

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

WILLIAM FAULKNER, #244067,

Plaintiff,

ORDER

v.

04-C-408-C

MR. JONES, Unit Manager, Whiteville,

Defendant.

Plaintiff William Faulkner, a prisoner at the Stanley Correctional Institution in Stanley, Wisconsin, has been granted leave to proceed under 28 U.S.C. § 1915A on his claim that defendant Jones failed to protect him from second hand smoke while he was a prisoner at a privately-owned prison facility in Whiteville, Tennessee. Plaintiff was denied leave to proceed on this same claim against several other defendants, including Jon Litscher, the former secretary of the Department of Corrections for the State of Wisconsin, and Wisconsin prison officials at the Columbia Correctional Institution in Portage, Wisconsin, who allowed plaintiff to be transferred to Whiteville.

On October 12, 2004, defendant Jones moved to dismiss this case on four grounds:
1) plaintiff failed to exhaust his administrative remedies; 2) the statute of limitations for

plaintiff's claim has run; 3) this court lacks personal jurisdiction over the defendant; and 4) this case is not properly venued in this district. On October 18, 2004, the clerk established a schedule for briefing defendant's motion. According to the schedule, plaintiff had until November 8, 2004, in which to oppose defendant's motion. Plaintiff's opposing brief was filed on October 21, 2004. It was accompanied by the affidavit of Rock Ingram.

Now before the court is defendant's motion to dismiss and plaintiff's "Motion for Additional Time to File Affidavits." Plaintiff's motion will be denied, because the affidavit he appears to want additional time to file will not affect the outcome of defendant's motion to dismiss. Defendant's motion to dismiss for improper venue will be denied, because it is in the interest of justice instead to transfer the case to the court in which venue is proper. With the transfer of plaintiff's case, defendant's motion to dismiss for lack of personal jurisdiction will be mooted, and the Tennessee court will have an opportunity to address as it sees fit the questions whether Tennessee's statute of limitations should govern this case and, if not, whether a grievance procedure existed through which plaintiff could have exhausted his administrative remedies before filing suit.

In opposing defendant's motion to dismiss, plaintiff argues that he did not fail to exhaust his administrative remedies because no remedies were available to him before he was moved out of the Tennessee facility. He argues also that it is Wisconsin's six-year statute of limitations that is applicable to his case and not Tennessee's one-year limitations statute,

which defendant argues should apply. Finally, plaintiff argues that because he was a Wisconsin prisoner at the time he was being housed in the Whiteville facility, defendant Jones was acting as an agent for the State of Wisconsin and is therefore subject to personal jurisdiction in this state. Plaintiff does not oppose defendant's fourth ground for dismissal, that this case is improperly venued.

I conclude that this action is improperly venued, and that even if I were to grant plaintiff's motion for additional time to file affidavits, the affidavits would not affect the outcome of defendant's motion to dismiss for improper venue. Furthermore, I conclude that that because plaintiff has been proceeding pro se, it is in the interest of justice to transfer this action to the Eastern Division of the District Court for the Western District of Tennessee, where venue lies. With the transfer, defendant's motion to dismiss for lack of personal jurisdiction will be mooted, leaving the Tennessee court to address the questions whether Tennessee's statute of limitations should govern this case and, if not, whether a grievance procedure existed through which plaintiff could have exhausted his administrative remedies before filing suit in this court.

The venue provision application to this case is 28 U.S.C. § 1391(b), which provides:

[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 property

that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

In support of his motion to dismiss for improper venue, defendant avers in an affidavit that he is a resident of Tennessee and that he has no residence in Wisconsin. As noted above, plaintiff did not oppose this part of defendant's motion, and nothing in his motion for additional time to file affidavits suggests that he is hot on the trail of obtaining an affidavit from someone who can properly dispute defendant's averments of residency. Rather, plaintiff contends that he is attempting to obtain an affidavit from a Frank Holt, another former inmate at the Whiteville facility, but that prison officials at Stanley Correctional Institution will not let Mr. Holt use the services of a notary public. Plaintiff does not say what it is that Mr. Holt is prepared to testify to, but it is unreasonable to speculate that an inmate would have personal knowledge of defendant Jones's residency. (For plaintiff's information, the absence of access to a notary public does not hinder a litigant's ability to file affidavits. An affidavit is admissible as evidence if the affiant simply makes a declaration at the completion of his affidavit that includes the following statement followed by a signature: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date) ." See 28 U.S.C. §1746.)

Plaintiff did submit one affidavit with his brief in opposition to defendant's motion to dismiss. However, this affidavit bears no relation to defendant's motion to dismiss for

improper venue. Indeed, it is difficult to see how it relates to any one of the grounds defendant raised for dismissal. In the affidavit, Rock Ingram, another former inmate of the Whiteville Correctional Institution, avers that while he was in Whiteville, the institution housed Wisconsin inmates only, and that “in the visiting room as well as in the cafeteria was the motto for the State of Wisconsin.”

Because plaintiff has put in no evidence to put into dispute defendant’s averments that he resides in Tennessee and does not have a residence in the State of Wisconsin, I conclude that venue in this district is improper. Specifically, venue is not proper under § 1391(b)(1) because, with the early dismissal of the Wisconsin defendants, no defendant resides in Wisconsin. Venue is not available under § 1391(b)(2), because the event giving rise to plaintiff’s claim, plaintiff’s exposure to second hand smoke, occurred in Tennessee. Finally, § 1391(b)(3) is not applicable, because plaintiff’s action may be brought in the Eastern Division of the District Court for the Western District of Tennessee.

28 U.S.C. § 1404(a) authorizes a federal court in which venue is improper to transfer a case to another court where venue is proper if the transfer would further the interests of justice. The court may transfer venue pursuant to § 1404(a) regardless whether it has personal jurisdiction over the defendant. See Goldlawr v. Heiman, 369 U.S. 463, 466 (1961). Particularly when a plaintiff is proceeding pro se, transfer to a district court in which venue is proper is in the interest of justice. Therefore, this case will be transferred to

the Eastern Division of the District Court for the Western District of Tennessee and the motion to dismiss for improper venue filed by defendant Jones will be denied.

ORDER

IT IS ORDERED that

1. The motion of defendant George Jones to dismiss the complaint because the action is improperly venued is DENIED.

2. Plaintiff's motion for additional time to file affidavits is DENIED.

3. This case is transferred to the Eastern Division of the United States District Court for the Western District of Tennessee.

4. The clerk of court is directed to transmit the file to the Eastern Division of the United States District Court for the Western District of Tennessee.

Entered this 17th day of November, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge