

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

DONALD LEE PIPPIN, JR.,

Plaintiff,

v.

LT. ROBERT BLECHL, 2nd Shift Security
at OSCI (now Capt. and 1st Shift),

Defendant.

ORDER

04-C-582-C

In an order dated September 29, 2005, I granted defendants' motion to dismiss all of plaintiff's claims except one on the ground that plaintiff had failed to exhaust his administrative remedies as required by 42 U.S.C. § 1997e. In granting defendants' motion in part, I resolved plaintiff's claims against former defendants Judy P. Smith, Jim Schwochert, Tom Edwards, Dr. Alexander Stolarski, Captain Derringer and John Doe. The one claim remaining is plaintiff's claim that defendant Blechl violated his First Amendment rights by refusing to allow plaintiff to mail letters to his family, friends and clergy sometime in November 2003. That claim may be amenable for disposition on a motion for summary judgment (the dispositive motions deadline is December 16, 2005) or at trial, which is scheduled for May 15, 2006.

Now plaintiff has filed a notice of appeal in which he states that he wants to appeal “the last three decisions reached by the court.” The last three decisions were the September 29 order, as well as an order entered on August 19, 2005, in which I denied plaintiff’s motion for appointment of counsel, and an order entered on September 1, 2005, in which I denied plaintiff’s motion for summary judgment because it failed to conform in every respect to this court’s summary judgment procedures, and his motion “for removal of the attorney general as counsel for defendants.” I construe plaintiffs’ notice of appeal to include a motion for the entry of final judgment pursuant to Fed. R. Civ. P. 54 as to former defendants Judy P. Smith, Jim Schwochert, Tom Edwards, Dr. Alexander Stolarski, Captain Derringer and John Doe, and a motion for modification of the orders of August 19 and September 1 to include a finding that orders are appealable immediately under 28 U.S.C. § 1292.

28 U.S.C. § 1292 states in relevant part,

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

Although judges may differ on the question whether plaintiff requires appointed counsel to assist him with the one claim remaining in this action, an immediate appeal will not

materially advance the ultimate termination of this litigation. Nor would it substantially move this case forward to allow plaintiff to take an immediate appeal from the denial of his improperly filed motion for summary judgment and his legally meritless motion “for removal of the attorney general as counsel for defendants.” Such an appeal would serve only to delay the litigation. Therefore, plaintiff’s motion for amendment of the August 19 and September 1, 2005 orders to include a finding that the orders are appealable under 28 U.S.C. § 1292 will be denied.

However, plaintiff’s motion for the entry of final judgment against former defendants Judy P. Smith, Jim Schwochert, Tom Edwards, Dr. Alexander Stolarski, Captain Derringer and John Doe also will be granted.

Fed. R. Civ. P. 54(b) provides in pertinent part:

[W]hen multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however, designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

The purpose of Rule 54(b) is to avoid "piecemeal disposal of litigation." Advisory Comm. Notes. Under this rule, a judge has the power to enter final judgment whenever there are

multiple parties following an order that finally resolves a party's liability even though the case continues in the district court between the other parties. As a general rule, however, the court of appeals frowns on the entry of partial final judgments, Doe v. City of Chicago, 360 F.3d 667, 673 (7th Cir. 2004) (judge has power to enter final judgment under Rule 54(b), but not duty), unless the order to be appealed from finally resolves a party's entire liability. The ruling on defendants' motion to dismiss for failure to exhaust his administrative remedies and the dismissal of all but one defendant fits into that category. Although dismissals for failure to exhaust are always without prejudice, Ford v. Johnson, 362 F.3d 395, 401 (7th Cir. 2004), when the dismissal without prejudice winds up the litigation in the federal court system, it is appealable even though it may "kick off" administrative proceedings in another forum. Disher v. Information Resources, Inc., 873 F.2d 136, 139 (7th Cir. 1989) (citing cases).

Entering a partial final judgment requires a court to determine that no just reason for delay exists. Rule 54(b). One "just reason" can be the need to develop a factual basis for disputed questions of law, id.; another may be to relieve the court of appeals of the need to familiarize itself with the factual and legal issues of a case more than once. Neither reason exists in this case. The facts that will be developed on summary judgment or at trial on plaintiff's claim against defendant Blechl are entirely independent of the facts bearing on the question of exhaustion of administrative remedies and plaintiff's claims against the dismissed

defendants. According, I conclude that entry of judgment with respect to plaintiff's claims against defendants Judy P. Smith, Jim Schwochert, Tom Edwards, Dr. Alexander Stolarski, Captain Derringer and John Doe will not lead to piecemeal appeals that would require the court of appeals to review the same factual record more than once. Therefore, I will grant plaintiff's motion for entry of judgment pursuant to Rule 54(b) on his claims against the dismissed defendants.

Plaintiff's filing of a notice of appeal triggers a financial obligation for plaintiff under the 1996 Prison Litigation Reform Act. He must pay the \$255 fee for filing his notice of appeal, either in installments if this court were to find that his appeal is taken in good faith, or in a lump sum if this court certifies that the appeal is not taken in good faith. In this case, I intend to certify that plaintiff's appeal is not taken in good faith. The evidence defendants submitted in support of their motion to dismiss compelled a conclusion that plaintiff did not raise in any inmate complaint any of the claims he raised in this lawsuit except his claim against defendant Blechl. He suggests that he will argue on appeal that this court failed to consider exhaustion documents he attached to his complaint in this case, but his argument would be false. As noted on pages 2 and 3 of the September 29 decision, I recognized the exhaustion documentation attached to plaintiff's complaint and considered that documentation in ruling on defendants' motion.

ORDER

IT IS ORDERED that plaintiff's motion for amendment of the August 19 and September 1, 2005 orders to include a finding that the orders are appealable under 28 U.S.C. § 1292 is DENIED.

Further, IT IS ORDERED that in the absence of any just reason for delay, the clerk of court is directed to enter judgment dismissing defendants Judy P. Smith, Jim Schwochert, Tom Edwards, Dr. Alexander Stolarski, Captain Derringer and John Doe of dismissal without prejudice pursuant to Fed. R. Civ. P. 54(b) on the ground that plaintiff has failed to exhaust his administrative remedies on his claims against them.

Finally, plaintiff's request for leave to proceed in forma pauperis on appeal is DENIED. I certify that plaintiff's appeal is not taken in good faith.

Because plaintiff's appeal is certified as not having been taken in good faith, plaintiff owes the \$255 fee for filing his notice of appeal immediately. If he does not have \$255 in his prison account, then prison officials must calculate monthly payments according to the formula set out in 28 U.S.C. § 1915(b)(2) and forward those payments to the court until the debt is satisfied. If plaintiff has enough money in his regular and release accounts to pay the full \$255, it must be sent promptly to the clerk of court in one payment. Plaintiff may delay payment of the fee, whether in payments because of insufficient funds or in full only if, within thirty days of the date he receives this order, he challenges in the court of appeals this

court's certification that his appeal is not taken in good faith. In that instance, the court of appeals may decide that the certification is improper, in which case the matter will be remanded to this court for collection of an initial partial payment of the fee before the court of appeals will decide whether plaintiff's appeal is legally frivolous. If the court of appeals determines that this court was correct in finding that the appeal is not taken in good faith, then the payment will once again be due in full immediately. Whatever the scenario, plaintiff is responsible for insuring that the required sum is sent to the court at the appropriate time.

Because this case remains pending against defendant Blechl, if plaintiff pays the fee for filing his appeal and the court of appeals requests the record of the case for the purpose of hearing plaintiff's appeal, the clerk of court will be directed to make copies of necessary documents for the court of appeals and to retain the remainder of the file in this court.

Entered this 19th day of October, 2005.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge