STATE OF MICHIGAN

COURT OF APPEALS

JOHN BORNSCHEIN,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

UNPUBLISHED
December 9, 2003

No. 243165
Ingham Circuit Court
LC No. 01-094112-AW

Before: Whitbeck, C.J., and Hoekstra and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from the dismissal of his complaint for mandamus. On appeal, plaintiff alleges the dismissal of his mandamus complaint was error due to several violations under the Department of Corrections Act, that he was wrongfully denied an evidentiary hearing, and that the trial court ignored his constitutional rights to fair and just treatment. Plaintiff also asserts that he has a liberty interest in parole. We will not review this argument as it was not addressed by the trial court. Because we do not find any of plaintiff's remaining arguments persuasive, we affirm.

First, plaintiff argues that the trial court improperly dismissed his complaint for mandamus. We disagree. This Court reviews a trial court's decision regarding an order of mandamus for an abuse of discretion. *Baraga Co v State Tax Comm*, 466 Mich 264, 268-269; 645 NW2d 13 (2002); *In re MCI Telecommunications*, 460 Mich 396, 443; 596 NW2d 164 (1999). Plaintiff alleges nine different violations of his procedural rights under the Department of Corrections Act, 1953 PA 232. Mandamus is the appropriate remedy when "the Legislature has established a clear, ministerial duty, but has failed to prescribe any consequence for a violation of that duty." *Jones v Dep't of Corrections*, 468 Mich 646, 658; 664 NW2d 717 (2003). But "[mandamus] will not lie for the purpose of reviewing, revising, or controlling the exercise of discretion reposed in administrative bodies." *Teasel v Dep't of Mental Health*, 419 Mich 390, 410; 355 NW2d 75 (1984).

In *Jones*, our Supreme Court held that mandamus was appropriate when the Department of Corrections failed to hold a hearing as MCL 791.240a(1) required. *Jones*, *supra* at 658. Here, plaintiff does not seek to compel defendant to simply hold a hearing or perform a duty, but instead to compel defendant to resolve questions in plaintiff's favor. For example, plaintiff argues that defendant should have awarded him a different parole guidelines score, should have provided "meaningful" recommendations for corrective action, and should have provided

substantial and compelling reasons for denying parole in writing even though plaintiff's parole guidelines score was not in the "high" range. Because plaintiff does not seek to compel defendant's performance of legal duties but rather to control the results of defendant's performance, mandamus is inappropriate under *Teasel*, and the trial court did not abuse its discretion.

Next, plaintiff argues that he has a liberty interest in parole, and that MCL 791.234(9) did not abrogate a prisoner's ability to appeal a parole board decision. We need not address these issues because they were not decided by the trial court and are beyond the scope of this appeal. The court dismissed plaintiff's case as a complaint for mandamus, and not as an appeal from a parole decision. Thus, whether plaintiff has a right to parole, or a right to appeal, has no bearing on this case.

Plaintiff also argues that the trial court erred in refusing to hold an evidentiary hearing to investigate his allegations of fraud on the court. We disagree. This Court reviews a trial court's decision regarding an evidentiary hearing for abuse of discretion. *Williams v Williams*, 214 Mich App 391, 399; 542 NW2d 892 (1995).

Plaintiff relies on *Kiefer v Kiefer*, 212 Mich App 176, 179; 536 NW2d 873 (1995), for the proposition that, "where a party has alleged that a fraud has been committed on the court, it is generally an abuse of discretion for the court to decide the motion without first conducting an evidentiary hearing regarding the allegations." But this Court questioned *Kiefer* in *Williams*, *supra*. The *Williams* Court held that "where the truth of fraud allegations can be determined without reference to demeanor, we do not believe that the law requires a trial court to devote its limited resources to an in-person hearing." *Id.* at 399.

The trial court found that plaintiff's allegations of fraud were nothing but disagreement with defendant's position, and we agree. Plaintiff presents no evidence that defendant lied to the trial court or concealed information. An opposing party does not commit fraud merely by taking an adversarial position, even if the court ultimately disagrees with that position. The trial court did not abuse its discretion.

Finally, plaintiff argues that the trial court ignored his rights to fair and just treatment under Const 1963, art 1, § 17. We disagree. This Court reviews constitutional issues de novo. *Wayne Co Chief Executive v Governor*, 230 Mich App 258, 263; 583 NW2d 512 (1998). Again, plaintiff fails to present any evidence of unfair or unjust treatment beyond defendant's failure to do as plaintiff desires. Defendant made some minor errors, such as an untimely Parole Eligibility Report and a miscommunication at the hearing, but nothing that would taint the entire parole process. We conclude there is no evidence of unfair or unjust treatment here.

Affirmed.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Pat M. Donofrio