

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

HOWARD BROWN

CIVIL DOCKET NO.: 3:22-cv-00264

VERSUS

JUDGE DICK

CITY OF CENTRAL, ET AL.

MAGISTRATE BOURGEOIS

**MEMORANDUM IN OPPOSITION TO PLAINTIFF’S MOTION TO STRIKE
DEFENDANTS’ MOTIONS TO DISMISS AND TO
PLAINTIFF’S MOTION TO SHOW CAUSE**

MAY IT PLEASE THE COURT:

Defendants, the City of Central, Roger Corcoran, John H Porche, Noah McKneely, and Darren Sibley¹, in their official capacities respectively as Chief of Police, a current Officer, and as former officers for the City of Central, oppose the Plaintiff’s Motion to Strike and Motion to Show Cause as follows:²

I. PLAINTIFF’S REPLY MOTION AND MEMORANDUM DOES NOT COMPLY WITH LOCAL RULE 7(f) AND THEREFORE HIS REPLY DOES NOT CONSTITUTE A PROPER OPPOSITION.

Although the case may be that pro se pleadings are held to less stringent standards than pleadings drafted by lawyers, a pro se plaintiff is not exempt from compliance with relevant rules of procedure and substantive law. *Reams v. Nielsen*, No. CV 18-389-SDD-EWD, 2019 WL 1931742 (M.D. La. Apr. 30, 2019). Even though “pro se plaintiffs often lack the legal training helpful in interpreting and applying the substantive and procedural requirements of the legal system”³ as is evidently the case here, a pro se litigant is not entitled to greater rights than would be a litigant represented by a lawyer. *NCO Fin. Sys., Inc. v. Harper-Horsley*, No. CIV.A. 07-4247, 2008 WL 2277843 (E.D. La. May 29, 2008). Local Rule 7(f) specifically requires that “Memoranda *shall* contain a concise statement of reasons in opposition to the motion and a citation of authorities upon which the respondent relies.” **Local Civil Rule 7(f)**. This court has held that when a party’s opposition is unresponsive to the substantive arguments made by the opposing party, that opposition is not proper under Local Rule 7(f), and thus, due to the lack of substantive opposition, the moving party’s motion may be deemed unopposed. *Reams v. Nielsen*, No. CV 18-

¹ A similar Motion to Dismiss was filed subsequently on behalf of former officer Darren Sibley. This opposition was prepared in anticipation that Plaintiff would make similar arguments as to Sibley’s Motion to Dismiss pursuant to 12(b)6.

² Given the overlapping nature of the Motion filed by Plaintiff in Documents 33 and 34, Defendants are opposing both in one document.

³ *Tipton v. Reynolds*, No. CIV.A. 13-0509, 2013 WL 4854372 (E.D. La. Sept. 10, 2013)

389-SDD-EWD, 2019 WL 1931742 (M.D. La. Apr. 30, 2019). Here, Plaintiff's memoranda have failed to substantively address the arguments raised in Defendant's 12(b)(6) motion for dismissal as well as failed to either cite to appropriate and relevant authority or failed to cite whatsoever.

(a) Defendant's Statute of Limitations Argument.

Because there is no federal statute of limitations for §1983 claims, federal courts presiding over §1983 claims must borrow the statute of limitations provisions of the state in which the federal court sits. *Abbott v. Otis-Sanders*, No. 22-CV-01271, 2022 WL 2981811 (W.D. La. June 17, 2022), *report and recommendation adopted*, No. 22-CV-01271, 2022 WL 2976798 (W.D. La. July 27, 2022).

This claim is therefore governed by Louisiana's statute of limitations provisions, which is one year. *Id.* This prescriptive period "commences to run from the day of injury or damage is sustained." **La. Civil. Code 3492.** However, even though state law controls the statute of limitations for §1983 claims, federal law determines when a cause of action accrues. *Abbott v. Otis-Sanders*, No. 22-CV-01271, 2022 WL 2981811 (W.D. La. June 17, 2022), *report and recommendation adopted*, No. 22-CV-01271, 2022 WL 2976798 (W.D. La. July 27, 2022). Under the federal standard, a cause of action accrues when "the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured." *Id.*; *Rodriguez v. Holmes*, 963 F.2d 799 (5th Cir. 1992); *Helton v. Clements*, 832 F.2d 332 (5th Cir. 1987). Although Plaintiff correctly notes that the Supreme Court has held that prescription begins to run at the point "when the plaintiff can file suit and obtain relief", he conveniently disregards the fact that this 'point' is determined when a plaintiff knew of should have known of the existence of a possible cause of action. *Payton v. Normand*, No. CV 21-1325, 2022 WL 412720 (E.D. La. Jan. 21, 2022), *report and recommendation adopted*, No. CV 21-1325, 2022 WL 393628 (E.D. La. Feb. 9, 2022); *Abbott v. Otis-Sanders*, No. 22-CV-01271, 2022 WL 2981811 (W.D. La. June 17, 2022), *report and recommendation adopted*, No. 22-CV-01271, 2022 WL 2976798 (W.D. La. July 27, 2022); *Helton v. Clements*, 832 F.2d 332 (5th Cir. 1987). This determination has two factors: "(1)[t]he existence of the injury; and, (2) causation, that is, the connection between the injury and the defendant's actions. *Payton*, WL 412720 at 3, *citing Dixon v. Cooper*, 260 F. App'x 728 (5th Cir. 2007).

The underlying complaint alleges clear dates on which the incident that serves the basis of Plaintiff's claims occurred. Specifically, the complaint alleges that the incident giving rise to the

claims asserted herein occurred on August 6th, 2020 and involved defendants. In the instant case, Plaintiff was a direct participant in the alleged August 6th, 2020, incidents about which he complains. In fact, Plaintiff **admits** to having knowledge of his injury at the time or shortly thereafter of the incident.⁴ Thus, there is no question that Plaintiff knew about his alleged injuries at the time they occurred. Here, a period of one year, 8 months, and 12 days elapsed between the time of the incident and the time that Plaintiff filed his complaint, well over the prescriptive deadline of August 6th, 2021. His claims are therefore time barred and neither his Motion nor his Memorandum substantively address this limitation.

In an effort to avert the statute of limitations bar, the closest if anything that Plaintiff responds with is the assertion that the doctrine of *Contra Non Valentum* should apply. (**Document 33-1, Page 4**). But again, he does not provide a meaningful or considerable argument as to why or how the doctrine of *Contra Non Valentum* should apply. His only assertion to this point is that he “didn’t have a complete cause of action and didn’t have the knowledge to be able to file suit and obtain relief.” (**Document 33, Page 5.**)

Under the theory of *Contra Non Valentum*, there are four situations in which the one-year prescriptive period for delictual actions will not run: (1) if there was some legal cause that prevented the courts or their officers from taking cognizance of or acting on the plaintiff's action, (2) if there was some condition coupled with the contract or connected proceeding that prevented the creditor from suing or acting, (3) if the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action, and (4) if the cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant. *Payton v. Normand*, 2022 WL 412720, at *3 (E.D.La., 2022); *Dominion Explor. & Prod. Inc. v. Waters*, 972 So. 2d 350, 358 (La. App. 4th Cir. 2007) (citing *Wimberly v. Gatch*, 635 So. 2d 206, 211 (La. 1994)). Thus, the “doctrine of *contra non valentem* recognizes that in limited circumstances prescription should not run if good cause exists as to why plaintiff would have been unable to exercise or was lulled into not exercising a cause of action when it first became exigible.” *Pracht v. City of Shreveport*, 830 So. 2d 546, 551 (La. App. 2d Cir. 2002).

However, it is well settled that the principle of *Contra Non Valentem* will not except the plaintiff’s claim from the running of prescription if his ignorance is attributable to his own

⁴ “While Plaintiff knew that he had been injured he certainly didn’t have a complete cause of action and didn’t have knowledge to be able to file suit and obtain relief.” **Document 33, Page 5.** His knowledge of his cause of action and knowledge of how to file suit is immaterial.

willingness, neglect, or unreasonableness. *Babineaux v. State ex rel. Dep't of Transp. & Dev.*, 2004-2649 (La. App. 1 Cir. 12/22/05), 927 So. 2d 1121. As a general rule, the prescriptive period commences when there is enough notice to call for an *inquiry* about a claim, not when an inquiry reveals the facts or evidence to sufficiently prove the claim. *Id*; *Terrel v. Perkins*, 96-2629 (La. App. 1 Cir. 11/7/97), 704 So. 2d 35. Given this general rule, a lack of knowledge to “be able to file suit and obtain relief” is not sufficient for purposes of *Contra Non Valentum*. The standard is ‘inquiry’, and it can hardly be disputed that there was not sufficient information known to the Plaintiff to create excitement, incite curiosity, and/or a reasonable desire to create further inquiry considering his own confession of having knowledge of his injury. Perhaps equally as telling to the fact that Plaintiff’s claim did not toll is the fact that plaintiff “spent countless hours, days and even weeks learning how to assert his rights and hold wreck less municipalities accountable...” (Document 33, Page. 5). It is clear from Plaintiff’s own words that he *knew* enough to inquire into his ‘claim’. The fact that plaintiff has chosen to represent himself in this matter, as admirable as it may be, does not grant him any special rights than any other plaintiff would get. *See., NCO Fin. Sys., Inc. v. Harper-Horsley*, No. CIV.A. 07-4247, 2008 WL 2277843 (E.D. La. May 29, 2008). Plaintiff’s neglect and arguable unreasonableness in failing to seek an attorney even though he had enough information to inquire into his claim does not provide adequate grounds for *Contra Non Valentem* and/or equitable tolling inapplicable in this scenario.

(b) Defendant’s Failure to State a Claim Upon which Relief can be Granted, and Qualified Immunity.

(i) Plaintiff has failed to substantively address Defendant’s assertion that Plaintiff’s claim fails to state a cause upon which relief can be granted.

The Plaintiff has again failed to substantively address defendant’s 12(b)(6) motion, he not only has confused the standard for dismissal, but has also failed to directly address defendant’s arguments.

Rather than address the fact that Plaintiff’s case does not state a cause of action upon which relief can be granted, Plaintiff instead cites to an inapplicable case concerning Oklahoma state law, in which he notes that “Since the defendants are seeking that this action be dismissed under Rule 12(b)(6), the must support their contentions of material fact with affidavits, depositions, or answers to interrogatories” (Document 33-1, Page. 2). In an equally unresponsive manner, Plaintiff

attempts to incorporate Article III standing⁵, alleges a failure to investigate the facts of the case,⁶ and attacks defendant's counsel for "duplicious arguments and contradictory statements."⁷ None of which substantively address defendant's arguments in favor of dismissal. At most, Plaintiff added the following in his Memorandum: "Anderson v. Creighton, 483 U.S. 635 (1987)", "Pearson v. Callahan, 555 U.S. 223 (2009)", and "Sandford Unified School Dist. #1 v. Reading, 129 S.Ct. 2633 (2009)" and nothing more. (**Document 33-1**).

To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead enough facts to state a claim to relief that is plausible on its face. *Id.* In *Twombly*, the United States Supreme Court set forth the basic criteria necessary for a complaint to survive a Rule 12(b)(6) motion to dismiss: "While a complaint attacked by Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. *Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). A complaint is also insufficient if "it merely 'tenders 'naked assertion[s]'' devoid of 'further factual enhancement.'" *Id.* In order to satisfy the plausibility standard, the plaintiff must show "more than a sheer possibility that the defendant has acted unlawfully." *Id.* Furthermore, while the court must accept well-pleaded facts as true, it should not strain itself to find inferences favorable to the plaintiff. *Nichols v. Wells Fargo Home Mortg.*, No. CV 17-104-SDD-EWD, 2018 WL 700869 (M.D. La. Feb. 2, 2018)

Specifically, the plaintiff has failed to address the fact that he has not pointed to an official policy or custom that motivated the alleged violation of his constitutional rights. To defeat a Motion to Dismiss under Rule 12(b)(6), Plaintiff must "show that (1) an official policy, (2) promulgated by the municipal policymaker, (3) was the moving force being the violation of a constitutional right. *Perron v. Travis*, No. CV 20-00221-BAJ-EWD, 2021 WL 1187077 (M.D. La. Mar. 29, 2021), citing *Pena v. City of Rio Grande City*, 879 F.3d 613 (5th Cir. 2018). In the absence of a policy, a plaintiff may also allege the existence of a "persistent or widespread practice that is so common as to constitute a custom that fairly represents municipal policy. *Perron*, 2021 WL 1187077 at 6. However, the Fifth circuit has been clear that "to proceed beyond the pleading stage, a complaint's 'description of a policy or custom and its relationship to the underlying

⁵ Document 33, Page. 3

⁶ Document 33-1, Page. 2

⁷ Document 33, Page 2.

constitutional violation...cannot be conclusory; it must contain specific facts.” *Id.* A general allegation of a policy is not sufficient. *See, Spiller v. City of Texas City, Police Dep’t*, 130 F.3d 162 (5th Cir. 1997) (Where the court rejected as vague and conclusory a claim by plaintiff that her arrest without probable cause stemmed from the police department’s general policy of disregarding the rights of African-America citizens.) Nor, is mere speculation that any particular policymaker...knew about the alleged custom. *Pena*, 879 F.3d at 623.

Here, Plaintiff’s complaint (**Document 1**), his Motion to Strike Defendant’s Motion to Dismiss (**Document 33**), and his Memorandum in Support of Motion to Dismiss (**Document 33-1**) all fail to contain specific facts. At most, in his motion, Plaintiff notes that: “Plaintiff is unaware of anyone at the scene that outranked the Chief of Police as Supervisor responsible for training police deputies. On Page 9 of Document 1 line 2, in the facts section of Plaintiff’s Complaint, it states under penalty and perjury (Also recorded on Plaintiff’s Video Exhibit B) that the City of Central’s Police Chief is quoted as saying ‘I don’t need a court order to store your bike.’” (**Document 33, Page 4**). This does not address Plaintiff’s failure to plead facts that support his allegations, nor demonstrate that there was a ‘persistent and widespread’ practice that practically has the force of law.

(ii) Qualified Immunity.

The Fifth circuit has established some of the most stringent pleading requirements on a Motion to Dismiss under Rule 12(b)(6) in qualified immunity cases, holding that “[A] plaintiff seeking to overcome qualified immunity must plead specific facts that both allow the court to draw the reasonable inference that the defendant is liable for the harm he has alleged and that defeat a qualified immunity defense with equal specificity.” *Perron v. Travis*, No. CV 20-00221-BAJ-EWD, 2021 WL 1187077 (M.D. La. Mar. 29, 2021) Citing, *Backe v. Leblanc*, 691 F.3d 645 (5th Cir. 2012). A plaintiff must at least “chart a factual path to the defeat of the defendant’s immunity, free of conclusion. *Schultea v. Wood*, 47 F.3d 1430 (5th Cir. 1995). The failure to provide these specific facts warrants dismissal under Rule 12(b)(6). *Perron*, 2021 WL 1187077 at 5.

As previously noted, Plaintiff as most in the Memorandum has cited to cases without any context provided. (**Document 33-1, Page 5**). In his Motion document (**Document 33**), Plaintiff essentially asserts two things. First, without citing to any authority, he asserts “qualified immunity only applies to suits against government officials as individuals, not suits against the government for damages caused by the officials’ actions. Although qualified immunity frequently appears in

cases involving police officers, it also applies to most other executive branch officials....” (**Document 33, Page 6**) Second, Plaintiff notes that he was unaware that Defendant’s counsel was representing Roger Corcoran, John Porche, and Noah Mckneely in their individual capacities. (**Document 33, Page 6**).

This is remarkably short of a substantive answer. The standard as previously stated is “plead specific facts that both allow the court to draw the reasonable inference that the defendant is liable for the harm he has alleged and that defeat a qualified immunity defense with equal specificity.” **Perron WL 1187077 at 5**. Plaintiff has unequivocally failed to substantively oppose Defendant’s argument that Roger Corcoran, John H. Porche, Noah McKneely, as well as Darren Sibley who filed a similar Motion after plaintiff filed these Motions, are entitled to qualified immunity as seen in Documents 20, 29, 31, and subsequently 37.

