

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

GLENN D. WARE,)	
)	
Plaintiff,)	
)	
vs.)	CAUSE NO. 2:15-CV-42
)	
GARY SCHOOL CITY, <i>et al.</i> ,)	
)	
Defendants.)	

OPINION AND ORDER

This matter is before the Court on the Motion to Dismiss Plaintiff's Amended Complaint, filed by Defendants, Gary Community School Corporation and Michael Brown, on July 17, 2015 (DE #49). For the reasons set forth below, the Motion (DE #49) is **GRANTED IN PART AND DENIED IN PART**. The Motion is **GRANTED** to the extent the official capacity claims against Officer Brown are **DISMISSED WITH PREJUDICE**. However, the Motion is **DENIED** on the other claims, which **REMAIN PENDING**, and Plaintiff's request for leave to amend the complaint for a second time is also **DENIED**.

DISCUSSION

Request for Leave to Amend The Complaint for a Second Time

In his response, Plaintiff requests leave to amend his complaint to include the Gary Police Department as a party. (DE

#51, p. 1, 2.) Plaintiff already filed an amended complaint on May 29, 2015 (DE# 34). He claims he inadvertently forgot to name the Gary Police Department as a party in the amended complaint. Plaintiff has failed to file a separate motion to amend his complaint as required by N.D. Local Rule 7-1. As such, the request for leave to file a second amended complaint made in his response to the pending motion to dismiss is **DENIED**.

Motion to Dismiss

For the purpose of analyzing Defendant's Rule 12(b)(1) claims, the following standards apply. Pursuant to Federal Rule of Civil Procedure 12(b)(1), a defendant may move to dismiss claims over which the federal court lacks subject matter jurisdiction. Jurisdiction is the "power to decide" and must be conferred upon a federal court. *In re Chicago, Rock Island & Pac. R.R. Co.*, 794 F.2d 1182, 1188 (7th Cir. 1986). When jurisdictional allegations are questioned, the plaintiff has the burden of proving that the jurisdiction requirements have been met. *Kontos v. United States Dep't of Labor*, 826 F.2d 573, 576 (7th Cir. 1987). In reviewing a Rule 12(b)(1) motion to dismiss, the Court may look beyond the complaint and review any extraneous evidence submitted by the parties to determine whether subject matter jurisdiction exists. *United Transp. Union v. Gateway Western R.R. Co.*, 78 F.3d 1208, 1210 (7th Cir. 1996).

To the extent Defendant's claims are under Rule 12(b)(6), the Court will apply the following guidelines. The purpose of a motion to dismiss is to test the legal sufficiency of the complaint, not to decide the merits. *Triad Assocs., Inc. v. Chicago Hous. Auth.*, 892 F.2d 583, 586 (7th Cir. 1989). In determining the propriety of dismissal under Federal Rule of Civil Procedure 12(b)(6), the court must accept all facts alleged in the complaint as true and draw all reasonable inferences in the light most favorable to the plaintiff. *Johnson v. Rivera*, 272 F.3d 519, 520 (7th Cir. 2001). A complaint is not required to contain detailed factual allegations, but it is not enough merely that there might be some conceivable set of facts that entitles the plaintiff to relief. *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007), abrogating in part *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). A plaintiff has an obligation under Rule 8(a)(2) to provide grounds of his entitlement to relief, which requires more than labels and conclusions. *Id.* at 1965. Factual allegations, taken as true, must be enough to raise a right to relief above the speculative level. *Id.* Moreover, a plaintiff may plead himself out of court if the complaint includes allegations that show he cannot possibly be entitled to the relief sought. *Jefferson v. Ambroz*, 90 F.3d 1291, 1296-97 (7th Cir. 1996).

Whether Plaintiff's Fourth and Fifth Claim Should be Dismissed
For Failure to Serve Defendants With An Indiana Tort Claims
Notice

Plaintiff sets forth claims of intentional infliction of emotional distress (Count 4) and negligent infliction of emotional distress (Count 5). Defendants, Gary Community School Corporation and Officer Michael Brown, argue these claims should be dismissed because Plaintiff failed to serve proper tort claim notices.

The ITCA provides that a claim against a political subdivision is barred unless the prescribed notice is filed within 180 days after the loss occurs. Ind. Code 34-13-3-8; *see also Davidson v. Perron*, 716 N.E.2d 29, 33-34 (Ind. Ct. App. 1999). Specifically, notice must be filed: (1) with the governing body of that political subdivision; and 2) the Indiana Political Subdivision Risk Management Commission. Ind. Code 34-13-3-8. "The notice requirements of the ITCA apply not only to suits against political subdivisions but also to suits against employees of political subdivisions." *Davidson*, 716 N.E.2d at 33-34 (citing *VanValkenburg v. Warner*, 602 N.E.2d 1046, 1048 (Ind. Ct. App. 1992)). The claimant bears the burden of establishing substantial compliance with the notice provisions and it is a question of law. *Chang v. Purdue Univ.*, 985 N.E.2d 35, 52 (Ind. Ct. App. 2013).

In response, the Plaintiff claims he did serve notice to the Gary Police Department, and claims information was withheld so he could not serve Officer Brown. (DE #51, p. 2.) Plaintiff does not address whether he served notice on the Gary Community School

Corporation, but claims Plaintiff has not presented evidence indicating it is a political subdivision which required notice.¹ Plaintiff does cite to docket entries 25-27, which contain documents outside the pleadings in this case, including postal service receipts. While compliance "with the notice provisions of the ITCA is a procedural precedent which the plaintiff must prove and which the trial court must determine before trial," *Alexander v. City of South Bend*, 256 F.Supp.2d 865, 875 (7th Cir. 2003), it will not be decided in the current context of a motion to dismiss. Rather, once Defendants raise this affirmative defense in their responsive pleading, this issue can be addressed in a motion pursuant to either a Rule 12(c) or Rule 56. *Thompson v. City of Aurora*, 325 N.E.2d 839, 843 (1975).

Claims Against Officer Brown

Next, Plaintiff argues in one short paragraph that:

A suit against Officer Brown in his official capacity is a suit against the police department. *Hill v. Shelander*, 924 F.2d 1370, 1372 (7th Cir. 1991). Plaintiff has sued the City of Gary, the Gary Community School Corporation and Michael Brown. That the complaint against Michael Brown individually should be dismissed in its entirety. The complaint against Michael Brown represents an

¹ The Court notes that the Gary Community School corporation does fall within the definition of a political subdivision of the State of Indiana. See Ind. Code § 34-6-2-110(9); see also *Meury v. Eagle-Union Cmty. Sch. Corp.*, 714 N.E.2d 233, 241 (Ind. Ct. App. 1999) ("Claims against school corporations and their employees are subject to the Indiana Tort Claims Act notice of claims provisions.").

official capacity lawsuit.

(DE #50, p. 3.) A civil rights plaintiff must specify whether suit is brought against the defendant in their official capacity, or in their individual capacity. *Hill v. Shelander*, 924 F.2d 1370, 1372 (7th Cir. 1991). The amended complaint states that Officer Brown "is sued individually and in his capacity as a Gary Police Department and School City of Gary officer." (Am. Compl., DE #34, ¶ 23.)

The Supreme Court has held that neither a State, nor its officials acting in their official capacities are "persons" under section 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989); see also *Joseph v. Board of Regents of Univ. of Wisconsin Sys.*, 432 F.3d 746, 748 (7th Cir. 2005). The Eleventh Amendment bars section 1983 claims for damages against state officers in their official capacity because the State, in such a suit, is the real party in interest. See, e.g., *Will*, 491 U.S. at 71 (state officials are not "persons" for the purposes of § 1983 where the relief sought is monetary in nature); *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 101 (1984); *Peirick v. Indiana Univ.-Purdue Univ. Indianapolis Athletics Dep't*, 510 F.3d 681, 695 (7th Cir. 2007) ("The [Eleventh] Amendment usually bars actions in federal court against a state, state agencies, or state officials acting in their official capacities"); *Porco v. Trustees of Indiana Univ.*, 453 F.3d 390, 394-95 (7th Cir. 2006) (finding

Eleventh Amendment protected the defendants sued in their official capacities from satisfying a money judgment). Alternatively, state officials sued in their *individual* capacities, are "persons" subject to liability under section 1983. *Hafer v. Melo*, 502 U.S. 21, 27-30 (1991).

The Court concurs that the Eleventh Amendment bars suit against Officer Brown in his official capacity, and these claims will be dismissed. See *Peirick*, 510 F.3d at 695. However, the claims against Officer Brown in his individual capacity remain.

Statute of Limitations

Defendants argue that Plaintiff had two years to bring his claim for personal injury pursuant to Ind. Code § 34-11-2-4, that Plaintiff alleges the action occurred on or about February 3, 2013, but "[t]o the extent that the alleged incident occurred prior to February 3, 2013, Plaintiff's claim is barred by the statute of limitations." (DE #50, p. 3.) Plaintiff points out that Defendant cites no evidence whatsoever indicating Plaintiff's claims occurred prior to the date at issue, February 3, 2013. This Court concurs that all of Plaintiff's allegations in the complaint, which the Court must accept as true at this stage of the proceeding, state the incident occurred on February 3, 2013. Therefore, the complaint, filed on February 3, 2015, was timely filed, and the claims are not barred by the statute of limitations.

CONCLUSION

For the reasons set forth below, the Motion (DE #49) is **GRANTED IN PART AND DENIED IN PART**. The Motion is **GRANTED** to the extent the official capacity claims against Officer Brown are **DISMISSED WITH PREJUDICE**. However, the Motion is **DENIED** on the other claims, which **REMAIN PENDING**, and Plaintiff's request for leave to amend the complaint for a second time is also **DENIED**.

DATED: August 12, 2015

/s/ RUDY LOZANO, Judge
United States District Court