VERMONT SUPERIOR COURT
CHITTENDEN UNIT
CIVIL DIVISION

JASON PLOOF, Plaintiff v. CITY OF BURLINGTON, Defendant	Docket No. 537-7-18 Cncv

VERMONT SUPERIOR COURT
FILED
MAR 15 2019
CHITTENDEN UNIT

RULING ON DEFENDANT'S MOTION TO DISMISS

Plaintiff Jason Ploof brings this civil rights action against the City of Burlington in connection with his arrest for trespassing in a public park. He claims that, by issuing him a "no-trespass" notice pursuant to a City ordinance and subsequently arresting him for violating that notice, the City violated several state and federal constitutional provisions. The City moves to dismiss on statute of limitations grounds, contending that the action accrued when the no-trespass notice was issued, rather than when Plaintiff was arrested 10 days later. Justin Barnard and James Diaz, Esqs. represent Plaintiff. Pietro Lynn and Sean Toohey, Esqs. represent the City.

Alleged Facts

The following facts are alleged in the complaint. The court makes no finding as to their accuracy.

In November 2010, the City of Burlington adopted City Ordinance No. 21-48 (the "trespass ordinance"), which prohibits certain conduct in City Hall Park, including possession of "open or opened intoxicating liquor" (except as allowed by permit), making "unreasonable noise," and using "obscene language." The trespass ordinance imposes a

fine for first offenses ranging from $200 to $500, with increasing maximum penalties for subsequent violations.

The ordinance also provides for the exclusion of violators from City Hall Park. A first-time violation can lead to exclusion for the rest of the day, a second offense for up to 90 days, and third or subsequent offenses for up to a year. For second, third, or subsequent violations, the police have discretion to determine whether to issue a no trespass order and the length of the exclusion.

A second or third citation that occurs even months or years after the first may be subject to increased penalties and increased no-trespass terms. The ordinance also contains no exemptions for activity protected by the First Amendment, nor any process for challenging a trespass order. In contrast, City Ordinance No. 21-49, which provides parallel authority for city police officers to issue no-trespass orders for prohibited conduct within the Church Street Marketplace, provides a notice and hearing procedure to challenge no-trespass orders before a panel designated for that purpose. It also allows no-trespass order recipients to request a waiver for "the exercise of constitutionally protected activities."

The City has had a policy and practice of banning individuals from City Hall Park through enforcement of the trespass ordinance. Since at least 2015, the Burlington Police Department has arrested or cited no fewer than 20 people for unlawful trespass in the park under 13 V.S.A. § 3705. These arrests were based on previously provided "trespass notices," authorized by the trespass ordinance, and the conduct supporting these arrests was predominantly innocent and based on mere presence.

On July 10 and 12, 2015, Burlington Police Officer Joseph Corrow issued municipal tickets to Plaintiff for allegedly having an open container in City Hall Park in violation of

the trespass ordinance. On both occasions, Officer Corrow also issued no-trespass notices. The first notice banned Plaintiff from the park for the remainder of the day. The second notice banned Plaintiff from the park for 90 days, and informed him that violation of the notice was punishable by imprisonment or a fine under 13 V.S.A. § 3705. Neither the notices nor the ticketing officer provided Plaintiff an opportunity or means to challenge, mitigate, or seek a variance from the trespass terms.

On July 22, 2015, Plaintiff saw friends standing near the fountain in City Hall Park. Forgetting about the trespass notice, he walked to them and began a conversation. Burlington Police Officer Michael Henry approached Plaintiff and informed him of the 90-day trespass notice. According to the affidavit of probable cause, Plaintiff "did not recall receiving a copy of the trespass notice." Officer Henry arrested and handcuffed Plaintiff, who was brought to the police station and then jailed overnight.

The following day, Plaintiff was arraigned and released from jail. Following his arrest and imprisonment, Plaintiff stayed away from City Hall Park until the 90-day no-trespass order expired because he feared being arrested again. During this time, the City policy and practice prevented Plaintiff from participating in or receiving information from the numerous events, community meetings, and farmers' markets held in the park. The unlawful trespass charge was dismissed by the State on October 13, 2015.

