

Remigio v. Kelly

United States District Court for the Southern District of New York

August 2, 2005, Decided ; August 12, 2005, Filed

04 Civ. 1877 (JGK) (MHD)

Reporter

2005 U.S. Dist. LEXIS 16789 *; 2005 WL 1950138

DAVID A. REMIGIO, Plaintiff, -against- RAYMOND W. KELLY, in his official capacity as Commissioner of the New York City Police Department; PROPERTY CLERK, New York City Police Department, and the CITY OF NEW YORK, Defendants.

Disposition: [*1] Defendants' motion to dismiss all of plaintiff's claims except his procedural due process claim granted.

Core Terms

continuing-violation, seizure, abstention, cases, defendants', due-process, seized, statute of limitations, retention, continuing violation, motion to dismiss, forfeiture, ongoing, rights, federal action, federal court, state court, discriminatory, asserts, proceedings, injuries, notice, prompt, Reply, charges, favored, parties, arrest, courts, constitutional claim

Case Summary

Procedural Posture

Plaintiff, a motorist whose vehicle was seized and held by defendants, New York City police and property clerk (city), brought a civil rights action pursuant to [42 U.S.C.S. § 1983](#), asserting that the city violated his due process, equal protection, and [Fourth Amendment](#) rights in the seizure and retention of the vehicle. The city moved to dismiss the action as barred by the statute of limitations or alternatively, by various abstention doctrines.

Overview

The motorist was stopped and arrested by city police for driving while intoxicated, and his vehicle was seized. The city later sent the motorist a notice that provided the reason for seizure and retention of the vehicle and stated that the vehicle was subject to possible forfeiture. The notice did not advise

the motorist of his due process right to a prompt post-seizure hearing, and the motorist asserted he had not been offered such a hearing, which he argued constituted a violation of his Due Process and [Fourth Amendment](#) rights. The court agreed with the city that most of the claims asserted by the motorist were barred by the three-year statute of limitations governing [§ 1983](#) actions. The only claim that could be construed as timely was an alleged continuing violation of due process by the city's ongoing refusal to provide a hearing. That claim survived, as it articulated the kind of compelling circumstances where the continuing-violation doctrine was applicable. The city argued that abstention was proper because a forfeiture action was pending in State court and that the federal action should have been dismissed as duplicative. The court rejected the arguments.

Outcome

The city's motion to dismiss on statute of limitations grounds was granted, except as to the motorist's claim alleging a continuing violation of his right to procedural due process.

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

[HNI](#) [↓] **Defenses, Demurrers & Objections, Motions to Dismiss**

In assessing a complaint on a motion to dismiss, a court assumes the truth of its well-pled factual allegations and draws all reasonable inferences against the defendants.

Civil Procedure > Pleading & Practice > Pleadings > General Overview

Evidence > Judicial Notice > Adjudicative
Facts > Judicial Records

Civil Procedure > ... > Responses > Defenses, Demurrers
& Objections > Motions to Dismiss

Evidence > Judicial Notice > General Overview

[HN2](#) [↓] **Pleading & Practice, Pleadings**

When deciding a motion to dismiss, a court must limit its consideration to facts stated in the complaint, documents attached to the complaint as exhibits or incorporated in the complaint by reference and matters of which judicial notice may be taken under *Fed. R. Evid. 201*. The judicial notice that may be taken extends both to the status of other proceedings, and to publicly filed documents, provided they are integral to the complaint.

Criminal Law &
Procedure > Sentencing > Forfeitures > General
Overview

[HN3](#) [↓] **Sentencing, Forfeitures**

See New York City, N.Y., Admin. Code § 14-140(e)(1).

Criminal Law & Procedure > ... > Vehicular
Crimes > Driving Under the Influence > General
Overview

Criminal Law & Procedure > Criminal
Offenses > Vehicular Crimes > General Overview

Criminal Law &
Procedure > Sentencing > Forfeitures > General
Overview

[HN4](#) [↓] **Vehicular Crimes, Driving Under the Influence**

New York City, N.Y., Admin. Code § 14-140(e)(1) applies to all levels of crime, not just felonies, and to all types of crimes. It applies to all property, both real and personal. Under the statute, the City can seize a motor vehicle following an arrest for the state-law charge of driving while intoxicated, or any other crime for which the vehicle could serve as an instrumentality.

Constitutional Law > ... > Fundamental

Rights > Procedural Due Process > Scope of Protection

[HN5](#) [↓] **Procedural Due Process, Scope of Protection**

Even a temporary deprivation of property is sufficient to state a claim for due process purposes.

Civil Procedure > Remedies > Forfeitures > General
Overview

Criminal Law &
Procedure > Sentencing > Forfeitures > General
Overview

[HN6](#) [↓] **Remedies, Forfeitures**

Where the New York City property clerk has reasonable cause to believe that property was the instrumentality of a crime, the clerk may refuse to return the property and cause a civil forfeiture proceeding to be initiated in accordance with certain procedures. If a claimant makes a timely demand for the return of the property before a forfeiture proceeding is instituted, such proceeding shall be brought within twenty-five days of the demand. New York City, N.Y., R. tit. 38, § 12-36(a).

Civil Rights Law > Protection of Rights > Section 1983
Actions > Scope

Governments > Legislation > Statute of
Limitations > Time Limitations

Governments > Legislation > Statute of
Limitations > General Overview

[HN7](#) [↓] **Protection of Rights, Section 1983 Actions**

The three-year statute of limitations for unspecified personal injury actions, *N.Y. C.P.L.R. § 214(5)*, governs *42 U.S.C.S. § 1983* actions in New York.

Civil Rights Law > Protection of Rights > Section 1983
Actions > Scope

Governments > Legislation > Statute of
Limitations > Pleadings & Proof

Governments > Legislation > Statute of
Limitations > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

[HN8](#) [↓] **Protection of Rights, Section 1983 Actions**

Federal law governs the determination of the accrual date (that is, the date the statute of limitations begins to run) for purposes of the statute of limitations in an action under [42 U.S.C.S. § 1983](#). The statute of limitations accrues when the plaintiff knows or has reason to know of the injury which is the basis of his action, such as when the plaintiff becomes aware that he is suffering from a wrong for which damages may be recovered in a civil action.

Civil Rights Law > ... > Section 1983 Actions > Scope > Due Process in State Proceedings

Criminal Law & Procedure > ... > Interrogation > Miranda Rights > General Overview

Governments > Legislation > Statute of Limitations > Pleadings & Proof

Civil Rights Law > Protection of Rights > Section 1983 Actions > General Overview

Civil Rights Law > ... > Scope > Law Enforcement Officials > Arrests

Civil Rights Law > ... > Scope > Law Enforcement Officials > Custody

Civil Rights Law > ... > Scope > Law Enforcement Officials > Property Actions

Civil Rights Law > ... > Scope > Law Enforcement Officials > Search & Seizure

Criminal Law & Procedure > Commencement of Criminal Proceedings > Interrogation > General Overview

[HN9](#) [↓] **Scope, Due Process in State Proceedings**

A violation of one's civil rights accrues when the property is seized. [42 U.S.C.S. § 1983](#) claims arising out of police actions toward a criminal suspect, such as arrest, interrogation, or search and seizure, are presumed to have accrued when the actions actually occur.

Civil Procedure > Remedies > Forfeitures > General Overview

Criminal Law & Procedure > Sentencing > Forfeitures > General Overview

Governments > Legislation > Statute of Limitations > Pleadings & Proof

[HN10](#) [↓] **Remedies, Forfeitures**

In the context of a federal forfeiture action, in a case of seizure and wrongful refusal to return property where no civil or administrative forfeiture proceeding has been instituted against the property, the general principle is that the accrual date of a cause of action is when plaintiff discovered that an injury has been suffered due to defendant's actions, when the property was seized.

Governments > Legislation > Statute of Limitations > Time Limitations

Labor & Employment Law > ... > Title VII Discrimination > Statute of Limitations > Continuing Violations

Governments > Legislation > Statute of Limitations > General Overview

[HN11](#) [↓] **Statute of Limitations, Time Limitations**

The continuing-violation doctrine has usually, but not exclusively, been applied in the context of discrimination claims. The doctrine generally provides that where there is a discriminatory practice or policy, the accrual time for the statute of limitations may be delayed until the last act in furtherance of the policy.

Governments > Legislation > Statute of Limitations > Time Limitations

Labor & Employment Law > Discrimination > Actionable Discrimination

[HN12](#) [↓] **Statute of Limitations, Time Limitations**

Where a plaintiff can sufficiently allege the existence of an ongoing policy of discrimination and some non-time-barred acts taken in furtherance of that policy, acts outside of the limitations period may be considered as part of the timely

claim. To invoke the doctrine, a plaintiff must demonstrate either (1) a specific ongoing discriminatory policy or practice, or (2) specific and related instances of discrimination that are permitted to continue unremedied for so long as to amount to a discriminatory policy or practice.

