

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

EDWIN F. CLAY,

Plaintiff,

v.

JOSEPH SCIBANA, Warden,

Defendant.

ORDER

04-C-631-C

This is a civil action brought under Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), in which plaintiff contends that the Federal Bureau of Prisons is deducting 50% of his income each month in violation of the Mandatory Restitution Act, 18 U.S.C. § 3572(d). In an order entered on April 27, 2005, I granted defendant an enlargement of time to April 29, 2005, in which to file an answer to plaintiff's complaint. Now defendant has filed a document titled "Response to Petition and Request for Stay." This document is accompanied by the affidavits of Vincent Shaw and Christine Hine.

It appears that defendant is confused about the nature of this action. Initially, plaintiff filed it as a proposed habeas corpus action under 28 U.S.C. § 2241. However, in an order dated October 27, 2004, I considered carefully whether plaintiff's claim was

properly raised in a habeas corpus action as opposed to a Bivens action and concluded that plaintiff should have brought his claim under Bivens. However, rather than construe plaintiff's action as a Bivens action, I offered plaintiff the option of choosing to proceed under habeas corpus, in which case I would dismiss his action, or to proceed under Bivens, in which case he would be subject to the 1996 Prison Litigation Reform Act and its various requirements, including the requirement that he pay the full fee for filing a civil action. Subsequently, plaintiff chose to proceed under Bivens.

The "Response to Petition" that defendant has filed cannot be construed as an answer to plaintiff's civil complaint. It neither admits nor denies plaintiff's allegations of fact and includes no affirmative defenses. Instead, it has the characteristics of a response to a habeas corpus petition, which is routinely accompanied by matters outside the pleadings. In this "response," defendant sets out his understanding of the law governing claims that the Bureau of Prisons is collecting restitution in the absence of a lawful delegation of authority, introduces factual information through affidavits relating to the information the Bureau of Prisons took into account when it made its decision to set the amount of restitution to collect from plaintiff's monthly income. According to defendant, in order to resolve the question whether it is lawful for the Bureau of Prisons to set the repayment schedule for plaintiff's restitution, it will need clarification from the judge who sentenced plaintiff. Therefore, defendant requests a stay of these proceedings for 60 days to allow it to move the

sentencing court for clarification.

It is not necessary to stay the proceedings in this case to allow defendant to undertake an investigation of the facts underlying the Bureau of Prisons' decision to collect restitution in the way that it has been doing. In civil actions such as this one, once an answer has been filed, a preliminary pretrial conference will be scheduled before the United States Magistrate Judge, at which time a trial date will be scheduled and deadlines set for completion of discovery and the filing of dispositive motions. If defendant determines that it may be collecting plaintiff's restitution unlawfully, it is free to attempt to negotiate with plaintiff a prompt settlement of the matter. Otherwise, defendant can introduce factual information outside the pleadings in connection with a motion for summary judgment.

Because defendant's response to plaintiff's complaint cannot be construed as an answer to plaintiff's complaint pursuant to Fed. R. Civ. P. 8(b), I will grant defendant a second short extension of time in which to file his answer. Defendant's motion for a stay of the proceedings in this action will be denied as unnecessary.

ORDER

IT IS ORDERED that defendant may have an enlargement of time to May 11, 2005, in which to file an answer to plaintiff's complaint.

Further, IT IS ORDERED that defendant's motion to stay the proceedings in this

case is DENIED as unnecessary.

Entered this 4th day of May, 2005.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge