

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM A. BELL-BEY,

Plaintiff-Appellant,

v

MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

UNPUBLISHED

December 17, 1996

No. 181598

Ingham County Court

LC No. 93-14801-CM

Before: Reilly, P.J. and White and P.D. Schaefer,* JJ.

PER CURIAM.

Plaintiff appeals the Court of Claims' order dismissing plaintiff's complaint pursuant to MCR 2.116(C)(4) and (C)(7). We affirm.

Plaintiff is a prisoner proceeding in propria persona. On July 2, 1985, plaintiff was charged with assault and battery, arising from the stabbing of another prisoner. At a major-misconduct hearing on July 9, 1985, the hearing officer found defendant guilty of the charge on the basis of a confidential informant's statement, as well as the testimony of two identified sources, an officer and another witness, regarding plaintiff's whereabouts during the relevant time period. The hearing officer ordered that defendant lose thirty days of privileges.

On July 10, 1985, defendant reclassified plaintiff to administrative segregation as a result of a review of the misconduct hearing report and a finding that plaintiff was a "serious threat to the physical safety of staff and/or other residents." Plaintiff filed a request for rehearing on July 22, 1985, which was denied in a decision mailed on September 1, 1987. The hearings administrator found that the hearing officer's findings were based on the confidential informant's statement as well as the statements of the other witnesses, and noted that the hearing officer found the evidence credible and reliable.

* Circuit judge, sitting on the Court of Appeals by assignment.

About 3 ½ years later, on March 12, 1991, plaintiff filed a grievance in which he complained that he was not given an opportunity to present his views to the decision-making body charged with determining confinement to segregation. Defendant rejected the grievance as frivolous and meritless, based on plaintiff's refusal to attend his last five Security Classification Committee hearings, held in late 1990 and early 1991.

Plaintiff filed the instant complaint on April 12, 1993. Plaintiff's amended complaint¹ alleged that the major-misconduct determination and resulting administrative segregation violated his rights of due process under the Michigan Constitution and MDOC policies, and also alleged gross negligence. Plaintiff alleged that defendant, by virtue of custom or unwritten policy, encouraged prisoners to provide confidential information to incriminate others contrary to MDOC regulations, and improperly used the confidential informants' statements without assessing their reliability and credibility. Plaintiff alleged that the major-misconduct charge was based on false, hearsay, and unverified information and that he had obtained a sworn affidavit from the victim exculpating him. The complaint further alleged that defendant grossly and intentionally violated ministerial duties, engaged in ultra vires activities, imposed cruel and unusual punishment, and violated plaintiff's right to due process by confining him to administrative segregation based on defendant's failure to provide plaintiff an opportunity to present his views to the officials determining whether to confine him. Plaintiff alleged that he had been illegally confined in administrative segregation since July 10, 1985, and had never been released or reclassified since. Plaintiff requested as relief to be released from confinement, declaratory and injunctive relief, and compensatory and exemplary damages.

Defendant filed a motion on May 11, 1993, requesting an additional twenty-one days within which to file an answer or other response. The court granted the motion on May 13, 1993. On June 11, 1993, defendant moved for summary disposition, arguing that the "circuit court" lacked jurisdiction over damage claims against the State. The Court of Claims denied the motion, and in its July 12, 1993 order stated that plaintiff would be awarded costs upon presentation of a bill of costs.

On August 6, 1993, plaintiff filed a request for entry of default against defendant and a motion for entry of default judgment, arguing that defendant refused to file an answer or responsive pleading within twenty-one days of the denial of defendant's motion for summary disposition.

On August 20, 1993, defendant filed a motion to set aside the default, noticed for hearing September 8, 1993, arguing that it had various meritorious immunity defenses that would establish good cause to set aside the default. Defendant argued that the State's operation of the DOC was both mandated and authorized by statute and constituted a governmental function, entitling the DOC to immunity; that plaintiff had failed to plead facts in avoidance of governmental immunity, noting that plaintiff alleged that the individual who gave him the misconduct ticket was grossly negligent, but that the individual was not made a defendant; that plaintiff only mentioned one individual in his complaint, Officer Nobles, and that vicarious or respondeat superior liability may not be imposed for violations of the Michigan Constitution; that a default must be set aside to prevent manifest injustice, particularly where a

defendant has established facts which would exonerate it from liability; and that if a complaint fails to state a cause of action, the entry of a default will not support a default judgment.

There is no indication in the Court of Claims file that a default or default judgment was entered. Nor does it appear that defendant's motion to set aside default was considered or ruled on.²

On September 8, 1993, defendant filed an answer and affirmative defenses. Defendant's affirmative defenses included that the Court of Claims lacked subject-matter jurisdiction over petitions for judicial review of MDOC's agency decisions, that plaintiff's claims were barred by governmental immunity, and that plaintiff failed to state claims on which relief could be granted as to his request for declaratory and injunctive relief and his federal constitutional claims.

On November 8, 1994, the Court of Claims issued an opinion and order dismissing plaintiff's complaint stating in pertinent part:

Despite plaintiff's attempt to cloak this matter as a constitutional issue, it is clear that this is nothing more than an administrative appeal. Plaintiff's pleadings deal exclusively with the procedures involved in the misconduct hearing conducted in 1985; he has thus failed to plead the necessary elements for a constitutional claim.

The court further found that plaintiff failed to exhaust administrative remedies and that plaintiff provided no basis upon which the court could grant relief as to the 1985 major-misconduct determination, and ordered defendant to pay plaintiff costs of \$100.00 pursuant to its July 12, 1993 order.

Both parties moved for reconsideration. The court denied plaintiff's motion and granted defendant's motion. The court noted it had been mistaken as to plaintiff's exhausting administrative remedies, noting that plaintiff had sought rehearing of the misconduct finding, but went on to note that plaintiff waited nearly ten years to file the present action. The court also vacated the award of \$100.00 to plaintiff, noting that it accepted defendant's argument that its filing of the motion for summary disposition on subject-matter jurisdiction grounds had been an inadvertent error.

I

We first consider two of plaintiff's arguments: that the Court of Claims abused its authority by allowing defendant to proceed in default without having set aside the default, in violation of MCR 2.603(A)(3); and that plaintiff was entitled to a default judgment because defendant failed to show good cause and failed to file an affidavit of fact showing a meritorious defense.

We again observe that neither the Court of Claims file nor the court's docket printout indicates that a default or default judgment was entered against defendant. This is supported by a notice defendant addressed to the Court of Claims clerk, dated October 28, 1993, which listed among "matters remaining unresolved," plaintiff's motion for default judgment. Thus, it appears that the court did not permit defendant to proceed in default.

Assuming a default had been entered, we conclude defendant's motion to set aside default and the supporting brief established that it had various meritorious defenses such that it would be prejudiced by a refusal to set aside the default. *Daugherty v Michigan (After Remand)*, 133 Mich App 593, 598; 350 NW2d 291 (1984), after second remand 163 Mich App 697; 415 NW2d 279 (1987); MCR 2.603(D). While defendant's effort to defend was tardy, its September 8, 1993 answer and affirmative defenses came less than sixty days after the court's July 12, 1993 order denying defendant summary disposition, and there is no indication that defendant intentionally delayed or that plaintiff was prejudiced by the delay. Further, although plaintiff correctly argues that MCR 2.603(D) requires that both good cause and an affidavit of facts showing a meritorious defense be filed in order for a motion to set aside a default to be granted, we cannot conclude under the circumstances presented here that defendant's failure to submit an affidavit is fatal, where defendant's brief set forth in considerable detail meritorious defenses of a legal nature and where no default or default judgment is evident from the record. The Court of Claims ultimately found several of the defenses asserted by defendant meritorious. We thus conclude that the court did not abuse its discretion by allowing defendant to proceed. *Daugherty, supra*.

II

Plaintiff also argues that the Court of Claims' order and opinion dismissing plaintiff's action based on an alleged motion for summary disposition by defendant was a violation of due process because plaintiff got no notice that defendant filed such a motion and defendant did not provide plaintiff with any such motion.

Although the court did not have before it a pending motion for summary disposition by defendant, the court did have before it a motion for summary disposition filed by plaintiff.³ Under MCR 2.116(I)(2), the court could appropriately render judgment in favor of the opposing party. As discussed, *infra*, we conclude the court properly dismissed plaintiff's claims. Thus, we find no error requiring reversal.

III

Plaintiff argues that the Court of Claims' opinion and order fraudulently converted plaintiff's complaint to an administrative appeal as a result of judicial corruption, that the court committed reversible error by dismissing plaintiff's constitutional tort and gross negligence actions for failure to exhaust administrative remedies, and that the court's opinion and order manifested fraud and corruption by dismissing plaintiff's actions based on 42 USC § 1983 when plaintiff made no claims under that statute.

There is no evidence before us that the court's determination that plaintiff's cause of action was an administrative appeal couched in constitutional terms was a result of judicial corruption or fraud. As discussed *infra*, we conclude that the court's dismissal of plaintiff's constitutional and gross negligence claims was proper. The court acknowledged on plaintiff's motion for reconsideration, that it had

mistakenly found that plaintiff failed to exhaust administrative remedies, noting that plaintiff did request rehearing of the major-misconduct finding. The court properly noted that plaintiff had nonetheless delayed for years in filing the instant complaint.

An aggrieved party must file a petition for judicial review within sixty days of the delivery or mailing of a denial of a rehearing request. *Seaton-El v Dep't of Corrections*, 184 Mich App 454, 455; 458 NW2d 910 (1990), MCL 791.255; MSA 28.2320(55). Plaintiff's request for rehearing was denied in a decision mailed on September 1, 1987. He filed the instant complaint in April 1993. Thus, to the extent plaintiff's complaint was an appeal of an administrative decision, rather than an original action, the court properly denied plaintiff judicial review because of plaintiff's delay in filing the instant complaint.

The court's opinion stated that plaintiff's federal action failed because the State and its agencies are not "persons" within this statute and thus are not subject to suit, and further that plaintiff's failure to assert a claim that rises to the level of a constitutional violation negates his claim for relief under Michigan's Constitution. Plaintiff's complaint did not directly allege violations of 42 USC § 1983, nor did it refer to that statute. However, the court's dismissal of plaintiff's complaint and his constitutional claims was not based solely on grounds pertinent to 42 USC § 1983. The court addressed plaintiff's claims of violations of the Michigan Constitution and, as discussed below, properly dismissed those claims. We find no error.

IV

Plaintiff next argues that the Court of Claims abused its authority by refusing to make findings of fact and conclusions of law on plaintiff's gross negligence claims, which were undisputed by defendant, and argues that defendant violated his due process rights and violated his right to be free from cruel and unusual punishment.

The court dismissed plaintiff's complaint on the basis of governmental immunity and lack of jurisdiction. Under these circumstances, the court had no obligation to make findings of fact and conclusions of law as to plaintiff's gross negligence claims. In any case, because plaintiff did not name individual defendants, the gross negligence exception to governmental immunity is inapplicable. MCL 691.1407(2)(c); MSA 3.996(107)(2). There is no indication that plaintiff attempted to amend his complaint to name an individual defendant. Dismissal of plaintiff's gross negligence claims was thus proper under MCR 2.116(C)(7).