Governments > Legislation > Statute of Limitations > Time Limitations

Labor & Employment
Law > Discrimination > Actionable Discrimination

Governments > Legislation > Statute of Limitations > General Overview

[HN13](#) **Statute of Limitations, Time Limitations**

Following *Nat'l R.R. Passenger Corp. v. Morgan*, each discrete discriminatory act starts a new clock for filing charges alleging that act. The Morgan court identified termination, failure to promote, denial of transfer, or refusal to hire as discrete discriminatory acts, but distinguished hostile-work-environment cases, and opined that the continuing violation doctrine would be appropriate in such cases because those claims are composed of a series of separate acts that collectively constitute one unlawful employment practice. The entire hostile work environment encompasses a single unlawful employment practice, and the statute does not separate individual acts that are part of the hostile environment claim from the whole for the purposes of timely filing and liability.

Civil Rights Law > ... > Immunity From Liability > Local Officials > General Overview

Governments > Local Governments > Claims By & Against

Civil Rights Law > ... > Section 1983
Actions > Scope > Government Actions

Labor & Employment
Law > Discrimination > Actionable Discrimination

[HN14](#) **Immunity From Liability, Local Officials**

The continuing violation doctrine may be available for [42 U.S.C.S. § 1983](#) claims based on an ongoing municipal policy or custom.

Governments > Legislation > Statute of Limitations > Time Limitations

Labor & Employment
Law > Discrimination > Actionable Discrimination

Governments > Legislation > Statute of Limitations > General Overview

[HN15](#) **Statute of Limitations, Time Limitations**

Discrimination cases draw an important distinction between continuing unlawful acts, and the continuing effects from an earlier unlawful act. The former circumstance may allow application of the continuing-violation doctrine, but the latter does not.

Governments > Legislation > Statute of Limitations > Time Limitations

Labor & Employment
Law > Discrimination > Actionable Discrimination

[HN16](#) **Statute of Limitations, Time Limitations**

A continuing violation cannot be established merely because the claimant continues to feel the effects of a time-barred discriminatory act. The fact that a plaintiff's ongoing protests, objections, requests for consideration, and persistent demands for administrative and judicial review have caused the dispute to linger does not constitute a continuing violation. The mere fact that wrongful acts may have a continuing impact is not sufficient to find a continuing violation.

Business & Corporate Compliance > ... > Protection of Rights > Federally Assisted Programs > Civil Rights Act of 1964

Governments > State & Territorial
Governments > Employees & Officials

Labor & Employment Law > ... > Title VII
Discrimination > Statute of Limitations > Continuing Violations

Governments > Legislation > Statute of Limitations > Time Limitations

[HN17](#) **Governments, Civil Rights Act of 1964**

The continuing-violation doctrine has been applied to a

variety of claims not arising from Title VII of the Civil Rights Act of 1964, [42 U.S.C.S. § 2000e et seq.](#), including a range of constitutional theories.

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

[HN18](#) [↓] **Statute of Limitations, Time Limitations**

In determining whether to apply the continuing-violation doctrine, a court considers whether the case before it is most analogous to those cases involving the repeated application of a discriminatory policy. When a plaintiff challenges a policy that gives rise over time to a series of allegedly unlawful acts, it will often be the case that plaintiff might bring a claim after the first such act, and yet the law may render timely a claim brought prior to the expiration of the statute of limitations on the last such act.

Governments > Legislation > Statute of Limitations > Time Limitations

[HN19](#) [↓] **Statute of Limitations, Time Limitations**

The continuing-violation doctrine is disfavored in the courts of the Second Circuit, and is applied only upon a showing of compelling circumstances. Courts have found "compelling circumstances" where the unlawful conduct takes place over a period of time, making it difficult to pinpoint the exact day the violation occurred; where there is an express, openly espoused policy that is alleged to be discriminatory; or where there is a pattern of covert conduct such that the plaintiff only belatedly recognizes its unlawfulness.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > Sentencing > Forfeitures > Proceedings

[HN20](#) [↓] **Procedural Due Process, Scope of Protection**

The Due Process clause requires, at the very least, a hearing after the government has seized a person's property. At the core of due process is the right to notice of the nature of the charges and a meaningful opportunity to be heard.

Civil Procedure > Remedies > Forfeitures > Forfeiture Hearings

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Civil Procedure > Remedies > Forfeitures > General Overview

[HN21](#) [↓] **Forfeitures, Forfeiture Hearings**

The United States Court of Appeals for the Second Circuit holds that due process requires prompt post-seizure, prejudgment hearings to determine whether New York City is likely to succeed on the merits of a forfeiture action under New York City, N.Y., Admin. Code § 14-140.

Civil Procedure > Remedies > Forfeitures > Forfeiture Hearings

Criminal Law & Procedure > Preliminary Proceedings > Bail > Delays in Granting of Bail

Civil Procedure > Remedies > Forfeitures > General Overview

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > Sentencing > Forfeitures > Proceedings

[HN22](#) [↓] **Forfeitures, Forfeiture Hearings**

The New York Court of Appeals holds that due process requires the county government to hold a prompt retention hearing before a neutral magistrate so that defendants whose cars were seized and held for possible forfeiture could challenge that seizure.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Abstention

Constitutional Law > Relations Among Governments > Full Faith & Credit

Governments > Courts > Judicial Comity

Civil Procedure > Preliminary Considerations > Federal

& State Interrelationships > General Overview

[HN23](#) **Federal & State Interrelationships, Abstention**

Under *Younger v. Harris*, federal courts, in the interest of comity, must abstain from enjoining pending state court criminal prosecutions and allow state courts to resolve pending matters within their jurisdiction. *Younger* abstention extends beyond the ambit of state criminal prosecutions to state civil proceedings and administrative proceedings. *Younger* abstention is appropriate when (1) there is an ongoing state proceeding; (2) the proceeding involves important state interests; (3) the state proceeding provides an adequate opportunity for the plaintiff to raise his constitutional claims.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Abstention

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > Concurrent Jurisdiction

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

[HN24](#) **Federal & State Interrelationships, Abstention**

Colorado River Water Conservation Dist. v. United States set forth the standards governing abstention when state and federal courts exercise concurrent jurisdiction simultaneously. The mere fact that parallel proceedings are pending in state court is insufficient to justify abdicating the virtually unflagging obligation of federal courts to exercise federal jurisdiction, and abstention from the exercise of federal jurisdiction is the exception, not the rule. District courts are to engage in a careful balancing of the important factors as they appear in a given case, with the balance weighted in favor of the exercise of jurisdiction. The burden of persuasion in favor of abstention rests on the party opposing federal jurisdiction. As a prudential doctrine, abstention under *Colorado River* is left to the court's discretion.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Abstention

[HN25](#) **Federal & State Interrelationships, Abstention**

Before a court can determine whether *Colorado River Water Conservation Dist. v. United States* abstention is warranted, it must first find that the state and federal actions at issue are parallel. Suits are parallel when substantially the same parties are contemporaneously litigating substantially the same issue in another forum. Once the court finds the actions to be parallel, abstention is proper if the two cases meet the six-factor test articulated in *Colorado River* and *H. Cone Memorial Hospital v. Mercury Constr. Corp.*: (1) whether the controversy involves a res over which one of the courts has assumed jurisdiction; (2) whether the federal forum is less convenient than the other for the parties; (3) whether staying or dismissing the federal action will avoid piecemeal litigation; (4) the order in which the actions were filed and whether the proceedings have advanced more in one forum than the other; (5) whether federal law provides the rule of decision; and (6) whether the state procedures are adequate to protect the plaintiff's federal rights.

Counsel: For David A. Remigio, Plaintiff: Steven L. Kessler, Kessler & Kessler, New York, NY.

For Raymond W. Kelly, in his official capacity as Commissioner of the New York City Police Department, Property Clerk, New York City Police Department, The City of New York, Defendants: Chlarens Orsland, NYC Law Department, Office of the Corporation Counsel, New York, NY.

Judges: MICHAEL H. DOLINGER, UNITED STATES MAGISTRATE JUDGE.

Opinion by: MICHAEL H. DOLINGER

Opinion

MEMORANDUM AND ORDER

MICHAEL H. DOLINGER

UNITED STATES MAGISTRATE JUDGE:

Plaintiff David Remigio has filed a civil rights action pursuant to [42 U.S.C. § 1983](#), asserting that the defendants -- consisting of Raymond W. Kelly, the New York City Police

Commissioner, the Property Clerk of the New York City Police Department ("NYPD"), and the City of New York -- violated his *due process*, *equal protection*, and *Fourth Amendment* rights in connection with the NYPD's June 1999 seizure of his automobile pursuant to a New York City ordinance. The defendants have moved to dismiss his complaint, asserting that the [*2] action is barred by the statute of limitations or alternatively, by various abstention doctrines. Plaintiff has filed opposing papers. For the reasons that follow, we grant defendants' motion in part and deny it in part.