Plaintiff filed this complaint on July 20, 2018. Count I alleges that, by prohibiting Plaintiff from accessing City Hall Park for 90 days, the City unlawfully restricted Plaintiff's freedom to receive information and enter a traditional public forum, in violation of the First Amendment and Article 13. Compl. ¶¶ 46–51. Count II alleges that, by arresting and jailing Plaintiff for his mere presence in the park during an unchallengable ban, the City violated Plaintiff's right to be free from unreasonable seizures, false arrest, and false

imprisonment under the Fourth Amendment, Article 11, and the common law. Compl. ¶¶ 52–55.

In Count III, Plaintiff alleges that because the City provided no opportunity to appeal or challenge the issuance of a no-trespass notice, it violated his rights to procedural due process under the 14th Amendment. Compl. ¶¶ 56–63. Count IV alleges that the City violated Plaintiff's 14th Amendment substantive due process right to intrastate travel. Compl. ¶¶ 64–69.[1] Plaintiff seeks declaratory and injunctive relief, compensatory and consequential damages, costs and expenses, and attorney's fees pursuant to 42 U.S.C. § 1988(b).

Discussion

The City contends that this action is time-barred because the three-year statute of limitations began to run on July 12, 2015, when Plaintiff was given the second no-trespass notice. Plaintiff asserts that the action accrued on July 22, 2015, when he was arrested for violating the no-trespass notice. Plaintiff filed suit on July 20, 2018.

The parties agree that Plaintiff's claims are governed by a three-year statute of limitations, *see* 12 V.S.A. § 512(4), and that the claims accrued when the plaintiff "knew or should have known of the injury that serves as the basis for the action." Shields v. Gerhart, 155 Vt. 141, 146 (1990). In determining the accrual of a constitutional claim, "the proper focus is on the time of the *discriminatory act*, not the point at which the *consequences* of the act become painful." Chardon v. Fernandez, 454 U.S. 6, 8 (1981) (emphasis in original) (citing Delaware State Coll. v. Ricks, 449 U.S. 250, 258 (1980)) (in employment discrimination case brought under § 1983, limitations period began to run

[1] Count V merely seeks a declaratory judgment based upon the other substantive claims. Compl. ¶¶ 70–75.

when employees received notice of termination for allegedly political reasons, rather than when employees were actually terminated).

Plaintiff's claim for false arrest/false imprisonment/unlawful seizure, alleged in Count II, accrued when he was arrested. "An action for false arrest brought under § 1983 requires a plaintiff to show that '(1) the defendant intended to confine him, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement and (4) the confinement was not otherwise privileged.'" Simuro v. Shedd, 176 F. Supp. 3d 358, 375 (D. Vt. 2016) (quoting Ackerson v. City of White Plains, 702 F.3d 15, 19 (2d Cir.2012)). "A false arrest action is substantially the same under Vermont state law, which necessitates proof that the 'defendant intended to confine plaintiff without plaintiff's consent, and that confinement was not otherwise privileged.'" Id. (quoting Connary v. Field, No. 2012–276, slip op. at 3 (Vt. 2013)); *see also* State v. May, 134 Vt. 556, 559 (1976) (quotations omitted) (false imprisonment is the "unlawful restraint by one person of the physical liberty of another," which "must not only be unlawful, but must also be total") (citing Restatement (Second) of Torts § 36(1) (1965)).

"[T]he statute of limitations upon a § 1983 claim seeking damages for a false arrest in violation of the Fourth Amendment, where the arrest is followed by criminal proceedings, begins to run at the time the claimant becomes detained pursuant to legal process." Wallace v. Kato, 549 U.S. 384, 397 (2007). Here, Plaintiff was first detained upon his arrest on July 22, 2015. Therefore, his false arrest claim began to accrue on that date, and no earlier. While the arrest obviously stems from the no-trespass notice, that does not affect the accrual of Count II. Plaintiff could not have brought a false arrest action

immediately upon receiving the no-trespass notice because he was not actually detained until 10 days later.[2]

As to the other claims, Plaintiff maintains that the no-trespass notice on its own did not cause him actionable harm, and thus could not trigger accrual. The court is not persuaded. Count I alleges a violation of his freedom to receive information and enter a traditional public forum, which occurred at the moment he received the trespass notice. Count III alleges a procedural due process violation, in that there is no way to challenge or appeal the no-trespass notice. Again, this alleged violation occurred the moment he received the trespass notice. Similarly, Count IV's alleged violation of Plaintiff's substantive due process right to access a public park began as soon as the City banned him from the park via the trespass notice. These claims all began to accrue at the time of the alleged unconstitutional act, that is, when Plaintiff received notice that he was banned from the park. Plaintiff could have brought these claims at that time.[3]

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[2] The City argues for the first time in its Reply brief that Plaintiff failed to allege that the arrest lacked probable cause, an element of the false arrest claim, and that because the claim is based on the alleged unconstitutional operation of the ordinance as the basis for the arrest, Wallace is distinguishable. Def.'s Reply at 3–4 and n. 3. This argument goes to the merits of this action and the court need not address it here.

[3] Plaintiff relies on an unpublished memorandum decision for the proposition that a trespass notice "has no legal significance beyond acting as a necessary predicate to a criminal prosecution for trespass." Maarawi v. Parenteau, No. 2001-230, 2001 WL 36140136, at *1 (Vt. Dec. 2001) (unpub. mem.). In Maarawi, however, which involved a trespass notice for private property, the Court actually specified that it was "[t]he notice against trespass *at issue in this case*" that has no legal significance. Id. (emphasis added). The City aptly explains why Maarawi is distinguishable.[3] A trespass notice for private property impacts no constitutional rights. A notice for public property does, however, because as soon as that notice is given, the person's right to access a public forum is curtailed. The Maarawi plaintiff did not bring a constitutional claim. Notwithstanding Plaintiff's protests to the contrary, the public versus private nature of the property is an important distinction where constitutional rights are concerned. *Compare* id. and Pietrangelo, II v. Alvas Corp., No. 5:09-CV-68, 2010 WL 3323701, at *3, *7 (D. Vt. May 19, 2010), aff'd sub nom. Pietrangelo v. Alvas Corp., 487 F. App'x 629 (2d Cir. 2012) (trespass notice for privately-owned delicatessen) *with* Cyr v. Addison Rutland Supervisory Union, 955 F. Supp. 2d 290, 297 (D. Vt. 2013) (trespass notice for public school property) and Huminski v. Corsones, 396 F.3d 53, 93 (2d Cir. 2005) (trespass notice for Vermont state court facilities).

The Second Circuit reached a similar conclusion in Smith v. Campbell, 782 F.3d 93, 99–102 (2d Cir. 1992). There, the plaintiff sued a police officer and department for First Amendment retaliatory prosecution under § 1983, after the trooper's allegedly harassing conduct and issuance of tickets after a traffic stop. The court held that all the elements of a retaliation claim were met at the time the tickets were issued, including the element that "the defendant's actions caused [plaintiff] some injury." Id. at 100. The "issuance of the tickets was an injury in that it subjected [plaintiff] to a state action requiring that she either appear in court, pay a fine, or both." Id. Thus, the claim accrued when the tickets were issued. Id.

Plaintiff maintains that Smith is distinguishable because the tickets there carried "concrete, automatic legal consequences," i.e., that the plaintiff go to court or pay a fine. Pl.'s Opp'n at 8. However, the no-trespass notice issued to Plaintiff also carried concrete legal consequences—it explicitly banned him from a public park. To the extent there is a distinction, it is one without a difference for purposes of the accrual date.

Plaintiff alternatively asserts that his claims are nonetheless saved from the statute of limitations by the "continuing violation" doctrine. This doctrine, most often raised in the Title VII employment discrimination context, *see, e.g.*, Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 116–17 (2002); In re Boyde, 165 Vt. 624, 625–26 (1996) (mem.), is an "exception to the normal knew-or-should-have-known accrual date." Shomo v. City of New York, 579 F.3d 176, 181 (2d Cir. 2009) (citing Harris v. City of New York, 186 F.3d 243, 248 (2d Cir.1999)). When a plaintiff brings a section 1983 claim challenging a discriminatory policy, "the commencement of the statute of limitations period may be delayed until the last discriminatory act in furtherance of it." Id. (citing Cornwell v. Robinson, 23 F.3d 694, 703 (2d Cir.1994)). "To trigger the continuing violation doctrine

when challenging discrimination, the plaintiff 'must allege both the existence of an ongoing policy of discrimination and some non-time-barred acts taken in furtherance of that policy.'" Id. (citing Harris, 186 F.3d at 250).

A number of federal courts have applied the continuing violation doctrine to a range of constitutional and statutory claims outside of the typical employment discrimination context. *See, e.g.*, Shomo, 579 F.3d at 182 (applying continuing violation doctrine to Eighth Amendment claim); Connolly v. McCall, 254 F.3d 36, 41 (2d. Cir. 2006) (plaintiff forced to give up accrual of pension benefits every two years); Velez v. Reynolds, 325 F. Supp. 2d 293, 313 (S.D.N.Y. 2004) (numerous claims, including procedural due process, challenging city policy of agency retaining children without legal authority); *see also* Remigio v. Kelly, No. 04 CIV 1877JGKMHD, 2005 WL 1950138, at *7 (S.D.N.Y. Aug. 12, 2005) (listing cases).

In Remigio, for example, the plaintiff sued the New York City police department for seizing his car under a city ordinance. One of his claims was that the defendants violated his procedural due process rights by failing to hold a hearing in connection with that seizure. Likening the claim to "failure to treat" claims and discriminatory municipal policies, the court held that the continuing violation doctrine saved the plaintiff's claim from the statute of limitations. The plaintiff's "alleged due-process injury . . . occurred because of the defendants' daily failure to act. . . . Each day that the defendants failed to hold a hearing, similar to each day defendants in a failure-to-treat case failed to treat the plaintiff, was another instance of the defendants' continuing and incrementally increasing unlawful conduct." Remigio v. Kelly, No. 04 CIV 1877JGKMHD, 2005 WL 1950138, at *10 (S.D.N.Y. Aug. 12, 2005); *see also* Urbina v. Port Auth. of New York, No. 15-CV-8647 (PKC), 2017 WL 3600424, at *5 (S.D.N.Y. Aug. 18, 2017) (applying continuing violation

doctrine to procedural due process claim based on reasoning in Remigio); *but see* VanDenBerg v. Appleton Area Sch. Dist., 252 F. Supp. 2d 786, 789–93 (E.D. Wis. 2003) (holding that continuing violation doctrine did not save procedural due process hearing claim from statute of limitations).

Similarly, in Kuhnle Bros., Inc. v. Cty. of Geauga, 103 F.3d 516, 522 (6th Cir. 1997), the Sixth Circuit held that the plaintiff's constitutional claim was a continuing violation. The plaintiff there, a trucking company, challenged the constitutionality of a county ordinance that banned through-truck travel on country roads. It claimed that the ordinance deprived it of the due process liberty interests created by the fundamental constitutional right to intrastate travel. Id. at 521. The court held that the ordinance "barred Kuhnle from using the roads in question on an ongoing basis, and thus actively deprived Kuhnle of its asserted constitutional rights every day that it remained in effect." Id. at 522. "[E]ach day that the invalid [ordinance] remained in effect, it inflicted 'continuing and accumulating harm' on Kuhnle." Id. (quoting Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 502 n.15 (1968)).

As in Kuhnle Brothers, the City here arguably barred Plaintiff from the park on an "ongoing basis," which thus "actively deprived" Plaintiff of his asserted constitutional right to travel "every day that [the ban] remained in effect." Kuhnle Bros., 103 F.3d at 522. Each day that Plaintiff was barred from the park could be considered a "continuing and accumulating harm" to Plaintiff. Id. The same analysis applies to Plaintiff's allegations that the ban denied him access to a traditional public forum under the First Amendment, and that he was denied a hearing. Each day that the City failed to hold a hearing and continued to ban Plaintiff from the park was arguably "another instance" of its "continuing and incrementally increasing unlawful conduct." Remigio, 2005 WL

1950138, at *10. As in Remigio, this could be considered a "continuous injury that was not simply a consequence of the initial" trespass notice. Id; *see also* Virginia Hosp. Ass'n v. Baliles, 868 F.2d 653, 663 (4th Cir. 1989) (citing Brown v. Board of Education, 347 U.S. 483 (1954))("[T]he continued enforcement of an unconstitutional statute cannot be insulated by the statute of limitations . . . .").

The Vermont Supreme Court has recognized the continuing violation doctrine in other contexts, but has never had occasion to address its application to the sorts of constitutional claims asserted here. It has referenced the doctrine in the context of discriminatory policies and statutory violations. *See, e.g.*, Town of Lunenberg v. Unorganized Towns and Gores of Essex Cnty., 2006 VT 71, ¶ 12, 180 Vt. 578 (mem.) (violation of statutory duty to make yearly distributions was a continuing violation); Lee v. Univ. of Vermont, 173 Vt. 626, 626–27 (2002) (mem.) (university's denial of admission and refusal to issue correct transcript to plaintiff multiple times was a "continuous practice and policy of discrimination"); *see also* Boyde, 165 Vt. at 625–26 (discussing but not adopting or rejecting the doctrine).[4]

"Motions to dismiss under V.R.C.P. 12(b)(6) should be granted only where it is beyond doubt that there exist no facts or circumstances that would entitle . . . plaintiff to relief." LeClair v. Reed ex rel. Reed, 2007 VT 89, ¶ 6, 182 Vt. 594 (mem.) (quotation and citation omitted). Our Supreme Court has instructed that "courts should be especially reluctant to dismiss [a cause of action] on the basis of pleadings when the asserted theory

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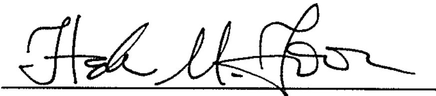
[4] The City argues that the doctrine "has not been adopted in Vermont," Def.'s Reply at 9, citing Gettis v. Green Mountain Econ. Dev. Corp., 2005 VT 117, ¶ 23, 179 Vt. 117. That case referred to a "continuing tort" doctrine, which appears to be different from the "continuing violation" doctrine. *See, e.g.*, Schmelzer v. Alexander, No. CIV.A. 4:03-CV-354-Y, 2005 WL 723660, at *3 n.7 (N.D. Tex. Mar. 29, 2005). In any case, the Court in Gettis declined to decide whether it would adopt or reject the doctrine. At worst, it remains an open question.

of liability is novel or extreme." Id. (quoting Ass'n of Haystack Prop. Owners, Inc. v. Sprague, 145 Vt. 443, 447 (1985)); *see also* Montague v. Hundred Acre Homestead, LLC, 2019 VT 16, ¶ 11. While the cases applying the continuing violation doctrine to similar facts are few, that does not mean Vermont would not join those ranks. Because there is a theory under which the continuing violation doctrine could toll the statute of limitations for all of Plaintiff's claims, the court must deny the motion to dismiss.

Order

Defendant's motion to dismiss is denied. Defendant shall file an Answer by March 30, and the parties shall file a proposed discovery schedule by April 30.

Dated at Burlington this 15th day of March, 2019.



Helen M. Toor
Superior Court Judge

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ENTRY REGARDING MOTION

Ploof vs. City of Burlington 537-7-18 Cncv

Title:

Motion for Leave to File Sur-Reply,

No. 3

Filed on: December 7, 2018

Filed By: Diaz, James M., Attorney for:
Plaintiff Jason Ploof

VERMONT SUPERIOR COURT
FILED
MAR 15 2019
CHITTENDEN UNIT

Response: NONE

✓ Granted Compliance by____________

___ Denied

___ Scheduled for hearing on: ________ at _______;Time Allotted _____

___ Other

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[signature] 3/14/19
Judge Date

Date copies sent to: 3/15/19 Clerk's Initials [initials]

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