

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

RONALD PAUL DAVENPORT	:	CIVIL ACTION
	:	
v.	:	
	:	
GRADUATE HOSPITAL	:	NO. 17-2397

MEMORANDUM

QUIÑONES ALEJANDRO, J.

JULY 19, 2017

Plaintiff Ronald Paul Davenport, a prisoner incarcerated in California, brings this civil action against Graduate Hospital in connection with the death of his alleged birth mother in 1970. He seeks to proceed *in forma pauperis*. For the following reasons, the Court will grant plaintiff leave to proceed *in forma pauperis* and dismiss his complaint.

I. FACTS¹

Plaintiff believes that he is the biological son of Tammi Terrell nee Montgomery, who sang with Marvin Gaye, and passed away in 1970.² The complaint indicates that Ms. Terrell was treated at Graduate Hospital from 1968 through 1970 for a brain tumor.³ Although plaintiff suggests that the hospital wrongfully caused Ms. Terrell’s death by using “experimental surgery techniques” to treat her, the complaint does not provide any facts to support that allegation or elaborate on that contention. (Compl. at 6, ¶ 5.)

¹ The following facts are taken from the complaint. The complaint also contains various legal definitions and legal conclusions, none of which are entitled to any weight in determining whether plaintiff has stated a claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

² Plaintiff alleges that his father is Harry Belafonte.

³ The Court takes judicial notice of the fact that Graduate Hospital has since closed. It was purchased by the University of Pennsylvania Health System in 2007. *See Penn Health System to buy Graduate*, available at <http://www.philly.com/philly/sports/colleges/penn/5334246.html> (Jan. 24, 2007, accessed July 14, 2017).

Plaintiff was not raised by Ms. Terrell; instead, he was raised by another woman in California, where he has lived for sixty-three years, thirty-eight of which he has spent in prison.⁴ Plaintiff—who was a minor when Ms. Terrell passed—was not notified of Ms. Terrell’s death at the time it occurred and did not receive any inheritance. Plaintiff contends that he “faced for over forty-five years the cover-up of the roots of his early life of Miss Tammy Montgomery A.K.A. Tammi Terrell based on allegations of reckless conduct, defamation and the fact that defendant [knew] she had a son in her insurance claims.” (Compl. at 7, ¶ 8.) Plaintiff appears to believe that Graduate Hospital should have had a policy whereby it notified “necessary relatives” or next of kin “if any mal-practice or negligence occurs during surgery.” (*Id.* at 7, ¶ 9)

Plaintiff initiated this civil action in May of 2017 against Graduate Hospital. He primarily raises wrongful death and survival act claims under Pennsylvania law on the basis that Graduate Hospital’s treatment of Ms. Terrell between 1968 and 1970 wrongfully caused her death. The complaint also asserts constitutional claims pursuant to 42 U.S.C. § 1983. Plaintiff claims to be Ms. Terrell’s only heir and seeks “to claim [his] deceased mother’s assets and royalties,” as well as additional compensatory and punitive damages. (Compl. at 3.)

II. STANDARD OF REVIEW

The Court grants plaintiff leave to proceed *in forma pauperis* because it appears that he cannot afford to prepay the fees to commence this civil action.⁵ Accordingly, 28 U.S.C. §

⁴ The complaint reflects that plaintiff was born in 1954. Accordingly, it appears he has lived his entire life in California.

⁵ The Court initially denied plaintiff’s motion to proceed *in forma pauperis* due to his failure to submit a certified copy of his prisoner account statement reflecting six months of account activity as required by 28 U.S.C. § 1915(a). Plaintiff moved for reconsideration and submitted a copy of his prison account statement. The Court will grant plaintiff’s motion for reconsideration and his motion to proceed *in forma pauperis*. However, as plaintiff is a prisoner subject to the

1915(e)(2)(B)(ii) applies, which requires the Court to dismiss the complaint if it fails to state a claim. To survive dismissal, a complaint must contain “sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotations omitted). “[M]ere conclusory statements[] do not suffice.” *Id.* Additionally, the Court may dismiss claims based on an affirmative defense if the affirmative defense is obvious from the face of the complaint. *See Fogle v. Pierson*, 435 F.3d 1252, 1258 (10th Cir. 2006); *cf. Ball v. Famiglio*, 726 F.3d 448, 459 (3d Cir. 2013), *abrogated on other grounds by, Coleman v. Tollefson*, 135 S. Ct. 1759, 1763 (2015). As plaintiff is proceeding *pro se*, the Court construes his allegations liberally. *Higgs v. Att’y Gen.*, 655 F.3d 333, 339 (3d Cir. 2011).

III. DISCUSSION

A. Section 1983 Claims

“To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law.” *West v. Atkins*, 487 U.S. 42, 48 (1988). Graduate Hospital is not a state actor subject to liability under § 1983. In any event, nothing in the complaint provides a plausible basis for concluding that plaintiff’s constitutional rights were violated. Accordingly, the Court will dismiss plaintiff’s § 1983 claims.

B. Survival Act Claims

“A survival action is a continuation of the personal injury action held by the decedent at the time of his or her death and may be brought by the personal representative of their estate.” *Miller v. Phila. Geriatric Ctr.*, 463 F.3d 266, 271 n.4 (3d Cir. 2006); *see also Pezzulli v.*

Prison Litigation Reform Act, he will be obligated to pay the filing fee in installments pursuant to 28 U.S.C. § 1915(b).

