UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

RODERICK WEBBER, Plaintiff v. EDWARD DECK, ET AL., Defendants	Case No. 1:18-cv-00931-LM

DEFENDANT XMARK LLC'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, defendant XMark LLC ("XMark") moves to dismiss the claims against it in plaintiff's second amended complaint for failure to state a claim upon which relief can be granted. The claims against XMark are time-barred by the applicable three-year statute of limitations.

I. Introduction

The plaintiff seeks to recover damages from XMark related to his removal from a political event known as the No Labels "Problem Solvers" convention. The convention took place in Manchester, New Hampshire, on October 12, 2015. Plaintiff did not name XMark as a defendant until he filed his first amended complaint on April 17, 2019. The second amended complaint alleges that XMark is liable for seven state law claims and five federal law claims under 42 U.S.C. §1983 ("§1983"), all of which are governed by a three-year statute of limitations. Because plaintiff did not commence an action against XMark within the three-year statutory period, the claims against XMark must be dismissed.

II. Statement of Facts

The plaintiff alleges that he was harmed on October 12, 2015, and that XMark is liable for his alleged injuries. *See generally* Doc. 75 (05/22/2019). The plaintiff filed his original complaint two years and 364 days after the incident at the convention. Doc. 1 (10/11/2018). XMark was not named among the thirteen defendants in the original complaint. *Id.* at 1.

The plaintiff filed an amended complaint on April 17, 2019, three years, six months, and five days after the incident at the convention. Doc. 47 (04/17/2019). The plaintiff named XMark as a defendant for the first time in the amended complaint. *Id.* at ¶8. The plaintiff alleges that he added XMark as a defendant after he discovered a connection between XMark and Donald J. Trump for President, Inc. (the "Campaign") in the publicly-available Federal Election Commission ("FEC") records. Doc. 39 (04/03/2019) at 5. The plaintiff also stated in one of his motions that, "[t]he brief backstory on that is that I had discovered what I believed to be evidence from the Federal Election Commission (FEC) indicating that [Defendant Edward] Deck's company XMark, LLC was involved in the incident described in the complaint, as they [sic] had been hired for security services." *Id.* The plaintiff acknowledged that "there are a multitude of FEC filings indicating the Trump/ Campaign/ Deck/ XMark connection." *Id.* at 6; *see also* Doc. 47 at ¶8 ("Public FEC filings report XMark, LLC's business address as 'C/O Eddie Deck,' at DECK's home address, as well as yet another address in South Carolina, (which shall go unnamed for privacy concerns)."). Plaintiff also provided a link in his papers establishing, through publicly-available records, that the alleged connection between XMark and the Campaign goes back to at least October 1, 2015. Doc. 39 (04/03/2019) at 8. According to his amended complaint, the plaintiff also ran "background" checks on Defendant Deck which

showed a number of addresses. Doc. 47, ¶7. One of those addresses is allegedly the same as an address listed for XMark. *Id.* at ¶8.

The plaintiff filed a second amended complaint with leave of the court on May 22, 2019. Doc. 75 (05/22/2019). The plaintiff again named XMark as a defendant. *Id*. at ¶¶8-9. Plaintiff distinguished between XMark, LLC organized under the laws of Arizona, and XMark, LLC organized under the laws of North Carolina in the second amended complaint. *Id.* Aside from the states of organization, however, the LLCs are identical and this motion is made on behalf of both entities.

III. Argument

A. Motion to Dismiss Standard

The argument that a claim is barred by the statute of limitations raises an affirmative defense and is considered under Federal Rule of Civil Procedure 12(b)(6). *See, e.g.*, *Edes v. Verizon Comm'ns, Inc.*, 417 F.3d 133, 137 (1st Cir. 2005); *Bergstrom v. Univ. of N.H.*, 959 F. Supp. 56, 58 (D.N.H. 1996). As a general proposition, to withstand a motion to dismiss pursuant to Rule 12(b)(6) "a complaint must allege 'a plausible entitlement to relief.' " *ACA Fin. Guar. Corp. v. Advest, Inc.*, 512 F.3d 46, 58 (1st Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678-87 (2009). The "tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). A facially-plausible complaint "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. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

The court will accept as true the well-pleaded factual allegations of the complaint and draw all reasonable inferences in favor of the plaintiff. *Cook v. Gates*, 528 F.3d 42, 48 (1st Cir. 2008); *McCloskey v. Mueller*, 446 F.3d 262, 266 (1st Cir. 2006). On the other hand, "this deferential standard does not force [a] court to swallow the plaintiff's invective hook, line, and sinker; bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like need not be credited." *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996).

B. Plaintiff Filed his Causes of Action Against XMark More Than Three Years After They Allegedly Accrued.

When Congress has not established a statute of limitations for a federal cause of action, courts adopt the statute of limitations for the most analogous cause of action under state law. *See Gilbert v. City of Cambridge*, 932 F.2d 51, 57 (1st Cir. 1991) ("The limitation period applicable to a section 1983 claim is to be found in the general personal injury statute of the jurisdiction in which the claim arises."); *Wilson v. Garcia*, 471 U.S. 261, 276 (1985) (causes of action brought under §1983 are best characterized as personal injury actions for purposes of determining the applicable statute of limitations.). New Hampshire state law provides a three-year statute of limitations for personal injury actions which begins to run on the date the act or omission occurred. RSA 508:4. Accordingly, the applicable statute of limitations for the plaintiff's claims here, which are brought under state law and §1983, is three years. RSA 508:4; *Wilson*, 471 U.S. at 266-67.

"Although the limitations period is determined by state law, the date of accrual is a federal law question." *Greenwood v. N.H. Pub. Util. Comm'n*, 527 F.3d 8, 14 (1st Cir. 2008)

(quotations omitted). An action accrues when a "plaintiff has a complete and present cause of action." *Id.* (quotations omitted). It is well settled that

> Section 1983 claims generally accrue when the plaintiff knows, or has reason to know of the injury on which the action is based, and a plaintiff is deemed to know or have reason to know at the time of the act itself and not at the point that the harmful consequences are felt.

Moran Vega v. Cruz Burgos, 537 F.3d 14, 20 (1st Cir. 2008) (quotations, citations, and emphasis omitted). Plaintiff alleges that he was harmed in a discrete incident on October 12, 2015. Doc. 75 (05/22/2019) at ¶¶33, 40-70.

The plaintiff had until October 12, 2018, to commence a cause of action against XMark. The plaintiff has admitted that he had access to public FEC records showing an alleged connection between XMark and Defendants Deck and the Campaign dating back to October 1, 2015, and has cited these records in prior pleadings in this case. There is no allegation in any complaint or other pleading that plaintiff did not or could not have found that alleged connection before the statute ran. The plaintiff has likewise presented no evidence that these publicly-available records were not accessible or available prior to when he filed his original complaint. Yet the plaintiff did not name XMark as a defendant until April 17, 2019, well outside the permissible three-year time period. His claims against XMark are time-barred as a result.

IV. Conclusion

XMark respectfully requests that the court dismiss the claims against it in the plaintiff's second amended complaint as untimely.

Respectfully submitted,

XMark LLC,
By Its Attorneys,

Date: June 5, 2019

/s/ Bryan K. Gould

Bryan K. Gould, Esq. (NH Bar #8165)
gouldb@cwbpa.com
Matthew D. Mortensen, Esq. (NH Bar #270795)
mortensenm@cwbpa.com
CLEVELAND, WATERS AND BASS, P.A.
Two Capital Plaza, P.O. Box 1137
Concord, NH 03302-1137
Telephone: (603) 224-7761
Facsimile: (603) 224-6457

CERTIFICATE OF SERVICE

I hereby certify that the within pleading is being served electronically upon the persons listed below through the court's ECF system.

Christian Hinrichsen, Esq.
Samantha D. Elliott, Esq.
Adam B. Pignatelli, Esq.
Jonathan S. Spaeth, Esq.
Peter S. Cowan, Esq.
Chloe F. Golden, Esq.
Roderick Webber, pro se

Date: June 5, 2019

/s/ Bryan K. Gould
Bryan K. Gould, Esq.