

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

JOEL FLAKES,

OPINION AND ORDER

Plaintiff,

04-C-0189-C

v.

CORRECTIONS CORPORATION OF AMERICA,

Defendants.

In this civil action for injunctive, declaratory and monetary relief, plaintiff Flakes contends that defendant Corrections Corporation of America disregarded his serious medical needs in violation of his Eighth Amendment rights, by depriving him of a cane, a double mattress, a chair and hip replacement surgery.

This case is before the court on defendant Corrections Corporation of America's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) or in the alternative for summary judgment. Defendant asserts that plaintiff has failed to state a claim upon which relief may be granted with respect to his claim that he was deprived of a cane, double mattress and chair because this same claim was considered on its merits in the United States District

Court for the Western District of Tennessee and is thus barred by the doctrine of claim preclusion. Defendant asserts also that plaintiff has failed to state a claim upon which relief may be granted with respect to his claim that he was deliberately refused hip surgery and his claim that he was denied a cane, double mattress and chair because he failed to exhaust his administrative remedies on this claim. In support of its claim preclusion argument, defendant has submitted the record of the Tennessee court action plaintiff filed. It has supported its failure to exhaust argument with an affidavit and documentary evidence relating to defendant's health services and grievance policies.

Fed. R. Civ. P. 12(b) states in pertinent part:

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Public documents may be considered in ruling on a motion to dismiss pursuant to Rule 12(b)(6) without converting the motion to a motion for summary judgment.

Menominee Indian Tribe of Wisconsin v. Thompson, 161 F. 3d 449, 455 (7th Cir. 1998) (citing General Electric Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1080-81 (7th Cir. 1997) (court may take judicial notice of public record documents without converting motion to dismiss into motion for summary judgment)). The record of plaintiff's

civil action in the Tennessee court is public record. However, defendant's remaining evidentiary submissions are not public documents and I do not intend to exclude them in considering defendant's motion. Therefore, for the sake of simplicity, I will treat the entire motion as a motion for summary judgment. The parties will not be prejudiced by this conversion because they have treated the motion as an alternative motion for summary judgment in any event.

From the record, the evidentiary submissions of the parties and the proposed findings of fact, I find the following facts to be material and undisputed.

FACTS

A. Parties

Plaintiff Joel Flakes is an inmate at Stanley Correctional Institution in Stanley, Wisconsin.

Defendant Corrections Corporation of America is a corporation that owns and operates prisons in Tennessee and other states.

B. Plaintiff's Claims in his Complaint in this Court

In the complaint he filed in this court, plaintiff alleges that he has serious medical problems with his hips and that while he was incarcerated in defendant's prison facilities in

Hardeman County, Tennessee and Whiteville, Tennessee in 1998 and 1999, defendant refused to provide him with a cane, a second mattress and a chair. Plaintiff alleges also that defendant failed to arrange for plaintiff to have hip surgery during his confinement in defendant's facilities, despite the recommendation of an orthopedic surgeon on April 26, 1999 that plaintiff should have such surgery.

C. Administrative Grievances

At the end of April 1998, plaintiff filed a grievance at the Hardeman facility, complaining that he was not being given a cane, a second mattress and a chair. The grievance was denied as untimely.

On August 4, 1998, plaintiff filed another grievance stating:

Contrary to my adequate care I have been denied a cane to assist me in walking, a double mattress to prevent pain and numbness in my lower body during sleeping hours. I further need a chair to sit in while in my cell these medical needs are as a result of the osteoarthritis that I suffer from since 1991. I have been denied these services because they do not supposedly comport with CCA policy.

Officer Currei of the Whiteville facility told plaintiff to withdraw the complaint because he would receive the requested items. Plaintiff dismissed the complaint but did not receive the items as promised by Officer Currei. On August 24, 1998, plaintiff filed a second complaint but never received a response.

Plaintiff did not file a grievance regarding defendant's alleged refusal to arrange hip surgery. Defendant's "Corporate and Facility Policy 13-16" governs defendant's medical and health care services. Paragraph L of section 13-16.5 states that "health services complaints will be administered according to Policy 14-5, Inmate Grievances." Defendant's "Corporate and Facility Policy 14-5" sets forth inmate grievance procedures. The procedures require inmates to file the grievance by completing the "inmate/resident grievance form" within fifteen days of the alleged incident. The inmate should deliver the grievance form to the facility grievance officer by leaving the completed form in the grievance drop box in the inmate's unit. After the facility grievance officer issues a decision, the inmate has five days to submit an appeal to the warden. Section 14-5.5 of the inmate grievances policy lists those matters that are non-grievable. This list of non-grievable matters does not include complaints regarding health services.

D. Previous Court Action

On September 22, 1998, plaintiff filed a lawsuit against defendant Corrections Corporation of America in the United States District Court for the Western District of Tennessee. One of the listed causes of action was:

The Defendants named herein have shown deliberate indifference toward the plaintiff's serious medical needs. They have denied the plaintiff adequate medical care and the use of a cane, second mattress, and a chair in his cell,

knowing that the end result would be a causation of severe pain and suffering to the plaintiff; their conduct and actions did in fact result in needless and continuing severe pain and suffering to the plaintiff.

On November 5, 1998, plaintiff filed an amended complaint, stating:

This Court as well should understand that plaintiff is alleging that defendants have shown deliberate indifference to his serious medical needs and is subjecting him to cruel and unusual punishment, in violation of the Americans with Disabilities Act of 1990; and the Eighth Amendment.

The lawsuit went to trial in March 2002. At the end of the trial defendant moved the court for judgment as a matter of law. In granting defendant's motion the judge stated:

I find that you have not shown a deliberate indifference to your serious medical needs. You just weren't happy with the treatment that they gave you.

OPINION

Defendant argues that plaintiff's claims against it must be dismissed for two reasons. First, defendant argues that plaintiff failed to exhaust his administrative remedies as required by 28 U.S.C. § 1997e. Alternatively, defendant argues that plaintiff's claim that he was denied a cane, second mattress and a chair is barred by the doctrine of claim preclusion.

In Perez v. Wisconsin Dept. of Corrections, 182 F.3d 532, 535 (7th Cir. 1999), the court of appeals held that it was improper for a district court to dismiss a prisoner's case on its merits instead of ruling first on the defendant's motion to dismiss for failure to exhaust administrative remedies. However, when there are multiple grounds for dismissing a suit as

opposed to deciding it on the merits, courts may select from among them. Id. at 536. In this case, defendant’s claim preclusion argument disposes of plaintiff’s claim that defendant denied him a cane, double mattress and a chair, and its exhaustion argument disposes of plaintiff’s claim that defendant denied him hip surgery.

A. Claim Preclusion

Under the federal common law of claim preclusion, a subsequent suit is barred if the claim upon which the suit is based arises from the “same incident, events, transaction, circumstances, or other factual nebula” as a prior suit that has gone to final judgment. Okoro v. Bohman, 164 F.3d 1059, 1062 (7th Cir. 1999). “For claim preclusion to apply there must be a final judgment on the merits in an earlier action, an identity of the cause of action in both suits, and an identity of parties or privies in the two suits.” Wilhelm v. County of Milwaukee, 325 F.3d 843, 846 (7th Cir. 2003) (citing Shaver v. F.W. Woolworth Co., 840 F.2d 1361 (7th Cir. 1988)). Claim preclusion “does not require identity of legal theory or of facts.” Okoro, 164 F.3d at 1062.

In plaintiff’s 1998 lawsuit against defendant, he alleged that defendant violated his Eighth Amendment rights by showing deliberate indifference toward his serious medical needs by failing to provide him a cane, a double mattress and a chair. The Tennessee court found that defendant did not show deliberate indifference toward plaintiff’s serious medical

needs by failing to provide him a cane, a second mattress and a chair. In the present case plaintiff claims that defendant violated his Eighth Amendment rights by showing deliberate indifference toward his serious medical needs by failing to provide him a cane, a double mattress, a chair and hip replacement surgery.

That portion of plaintiff's present claim regarding defendant's failure to provide him a cane, a double mattress and a chair is identical to his prior claim and is therefore barred by claim preclusion because it meets all three requirements: the parties are identical, there was a final judgment in the prior lawsuit and the two suits involve the same cause of action. Accordingly, I will dismiss plaintiff's claim with regard to defendant's failure to provide a cane, a double mattress and a chair.

B. Exhaustion

The exhaustion provisions of the 1996 Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), state that “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” The phrase “civil action with respect to prison conditions’ means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does

not include habeas corpus proceedings challenging the fact or duration of confinement in prison.” 18 U.S.C. § 362(g)(2).

The Court of Appeals for the Seventh Circuit has held that “a suit filed by a prisoner before administrative remedies have been exhausted must be dismissed; the district court lacks discretion to resolve the claim on the merits.” Perez, 182 F.3d at 535; see also Massey v. Helman, 196 F.3d 727, 733 (7th Cir. 1999). The court of appeals has held also that “if a prison has an internal administrative grievance system through which a prisoner can seek to correct a problem, then the prisoner must utilize that administrative system before filing a claim. The potential effectiveness of an administrative response bears no relationship to the statutory requirement that prisoners first attempt to obtain relief through administrative procedures.” Massey, 196 F.3d at 733.

Defendant had grievance procedures in place which plaintiff could have used to file an inmate complaint about defendant’s failure to provide him with hip surgery. However, plaintiff did not file such a complaint. Plaintiff argues that he could not use defendant’s procedures to challenge defendant’s refusal to give him hip surgery. I understand plaintiff’s argument to stem from defendant’s exclusion of complaints about “diagnoses by medical professionals.” However, plaintiff’s challenge was not to the diagnosis of the doctor who recommended hip replacement surgery, it was to defendant’s decision to ignore the suggestion of a medical professional. Nothing in the exclusionary provisions of defendant’s

grievance policy precludes a complaint of this nature.

I conclude that plaintiff did not exhaust his administrative remedies with respect to his claim that defendant failed to provide him with hip surgery. Therefore, this claim will be dismissed on exhaustion grounds.

C. Other Matters

I need not rule on defendant's motion to strike plaintiff's expert witness because I am granting defendant's motion to dismiss.

ORDER

IT IS ORDERED that the motion of defendant Corrections Corporation of America to dismiss plaintiff's claim that he was deprived of a cane, double mattress and chair while he was in defendant's custody is GRANTED on the ground that the claim is barred under the doctrine of claim preclusion. The dismissal of this claim is with prejudice.

Further, IT IS ORDERED that defendant's motion to dismiss plaintiff's claim that he was denied hip surgery while he was in defendant's custody is GRANTED on the ground that plaintiff failed to exhaust his administrative remedies. The dismissal of this claim is without prejudice.

Entered this 19th day of October, 2005.

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