D'Ambrosia, 26 A.2d 659, 646 (Pa. 1942). Nothing in the complaint suggests that plaintiff has authority to act as personal representative of Ms. Terrell's estate. To the contrary, it appears that the estate was administered without his involvement, which appears to be the primary impetus for this lawsuit. Accordingly, as plaintiff lacks the ability to bring survival act claims on behalf of Ms. Terrell's estate, the Court will dismiss those claims without prejudice.⁶

C. Wrongful Death Claims

To the extent plaintiff is raising wrongful death claims on behalf of Ms. Terrell's estate, those claims are dismissed without prejudice for the same reasons the Court dismissed his survival act claims. To the extent plaintiff is raising wrongful death claims on his own behalf based on his belief—which the Court accepts as true for purposes of this opinion—that he is Ms. Terrell's son, his claims are time-barred.⁷

“[A]n action for the wrongful death of another person must be brought no later than two years after the date of death.” *Baumgart v. Keene Bldg. Prod. Corp.*, 633 A.2d 1189, 1194 (Pa.

⁶ Even if plaintiff had been named as administrator of Ms. Terrell's estate by the appropriate Pennsylvania court, he would not necessarily have authority to bring claims on behalf of the estate in federal court. Non-attorneys proceeding *pro se* such as plaintiff generally may not pursue claims on behalf of others in a representative capacity. See *Gunn v. Credit Suisse Grp. AG*, 610 F. App'x 155, 157 (3d Cir. 2015) (per curiam). Thus, federal courts generally will only permit a non-attorney to proceed *pro se* in his capacity as the administrator of an estate when he is the sole beneficiary and the estate has no creditors. Compare *Johnson v. Marberry*, 549 F. App'x 73, 75 (3d Cir. 2013) (per curiam) (*pro se* litigant could not prosecute claims on behalf of estate/heirs); *Jones ex rel. Jones v. Corr. Med. Servs., Inc.*, 401 F.3d 950, 952 (8th Cir. 2005) (“[W]hen an estate has beneficiaries or creditors other than the administratrix or executrix, the action cannot be described as the litigant's own, because the personal interests of the estate, other survivors, and possible creditors will be affected by the outcome of the proceedings.” (quoting *Pridgen v. Andresen*, 113 F.3d 391, 393 (2d Cir. 1997) (alteration in original))) with *Guest v. Hansen*, 603 F.3d 15, 17 (2d Cir. 2010) (“[A]n administrator can proceed *pro se* where an estate has neither creditors nor beneficiaries other than the administrator.”).

⁷ Even if plaintiff's claims were not time-barred, his allegations of negligence are too conclusory to state a plausible basis for a wrongful death claim. See *Iqbal*, 556 U.S. at 678.

Super. Ct. 1993). The discovery rule—which delays running of the limitations period until a plaintiff knows or reasonably should know that he has been injured by the defendant’s conduct—does not apply to wrongful death claims. *See Pastierik v. Duquesne Light Co.*, 526 A.2d 323, 327 (Pa. 1987) (“[T]here is no basis to extend application of the discovery rule to permit the filing of survival actions, or wrongful death actions, at times beyond the specified statutory period.”). Here, plaintiff’s wrongful death claims accrued when Ms. Terrell passed away in 1970, but he did not file this action until May of 2017, approximately forty-seven years later.⁸ Accordingly, his claims are clearly time-barred unless tolling applies.⁹

Plaintiff alleges that he did not know he could bring a wrongful death claim, presumably to justify the more than forty-year delay in filing his lawsuit. However, even leaving aside the fact that the discovery rule does not apply to wrongful death claims, plaintiff’s ignorance of the law cannot provide a basis for tolling. *See Baumgart*, 633 A.2d at 1192 (explaining that “lack of knowledge, mistake or misunderstanding [does] not toll the running of the statute of limitations.” (quoting *Pocono Int’l Raceway, Inc. v. Pocono Produce, Inc.*, 468 A.2d 468, 471 (Pa. 1983)) (internal quotations omitted and alteration in original)). Additionally, plaintiff’s belief that he was subject to a “cover-up” because Graduate Hospital did not notify him of Ms. Terrell’s death or establish a procedure to notify next of kin of possible malpractice does not provide a plausible basis for tolling based on fraudulent concealment. *See Baselice v. Franciscan Friars Assumption*

⁸ Pursuant to the prison mailbox rule, a prisoner’s complaint is considered filed at the time he or she hands it over to prison authorities for forwarding to the Court. *See Houston v. Lack*, 487 U.S. 266, 276 (1988); *Terrell v. Benfer*, 429 F. App’x 74, 75 n.1 (3d Cir. 2011) (per curiam). The complaint reflects that plaintiff delivered it to prison authorities for mailing on May 21, 2017.

⁹ Although plaintiff alleges that he was a minor at the time of Ms. Terrell’s death, he has long since reached the age of majority. Accordingly, his status as a minor does not justify tolling the limitations period for several decades.

BVM Province, Inc., 879 A.2d 270, 278 (Pa. Super. Ct. 2005) (“[I]n order for fraudulent concealment to toll the statute of limitations, the defendant must have committed some affirmative independent act of concealment upon which the plaintiff justifiably relied.” (internal quotations omitted)).

IV. CONCLUSION

For the foregoing reasons, the Court will dismiss plaintiff’s complaint pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). Plaintiff’s claims are dismissed with prejudice with the exception of any claims raised on behalf of Ms. Terrell’s estate, which are dismissed without prejudice because plaintiff lacks the authority to bring those claims. Plaintiff may not file an amended complaint because the Court concludes that amendment would be futile. Plaintiff’s motion for counsel is denied. *See Tabron v. Grace*, 6 F.3d 147, 155 (3d Cir. 1993) (in determining whether appointment of counsel is appropriate, the Court should first determine whether plaintiff’s lawsuit has a legal basis). An appropriate order follows.