The Court of Claims also properly dismissed plaintiff's due process claims. Prison disciplinary proceedings are not clothed with the same constitutional protections as criminal prosecutions. *Tauber v Dept of Corrections*, 172 Mich App 332, 336; 431 NW2d 506 (1988). In *Casper v Marquette Warden*, 126 Mich App 271, 275; 337 NW2d 56 (1983), this Court considered the use of confidential witnesses in disciplinary proceedings:

Minimum due process requires a disciplinary committee to establish in good faith to its own satisfaction the credibility and reliability of an informant. There must be some information on the record to convince an appellate tribunal that the disciplinary committee undertook such an inquiry in good faith. This does not require the informant himself to be brought before the committee.

Here, the misconduct hearing report demonstrates that the hearing officer heard plaintiff's evidence but believed that plaintiff committed the assault, based not only on the confidential informant's statement, but on the testimony of two others regarding plaintiff's whereabouts. The hearing officer explained that the witness' identity would be confidential and that he would rely on the confidential informant's testimony. The report indicates that the hearing officer considered plaintiff's contrary evidence and utilized evidence from identified sources—two other witnesses—to conclude that plaintiff was guilty of misconduct. The hearing report implies that the confidential informant's statement was consistent with the other two witnesses' account to an extent sufficient to reject plaintiff's account. The hearing administrator's denial of plaintiff's request for rehearing states:

The record indicates you received notice of the charges in accordance with PD-DWA-60:01, You were given the opportunity to request staff assistance and witness per R 791.3315. The hearing was held in a timely manner per R 791.5501. The hearing record complies with the requirements of MCL 791.252(k) and MCL 791.253. The sanction imposed is authorized by R 791.5505. No due process violation is found. . .

. . . the record indicates the hearing officer based her finding on the confidential witness statement as well as other witness statements. The hearing officer found this evidence to be credible and reliable. . . The hearing officer is the sole finder of fact in major misconduct hearings under MCL 791.252(g) and (k) and, as such, is the person who determines the credibility of credibility evidence. The hearing officer found the preponderance of the evidence supported the statements of the reporting staff member and therefore found you guilty of the charge. . .

We note relative to plaintiff's argument that he has been illegally and excessively confined to administrative segregation since July 1985, in violation of his due process rights, that plaintiff has not disputed, as stated in the DOC's rejection of plaintiff's March 12, 1991 grievance, that he did not attend his last five SCC hearings and thus did not present his views relative to his continued administrative segregation. Under these circumstances, we will not disturb the Court of Claims' determination that plaintiff failed to assert a claim that rises to the level of a constitutional violation, and that this negated his claims for relief under the Michigan Constitution.⁴ Nor do plaintiff's allegations implicate the prohibition against cruel and unusual punishment. *People v James Johnson*, 167 Mich App 548, 551-552; 423 NW2d 52 (1988).

We conclude that the Court of Claims properly dismissed plaintiff's claims. In light of our disposition, we do not address plaintiff's claims that plaintiff was entitled to summary disposition based

on defendant's failure to answer requests for admission, that plaintiff's proofs showed no genuine issues of material fact remained, and defendant failed to produce any evidence to oppose plaintiff's claims.

Affirmed.

/s/ Maureen Pulte Reilly

/s/ Helene N. White

/s/ Philip D. Schaefer

¹ Plaintiff filed a first amended complaint on June 10, 1993. Plaintiff filed a second amended complaint on November 14, 1994, along with his motion for reconsideration, six days after the court dismissed plaintiff's complaint. There is no indication in the file that plaintiff had leave to file this second amended complaint. In any case, the substance of the complaint is equivalent to plaintiff's first amended complaint, although it is entitled "Plaintiff's Second Amended Constitutional Gross Negligence Action and Complaint."

² A letter in the lower court record from defendant to the judge's clerk states that defendant cancelled the hearing.

³ On August 18, 1993, plaintiff filed a motion for summary disposition pursuant to MCR 2.116(I), arguing that defendant's failure to respond to plaintiff's request for admissions formed the basis for the motion.

⁴ We thus need not address plaintiff's argument that governmental immunity is not applicable to allegations that the state violated a right conferred by the Michigan Constitution.