The Complaint

[HN1](#) In assessing a complaint on a motion to dismiss, we must assume the truth of its well-pled factual allegations and draw all reasonable inferences against the defendants. ¹ See, e.g., *In re Sharp Intern. Corp.*, 403 F.3d 43, 49 (2d Cir. 2005); *Woolford v. Cmty. Action Agency of Greene County, Inc.*, 239 F.3d 517, 526 (2d Cir. 2000). The pertinent facts in plaintiff's complaint, filed on March 9, 2004, are as follows: Remigio, a New Jersey resident, is a "self-employed businessman who has maintained a salon in Manhattan for eighteen years." (Compl. P17). He is the owner of a 1989 Nissan, bearing New Jersey license plates. (*Id.* P22). On June 10, 1999, he was stopped and arrested by the NYPD officers, and charged with Driving While Intoxicated. (*Id.* at P23). He had never been arrested before. (*Id.* at P17). In connection with the arrest, his vehicle was seized by NYPD officers. (*Id.* at PP23, 28).

[*3] In June 1999, Remigio received a notice from the NYPD, dated June 16, informing him that his vehicle was "being held/stored at the New York City Police Department Auto Pound." (*Id.* at P24). The notice provided "four possible categories for defendants' reason for seizure and retention of the vehicle," and indicated that the vehicle was in the "Subject

to Possible Forfeiture" category. (*Id.*). The notice did not advise Remigio of his "due process right to a prompt post-seizure hearing," and Remigio asserts that "neither in the Notice nor at any time since the arrest have the defendants made such a hearing available." (*Id.* at P25).

On July 8, 1999, defendants commenced a forfeiture action against Remigio, captioned *Property Clerk, New York City Police Department v. David Remigio*, No. 402784/99 (Sup.Ct. New York Cty. 1999), by which they sought the permanent forfeiture of Remigio's seized vehicle, pursuant to [section 14-140 of the New York City Administrative Code](#) and the Rules of the Property Clerk. ² [*5] (*See* Compl. at P28). On August 3, 1999, Remigio served an answer, counterclaims, a demand for a bill of particulars, and a demand for discovery and inspection on the [*4] City. (*Id.* at P29). The City replied to the counterclaims on August 5, 1999, and over the next few months, the parties served and responded to various discovery demands in that action. (*Id.*). According to plaintiff, "the City has taken no steps to litigate the state court action since the latter part of 1999," and his "vehicle remains in defendants' impound lot to this day." (*Id.* at PP27, 30). ³

Remigio's DWI charges were resolved in September 1999. He

² The relevant provision of the NYC Administrative Code states:

[HN3](#) Where . . . property has been used as a means of committing crime or employed in aid or in furtherance of crime . . . , a person who so . . . used [or] employed any such . . . property or permitted or suffered the same to be used [or] employed . . . or who was a participant or accomplice in any such act, or a person who derives his or her clam in any manner from or through any such person, shall not be deemed to be the lawful clamant entitled to . . . such . . . property.

N.Y.C. Code § 14-140(e)(1). [HN4](#) "The statute applies to all levels of crime, not just felonies, and to all types of crimes. Moreover, it applies to all property, both real and personal." *Krimstock v. Kelly*, 306 F.3d 40, 44 (2d Cir. 2000). "Under the statute, the City can seize a motor vehicle following an arrest for the state-law charge of driving while intoxicated . . . or any other crime for which the vehicle could serve as an instrumentality." *Id.*

³ In plaintiff's brief, he notes that on May 25, 2004, "defendants' counsel handed plaintiff's counsel a release for Mr. Remigio's vehicle." (Pl. Memo at 7, n.3). This fact is immaterial for present purposes since [HNS](#) even a temporary deprivation of property is sufficient to state a claim for due-process purposes. *See Connecticut v. Doehr*, 501 U.S. 1, 12, 115 L. Ed. 2d 1, 111 S. Ct. 2105 (1991). The fact that plaintiff may have ultimately recovered his vehicle is inconsequential. *See United States v. Monsanto*, 924 F.2d 1186, 1192 (2d Cir. 1991) (holding that a "temporary and nonfinal . . . removal is, nonetheless, a 'deprivation of property' subject to the constraints of due process").

¹ [HN2](#) When deciding such a motion, the court must limit its consideration "to facts stated in the complaint[,] . . . documents attached to the complaint as exhibits or incorporated in the complaint by reference . . . [and] matters of which judicial notice may be taken under *Fed. R. Evid. 201*." *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 773 (2d Cir. 1991); *see also Newman & Schwartz v. Asplundh Tree Expert Co.*, 102 F.3d 660, 662 (2d Cir. 1996). The judicial notice that may be taken extends both to the status of other proceedings, *see, e.g., Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 75 (2d Cir. 1998), and to publicly filed documents, at least if they are integral to the complaint. *See, e.g., In re Merrill Lynch Ltd. P'ships Litig.*, 154 F.3d 56, 58 (2d Cir. 1998). Defendants urge the court to take judicial notice of the pleadings in the state court forfeiture action. (*See* Defts' Memo at 4 n.1; Orsland Decl., Exs. B & C).

received a conditional discharge in exchange for a plea of guilty to driving under the influence, payment of a fine, and suspension of his driver's license. (*Id.* at P26).

Remigio asserts that the seizure of the vehicle caused him "substantial personal and economic hardship." (*Id.* at P18). He alleges that, without his vehicle, he "has spent an additional [*6] three hours per day commuting," his income has been reduced "by increasing his time away from his business," and he "has been unable to drive his daughter to school, dance classes and soccer practices, instead being forced to pay for transportation or beg rides on her behalf from other parents." (*Id.*).

In his complaint, Remigio asserts six claims for relief. He contends that, under the [Fourth](#) and [Fourteenth Amendments](#), the defendants were required to provide him -- promptly after the vehicle's seizure -- the opportunity for a hearing before a neutral factfinder at which he "could challenge the 'probable validity of continued deprivation of [his] vehicle[], including the City's probable cause of the initial warrantless seizure.'" (*Id.* at P32, quoting [Krimstock v. Kelly](#), 306 F.3d 40, 69 (2d Cir. 2002)). Remigio charges that the defendants' failure to provide a hearing constituted a violation of his [Due Process](#) and [Fourth Amendment](#) rights. (*Id.* at P33).

Remigio's second claim is for "Arbitrary Administrative Action." He declares that, in proceeding against his vehicle, the "defendants have failed to adhere to their own procedural rules set forth in 38-A. [*7] R.C.N.Y. 12-36 *et seq.*,"⁴ and specifically that they "have retained [his] vehicle for an unreasonably long period of time without cause or an opportunity to be heard." He further asserts that this "arbitrary, capricious and irrational" conduct violates the [Fourth](#) and [Fourteenth Amendments](#). (*Id.* at PP37-38). Remigio next alleges that defendants have violated the [Equal Protection Clause](#) by targeting cars of substantial value, such as his, for forfeiture and ignoring cars of lesser value "while

purporting to be protecting the public safety in their enforcement of the City Code." (*Id.* at PP42, 43).

[*8] In addition, Remigio challenges enforcement of the City's DWI policy as punitive, alleging that the forfeiture of his "vehicle of substantial value, for a violation that carries a maximum penalty of \$ 1,000, would be 'grossly disproportionate' to the severity of the crime,' and constitutes an excessive fine within the meaning of the [Eighth Amendment](#)." (*Id.* at PP47-48). Remigio next asserts a declaratory judgment claim, charging that unless there is a declaration of his rights, defendants' "unconstitutional policies and practices will continue." (*Id.* at P51). He seeks a judgment declaring (1) that defendants have violated his rights under the [Due Process](#), [Equal Protection](#), and [Excessive Fines Clauses](#); (2) that he is entitled to the immediate release and return of his vehicle; (3) that defendants are permanently precluded from prosecuting any future forfeiture action because of the lapse of time between the seizure of the vehicle and the resolution of the criminal proceeding; (4) that defendants are not entitled to recover any of plaintiff's property by reason of forfeiture, and (5) that he is entitled to costs, pre- and post-judgment interest, and attorneys' fees pursuant to [*9] [42 U.S.C. § 1988](#). (*Id.* at P52).

For relief, Remigio seeks an injunction directing the immediate and permanent release of his vehicle, as well as relief similar to that requested in his declaratory judgment claim. (*Id.* at P55). He also seeks not less than \$ 25,000.00 in damages. (*Id.* at "Conclusion").

Motion to Dismiss

In June 2004, defendants filed a motion to dismiss the complaint. They contend that Remigio's complaint is barred by the three-year statute of limitations governing [section 1983](#) actions. (*See* Defts' Memo at 3). They also argue that the federal action should be dismissed as duplicative because Remigio asserted the same core federal claims in response to the civil forfeiture action brought by the NYPD, a proceeding that is still pending in the state court. (*Id.* at 7; Declaration of Assistant Corporation Counsel Chlarens Orsland, Esq., dated June 20, 2004, at Exs. B & C). Specifically, they posit that the abstention doctrines set forth in [Younger v. Harris](#), 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971) and [Colorado River Water Conservation District v. United States](#), 424 U.S. 800, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976), apply to these proceedings, [*10] warranting dismissal. (*See* Defts' Memo at 8-11).

Relying on *Krimstock*, plaintiff responds that his claims are timely as a result of the application of the continuing-violation doctrine, and that there is no basis for the federal

⁴Title 38, Chapter 12-36 of the Rules and Regulations of the City of New York, is entitled "Property Clerk Forfeiture Proceedings" and provides that [HN6](#)[↑] where the City's property clerk has "reasonable cause" to believe that property was the instrumentality of a crime, the clerk "may refuse to return the property and cause a civil forfeiture proceeding . . . to be initiated" in accordance with certain procedures. The rule notes that if a claimant makes a timely demand for the return of the property before a forfeiture proceeding is instituted, such proceeding shall be brought, *inter alia*, within twenty-five days of the demand. 38 RCNY § 12-36(a). The Rules go on to say that, should the City initiate a forfeiture proceeding, "any such proceeding shall provide the claimant. . . with an adequate opportunity to be heard *within a reasonable period of time.*" 38 RCNY § 12-36(b) (emphasis added).

court's abstention from this case. (*See* Pl. Memo at 5-18).

ANALYSIS

I. The Statute of Limitations

A. Arguments of the Parties

Defendants argue that all of plaintiff's claims must be dismissed as untimely under the three-year limitations period for [section 1983](#) cases. (*See* Defts' Memo at 3-5). They reason that because a claim accrues "when the plaintiff 'knows or has reason to know of the injury which is the basis of his action,'" citing [Singleton v. City of New York](#), [632 F.2d 185, 191 \(2d Cir. 1980\)](#) (quoting [Bireline v. Seagondollar](#), [567 F.2d 260, 263 \(4th Cir. 1977\)](#)), Remigio was aware of the injury upon which this action was based on June 10, 1999, when his car was seized, and on June 16, 1999, when he was advised that his car was being held at the auto pound for possible forfeiture. Defendants argue that Remigio's statute of limitations ran in June 2002, and because he waited until [*11] March 2004 to file his action, it is time-barred. (*See* Defts' Memo at 3-4). They point out that Remigio's counterclaims in the state-court action, in which he "explicitly acknowledged his awareness of the injury when he set forth his constitutional claims," underscore his awareness of his constitutional injury in August 1999. (*Id.* at 5).

Anticipating that Remigio would contend that he was entitled to tolling by virtue of the "continuing violation" doctrine, defendants argue that that doctrine is usually asserted in employment discrimination suits and is, in any case, not applicable here. They assert that the only action challenged by Remigio is the seizure and retention of the automobile; that they have undertaken no further acts; and that the continuing-violation doctrine cannot be based on the continuing effects of their earlier purportedly unlawful conduct. (*See id.* at 5-6, Reply Memo at 3-6).

In opposing defendants' motion, Remigio focuses only on his due-process claim, insisting that the continuing-violation doctrine saves it from dismissal. He protests that the defendants have mischaracterized his claim as a challenge primarily to the seizure of his vehicle -- the [*12] statute of limitations for which expired three years after the date of seizure -- rather than as a due-process claim based on the defendants' failure to provide a post-seizure hearing on the validity of the vehicle's continued retention. (*See* Pl. Memo at 2, 5). He reasons that, in this context, his injury is the continuing failure of the defendants to provide a hearing during the five years that the vehicle had been impounded and retained by them (the time between the seizure and the filing of his opposition papers in federal court), and that therefore

the continuing-violation doctrine applies. (*Id.* at 5).

Remigio counters defendants' argument that the continuing-violation doctrine applies only to employment discrimination and not to due-process claims, citing [Jackson v. Galan](#), [868 F.2d 165 \(5th Cir. 1989\)](#), where the court recognized a "continuing violation in the context of a due process claim." (Pl. Memo at 5, n.2). In his view, "there is nothing barring application of the continuing wrong doctrine to this proceeding." (*Id.* at 9). He also relies on [Krimstock](#), a [section 1983](#) action in which the Second Circuit held that New York City had violated the [*13] plaintiffs' due-process rights by not holding prompt hearings after their cars had been seized pursuant to the same statute under which Remigio's car had been seized. Remigio characterizes [Krimstock](#) as "dealing with the issue of continuing violations." (*Id.* at 6).

In their Reply Brief, defendants take issue with Remigio's continuing-violation premise and point to the absence of Second Circuit case law in his brief applying that doctrine in a [section 1983](#) action. They also contend that Remigio's reliance on [Krimstock](#) is misplaced because that case did not consider either the statute of limitations or continuing-violations issues but only addressed the merits of the due-process constitutional violation resulting from seizure of the plaintiffs' vehicles without a hearing. (*See* Reply Memo at 3-7). Defendants note that they

are not contesting their general obligation to provide a prompt hearing to justify continued retention of the vehicle. Our point is that the motorist's cause of action challenging the failure to provide that hearing accrues at the time of seizure -- when he should receive a notice of such a hearing and does not. A motorist such as Mr. Remigio [*14] can not reasonably wait four and a half years and only then purport to notice that he has not received a hearing, arguing that the harm has been continuing each day the hearing was not provided. If he could do so, a limitations period would never be effective.

(Reply Memo at 7).

B. The Accrual Date

[HN7](#) [↑] It is well-settled that "New York's three-year statute of limitations for unspecified personal injury actions, [New York Civil Practice Law and Rules § 214\(5\)](#), governs [section 1983](#) actions in New York." [Ormiston v. Nelson](#), [117 F.3d 69, 71 \(2d Cir. 1997\)](#). *Accord* [Curto v. Edmundson](#), [392 F.3d 502, 504 \(2d Cir. 2004\)](#). [HN8](#) [↑] As for accrual, federal law "governs the determination of the accrual date (that is, the date the statute of limitations begins to run) for purposes of the statute of limitations in a [section 1983](#) action." [Ormiston](#), [17 F.3d at 71](#). Under the [Singleton](#) rule, the statute of

limitations accrues "when the plaintiff knows or has reason to know of the injury which is the basis of his action," such as "when the plaintiff becomes aware that he is suffering from a wrong for which damages may be recovered [*15] in a civil action." 632 F.2d at 191, 192. Accord Pearl v. City of Long Beach, 296 F.3d 76, 79-80 (2d Cir. 2002).

Courts in other circuits have held, in the context of a section 1983 action alleging the wrongful deprivation of property, that HN9 [↑] "the violation of one's civil rights accrues when the property is seized." Johnson v. Cullen, 925 F.Supp. 244, 249 (D.Del. 1996). See Kaster v. State of Iowa, 975 F.2d 1381 (8th Cir. 1992) ("Kaster's cause of action arose when the state officials searched and seized his property"); Johnson v. Johnson County Comm'n Bd., 925 F.2d 1299, 1300 (10th Cir. 1991) ("[Section 1983] claims arising out of police actions toward a criminal suspect, such as arrest, interrogation, or search and seizure, are presumed to have accrued when the actions actually occur," (citing Singleton, 632 F.2d at 191)). See also Stein v. United States, 2005 U.S. Dist. LEXIS 6910, 2005 WL 936979, at *2 (D.Md. Apr. 5, 2005) (noting, HN10 [↑] in the context of a federal forfeiture action, that "in a case of seizure and wrongful refusal to return property where no civil or administrative forfeiture proceeding [*16] has been instituted against the property, the general principle is that the accrual date of a cause of action is when plaintiff discovered . . . that he has suffered injury due to defendant's actions" - when his property was seized); Fernandez v. United States, 1996 U.S. Dist. LEXIS 4073, 1996 WL 153952, at *2 (S.D.N.Y. Apr. 2, 1996) (cause of action accrued in federal action on the date the DEA agents seized property of claimant during unconstitutional search and seizure of apartment).

