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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RENE PEINADO,

No. C-11-1799 EMC

Plaintiff,

v.

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION TO DISMISS**

CITY AND COUNTY OF SAN
FRANCISCO,

(Docket Nos. 16-17)

Defendant.

I. INTRODUCTION

Plaintiff Rene Peinado filed a complaint on April 13, 2011 against Defendants the City and County of San Francisco (the "City") and Elias Georgopoulos asserting four causes of action under 42 U.S.C. § 1983 for (1) unreasonable search and seizure; (2) malicious prosecution; (3) violation of First Amendment rights; and (4) a *Monell* claim. Compl., Docket No. 1. The City now moves to dismiss the Complaint on the grounds that it was not filed within the applicable statute of limitations and not served within the period of time allowed for service. *See* Def.'s Mot., Docket No. 16. For the reasons stated herein, the Court **GRANTS** in part and **DENIES** in part the City's motion.

II. FACTUAL & PROCEDURAL BACKGROUND

Plaintiff alleges in his complaint that on or about March 23, 2005, Georgopoulos, a parking control officer for the San Francisco Municipal Transportation Agency, falsely accused Plaintiff of committing assault and battery against Georgopoulos with Plaintiff's vehicle. Compl., Docket No. 1, ¶ 11. As a result of this false accusation, Plaintiff was arrested on March 25, 2005, placed in jail,

1 and subsequently charged with assault and battery. *Id.*; see Pl.’s Opp’n, Docket No. 21, Ex. A.¹
2 Plaintiff was arraigned on April 1, 2005, at which time he pled not guilty to the charges against him.
3 Pl.’s Opp’n, Docket No. 21, Ex. A. Plaintiff was acquitted of all charges on April 14, 2009.
4 Compl., Docket No. 1, ¶ 11; Pl.’s Opp’n, Docket No. 21, Ex. A.

5 III. DISCUSSION

6 A. Legal Standard

7 Under Federal Rules of Civil Procedure, Rule 12(b)(6), a party may move to dismiss based
8 on the failure to state a claim upon which relief may be granted. *See* Fed. R. Civ. P. 12(b)(6). A
9 motion to dismiss based on Rule 12(b)(6) challenges the legal sufficiency of the claims alleged. *See*
10 *Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). In considering such a motion,
11 a court must take all allegations of material fact as true and construe them in the light most favorable
12 to the nonmoving party, although “conclusory allegations of law and unwarranted inferences are
13 insufficient to avoid a Rule 12(b)(6) dismissal.” *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir.
14 2009). While “a complaint need not contain detailed factual allegations . . . it must plead ‘enough
15 facts to state a claim to relief that is plausible on its face.’” *Id.* “A claim has facial plausibility when
16 the plaintiff pleads factual content that allows the court to draw the reasonable inference that the
17 defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see*
18 *also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). “The plausibility standard is not akin to
19 a ‘probability requirement,’ but it asks for more than sheer possibility that a defendant acted
20 unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

21 As § 1983 is silent on statutes of limitations, federal courts look to the underlying state law
22 for guidance. *See* 42 U.S.C. § 1988(a). The statute of limitations for § 1983 claims arising in
23 California is two years. *See Maldonado v. Harris*, 370 F.3d 945, 954-55 (9th Cir. 2004). Unlike the
24 length of the statute of limitations period, the accrual of a § 1983 claim is a question of federal law.

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26
27 ¹ The Court takes judicial notice of the docket report for Plaintiff’s criminal case attached as
28 Exhibit A to his opposition to the City’s motion to dismiss. In ruling on a 12(b)(6) motion, a court
may take judicial notice of undisputed matters of public record, including documents on file in
federal or state courts. *See Harris v. County of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012).

1 *Wallace v. Kato*, 549 U.S. 384, 388 (2007). Tolling, on the other hand, generally follows state law
2 principals. *See Wallace*, 549 U.S. at 394.

3 B. Individual Claim Analysis

4 1. Unreasonable Search and Seizure (First Cause of Action)

5 Plaintiff's first cause of action for unreasonable search and seizure ostensibly refers to his
6 arrest and imprisonment. *See Compl.*, Docket No. 1, ¶¶ 16-19. Under federal law, a claim for false
7 arrest and imprisonment accrues when an individual's imprisonment ends or when he becomes
8 detained pursuant to legal process, such as when he is arraigned on charges. *See Wallace*, 549 U.S.
9 at 388-90. Here, Plaintiff's first cause of action thus accrued, at the latest, at his April 1, 2005
10 arraignment. *See Pl.'s Opp'n*, Docket No. 21, Ex. A.

11 There is no applicable tolling provision in state law for Plaintiff's unreasonable search and
12 seizure cause of action. While the statute of limitations for filing an action against a public entity
13 based upon the conduct of a "peace officer" is tolled pursuant to California Government Code
14 section 945.3 ("section 945.3 ") while criminal charges are pending before a superior court,
15 Plaintiff's claims are based upon the conduct of a *parking control officer*. *See Compl.*, Docket No.
16 1, ¶ 6. The California Penal Code narrowly and specifically defines a "peace officer." *See Cal.*
17 *Penal Code* §§ 830-831.7 (providing exclusive definition of "peace officer" within meaning of
18 California law); *Serv. Employees Int'l Union v. City of Redwood City*, 32 Cal. App. 4th 53, 60
19 (1995) ("the Legislature intended to grant peace officer status . . . subject to carefully prescribed
20 limitations and conditions"). A parking officer is not included in that definition. *See Cal. Penal*
21 *Code* §§ 830-831.7 (no mention of parking officers); *cf. Cal. Penal Code* §§ 830.14 (fare inspection
22 conductors are "public officers," not "peace officers"), 831.4 (even sheriff's or police security
23 officer are "public officers," not "peace officers"). Furthermore, the Penal Code requires, at a
24 minimum, that all peace officers satisfactorily complete an introductory course of training prescribed
25 by the Commission on Peace Officer Standards and Training (POST). *Cal. Penal Code* § 832.
26 Parking control officers are not required to complete POST training, and thus do not fall within the
27 Penal Code's definition of a "peace officer." *See 8214 Parking Control Officer Examination*
28 *Announcement*, <http://www.jobaps.com/sf/sup/BulPreview.asp?R1=CBT&R2=8214&R3=M00001>

1 (opened Sept. 12, 2012) (last visited Dec. 19, 2012) (training program for parking control officers
2 consists solely of two weeks of classroom instruction, one week of vehicle training, and completion
3 of a mentoring program, and does not include POST training).² Thus, section 945.3 does not toll
4 Plaintiff's first cause of action. *Cf. Damjanovic v. Ambrose*, 3 Cal. App. 4th 503, 510-11 (1992)
5 (Cal. Gov. Code § 945.3 does not apply to non-peace officer defendants charged with false arrest).
6 Plaintiff has not identified any other potentially applicable tolling provision, nor is any apparent
7 from the facts alleged. Absent tolling, the statute of limitations for Plaintiff's first cause of action
8 expired, at the latest, on April 1, 2007, two years after Plaintiff's arraignment.

9 2. Malicious Prosecution (Second Cause of Action)

10 Plaintiff's second cause of action is for malicious prosecution under § 1983. Following the
11 Supreme Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), the Ninth Circuit has
12 recognized that malicious prosecution claims brought under § 1983 accrue upon favorable
13 termination of the underlying criminal proceeding. *See Cabrera v. City of Huntington Park*, 159
14 F.3d 374, 382 (9th Cir. 1998) (plaintiff's "malicious prosecution claim did not accrue until his
15 acquittal"); *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1060 n.11 (9th Cir. 2002) ("a claim
16 of malicious prosecution does not accrue until the plaintiff is acquitted, because acquittal is an
17 element of the claim").

18 At the hearing in this matter, the City urged that, pursuant to the Supreme Court's more
19 recent decision in *Wallace v. Kato*, 549 U.S. 384 (2007), the statute of limitations for a malicious
20 prosecution cause of action under § 1983 accrues upon commencement of the underlying criminal
21 proceeding. However, in *Wallace* the plaintiff specifically did *not* bring a claim for malicious
22 prosecution, but rather for false arrest and imprisonment. *Id.* at 390 n.2. The Court specifically
23 distinguished a claim for unlawful detention from the "'entire district' tort of malicious
24 prosecution." *Id.* at 390. The Court held that a claim for false arrest accrues when the allegedly

25
26 ² The Court takes judicial notice of the Parking Control Officer examination announcement
27 as a matter of public record not subject to reasonable dispute. *Cf. Wilbur v. Locke*, 423 F.3d 1101,
28 1112 (9th Cir. 2005) (Federal Rule of Evidence 201 permits judicial notice of records of public
entities), *abrogated on other grounds by Levin v. Commerce Energy, Inc.*, 130 S. Ct. 2323, 2329,
2337 (2010).

1 false imprisonment ends; *i.e.*, when the victim is released or becomes held pursuant to legal process,
2 such as when the petitioner was bound over for trial by a magistrate. The Court did not address
3 when a cause of action for malicious prosecution accrued. Although the Court noted it had never
4 explored the contours of a Fourth Amendment malicious prosecution suit under § 1983 (*id.* at 390,
5 n.2), the Court noted it had analogized the suit in *Heck v. Humphrey* to “one for malicious
6 prosecution; an element of which is the *favorable termination* of criminal proceedings.” *Id.* at 392
7 (emphasis added).

8 Consistent with *Wallace*, subsequent decisions have continued to recognize that a malicious
9 prosecution claim brought pursuant to § 1983 does not accrue until favorable termination of the
10 underlying criminal proceeding. *See, e.g., Paris v. City of Elkhart*, 614 F.3d 677, 682 (7th Cir.
11 2010) (“the tort of malicious prosecution is not complete until a conviction occurs and that
12 conviction has been overturned, and therefore the statute of limitations for malicious prosecution
13 does not begin to accrue until that time.”); *Mondragon v. Thompson*, 519 F.3d 1078, 1083 (10th Cir.
14 2008) (“Because the statute of limitations does not start running before the elements of a claim are
15 satisfied, the statute of limitations for this due process claim [for malicious prosecution] cannot start
16 until the plaintiff has achieved a favorable result in the original action.”).

17 In this instance, where Plaintiff’s second cause of action is simply a claim for malicious
18 prosecution pursuant to § 1983, *Wallace* does not mandate an accrual date earlier than Plaintiff’s
19 acquittal; in fact, it supports the conclusion that the claim did not accrue until the case was favorably
20 terminated. The criminal proceedings allegedly terminated in Plaintiff’s favor on April 14, 2009.
21 *See* Pl.’s Opp’n, Docket No. 21, Ex. A. As he filed his complaint within two years of this date, on
22 April 13, 2011, his second cause of action is not barred by the statute of limitations.

23 3. First Amendment Retaliation (Third Cause of Action)

24 Plaintiff’s third cause of action alleges that his arrest and prosecution were in retaliation for
25 the exercise of his rights under the First Amendment, and thus consists of two sub-claims for
26 retaliatory arrest and retaliatory prosecution. *See* Compl., Docket No. 1, ¶¶ 26-29. Like his claim
27 for false arrest and imprisonment, Plaintiff’s retaliatory arrest sub-claim accrued, at the latest, on
28 April 1, 2005. *See* Pl.’s Opp’n, Docket No. 21, Ex. A. Similarly, as it is based on the conduct of a

1 parking control officer, not a “peace officer” within the meaning of the law, it is not subject to the
2 tolling provision at California Government Code section 945.3, and thus was not timely filed within
3 the applicable statute of limitations.

4 On the other hand, there is a split in authority as to whether a First Amendment retaliatory
5 prosecution cause of action accrues at the commencement or termination of such prosecution.
6 *Compare Mata v. Anderson*, 685 F. Supp. 2d 1223, 1247-49, 1262-65 (D.N.M. 2010) (holding that
7 retaliatory prosecution claim accrues as soon as plaintiff has reason to know of prosecution) *with*
8 *Haagensen v. Penn. State Police*, No. 08-727, 2009 WL 790355, at *4 (W.D. Penn. Mar. 25, 2009)
9 (concluding that “First Amendment retaliatory prosecution claim did not accrue until the charges
10 against her had been dismissed”).

11 Here, however, the Court need not determine when Plaintiff’s retaliatory prosecution claim
12 accrued as he does not plead sufficient facts to support either a retaliatory arrest or a retaliatory
13 prosecution cause of action. To prevail in a retaliatory arrest or prosecution cause of action, a
14 plaintiff must demonstrate that “the officials secured his arrest or prosecution without probable
15 cause and were motivated by retaliation against the plaintiff’s protected speech” *Beck v. City of*
16 *Upland*, 527 F.3d 853, 864 (9th Cir. 2008). Here, Plaintiff’s complaint does not allege any such
17 retaliation for protected speech. *See* Compl., Docket No. 1, ¶¶ 9-12. Rather, he alleges that he was
18 arrested because Defendant Georgopoulos falsely accused him of committing assault and battery.
19 *Id.* ¶ 11. Thus, his third cause of action, as pled, fails on the merits.

20 4. Monell Claim (Fourth Cause of Action)

21 Plaintiff’s fourth cause of action simply states the basis for holding the City liable for the
22 constitutional violations alleged in his first three causes of action. As the first and third causes of
23 action are barred by the statute of limitations and Plaintiff’s failure to state a claim, so, too, is the
24 *Monell* claim, to the extent it incorporates those two causes of action.

25 The second cause of action, for malicious prosecution, is not barred by the statute of
26 limitations, as discussed above. Defendant has raised no other specific defense to Plaintiff’s
27 malicious prosecution cause of action or the City’s liability for such malicious prosecution pursuant
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1 to *Monell*. See Def.’s Mot., Docket No. 16. Thus, the Court does not dismiss the fourth cause of
2 action to the extent it derives from Plaintiff’s malicious prosecution.

3 C. Service of Complaint

4 The City also argues that Plaintiff’s complaint should be dismissed due to his failure to serve
5 it until more than a year after its filing. See Def.’s Mot., Docket No. 16, at 2:21-28. Plaintiff filed
6 his complaint on April 13, 2011, but did not serve it on the City until October 4, 2012, 540 days
7 later. See Compl., Docket No. 1; Proof of Service, Docket No. 15. Plaintiff does not address this
8 argument in his opposition brief. See Docket No. 21.

9 Federal Rules of Civil Procedure, Rule 4(m) provides that “[i]f a defendant is not served
10 within 120 days after the complaint is filed, the court – on motion or on its own after notice to the
11 plaintiff – must dismiss the action without prejudice against that defendant or order that service be
12 made within a specified time.” “Complaints are not to be dismissed if served within 120 days, or
13 within such additional time as the court may allow.” *Henderson v. U.S.*, 517 U.S. 654, 663 (1996).
14 Here, after 120 days had transpired, the Court extended the time in which Plaintiff could serve the
15 City on December 22, 2011 (Docket No. 10), April 11, 2012 (Docket No. 12), and July 9, 2012
16 (Docket No. 13). Plaintiff complied with the last extension, which required he serve Defendant by
17 October 5, 2012. See Minute Entry, Docket No. 13; Compl., Docket No. 1.

18 Beyond the fact that Plaintiff complied with the Court’s ultimate extension of the time in
19 which to serve the complaint, there are no equitable grounds for granting the City’s motion to
20 dismiss on the basis of Plaintiff’s delay. Plaintiff is representing himself *pro se*, which “entitles him
21 to a certain degree of leniency so as to ensure that his case is justly resolved on its merits rather than
22 on the basis of procedural technicalities to the extent possible.” See *Poulakis v. Amtrak*, 139 F.R.D.
23 107, 109 (N.D. Ill. 1991). Moreover, the City has made no argument suggesting it was prejudiced
24 by such delay. See Def.’s Mot., Docket No. 16, at 2:21-28; see also *Rice v. Scudder Kemper*
25 *Investments, Inc.*, No. 01 Civ. 7078(RLC), 2003 WL 174243, at *2 (S.D.N.Y. Jan. 27, 2003)
26 (approving extension where plaintiff was not represented by counsel throughout 120 day period and
27 defendant’s claim of prejudice was unsupported). Thus, the Court declines to dismiss the complaint
28 on the grounds of untimely service.

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V. CONCLUSION

As Plaintiff filed his complaint within the applicable statute of limitations for his malicious prosecution cause of action and related *Monell* claim, Plaintiff complied with the Court’s ultimate extension of time in which to serve his complaint, and the City has not demonstrated any prejudice resulting from such delay in service, the Court **DENIES** the City’s motion to dismiss these claims. As Plaintiff did not file his complaint within the applicable statute of limitations for his unreasonable search and seizure, First Amendment retaliatory arrest, and related *Monell* claims, the Court **GRANTS** the City’s motion to dismiss these claims. Lastly, as Plaintiff does not plead sufficient facts to support a claim for retaliatory arrest, retaliatory prosecution, or the related *Monell* claims, the Court **GRANTS** the City’s motion to dismiss these claims.

Plaintiff has not yet amended his complaint. Thus, the Court’s dismissal is without prejudice and with leave to amend. However, he should not re-assert the claims dismissed unless he has a basis for doing so consistent with Fed. R. Civ. P. 11. Plaintiff has thirty days from the date of this order in which to file a first amended complaint should he choose to do so.

This order disposes of Docket Nos. 16 and 17.

IT IS SO ORDERED.

Dated: January 15, 2013


EDWARD M. CHEN
United States District Judge