IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JESSIE THOMAS #263550,

Plaintiff,

v.

CORRECTIONS CORPORATION OF AMERICA, RENEE WATKINS, OFFICER JOHN DOE #1, OFFICER JOHN DOE #2, and OFFICER JOHN DOE #3,

Defendants.

OPINION AND ORDER

03-C-0044-C

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This is a civil action brought under 42 U.S.C. § 1983. Plaintiff is presently confined at the Secure Program Facility in Boscobel, Wisconsin. On February 28, 2003, I granted plaintiff leave to proceed in forma pauperis against defendant Corrections Corporation of America on his claim that while he was a prisoner at the Correction Corporation of America facility in Whiteville, Tennessee, defendants failed to protect him from harm in violation of the Eighth Amendment and that plaintiff was subject to conditions of confinement that violated the Eighth Amendment. Also, I granted plaintiff leave to proceed in forma pauperis against John Doe numbers 1, 2 and 3 on a claim that he was subjected to excessive force.

Finally, for the sole purpose of allowing plaintiff to discover the identities of the Doe defendants, I granted plaintiff leave to proceed against defendant Pitzer, who at the time was the warden of the Whiteville Correctional Facility. I dismissed plaintiff's claims against eight other proposed defendants for plaintiff's failure to state a claim against them. On March 19, 2003, I ordered that Renee Watkins, the current warden at Whiteville Correctional Facility, be substituted for defendant Pitzer.

On April 16, 2003, defendants Corrections Corporation of America and Watkins moved to dismiss plaintiff's complaint for lack of proper venue pursuant to Fed. R. Civ. P. 12(b)(3). Defendant's motion raised a number of issues: (1) whether a defendant can assert a defense of lack of venue when he is named as a defendant solely for the purpose of identifying Doe defendants; (2) whether a motion to dismiss for improper venue can be decided before the Doe defendants are known; and (3) whether this case should be dismissed or transferred to the Western District of Tennessee. In support of their motion, defendants supplied (1) an affidavit from Renee Watkins in which Watkins avers that she does not have a residence in Wisconsin and (2) an affidavit from Steve Dotson, who has replaced Watkins as warden of Whiteville Correctional Facility, in which Dotson avers that he does not have a residence in Wisconsin. In addition, defendants concede "for the sake of argument" that defendant Corrections Corporation of America is a defendant that resides for the purposes of venue in the Western District of Wisconsin.

Plaintiff responded to defendants' motion, arguing that it should be denied because this court has personal jurisdiction over defendants. I conclude that a defendant can raise improper venue even if he is named only for the purpose of obtaining the names of Doe defendants, that it is not necessary to identify the Doe defendants before ruling on the motion to dismiss because the question of their residence does not make a difference in the outcome of the motion and that the case should be dismissed rather than transferred because the Tennessee court has ruled once that until plaintiff exhausts his administrative remedies, it lacks subject matter jurisdiction over plaintiff's claims in this lawsuit.

As a preliminary matter, I will substitute warden Dotson as a defendant in place of his predecessor in office, defendant Watkins. See Fed. R. Civ. P. 25(d)(1) (stating that when a public officer is sued in an official capacity and ceases to hold office, successor is substituted automatically.) Next, I will resolve a question I raised in an earlier order, which is whether an official named as a defendant for the sole purpose of identifying Doe defendants is a proper defendant to assert lack of venue. I conclude that defendant Dotson is entitled to raise such a defense. Although § 1391(b) does not define the word "defendant," Dotson is a defendant within the plain meaning of the statute. Unless a word is defined by statute, it is presumed to have its ordinary or natural meaning. Trustees of Chicago Truck Drivers, Helpers & Warehouse Workers Union (Independent) Pension Fund v. Leaseway Transp. Corp., 76 F.3d 824, 828 (7th Cir. 1996). Moreover, former warden

Watkins was served with a summons and complaint in this case and thus is a "defendant" as the term is applied in the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 4(a) (stating that summons shall "be directed to the defendant" in an action). The court has made her replacement, Warden Dotson, a defendant in this action. Therefore, under the plain language of § 1391(b), Dotson is a proper defendant to assert improper venue.

I turn now to the venue question. Plaintiff bears the burden of proving that venue is proper. Grantham v. Challenge-Cook Bros., Inc., 420 F.2d 1182, 1184 (7th Cir. 1969). Venue for plaintiff's claims is controlled by 28 U.S.C. § 1391(b). It provides that:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is subject to the action is situated, or (3) a judicial district in which any defendant resides, if there is no district in which the action may otherwise be brought.

"The purpose of statutorily specified venue is to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial." Leroy v. Great Western United Corp., 443 U.S. 173, 183-84 (1979).

Venue for plaintiff's action does not exist in this district under § 1391(b)(1) because all defendants do not reside in Wisconsin. "A defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the

time the action is commenced . . ." 28 U.S.C. § 1391(c). Defendants concede that defendant Corrections Corporation of America is subject to personal jurisdiction in the Western District of Wisconsin, making it a resident of Wisconsin for the purpose of venue. However, defendant Dotson does not reside in Wisconsin. Thus, even if the Doe defendants reside in Wisconsin (which is unlikely given that plaintiff alleges that they all work in Tennessee), venue is not proper in this district under § 1391(b)(1) since *all* the defendants do not reside in Wisconsin.

Venue does not lie in this district under § 1391(b)(2) either, because none of the events giving rise to the claim occurred in Wisconsin. All of the events giving rise to plaintiff's claims occurred during a prison riot and within the month following this riot in the Whiteville Correctional Facility which is located in Whiteville, Tennessee.

Finally, because this case could have been brought in the Western District of Tennessee under § 1391(b)(2), venue does not lie in this district under § 1391(b)(3), which would apply only if there was no other district in which this action could be brought. See Wright, Miller & Cooper, Federal Practice & Procedure: Jurisdiction 2d § 3802.1 n.26 (Supp. 2003) (citing F.S. Photo, Inc. v. Picturevision, Inc., 48 F. Supp. 2d 442, 448 (Del. D.C. 1999) ("'. . . 1391(b)(3) may only be utilized if there is no other district which would have personal jurisdiction and venue as to all defendants.'")) In this case, venue would be proper in the Western District of Tennessee. A substantial part of the events or omissions

giving rise to plaintiff's claims occurred in the Western District of Tennessee. Presumably, the Tennessee district would also have personal jurisdiction over defendant Corrections Corporation of America because it operates the Whiteville Correctional Facility there and would have jurisdiction over defendant Dotson because he resides in Tennessee.

Plaintiff argues that I should deny defendant's motion because this court has personal jurisdiction over the defendants, but he does not advance any persuasive argument to show why this court would have personal jurisdiction over defendant Dotson. Even if he had, it would not matter. Venue and personal jurisdiction are sometimes confused. Wright, Miller & Cooper, Federal Practice & Procedure 2d § 3801. Both personal jurisdiction and venue determine where litigation will take place. Moreover, as discussed earlier, personal jurisdiction over a corporation determines its residency for venue purposes. See 28 U.S.C. § 1391(c). However, venue and personal jurisdiction are different. "The question of personal jurisdiction . . . goes to the court's power to exercise control over the parties, . . . [whereas] venue . . . is primarily a matter of choosing a convenient forum. Leroy, 443 U.S. at 180. Thus, even if a defendant is subject to personal jurisdiction, a claim against a defendant can still be dismissed for improper venue.

28 U.S.C. § 1406(a) allows a district court in which venue is improper to transfer any civil action to a court where venue is proper if the transfer is in the interest of justice. However, courts do not transfer cases pursuant to § 1406(a) if it should have been obvious

to the plaintiff that venue was improper in the district in which he filed the complaint. See Hapaniewski v. City of Chicago, 883 F.2d 576, 579 (7th Cir. 1989); see also McFarlane v. Esquire Magazine, 74 F.3d 1296, 1301 (D.C.Cir. 1996); Spar, Inc. v. Information Resources, Inc., 956 F.2d 392, 394 (2d Cir. 1992). Furthermore, the district to which transfer is to be made must have subject matter jurisdiction over the action. See Schultz v. McAfee, 160 F. Supp. 210 (D.Me. 1958); Roberts Bros., Inc. v. Kurtz Bros., 231 F. Supp. 163 (D.N.J. 1964).

In the February 28, 2003 opinion and order granting plaintiff leave to proceed in forma pauperis, I recognized that I had previously granted the plaintiff leave to proceed on nearly analogous claims in Winters v. Litscher, case no. 00-C-318-C. While I was determining whether he and his co-plaintiffs had properly exhausted their administrative remedies as required by 42 U.S.C. § 1997e(a), he and his co-plaintiffs filed a motion seeking a transfer to the United States District Court of Tennessee because of improper venue. Subsequently, the Tennessee court dismissed plaintiff's claim without prejudice, applying the Sixth Circuit rule that exhaustion of administrative remedies is a predicate to subject matter jurisdiction. The Court of Appeals for the Seventh Circuit treats exhaustion as a non-jurisdictional matter to be raised by the defendants. See Perez v. Wisconsin Dep't of Corrections, 182 F.3d 532, 535 (7th Cir. 1999). Perhaps for that reason plaintiff has chosen to return to this court without submitting any evidence that he has exhausted his

administrative remedies on his Eighth Amendment claims, instead of refiling his complaint in the Tennessee court along with evidence that he has exhausted his administrative remedies.

Under the circumstances, it would not be in the interest of justice to transfer the case to the Tennessee court, where venue is proper. Plaintiff recognized previously that the Western District of Wisconsin was the wrong venue for his complaint and the Western District of Tennessee has indicated that it lacks subject matter jurisdiction over plaintiff's claims until plaintiff can show that he has exhausted his administrative remedies. It would not serve the interests of justice to bounce this case between judicial districts. Therefore, I will grant the defendants' motion to dismiss this case for improper venue.

ORDER

IT IS ORDERED that defendants' motion to dismiss for improper venue is GRANTED and this action is DISMISSED.

Entered this 24th day of June, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge