

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

CHAD STITES,

Plaintiff,

v.

SHERIFF DAVID MAHONEY, *et al.*,

Defendants.

ORDER

12-cv-383-wmc

Plaintiff Chad Andrew Stites filed this civil action under 42 U.S.C. § 1983, claiming that jail staff acted with deliberate indifference to the need to prevent and treat an infection he developed while incarcerated at the Dane County Jail. On August 27, 2014, the court granted the defendants' motion for summary judgment and dismissed this case. Specifically, as explained in its decision, the court found that plaintiff failed to exhaust available administrative remedies before filing suit, as required by the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a). (Dkt. #66). Plaintiff later filed a motion for relief from judgment under Fed. R. Civ. P. 59, which was denied. (Dkt. #73). Finally, plaintiff then appealed the decision, which was affirmed by the Seventh Circuit. *Stites v. Mahoney*, 594 Fed. Appx. 303 (7th Cir. Feb. 17, 2015).

Plaintiff has now filed a motion for relief from judgment under Fed. R. Civ. P. 60(b)(2) and (3). His motion is timely because he filed it on April 6, 2015, within one year of the entry of judgment against him. Fed. R. Civ. P. 60(c)(1). The relevant portions of Rule 60(b)(2) and (3) state that "the court may relieve a party . . . from a final judgment" based on:

- (2) "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)"; or

(3) “fraud . . . misrepresentation, or misconduct by an opposing party.”

In his motion, plaintiff purports to have discovered new evidence proving that he exhausted his administrative remedies. He also attaches copies of several grievances that were apparently filed with the jail relating to his infection and treatment. (Dkt. #80.) Additionally, plaintiff submits an affidavit from his father, who says that he discovered these grievances while he was moving boxes in his body shop. (Dkt. #79.) Plaintiff argues that this “newly discovered evidence” could not have been discovered earlier with “reasonable diligence,” because neither he nor his father realized that there were copies of the grievances and other legal documents in the boxes stored in the body shop. Additionally, plaintiff suggests that defendants may have committed fraud or misrepresentation by not providing copies of these grievances to him during discovery.

Plaintiff’s arguments are not persuasive for several reasons. *First*, the court is not persuaded that plaintiff could not have discovered these grievances earlier with the exercise of reasonable diligence. Plaintiff was out of prison for nearly the entire duration of this lawsuit, including more than a year before his response to defendants’ motion for summary judgment was due. (Dkt. #14, Notice of Change of Address). Because the grievances were apparently in plaintiff’s or plaintiff’s father’s possession during the entire pendency of this lawsuit, plaintiff should have been able to discover them if he had exercised reasonable diligence.

Second, plaintiff has not shown that defendants committed fraud or misrepresentation. According to defendants, the Dane County Jail does not generally

keep copies of grievances for more than two years. (Dkt. #83, Statz Dec. ¶ 3). Thus, while providing copies of all of the grievances filed by plaintiff that had been retained by the jail, they could not provide copies of grievances they did not have. (*Id.*). Since plaintiff has submitted no evidence to contradict defendants' assertions, he has failed to meet his burden to establish actual fraud or misrepresentation.

Finally, and perhaps most importantly, even if the court were to consider the grievances submitted by plaintiff, they do *not* prove that he exhausted his administrative remedies. In fact, the summary judgment record included reference to these particular grievances already. The grievance spreadsheet provided by defendants at summary judgment listing all the grievances plaintiff had filed while in jail identified the nature, response and disposition of these “newly discovered” grievances. (Dkt. #54-9.) In other words, the existence of these grievances, as well as the reasons for their denial, have been known to the parties and court for some time. The problem for plaintiff at summary judgment was that he could not show either that: (1) the grievances he filed related specifically to the claims on which he had been allowed to proceed in this lawsuit; or (2) he had appealed dismissal of the grievances, a step that was necessary in order to exhaust his administrative remedies fully. Moreover, plaintiff's recent submissions do not make this showing either.

In sum, Rule 60(b) relief is an extraordinary remedy and is granted only in exceptional circumstances. *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831, 837 (7th Cir. 2005). For the reasons above, plaintiff has not met that high standard.

ORDER

IT IS ORDERED that plaintiff Chad Andrew Stites's motion for relief from judgment (Dkt. # 78) is DENIED.

Entered this 4th day of March, 2016.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge