

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

ANDREW S. SATO
A.K.A. TIMOTHY TIKKURI,

Plaintiff,

ORDER

v.

03-C-0185-C

SHERIFF DAVID CLARKE and
DAVID "DOE" (LAST NAME UNKNOWN R.N.)
at the Milwaukee County Jail,

Defendants.

In an order entered on August 28, 2003, I stayed a decision on defendants' motion to dismiss for improper venue to allow defendant David Clarke an opportunity to support his motion with an affidavit stating he does not have a residence in the Western District of Wisconsin. In addition, I stayed a decision on defendants' motion to dismiss for plaintiff's failure to exhaust his administrative remedies until a decision could be reached on the motion to dismiss for improper venue. With respect to the exhaustion issue, I advised defendant Clarke that in order to prevail on this defense, he had the burden to show that plaintiff failed to use the administrative procedures available to him at the Milwaukee

County Jail for challenging defendant Doe's failure to obtain medical treatment for his fractured wrist for twelve days.

Now defendant Clarke has submitted an affidavit in which he avers that he resides in the City and County of Milwaukee, Wisconsin and that he works at the Milwaukee County Sheriff's Department. Unfortunately, this information is simply not enough to allow me to rule in defendant's favor on the venue motion.

To be entitled to a decision in his favor on a motion to dismiss for improper venue, a defendant must make a showing that he does not have a residence in the district in which the action is brought and that the claim did not arise in the filing district. 28 U.S.C. § 1391(b). In the August 28 order, I noted that it was clear from the allegations of plaintiff's complaint that his claim arose in Milwaukee, Wisconsin while plaintiff was a prisoner at the Milwaukee County jail. However, I noted as well that defendant Clarke had not supported his motion with an affidavit averring that he does not have a residence in the Western District of Wisconsin. Clarke's averments that he has a residence and works in the Eastern District of Wisconsin do not resolve the question whether defendant Clarke has a residence in the Western District of Wisconsin. It is a picky point to be sure. However, a defendant may have more than one residence. Thus, I would have to infer from defendant's averment that he has a residence in Milwaukee that he does not have a residence in the Western District of Wisconsin. As I advised defendant in the August 28 order, I am unwilling to infer

this dispositive fact in deciding defendant's venue motion. Because defendant has failed to meet his burden to prove that venue is improper in this district, the motion to dismiss for improper venue will be denied.

With the denial of the motion to dismiss for improper venue, I will lift the stay on defendants' motion to dismiss grounded on plaintiff's alleged failure to exhaust his administrative remedies as required under 42 U.S.C. § 1997e. With respect to this motion, defendants have submitted the affidavit of Brian J. Mascari, a captain at the Milwaukee County Sheriff's Department, Office of Professional Standards. According to Captain Mascari, he has conducted a review of the Milwaukee County jail files and has confirmed that plaintiff sought medical care on or about September 6, 2001 relating to the physical injury alleged in this case. However, according to Mascari, plaintiff "never filed a complaint or grievance alleging medical malpractice, negligence or deliberate indifference to his medical care while incarcerated at the Milwaukee County Jail between September 6, 2001 and the present."

As I advised the parties in the August 28 order, 28 U.S.C. § 1997e(a) does not delineate the procedures prisoners must follow in exhausting administrative remedies. The Court of Appeals for the Seventh Circuit has held that the rules come from the prison grievance systems themselves. "[P]risoner[s] must file complaints and appeals in the place, and at the time, the prison's administrative rules require," Pozo v. McCaughtry, 286 F.3d

1022, 1025 (7th Cir. 2002), containing “the sort of information that the administrative system requires,” Strong v. David, 297 F.3d 646 (7th Cir. 2002). Moreover, a plaintiff must exhaust his administrative remedies *before* filing a lawsuit in federal court. Massey v. Helman, 196 F.3d 727, 733 (7th Cir. 1999). Thus, unless plaintiff submits proof of exhaustion sufficient to disprove defendants’ averment that he has not exhausted his administrative remedies on his claim, defendants will be entitled to a dismissal of this action.

ORDER

IT IS ORDERED that

1. The stay on defendants’ motion to dismiss for improper venue is LIFTED and the motion is DENIED for defendant Clarke’s failure to show that venue in this district is improper.

2. The stay on defendants’ motion to dismiss for plaintiff’s failure to exhaust his administrative remedies is LIFTED. Plaintiff may have until October 10, 2003, in which to file and serve documentary evidence and legal argument in opposition to defendants’ assertion that he failed to grieve his claim through administrative procedures available to him

at the Milwaukee County jail. Defendants may have until October 17, 2003, in which to serve and file a reply.

Entered this 22nd day of September, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge