informed of his right to respond, and he has done so (Response, DE# 24).

In his motion, Nye argues that he is entitled to judgment as a matter of law, because he was not present at the site of plaintiff's apprehension and did not participate in his arrest. According to Nye, he first encountered Hudson at the hospital, post-arrest. (DE# 18). Plaintiff Hudson has responded, stating that "after careful consideration," he "concedes to the granting of Nye's Motion for summary judgment to the extent that officer D. Nye is struck as a defendant." (DE# 24, pp. 1-2).

***3** The Order of Instructions (DE# 5) instructed plaintiff Hudson that he must serve each defendant, or the defendant's attorney if counsel has appeared in the case, with a copy of each and every docu-

ment submitted in the case, and must include a Certificate of service stating to whom the document was served and on what date (*Id.*, ¶ 4). The Order further informed plaintiff Hudson regarding the discovery methods available to him (*Id.*, pp. 3-4, at ¶ 9), and that it was his responsibility to actively pursue the case in a timely manner, or risk its dismissal for lack of prosecution (*Id.*).

In regard to Hernandez and defendants Doe, plaintiff Hudson drafted a premature discovery request in December 2005 (DE# 10, which was approximately three months before Nye was served (DE# 13) and more than three months before Nye made his first filing through counsel (DE# 14). After Nye filed his motion (DE# 18), plaintiff Hudson filed a document captioned as a "motion for production" and "motion for leave to amend" (respectively assigned DE# s 21-1 and 21-2). In the Court's Order (DE# 23, entered June 19, 2006), the motion for leave to amend was denied, without prejudice. The Order (DE# 23) also denied the motion for production (essentially a motion to compel), because the record did not indicate that the plaintiff had previously complied with the Rules of Civil Procedure by first serving the defendant, through counsel, with a copy of the discovery requests before seeking a Court Order compelling production by the defendant. In addition, the Order (DE# 23) noted that defendant Nye had filed a Response (DE# 22) to the motion for production (DE # 21-1), arguing not only that Hudson in his motion had conceded that Nye was not the dog handler, but that Nye and his attorney had not been served with production requests, and, further, that with her motion to dismiss [summary judgment] (DE# 18) she had served plaintiff Hudson with copies of his arrest form.

Plaintiff Hudson, in his Response (DE# 24) to Nye's motion for summary judgment (DE# 18), has incorporated what is in effect a motion "for leave to amend the complaint after receipt of documents via discovery and otherwise if necessary" (DE# 24, p. 2, ¶ 3). In support thereof, Hudson attached a June 8, 2006 letter to him from the Volunteer Lawyers' Project For the Southern District of Florida (the "VLP"), stating that his case had been found eligible for participation in the VLP's program, informing Hudson that diligent efforts to find a *pro bono* attorney to represent him were ongoing, but that there was no guarantee that the VLP would be able to find him representation. The letter further advised Hudson that he remains totally responsible for his lawsuit until an attorney files a notice of appearance on his behalf. (DE# 24, Ex. A).

In light of Hudson's Response (DE# 24), stating that Nye should be "stricken as a defendant," Nye's pending motion to dismiss, treated as a motion for summary judgment (DE# 18), should be granted.

***4** With respect to the named defendant Hernandez, who was timely named in the original complaint that was "filed" on October 6, 2005,[FN1] just 4 days before the running of Florida's applicable four year statute of limitations,[FN2] the plaintiff Hudson's stated desire to amend, which is incorporated in his Response (DE# 24), should be granted solely as to the defendant Hernandez, and subject to the requirement that Hudson first provide the Court with that defendant officer's [Hernandez's] full name and a valid address at which he can be served with process, and also provide, if possible, the defendant Officer's Badge Number and title/position. It appears that plaintiff Hudson should be granted a reasonable but not unlimited time, perhaps 45 days from the entry of this Report, in which to provide to the Court the necessary identifying information for Hernandez, failing which the complaint against Hernandez should be dismissed pursuant to *Fed.R.Civ.P.* 4(m), which provides, in pertinent part, for dismissal of a complaint which has not been served within 120 days of its filing.

> FN1. The principle that the date a *pro se* prisoner's pleading is file stamped by the clerk of court is not the date of filing is well settled. In *Houston v. Lack,* 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1998) the Supreme Court established the

> principle that a *pro se* petitioner's notice of appeal is deemed filed on the date that it is delivered to prison authorities for mailing. In *Garvey v. Vaughn,* 993 F.2d 776 (11 Cir.1993) the Eleventh Circuit extended the *Houston v. Lack* principle to Federal Tort Claims Act and 42 U.S.C. § 1983 *pro se* prisoner complaints, holding that such complaints are deemed to be filed when they are delivered to prison authorities for mailing.
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> FN2. *See* Footnote 3, of this Report, *infra,* for discussion relating to Florida's applicable period of limitations.

As to the defendant "John Doe Sergeant," and any other "John Doe K-9 Officers," the complaint [DE# 1] is, at this point in time subject to *sua sponte* dismissal by the Court, because it is barred by the applicable four-year period of limitations.

A § 1983 action brought in Florida is governed by Florida's four-year personal injury statute of limitations. *See Chappell v. Rich,* 340 F.3d 1279, 1283 (11 Cir.2003); *Burton v. City of Belle Glade,* 178 F.3d 1175, 1188 (11 Cir.1999) (citing *Owens v. Okure,* 488 U.S. 235, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989); *Wilson v. Garcia,* 471 U.S. 261, 276, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985)).[FN3]

> FN3. In *Wilson v. Garcia,* 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985), the Supreme Court held that the length of the limitations period in actions pursuant to 42 U.S.C. § 1983, and the closely related questions of tolling and applications, are to be governed by state law. The Court further held that these cases are best characterized as personal injury actions. Such claims in Florida are governed by *Fla.Stat.* § 95.11(3)(a), actions founded on negligence, or *Fla.Stat.* § 95.11(3)(o), actions for assault, battery, false arrest, malicious prosecution, malicious interference, false imprisonment, or other intentional tort, except as provided in other sections. Both of these sections establish four year periods of limitations.
>
> Later, the Supreme Court decided *Owens v. Okure,* 488 U.S. 235, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989), which held that when a State has multiple statutes of limitations for personal injury actions as does Florida, courts considering § 1983 claims should borrow the State's general or residual personal injury statute of limitations. In Florida, this is *Fla.Stat.* § 95.11(3)(p), four years for actions not specifically provided for. The Supreme Court has also held that a federal court applying a state statute of limitations to an inmate's federal civil rights action should also apply any state statute tolling the limitations period for prisoners. *Hardin v. Straub,* 490 U.S. 536, 109 S.Ct. 1998, 104 L.Ed.2d 582 (1989). Florida has a general tolling statute, *Fla.Stat.* § 95.051, but it does not toll limitations periods for prisoners.
>
> Thus, for purposes of the claims raised in this civil rights suit, the length of the limitations period, determined by state law, is four years.

The expiration of Florida's four-year statute of limitations is an affirmative defense the existence of which warrants a dismissal of a complaint, as frivolous. *Clark v. Ga. Pardons and Paroles Bd.,* 915 F.2d 636, 641 n. 2 (11 Cir.1990). When the defense is apparent from the face of the complaint or the court's records, however, the court need not wait and see if the defense will be asserted in a defensive pleading, *Id.,* and under such circumstances a *sua sponte* dismissal will not constitute an abuse of the Court's discretion. *See Miller v. Woodham,* No. 05-12425 (Slip Opinion), 2006 WL 955748, at *1 (11 Cir. (Fla.) Apr. 12, 2006).

Under the circumstances of this case, the complaint

naming the "John Doe Sergeant," and any other "John Doe K-9 Officers" was not sufficient to toll the statute of limitations as to those defendants. In order for a complaint against those individuals to have been "timely," a pleading designating them by name must have been "filed" within 4 years of the occurrence of the events which are the subject of the lawsuit [i.e., police brutality, through use of K-9 force, which occurred on October 10, 2001].

With regard to the "John Doe Sergeant," and "John Doe K-9 Officers," the complaint [DE# 1] which was "filed" on October 6, 2004, if untimely, is subject to dismissal under the PLRA,[FN4] pursuant to 28 U.S.C. § 1915(e)(2)(B)(i).[FN5]

> FN4. Prior to enactment of the PLRA in April of 1996, a district court's sua sponte dismissal of claims, including claims which are barred by an applicable period of limitations, was pursuant to 28 U.S.C. § 1915(d). The Supreme Court had identified two classes of cases in which 28 U.S.C. § 1915(d) authorized courts to dismiss cases *sua sponte:* (I) "claim[s] based on an indisputably meritless legal theory," and (ii) "those claims whose factual contentions are clearly baseless." *Sultenfuss v. Snow,* 894 F.2d 1277, 1278 (11 Cir.1990), quoting *Neitzke v. Williams,* 490 U.S. 319, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989).
>
> Subsequent to the *Neitzke* decision, *supra,* the Eleventh Circuit reviewed the law in this area in *Moreland v. Wharton,* 899 F.2d 1168 (11 Cir.1990). The Court, in *Moreland,* noted the following:
>
> "[D]rawing from his years of experience in reading complaints and living lawsuits from start to finish," a district judge is uniquely qualified to decide the likelihood that a lawsuit will succeed on the merits. *Spencer v. Rhodes,* 656 F.Supp. 458, 461 (E.D.N.C.), *aff'd without opinion,* 826 F.2d 1061 (4th Cir.1987).
>
> *Moreland,supra* at 1170. The Eleventh Circuit went on to cite *Harris v. Menendez,* 817 F.2d 737, 740 (11 Cir.1987), a pre-*Neitzke* case, to reaffirm the proposition that even post-*Neitzke* a Court may dismiss a case after it has conducted a "sufficient inquiry" to determine whether the plaintiff's realistic chances of ultimate success are slight. *Moreland,supra* at 1171.
>
> Thereafter, in *Clark v. State of Georgia Pardons and Paroles Board,* 915 F.2d 636 (11 Cir.1990), the Court not only restated the rule of *Moreland,supra,* but noted that even if the complaint states a cause of action, it can sometimes be frivolous within the meaning of 28 U.S.C. § 1915(d). *Id.,* at 639, citing *Harris v. Menendez,* 817 F.2d 737, 739-40 (11 Cir.1987). As examples, the Court noted that the obvious applicability of an affirmative defense such as absolute immunity, res judicata, collateral estoppel, and expiration of the statute of limitations, would all justify a § 1915(d) dismissal. *Clark,supra* at 640, n. 2.

FN5. Upon enactment of the PLRA on April 26, 1996, the requirements for proceeding *in forma pauperis* in federal courts were modified. Statutory provisions of the PLRA, which pertain to dismissal of prisoner complaints, are, in pertinent part, codified under 28 U.S.C. §§ 1915(e), as follows.

> Under the April 26, 1996 enactments, 28 U.S.C. § 1915, as amended, reads in pertinent part, as follows.
>
> Sec.1915 Proceedings in Forma Pauperis
>
> (e)(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at

> any time if the court determines that-
>
> (B) the action or appeal-
>
> (i) is frivolous or malicious;
>
> (ii) fails to state a claim on which relief may be granted; or
>
> (iii) seeks monetary relief from a defendant who is immune from such relief.

***5** In the case of *Wayne v. Jarvis,* 197 F.3d 1098 (11 Cir.1999), a *pro se* case in which the inmate/plaintiff did not identify John Doe deputy sheriffs by name until three months after expiration of the period of limitations, the Eleventh Circuit held that the *pro se* inmate's lack of knowledge regarding identities of the deputy sheriffs was not a mistake concerning the identity of the proper parties, and thus, his amendment to the Section 1983 complaint arising from a beating by fellow inmates, to replace the "John Doe" deputy sheriffs with specifically-named defendants, did not relate back to the original complaint, so as to avoid a bar based on the statute of limitations.

In the context of this civil rights action brought by plaintiff Hudson, the "sufficient inquiry" contemplated by *Moreland, supra* at 1171, is supplied by review of the original complaint, and the docket sheet and the rest of the record in the case, in which the plaintiff filed nothing, on or before October 10, 2005, designating by name the officers referred to by him as defendants "Doe." It is apparent from the face of the pleadings in this case, that as to the defendants Doe, the four year period of limitations expired on the very day that the complaint was received by the Clerk of Court [October 11, 2005]. (*See* docket, and DE# 1). The plaintiff, rather than waiting until the last days of the four year period of limitations to file his complaint, could have filed his pleading [DE# 1] earlier, but did not. If he had done so, he might have had adequate time to discover the names of the defendants Doe. That, however, did not happen in this case.

Under these circumstances, dismissal of the "John Doe Sergeant," and other "John Doe K-9 Officers" is appropriate pursuant to *Wayne v. Jarvis, supra;* and the complaint against the defendants Doe is therefore subject to dismissal by the Court, *sua sponte,* pursuant to 28 U.S.C. § 1915(e)(2)(B)(i), as frivolous. *Miller v. Woodham, supra.*

It is therefore recommended that: 1) defendant D. Nye's motion to dismiss (DE # 18) treated as a motion for summary judgment, be granted, as to all claims against him; 2) the defendants "John Doe Sergeant," and "John Doe K-9 Officers" be dismissed, *sua sponte,* as frivolous, pursuant to 28 U.S.C. § 1915(e)(2)(B)(i), and pursuant to *Miller v. Woodham,* No. 05-12425, 2006 WL 955748, at *1 (11 Cir. (Fla.) Apr. 12, 2006), *Wayne v. Jarvis,* 197 F.3d 1098 (11 Cir.1999), and *Moreland v. Wharton,* 899 F.2d 1168 (11 Cir.1990); and 3) if within 45 days of the entry of this July 11, 2006 Report of Magistrate Judge, the plaintiff has not provided a full named and current address, and if possible title and badge number for the defendant Miami-Dade County Police Officer Hernandez, the complaint against Hernandez be dismissed pursuant to *Fed.R.Civ.P.* 4(m), and this case be closed.

Objections to this report may be filed with the District Judge within ten days of receipt of a copy of the report.

S.D.Fla.,2006.
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