Remigio knew on the date of his arrest that his property had been seized, and he knew from the June 1999 notice that defendants had retained it and that it may be subject to forfeiture. The latest possible accrual date for Remigio's federal constitutional claims would be August 3, 1999, the date on which he filed his counterclaims in the state-court forfeiture action. In that filing, he acknowledged his constitutional injuries by challenging the "wrongful and unconstitutional seizure and retention" of his vehicle, as well as the wrongful and continued possession of his vehicle when the City "has no procedure in place for the prosecution and negotiation of DWI forfeiture cases." (See Orsland Decl., Ex. C at [*17] 4-5). See, e.g., Hondo, Inc. v. Sterling, 21 F.3d 775, 778 (7th Cir. 1994) ("It is clear that [plaintiffs] knew of the injury when they filed suit against [defendant] in state court."). Therefore, by August 3, 1999, there was no question but that Remigio was cognizant of his constitutional injuries. Accordingly, Remigio's injury occurred more than three years before he filed his federal complaint in March 2004, and his section 1983 claims are time-barred unless the continuing-

violation doctrine applies.

Remigio does not argue that his other section 1983 claims survive the motion to dismiss. Because he argues only that his due-process claim survives based on the continuing-violation doctrine, and because the injury upon which his other constitutional claims are based occurred more than three years before he filed his federal action, they are time-barred and we grant defendants' motion to dismiss those claims.

C. The Continuing-Violation Doctrine and the Due-Process Claim

HN11 [↑] The continuing-violation doctrine has usually -- but not exclusively -- been applied in the context of Title VII discrimination claims, and thus the majority of the cases discuss its application [*18] to that specific statute. See, e.g., AMTRAK v. Morgan, 536 U.S. 101, 153 L. Ed. 2d 106, 122 S. Ct. 2061 (2002); Harris v. City of New York, 186 F.3d 243 (2d Cir. 1999). The doctrine generally provides that "where there is a discriminatory practice or policy, the accrual time for the statute of limitations may be delayed until the last act in furtherance of the policy." Velez v. Reynolds, 325 F.Supp.2d 293, 312 (S.D.N.Y. 2004). HN12 [↑] "If the plaintiff can sufficiently allege 'the existence of an ongoing policy of discrimination and some non-time-barred acts taken in furtherance of that policy,' acts outside of the limitations period may be considered as part of the timely claim." *Id.* (quoting Bendik v. Credit Suisse First Boston (USA), Inc., 2004 U.S. Dist. LEXIS 5750, 2004 WL 736852, at *6 (S.D.N.Y. Apr. 5, 2004)). To invoke the doctrine, "a plaintiff must demonstrate either (1) a specific ongoing discriminatory policy or practice, or (2) specific and related instances of discrimination that are permitted to continue unremedied for so long as to amount to a discriminatory policy or practice." *Id.* (citing cases). Interestingly, in some cases considering application [*19] of the continuing-violation doctrine, courts did not consider whether policies were discriminatory, as the claims did not involve discrimination, but whether the policies were constitutionally infirm. See Connolly v. McCall, 254 F.3d 36, 41 (2d Cir. 2001) (considering whether state policy regarding eligibility for public pension benefits violated federal constitution); Deepwells Estates, Inc. v. Incorporated Village of Head of the Harbor, 973 F.Supp. 338, 345 (E.D.N.Y. 1997), aff'd, 162 F.3d 1147 (2d Cir. 1998) (considering whether plaintiffs' inverse condemnation allegations may constitute an over-arching policy of the Village); Velez, 325 F.Supp.2d at 311-14 (applying doctrine not only where bias against abused mothers was alleged, but also where other policies and practices were alleged that contributed to the main violation).

Prior to the Supreme Court's decision in *Morgan*, "the

continuing violation doctrine permitted recovery for discriminatory conduct that occurred outside of the applicable limitations period if the conduct was part of a 'practice or policy' of discrimination." *Nakis v. Potter*, 2004 U.S. Dist. LEXIS 25250, 2004 WL 2903718 (S.D.N.Y. Dec. 15, 2004) [*20] (no page numbers assigned) (citing cases). *Morgan* substantially restricted the scope of the doctrine, holding that [HN13](#) [↑] "each discrete discriminatory act starts a new clock for filing charges alleging that act." 536 U.S. at 113. The Court identified "termination, failure to promote, denial of transfer, or refusal to hire" as "discrete discriminatory acts." *Id.* at 114. The Court, however, distinguished hostile-work-environment cases, and opined that the continuing-violation doctrine would be appropriate in such cases because those claims are "composed of a series of separate acts that collectively constitute one unlawful employment practice," "the entire hostile work environment encompasses a single unlawful employment practice," and the statute "does not separate individual acts that are part of the hostile environment claim from the whole for the purposes of timely filing and liability." *Id.* at 117, 118.

Morgan also noted that it was not considering the "timely filing question" with respect to "'pattern-or-practice' claims brought by private litigants." *Id.* at 115, n.9. Thus, cases following [*21] *Morgan* have pointed out that [HN14](#) [↑] "the continuing violation doctrine may be available for § 1983 claims based on, for example, an ongoing municipal policy or custom." *Velez*, 325 F.Supp.2d at 312 (citing *Branch v. Guilderland Cent. Sch. Dist.*, 239 F.Supp.2d 242, 253-54 (N.D.N.Y. 2003)).

Another important tenet of the continuing-violation doctrine involves the rule gleaned from the Supreme Court's holding in *Delaware State College v. Ricks*, 449 U.S. 250, 66 L. Ed. 2d 431, 101 S. Ct. 498 (1980), and its progeny. *Ricks* held that the statute of limitations ran from the time of the injury -- denial of tenure -- and not from the plaintiff's actual termination one year later, which was but an "inevitable consequence of the denial of tenure." *Id.* at 257-58. [HN15](#) [↑] Cases thus draw an important distinction between continuing unlawful acts, and the continuing effects from an earlier unlawful act. The former circumstance may allow application of the continuing-violation doctrine, and the latter does not. See *Chardon v. Fernandez*, 454 U.S. 6, 8, 70 L. Ed. 2d 6, 102 S. Ct. 28 (1981) ("In *Ricks*, we held that the proper focus is on the time of the *discriminatory act*, not the point [*22] at which the *consequences* of the act become painful") (emphasis in original); *Harris*, 186 F.3d at 250 ("We have made it clear that [HN16](#) [↑] a continuing violation cannot be established merely because the claimant continues to feel the effects of a time-barred discriminatory act."); *Yip v. Bd. of Trustees of the State Univ. of New York*, 2004 U.S.

Dist. LEXIS 28366, 2004 WL 2202594, *5 (W.D.N.Y. Sept. 29, 2004) ("The fact that the plaintiff's ongoing protests, objections, requests for consideration, and persistent demands for administrative and judicial review have caused the dispute to linger to the present day" does not constitute a continuing violation); *Blankman v. County of Nassau*, 819 F.Supp. 198, 207 (E.D.N.Y. 1993) ("The mere fact that wrongful acts may have a continuing impact is not sufficient to find a continuing violation") (citing *Ricks*, 449 U.S. at 257, and *United Air Lines v. Evans*, 431 U.S. 553, 558, 52 L. Ed. 2d 571, 97 S. Ct. 1885 (1977)).

Contrary to defendants' view, see Defts' Reply Memo at 3, [HN17](#) [↑] the continuing-violation doctrine has been applied, both by the Second Circuit and by courts in other jurisdictions, to a variety of non-Title VII claims, [*23] including a range of constitutional theories. See *Washington v. Rockland*, 373 F.3d 310 (2d Cir. 2004) (racial discrimination claim under section 1983); *Heard v. Sheahan*, 253 F.3d 316 (7th Cir. 2001) (*Eighth Amendment* failure-to-treat claim); *Connolly*, 254 F.3d 36 (challenge to State's statutory scheme governing state employees' eligibility for public pensions); *Perry v. Sullivan*, 207 F.3d 379 (7th Cir. 2000) (unlawful arrest); *287 Corporate Center Associates v. Township of Bridgewater*, 101 F.3d 320 (3d Cir. 1996) (inverse condemnation); *Kraebel v. New York City Dep't of Housing Preservation & Development*, 959 F.2d 395 (2d Cir. 1992) (action challenging city's improper administration of municipal programs); *Deepwells Estates*, 973 F.Supp. 338 (inverse condemnation); *Jackson v. Galan*, 868 F.2d 165 (5th Cir. 1989) (garnishment of wages); *Velez*, 325 F.Supp.2d at 313 (numerous claims, including procedural due process, challenging city policy of agency retaining children without legal authority after court-ordered placements have lapsed, as [*24] well as treating abused mothers differently from mothers who have not been abused); *Johnson v. Cullen*, 925 F.Supp. 244 (D.Del. 1996) (wrongful seizure of property). Moreover, courts have applied the continuing-violation doctrine to statutes far afield from employment discrimination and section 1983. See *Brenner v. Local 514, United Bhd. of Carpenters and Joiners of Am.*, 927 F.2d 1283 (3d Cir. 1991) (applying doctrine to claim under *National Labor Relations Act*); *DirecTV, Inc. v. Rodkey*, 369 F.Supp.2d 587 (W.D.Pa. 2005) (analyzing doctrine in context of claims under *Electronic Communication Policy Act*); *Southern Appalachian Biodiversity Project v. United States Fish & Wildlife Serv.*, 181 F.Supp.2d 883 (E.D.Tenn. 2001) (applying doctrine to claim brought under the *Endangered Species Act*); *Jeffery Y. v. St. Marys Area Sch. Dist.*, 967 F.Supp. 852, 855-56 (W.D.Pa. 1997) (applying doctrine in IDEA case).

When analyzing whether the continuing-violation doctrine applied in a case that did not involve claims grounded in

discrimination, the Second Circuit reasoned by analogy. In *Connolly*, the plaintiff [*25] challenged as unconstitutional the State's statutory scheme governing the eligibility for public pensions of employees who work in one public job, retire, and then work in another public job. [HN18](#)[↑] In determining whether to apply the continuing-violation doctrine, the court opined that "this case is most analogous to those [cases] involving the repeated application of a discriminatory policy," and noted that "when a plaintiff challenges a policy that gives rise over time to a series of allegedly unlawful acts, it will often be the case that plaintiff might bring his claim after the first such act, and yet the law may render timely a claim brought prior to the expiration of the statute of limitations on the last such act." [254 F.3d at 41](#). The Court then applied the doctrine. See also [SJB v. New York City Dep't of Educ., 2004 U.S. Dist. LEXIS 13227, 2004 WL 1586500, *6 \(S.D.N.Y. July 14, 2004\)](#) (rejecting application of continuing-violation doctrine to an IDEA claim, which plaintiffs analogized to hostile-work-environment claim).

As a final note, [HN19](#)[↑] the continuing-violation doctrine is "disfavored in this Circuit" and is "applied only upon a showing of compelling circumstances." [Nakis v. Potter, 2004 U.S. Dist. LEXIS 25250, 2004 WL 2903718 at n.2 \(S.D.N.Y. Dec. 15, 2004\)](#) [*26] (citing cases). Courts have found "compelling circumstances" "where the unlawful conduct takes place over a period of time, making it difficult to pinpoint the exact day the violation occurred; where there is a 'express, openly espoused policy [that is] alleged to be discriminatory'; or where there is a pattern of covert conduct such that the plaintiff only belatedly recognizes its unlawfulness." [Yip, 2004 U.S. Dist. LEXIS 28366, 2004 WL 2202594 at *4](#) (citing cases).

D. Application

What complicates our assessment of whether the continuing-violation doctrine applies to Remigio's procedural due process claim is the fact that the injury about which he complains has a compound nature. Not only is his due-process claim tied to the NYPD's affirmative act of seizing and retaining his car, but it also is based on the defendants' subsequent inaction in failing to provide a hearing in which he could challenge that seizure.

The compound nature of Remigio's due-process injury does not change the accrual date of the injury for statute of limitations purposes, because it is clear that, at least by August 1999, Remigio understood that he had suffered a due-process injury. ⁵ [*27] It does, however, insure that

Remigio's claim does not fail on the basis of the holdings in *Ricks* and its progeny. If Remigio had simply complained about the continuing ill effects from the deprivation of his property following its seizure, the continuing violation doctrine could not apply because Remigio would be complaining about the painful consequences of that original act. See [Johnson, 925 F.Supp. at 249](#) (holding that "because the injury arose from the unlawful seizure of the property, the retention by the defendants of the seized property was a mere consequence of the alleged illegal seizure. Therefore, . . . any injuries suffered by the plaintiffs stemmed from the initial, single, unlawful act" and that continued retention of property by defendants did not constitute a continuing violation); [Shannon v. Recording Indus. Ass'n of Am., 661 F.Supp. 205, 211 \(S.D. Ohio 1987\)](#) (holding that because the injury arose from the unlawful seizure of the property, the retention by the defendants of the seized property was a mere consequence of the alleged illegal seizure). Remigio argues, however, that he suffers not only from the continuing deprivation [*28] of his property, but more specifically from the continuing ill effects of being deprived of a hearing allowing him to challenge its continued retention.

Although [Administrative Code § 14-140](#) did not then, and still does not, provide for a hearing within a reasonable time after a vehicle is seized, the City's rules and regulations governing forfeiture proceedings state that a claimant "shall" be provided with a hearing "within a reasonable period of time." 38 R.C.N.Y. § 12-36(b). [HN20](#)[↑] The Constitution also requires, at the very [*29] least, a hearing after the government has seized a person's property. See [Bray v. City of New York, 346 F.Supp.2d 480, 490 \(S.D.N.Y. 2004\)](#) (citing [United States v. James Daniel Good Real Prop., 510 U.S. 43, 53, 126 L. Ed. 2d 490, 114 S. Ct. 492 \(1993\)](#)); see also [Brown v. Ashcroft, 360 F.3d 346, 350-51 \(2d Cir. 2004\)](#) ("At the 'core' of due process is the right to notice of the nature of the charges and a meaningful opportunity to be heard."). Furthermore, [HN21](#)[↑] the Second Circuit held in no uncertain terms in *Krimstock* that due process requires prompt post-seizure, pre-judgment hearings to determine whether New York City was likely to succeed on the merits of the forfeiture action under [§ 14-140 of the Administrative Code](#). [HN22](#)[↑] The New York Court of Appeals has also weighed in on this issue in [County of Nassau v. Canavan, 1 N.Y.3d 134, 802 N.E.2d 616, 770 N.Y.S.2d 277 \(2003\)](#), holding that due process required the county government to hold a prompt retention hearing before a neutral magistrate in order that

plaintiff is given final notice that she would not receive further process"); [Hoesterey v. City of Cathedral City, 945 F.2d 317, 320 \(9th Cir. 1991\)](#) (due process claim accrued when employee "received notice, not only of termination decision, but also that the decision was final and that it would be followed by no further process.").

⁵ But see [Knox v. Davis, 260 F.3d 1009, 1015 \(9th Cir. 2001\)](#) (holding that "a procedural due process claim accrues when a

defendants whose cars had been seized and held for possible forfeiture could challenge that seizure.

Very few cases have discussed the continuing-violation doctrine in [*30] a procedural due process context. In order to determine whether the doctrine applies in this instance, we reason by analogy in two respects. First, we liken Remigio's complaint concerning the defendants' ongoing failure to hold a hearing to claims alleging a constitutional failure to treat. Second, following the Second Circuit's reasoning in *Connolly*, where it analogized the plaintiff's pension benefits due-process claim to cases "involving the repeated application of a discriminatory policy," [254 F.3d at 41](#), we analyze plaintiff's due-process claim in the context of discriminatory municipal policies, which brings the claim within the confines of the continuing-violation doctrine.

Generally speaking, in [section 1983](#) failure-to-treat cases, a jailed plaintiff charges prison defendants with refusing to treat his serious medical condition. See, e.g., [McKenna v. Wright, 386 F.3d 432, 437 \(2d Cir. 2004\)](#) (where deprivation of appropriate medical treatment -- i.e., a failure to act by prison authorities -- supported a [section 1983 Eighth Amendment](#) deliberate indifference claim). In such cases, the plaintiff charges the defendants with non-action, with [*31] failing to provide him with a proper level of care that is so egregious that the defendants' failure rises to the level of a constitutional violation. See, e.g., [Johnson v. Wright, 412 F.3d 398, 403 \(2d Cir. 2005\)](#). Although the Second Circuit has not directly applied the continuing-violation doctrine in a failure-to-treat case,⁶ Judge Posner in [Heard v. Sheahan, 253 F.3d 316 \(7th Cir. 2001\)](#), explained the nexus between the two. He noted that the refusal of the prison authorities to treat the plaintiff's condition

continued for as long as the defendants had the power to do something about his condition, which is to say until he left the jail. Every day that they prolonged his agony by not treating his painful condition marked a fresh

infliction of punishment that caused the statute of limitations to start running anew. A series of wrongful acts creates a series of claims.

[Id. at 318](#). The Court ruled that the continuing-violation doctrine -- which it described as "a general principle of federal common law; it is not anything special to [section 1983](#)" -- applied in *Heard, id.*, and it posited,

A violation is [*32] called 'continuing,' signifying that a plaintiff can reach back to its beginning even if that beginning lies outside the statutory limitations period, when it would be unreasonable to require or even permit him to sue separately over every incident of the defendant's unlawful conduct. The injuries about which the plaintiff is complaining in this case are the consequence of a numerous and continuous series of events. When a single event gives rise to continuing injuries. . . the plaintiff can bring a single suit based on an estimation of his total injuries, and that mode of proceeding is much to be preferred to piecemeal litigation despite the possible loss in accuracy. But in this case, every day that the defendants ignored the plaintiff's request for treatment increased his pain. Not only would it be unreasonable to require him. . . to bring separate suits. . . but it would impose an unreasonable burden on the courts to entertain an indefinite number of suits and apportion damages among them.

[Id. at 319-20](#).

[*33] The Seventh Circuit characterized the injuries from which Heard suffered as "the consequence of a numerous and continuous series of events," and distinguished them from "cases in which repeated events give rise to discrete injuries, as in suits for lost wages." [Id. at 320](#) (citing, *inter alia*, [Pollis v. New School for Social Research, 132 F.3d 115 \(2d Cir. 1997\)](#)). In *Pollis*, the plaintiff was seeking backpay for repeated acts of wage discrimination. The Second Circuit held that the continuing-violation doctrine did not apply since the damages from each discrete discriminatory act were readily calculable. [Id. at 118-19](#). In that case, however, because of the continuing series of discrete violations, the more recent ones were deemed timely even though the earlier ones were not saved by the continuing-violation rule. See [id. at 119](#) (discussing [Bazemore v. Friday, 478 U.S. 385, 395-96, 92 L. Ed. 2d 315, 106 S. Ct. 3000 \(1986\)](#)).

In this case, Remigio's alleged due-process injury also occurred because of the defendants' daily failure to act. The continued impoundment of his vehicle, without providing him recourse to challenge the retention, caused [*34] him "substantial personal and economic hardship." (Compl. P18).

⁶The Second Circuit has not ruled directly on point, in a published case, that the continuing-violation doctrine applies in a failure-to-treat case. In [Pino v. Ryan, 49 F.3d 51, 54 \(2d Cir. 1995\)](#), the Court indicated that the doctrine may apply in such a case, when it affirmed the dismissal of a prisoner's claim stating that plaintiff's injuries fell well outside of the limitations period and that he had alleged no facts indicating a continuous or ongoing violation of his constitutional rights. See also [Pratts v. Coombe, 59 Fed. Appx. 392, 2003 WL 1025095, *3 \(2d Cir. Mar. 7, 2003\)](#) (advising plaintiff on remand that in pleading his failure-to-treat claim, he had to plead both an ongoing policy of deliberate indifference and some time-barred acts in furtherance of that policy); [Cole v. Mirafior, 2001 U.S. Dist. LEXIS 1681, 2001 WL 138765, *5-6 \(S.D.N.Y. Feb. 19, 2001\)](#) (applying doctrine in failure-to-treat case).

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.⁷ It would be unreasonable to require Remigio to sue each day that a hearing was not held, when the days seemed to stretch into the future without end. See Quinn v. Green Tree Credit Corp., 159 F.3d 759, 766 (2d Cir. 1998) (where acts alleged to have occurred outside the limitations periods "are not continuous in time with one another or with the timely acts" that are alleged, this "discontinuity" is fatal to a "continuing violation" argument). Here, each day's due-process injury was similar to that of the day before and the day after, part of a continuous injury that was not simply a consequence of the initial seizure. Thus, similar to the plaintiff in *Heard*, the continuing-violation doctrine should apply to allow Remigio to "bring a single suit based on an estimation of his total injuries." 253 F.3d at 320. In any event, plaintiff's claim, insofar [*35] as it is based on the daily failure of defendants to conduct a hearing during the three years prior to plaintiff's filing of this lawsuit, would be timely under *Pollis* and similar decisions even if we viewed each day's inaction as a separate discrete violation. See Pollis, 132 F.3d at 119.

[*36] Remigio's complaint may also be read as asserting a continuing violation since he, in effect, alleges the existence of "specific ongoing [illegal] policies or practices, [and] . . . specific and related instances of [misconduct that] are permitted by the [defendants] to continued unremedied for so long as to amount to an [illegal] policy or practice." Cornwell v. Robinson, 23 F.3d 694, 704 (2d Cir. 1994).⁸ Remigio has

⁷Here, we depart from Third Circuit caselaw, which holds that a defendant's continued failure or refusal to act does not constitute a continuing violation. See Cowell v. Palmer Township, 263 F.3d 286, 292-93 (3d Cir. 2001) (finding that defendant's refusal, for several years, to remove liens from plaintiff's property did not constitute a continuing violation because "the focus of the continuing violations doctrine is on the affirmative acts of the defendants," and denying substantive due process claim). As discussed above, allegations of a failure to act can state a constitutional violation. Because a failure to act can have the same kind of egregious consequences as an affirmative act, we do not view the suggested distinction between continuing acts and continuing inaction as crucial in determining the applicability of the continuing-violation doctrine in a case such as this. See Southern Appalachian Project, 181 F.Supp.2d at 887 (finding that defendant's "non-action can only be construed as a continuing violation," where the "statute of limitations commences to run anew each and every day that the defendant does not fulfill the affirmative duty required of it. In short, the statute of limitations never commenced to run.").

⁸As indicated *supra*, this kind of allegation survives in a post-*Morgan* legal landscape.

adequately pled a continuing violation on both prongs of the doctrine: he cites his experience as specific proof of the defendants' illegal ongoing policy or practice of failing to hold prompt due process hearings following seizure of vehicles, when both the Second Circuit and New York Court of Appeals caselaw are clear that a prompt hearing is required. The defendants' failure to hold a hearing had continued for five years from the point he challenged their position in his state law counterclaims until he filed his brief in federal court. That extraordinary delay, even in the face of Second Circuit and Court of Appeals precedent, indicates that the defendants have permitted the practice to continue unremedied for so long that it amounts [*37] to an illegal policy or practice, if it was not one to begin with. See Krimstock, 306 F.3d at 44-46 (identifying City practice).

We also hold that Remigio has articulated the kind of "compelling circumstances" where the continuing-violation doctrine should apply. The recalcitrance of the defendants in failing to hold a due-process hearing, supported by state and federal case law holding that a prompt hearing was required, cries out for a remedy and for application of the continuing-violation doctrine.

Accordingly, we find that the continuing-violation doctrine applies, that Remigio's due-process claim is not time-barred, and that it survives defendants' motion to dismiss. His other claims, however, are time-barred, and we grant defendants' motion to dismiss to that extent.

III. The Abstention Arguments

Defendants argue in the alternative that plaintiff's complaint should be dismissed pursuant [*38] to two abstention doctrines. We find neither argument persuasive.

A. The Younger Abstention

HN23 [↑] Under Younger v. Harris, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971), "federal courts, in the interest of comity, must abstain from enjoining pending state court criminal prosecutions and allow state courts to resolve pending matters within their jurisdiction. *Younger* abstention also has been extended beyond the ambit of state criminal prosecutions to state civil proceedings and administrative proceedings." Washington, 373 F.3d at 318. "*Younger* abstention is appropriate when (1) there is an ongoing state proceeding; (2) the proceeding involves important state interests; (3) the state proceeding provides an adequate opportunity for the plaintiff to raise his constitutional claims." Krimstock v. Safir, 2000 U.S. Dist. LEXIS 16444, 2000 WL 1702035, *2 (S.D.N.Y. Nov. 13, 2000) (citing Phillip Morris, Inc. v. Blumenthal, 123 F.3d 103, 105 (2d Cir. 1997)). The defendants assert that the ongoing state forfeiture action "represents the important state interest of vigorously seizing

instrumentalities of crime, particularly in DWI cases, in order to better protect the safety [*39] of its residents," and since "constitutional claims are routinely litigated in the State Supreme Court, there is no reason why this Court should not defer to that Court in hearing this case." (Defts' Memo at 8, 9).

We adopt the reasoning of the district court in *Krimstock*, which declined to abstain under *Younger*. Dealing with the same New York City statute, the district court held that, similar to the case here, the New York City Property Clerk's forfeiture proceedings were pending in the state court when the plaintiffs' complaint was filed. Because "state proceedings are ongoing until the parties exhaust their state appellate remedies," the court held that the first *Younger* ground favored abstention. [2000 U.S. Dist. LEXIS 16444](#), [2000 WL 1702035](#), at *2. The court also found that the Property Clerk's forfeiture proceedings involved an "important state interest," which favored abstention. *Id.* However, when assessing the third abstention prong -- whether the state proceeding provided an adequate opportunity for the plaintiff to raise his constitutional claims -- the *Krimstock* court observed that even though the city statute provided that after claimants demand the return of their [*40] vehicle, the Property Clerk had twenty-five days in which to begin forfeiture proceedings, and even if the state court immediately ruled in plaintiffs' favor, "the time for a prompt probable cause hearing would already have passed." *Id.* [2000 U.S. Dist. LEXIS 16444](#), at [WL] *3, citing *Gerstein v. Pugh*, [420 U.S. 103](#), [108 n.9](#), [43 L. Ed. 2d 54](#), [95 S. Ct. 854](#) (1975). That point is exponentially made in this case, where the state proceeding has stalled in some sort of legal purgatory since 1999, offering Remigio no adequate opportunity to press his due-process claims. For reasons similar to those discussed by the district court in *Krimstock*, we also decline to abstain under *Younger* from hearing Remigio's claim that he has a due-process right to prompt probable cause hearings.

B. *The Colorado River Abstention*

[HN24](#) [↑] [Colorado River Water Conservation Dist. v. United States](#), [424 U.S. 800](#), [47 L. Ed. 2d 483](#), [96 S. Ct. 1236](#) (1976), and subsequent cases, set forth the standards governing abstention when "state and federal courts exercise concurrent jurisdiction simultaneously." *Village of Westfield v. Welch's*, [170 F.3d 116](#), [120 \(2d Cir. 1999\)](#). Cases hold that "the mere fact that parallel proceedings are pending in state court is insufficient [*41] to justify abdicating the 'virtually unflagging obligation' [of federal courts] to exercise federal jurisdiction." *Gregory v. Daly*, [243 F.3d 687](#), [702 \(2d Cir. 2001\)](#) (quoting *Colorado River*, [424 U.S. at 817](#)), and "abstention from the exercise of federal jurisdiction is the exception, not the rule." [Colorado River](#), [424 U.S. at 814](#). The

Supreme Court bids the district courts to engage in a "careful balancing of the important factors as they appear in a given case, with the balance weighted in favor of the exercise of jurisdiction." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, [460 U.S. 1](#), [16](#), [74 L. Ed. 2d 765](#), [103 S. Ct. 927](#) (1982). The burden of persuasion in favor of abstention rests on the party opposing federal jurisdiction. See *Arkwright-Boston Manufacturers Mutual Ins. Co. v. City of New York*, [762 F.2d 205](#), [210 \(2d Cir. 1985\)](#). As a prudential doctrine, abstention under *Colorado River* is left to the court's discretion. See *De Cisneros v. Younger*, [871 F.2d 305](#), [307 \(2d Cir. 1989\)](#).

[HN25](#) [↑] Before a court can reach the issue of whether *Colorado River* abstention is warranted, it must first find that the [*42] state and federal actions at issue are parallel. See *Wells Fargo Century, Inc. v. Hanakis*, [2005 U.S. Dist. LEXIS 17440](#), [2005 WL 1523788](#), *8 (E.D.N.Y. June 28, 2005). "Suits are parallel when substantially the same parties are contemporaneously litigating substantially the same issue in another forum." *Dittmer v. County of Suffolk*, [146 F.3d 113](#), [118 \(2d Cir. 1998\)](#) (quoting *Day v. Union Mines, Inc.*, [862 F.2d 652](#), [655 \(7th Cir. 1988\)](#)). Once the court finds the actions to be parallel, abstention is proper if the two cases meet the six-factor test articulated in *Colorado River* and *Moses Cone*:

- (1) whether the controversy involves a res over which one of the courts has assumed jurisdiction . . .
- (2) whether the federal forum is less convenient than the other for the parties . . .
- (3) whether staying or dismissing the federal action will avoid piecemeal litigation . . .
- (4) the order in which the actions were filed . . . and whether the proceedings have advanced more in one forum than the other . . .
- (5) whether federal law provides the rule of decision . . . and
- (6) whether the state procedures are adequate to protect the plaintiff's federal rights.

[*43] *Woodford*, [239 F.3d at 522](#) (quoting *Colorado River*, [424 U.S. at 813](#), [817-18](#) and *Moses Cone*, [460 U.S. at 22](#), [26-27](#)). Only the "clearest of justifications will warrant dismissal." *Moses Cone*, [460 U.S. at 16](#).

Even assuming, *arguendo*, that the state and federal actions are parallel, abstention would be improper in this case. With regard to the six-factor test, the defendants make the conclusory statement that "all the factors militate in favor of abstention. The state action was filed first and the parties have been engaged in discovery in that forum, which is no less convenient to the parties than the federal forum." (Defts' Brief

at 10). They acknowledge that federal law provides the rule of decision, but note that the state court could apply that law, which "would avoid piecemeal litigation." *Id.* at 10-11. They then assert that the first factor appears to be "non-applicable, as the Property Clerk has previously offered to return the vehicle to plaintiff." *Id.* at 11.

The first *Colorado River* factor, jurisdiction over the res, "looks to whether there is a particular piece [*44] of real or tangible property the rights to which are in dispute." *Wells Fargo Century, Inc. v. Hanakis*, 2005 U.S. Dist. LEXIS 17440, 2005 WL 1523788 *10 n.3 (E.D.N.Y. June 28, 2005). Plaintiff argues that the defendants have confused their impoundment of the vehicle with a court order authorizing its retention, and emphasizes that no court has assumed jurisdiction over the vehicle. (See Pl. Brief at 17 n.5). In their Reply Brief, the defendants appear to retract their position that the first factor is not applicable, asserting that "when property is in dispute, the first court in which an action regarding that property is filed obtains jurisdiction over the property, regardless of actual physical possession." Reply Brief at 16, citing *National Union Fire Ins. Co. v. Kunin*, 1988 U.S. Dist. LEXIS 9822, 1988 WL 96019, at *3 (S.D.N.Y. Aug. 24, 1988) (holding that "when jurisdiction over property is involved and the subject matter of the two suits is the same, the court in which an action is filed first has constructive possession over the property"). Even if we assume that the state-court action, involving title to property, is an *in rem* action (despite the fact that the action is not against the vehicle [*45] but against its owner), the federal action does not involve title to property, and in that regard the actions are not parallel and the first *Colorado River* factor does not favor defendants.

Moreover, the other *Colorado River* factors favor plaintiff. Where the "federal and state courthouses are in close proximity to each other," *Hanakis*, 2005 U.S. Dist. LEXIS 17440, 2005 WL 1523788 *10, as they are here, the Second Circuit has held that that factor favors retention of the case in the federal court. See *Village of Westfield v. Welch's*, 170 F.3d 116, 122 (2d Cir. 1999). The third factor, "often considered the most important," is concerned with "lawsuits that pose[] a risk of inconsistent outcomes not preventable by principles of res judicata and collateral estoppel." *Woolford*, 239 F.3d at 524. Defendants do not meet their burden of persuasion on this point. They note conclusorily and in passing that abstention "could avoid piecemeal litigation." (Defts' Brief at 11). But there is no inherent problem in the state and federal courts exercising simultaneous jurisdiction over parallel cases. Moreover, in this case, there is no risk of an inconsistent result [*46] between the state and federal courts because, on the due-process issue, both the Second Circuit and the New York Court of Appeals have addressed the same

or similar statutes and have held that a prompt due-process hearing is required following seizure of a vehicle. See *Krimstock*, 306 F.3d at 68-69; *Canavan*, 1 N.Y.3d at 145, 770 N.Y.S.2d at 286.

The fourth factor, the order in which the actions were filed and whether proceedings in one forum have advanced further than the other, clearly favors plaintiff. "This factor does not turn exclusively on the sequence in which the cases were filed, but rather in terms of how much progress has been made in the two actions." *Welch's*, 170 F.3d at 122 (quotation omitted). Although the state action was filed four years prior to the federal action, it has existed in some sort of litigation limbo where, after some initial discovery, all action has ceased. Whatever the reason for this apparent paralysis, the fact that the state-court proceeding has not advanced for years tilts this factor in favor of plaintiff. Remigio was due a prompt hearing, within a "reasonable time" pursuant to the rules, and that [*47] has not occurred. In *Woodford*, the Second Circuit held that the district court erred in holding that this factor favored abstention because even though a state complaint had been filed before the federal complaint, the state proceedings had not significantly advanced, and therefore the fact that the federal action had not yet entered discovery was not a basis for finding that this factor favored abstention (even though close to a year had passed between the defendants' filing the motion to dismiss in federal court and the court's ruling on it). *239 F.3d at 524-25*. A similar circumstance, with a similar result, obtains in this case.

The defendants have acknowledged that federal law provides the rule of decision (Defts' Brief at 10-11), and thus the fifth *Colorado River* factor weighs in favor of the plaintiff. Finally, the question of "whether the state procedures are adequate to protect the plaintiff's federal rights" must be answered with a resounding no. Based on the allegations in the complaint, the stagnated state action would provide this court "no discretion to assume that the state court was an adequate vehicle for the 'prompt resolution' of the issues. [*48] " *Welch's*, 170 F.3d at 124.

Therefore, in light of "the heavy presumption favoring the exercise of federal jurisdiction and the lack of exceptional circumstances" in this case, *Colorado River* abstention is not warranted.

CONCLUSION

For the reasons noted, we grant defendants' motion to dismiss all of plaintiff's claims except his procedural due process claim.

DATED: New York, New York

August 2, 2005

MICHAEL H. DOLINGER

UNITED STATES MAGISTRATE JUDGE

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