(iii) Request for Grand Jury empanelment.

For all of the reasons stated in this opposition, plaintiff’s request for the empaneling of a grand jury to review this matter has no meri and should not be considered in any way.

II. PLAINTIFF’S MOTIONS TO SHOW CAUSE.

Plaintiff’s allegations of “untruthful statements”⁸ and “outright dishonesty to harass Plaintiffs and mislead the court”⁹ can only be explained by an unfamiliarity with the structure of the legal system and its complexities as there is no viable reason for their existence.

Plaintiff has pointed out a number of discrepancies between Defendant’s Answer to Complaint and Affirmative Defenses (**Document 7**) and the Memorandum in Support of Motion to Dismiss (**Document 20-1**). These discrepancies have a simple and known explanation to those who are acquainted with posture of the American legal system and are far from an attempt to ‘obfuscate, stonewall or mislead the court’. When deciding a Rule 12(b)(6) motion to dismiss, “the court accepts all well pleaded facts as true, viewing them in the light most favorable to the plaintiff.” **Nichols v. Wells Fargo Home Mortg., No. CV 17-104-SDD-EWD, 2018 WL 700869 (M.D. La. Feb. 2, 2018)**. The court assumes the factual allegations in the complaint are true and gives the plaintiff the benefit of all reasonable factual inferences. **Goodridge v. Siemens Energy, Inc., 276 F.R.D. 540 (N.D. Ala. 2011)** This standard is universally understood among those who practice in the Federal District Courts, including Defendant counsel. It would be illogical, that one would

⁸ Document 34, Page 1.

⁹ Document 34, Page 2.

put together a Rule 12(b)(6) dismissal without first considering that the reviewing Federal Court upon which this claim sits would stand true to the standard cemented in the Federal rule and relevant jurisprudence. Here, Defendant's counsel has considered the pleaded facts as true in **Document 20-1**, as well as in all of the subsequently filed Motions to Dismiss. (**Documents 29, 31 and 37**) Defendant's Memorandum in Support of Motion to Dismiss Pursuant to FRCP Rule 12(b)(6) in anticipation of the standard that the reviewing court would place on its motion. Although it may be a foreign concept to Plaintiff, it is a very distant exercise than that to which Plaintiff accuses Defendant counsel.

Similar, Plaintiff's assertion that "counsel has no indication of his defense." (**Document 34, Page 5**) and that "defense counsel should not be allowed to randomly throw mud on the wall of the court to see what sticks" (**Document 34, Page 5**) can only be explained by a lack of understanding of the Federal Rules of Civil Procedure. Rule 12 (b) of the Federal Rules of Civil Procedure governs the presentment of defenses and notes as follows "every defense to a claim for relief in any pleading must be asserted in the responsive pleading." **FRCP 12 (b)** (Emphasis added) It is therefore defendant's obligation to assert any defenses that they believe apply.

III. CONCLUSION.

For the foregoing reasons, Plaintiff's Motion to Strike Defendants' Motions to Dismiss and Plaintiff's Motion to Show Cause should be dismissed with prejudice. Further, Defendants' various Motions to Dismiss (**Documents 20, 29, 31, and 37**) should be granted and this matter be dismissed with prejudice as to all defendants.

Respectfully submitted,

/s/ J. Scott Thomas

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McKneely, and Darren Sibley, in their

official capacities as Chief of Police, an

Officer, and former Officers for the City of

Central Police Department

CERTIFICATE

I hereby certify that on this 14th day of September 2022, a copy of the above and foregoing motion was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to plaintiff and any counsel of record by operation of the court's electronic filing system as well as by U.S. mail, postage prepaid, to the plaintiff at the address he provided to the Court which is as follows:

Howard Gary Brown
1344 Lakeridge Drive
Baton Rouge, Louisiana 70802

/s/ J. Scott Thomas
J. Scott Thomas (La. Bar Roll No. 22635)