

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RODOSVALDO POZO,

Plaintiff,

ORDER

v.

02-C-12-C

BRAD HOMPE, CAPT. BLACKBOURN,
WARDEN GERALD BERGE,
SGT. HUIBRETSE and JON LITSCHER,

Defendants.

In an order entered May 31, 2002, I lifted a stay imposed in this case and allowed plaintiff Rodosvaldo Pozo to proceed on his claim that certain of the physical conditions of his confinement violate his Eighth Amendment rights. The case is now before the court on plaintiff's motion for a temporary restraining order, in which he requests an order requiring defendants to return certain legal documents, books and his glasses because the confiscation has made it difficult to prosecute this case and other cases. Plaintiff's motion will be denied.

Plaintiff has not been granted leave to proceed in this case on a claim that defendants are interfering with his ability to prosecute this case. He has been told on two prior occasions in this lawsuit that a claim of interference with his personal property is not

properly raised in the context of this case because his allegations do not suggest that such interference is physically preventing him from prosecuting this case. In only this rare instance would this court have inherent authority to intervene in the interest of insuring proper management of the case.

In reviewing the papers plaintiff has submitted in support of his motion, I note that again plaintiff does not confine his complaints about the taking of his property to legal papers that relate to this case. Instead, his complaint includes the taking of his bible, personal mail, writing paper and other items of personal property. In deciding this motion, I can consider only those factual assertions that are relevant to the limited motion under review.

Ordinarily, motions for preliminary injunction or temporary restraining order require the submission of admissible evidence. In this case, the magistrate judge set briefing on plaintiff's motion at a preliminary pretrial conference, but he did not require the parties to conform their submissions to this court's procedures to be followed on motions for preliminary injunctive relief. Rather than require the parties to resubmit their supporting and opposing papers, I will accept as true plaintiff's unsworn assertions set out in his submission entitled "Motion Supporting T.R.O." From this document and the affidavits submitted by defendants, I find the following facts.

FACTS

Prison officials have legal property belonging to plaintiff in their possession and refuse to give it back. Included in that property are all of plaintiff's "exhibits" and affidavits obtained from other inmates for this case, plaintiff's reading glasses and self-help litigation manual, and this court's order of March 20, 2002.

On April 29, 2002, corrections officer James Finnell conducted a random search of plaintiff's cell. As a result of the search, Finnell wrote plaintiff a conduct report for "possession of contraband miscellaneous" and disruptive conduct. The conduct report states that plaintiff possessed more than the allowed 25 publications and that he refused to sort through them to comply with the limit, causing a disruption. Finnell seized many publications from plaintiff's property box, including law books, two Korans and many publications. The "contraband seized" form dated April 29, 2002 does not show a record of officials confiscating plaintiff's glasses, Bible, carbon paper, self-help litigation manual, white manila envelope, Amnesty International exhibits, receipts or Wis. Stat. vol. 5.

On May 17, 2002, a disciplinary hearing took place. The report from the hearing indicates that plaintiff was given a chance to attend the meeting but that he refused. The hearing officer determined that plaintiff was guilty of both charges and ordered ten days' loss of electronics and the destruction of the contraband.

OPINION

In general, temporary restraining orders are disfavored because they deprive the opposing parties of the opportunity to respond to the movant's allegations. In this case, defendants were given the opportunity to respond to plaintiff's motion and they have done so. To obtain emergency injunctive relief, plaintiff must show that (1) he has no adequate remedy at law; (2) he will suffer irreparable harm if the relief is not granted; (3) the irreparable harm he would suffer outweighs the irreparable harm defendants would suffer from an injunction; (4) he has some likelihood of success on the merits; and (5) the injunction would not frustrate the public interest. Kellas v. Lane, 923 F.2d 492, 493 (7th Cir. 1990).

Plaintiff has failed to demonstrate that he is entitled to preliminary injunctive relief. In his complaint, plaintiff alleges that defendants violated his Eighth Amendment right to be free from cruel and unusual punishment by subjecting him to inhumane conditions of confinement, including 24-hour cell illumination with bed checks every hour, extreme cell temperatures and lack of exercise. Plaintiff's motion for a temporary restraining order is not directly related to these claims. Instead, he alleges that defendants have his legal materials in their possession and that they refuse to return them because plaintiff helps other inmates with their legal matters. Plaintiff has made no showing that he has no adequate remedy at law, that he will suffer irreparable harm if his motion is not granted or that he has a

reasonable likelihood of prevailing on the merits of his claim. Id.

This court could provide plaintiff relief from the confiscation only if defendants' acts were preventing plaintiff from prosecuting this case. However, the facts do not suggest that this is the case. Plaintiff's property was taken because he chose not to comply with the 25 publication limit. Plaintiff complains that defendants' act is interfering with his ability to prosecute this and other lawsuits, but it is only the interference with his pursuing this lawsuit that is relevant to his motion. In this regard, plaintiff has not made a showing that he is incapable of recreating any affidavits or exhibits that are relevant and necessary for this case. Nor does it appear that he needs eyeglasses to prepare papers for filing in this case. The fact that he has submitted a nine-page brief and several exhibits in support of his motion for a temporary restraining order reinforces the conclusion that plaintiff is not being prevented from prosecuting this case.

Although I am denying plaintiff's motion, I note that plaintiff avers that he no longer has in his possession his copy of this court's "March 20, 2002, 32 pages?" order, which I assume to refer to the February 20, 2002 order in which he was granted leave to proceed on his conditions of confinement claim. I am enclosing a copy of the two pages from the February 20, 2002 order that relate to plaintiff's conditions of confinement that are still at issue in this case, for whatever use plaintiff wishes to make of them.

Also before the court is plaintiff's third "Motion to Return Legal and Personal

Documents” dated July 21, 2002. In this motion, plaintiff alleges again that defendants have taken his legal and personal property and have refused to return them despite plaintiff’s repeated requests. This motion is no different from the first two. It will be denied for the reasons set forth in this court’s orders of March 15, 2002 and April 29, 2002.

ORDER

IT IS ORDERED that

1. Plaintiff Rodosvaldo Pozo’s motion for a temporary restraining order is DENIED;
- and
2. Plaintiff’s third motion “to return legal and personal documents” is DENIED.

Entered this 30th day of July, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge