IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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COREY C. ISAACSON,

ORDER

Plaintiff,

07-121-C

v.

GOERGE GOTHNER and
DOUGLAS COUNTY,

Defendants.

- -

According to the complaint filed in this civil lawsuit, on the night of April 4, 2004, plaintiff Corey Isaacson was at his home in Superior, Wisconsin "breaking windows," when police officer defendant George Gothner arrived on the scene and shot him without provocation in the thigh and the arm. Plaintiff was charged later with recklessly endangering safety; defendant Gothner faced no legal consequences. Disturbed by this alleged injustice, plaintiff filed a complaint under 42 U.S.C. § 1983. Because plaintiff is a prisoner at the Dodge Correctional Institution in Waupun, Wisconsin, I screened his complaint under 28 U.S.C. § 1915(e)(2). In an order dated March 13, 2007, I granted him leave to proceed on his claims that defendant Gothner used excessive force against him in violation of the Fourth

Amendment and defendant Douglas County failed to adequately train and supervise Gothner in violation of plaintiff's Fourth Amendment rights. I denied him leave to proceed on additional claims against former defendants Charles LaGeese and the City of Superior Police Station.

Recently, plaintiff submitted a flurry of filings. Now before the court are plaintiff's (1) motion to stay screening of his complaint, (2) motion to supplement the complaint (which I construe as a motion to substitute the City of Superior Police Department for former defendant City of Superior Police Station), (3) motion for reconsideration of the March 13 screening order, (4) motion for appointment of counsel; (5) motion to alter the caption of the complaint and (6) motion for an ownership or property lien. In addition, plaintiff has filed a notice of appeal, in which he states his intention to proceed immediately to an appeal if the court denies his pending motion for reconsideration.

Plaintiff's motion to stay screening of the complaint was mooted by this court's March 13, 2007 screening order. I will grant plaintiff's motion to motion to substitute the City of Superior Police Department for former defendant City of Superior Police Station. The case caption will be updated accordingly in future orders. Plaintiff's motion for appointment of counsel will be denied as premature because plaintiff has not shown that he has requested assistance from lawyers in the community. Plaintiff's motion for a lien will be denied because he has no legal right to place one on defendant Gothner's property.

Finally, because plaintiff has filed an improper interlocutory appeal, his motion for leave to proceed in forma pauperis on appeal will be denied.

A. Motions Relating to Screening

At the same time this court was issuing its March 13 screening order, plaintiff was filing his motion to stay screening so that he might submit a more detailed supplement to his complaint. Later, plaintiff submitted a document entitled "supplemental petition" which I construe as a motion to substitute the City of Superior Police Department for former defendant City of Superior Police Station. In deciding plaintiff's motion for reconsideration of the March 13 screening order, I have considered the facts originally alleged against the City of Superior Police Station and considered them as applied to the City of Superior Police Department.

Plaintiff contends that the court erred by dismissing his claims against former defendant City of Superior Police Station. Plaintiff acknowledges that he cannot sue the police station because it is not a person suable under § 1983, but asserts that he should be allowed to sue the city's police *department* instead. In his original complaint, plaintiff suggested that defendant Douglas County employed defendant Gothner and failed to train or supervise him in a way that would have prevented Gothner from using potentially deadly force on plaintiff. From plaintiff's motion for reconsideration, it appears now that plaintiff

does not know whether defendant Gothner is employed by defendant Douglas County or by the City of Superior Police Department. Whichever it is, plaintiff contends, failed to train or supervise its officers in a manner that constituted deliberate indifference to the rights of people with whom the officers came in contact. City of Canton v. Harris, 489 U.S. 378, 388-89 (1989); Alexander v. City of South Bend, 433 F.3d 550, 557 (7th Cir. 2006).

Under Fed. R. Civ. P. 8(a), a litigant is entitled to plead claims in the alternative. Therefore, although plaintiff could not prevail against a municipality that did not employ defendant Gothner, at this stage, he may proceed against both defendant Douglas County and proposed defendant City of Superior Police Department. (It may be that the police department is not a suable entity; if so, that is an issue to be raised by the department.) For now, I will grant plaintiff's motion for reconsideration with respect to the City of Superior Police Department and will substitute the department for the police station in plaintiff's original complaint. Plaintiff's motion to amend the caption of this case will be granted as well, with respect to the City of Superior Police Department. A copy of the amended complaint will accompany this order and will be served on defendant City of Superior Police Department. Defendant Gothner may have 10 days from the date of this order in which to answer the amended complaint or advise the court and plaintiff that he will stand on the answer he filed in response to the original complaint. Defendant Douglas County has not yet filed an answer to the original complaint. Therefore, it may have ten days from the date

of this order or until the time its response to the original complaint is due, whichever is longer, in which to file a response to plaintiff's amended complaint. Fed. R. Civ. Pro. 15(a).

In his motion for reconsideration, plaintiff takes issue also with the court's dismissal of defendant Charles LaGeese. According to plaintiff, former respondent LaGeese is an official who was assigned to investigate defendant Gothner's decision to shoot plaintiff on April 4, 2004. Plaintiff contends that by recommending that defendant Gothner be permitted to return to work, LaGesse violated plaintiff's constitutional rights. In addition, plaintiff suggests that LaGeese "conspired" with the local district attorney to insure that Gothner would not be prosecuted. Plaintiff insists that LaGeese and the district attorney permitted Gothner to return to duty before plaintiff was convicted so that potential jurors would be intimidated at the thought of acquitting plaintiff were he to proceed to trial, out of fear that Gothner might retaliate against them. (Ultimately, plaintiff pleaded guilty out of fear his jury would be tainted by Gothner's return to duty.)

Although plaintiff may disagree with the district attorney's decision not to charge defendant Gothner and with LaGeese's recommendation that Gothner be permitted to return to work, neither of these decisions impinged upon any of plaintiff's constitutional rights. Even if the events plaintiff describes are true, plaintiff has no right to have defendant Gothner charged with a crime or terminated from his employment. LaGeese did not violate plaintiff's rights; therefore, he was properly dismissed from this lawsuit. For this reason,

plaintiff's motion for reconsideration and for amendment of the case caption will be denied with respect to his claims against former defendant LaGeese.

B. Motion to Appoint Counsel

Federal district courts are authorized by statute to appoint counsel for an indigent litigant when "exceptional circumstances" justify such an appointment. Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993) (quoting with approval Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991)). The Court of Appeals for the Seventh Circuit will find such an appointment reasonable where the plaintiff's likely success on the merits would be substantially impaired by an inability to articulate his claims in light of the complexity of the legal issues involved. Id. In other words, the test is, "given the difficulty of the case, [does] the plaintiff appear to be competent to try it himself and, if not, would the presence of counsel [make] a difference in the outcome?" Id. The test is not whether a good lawyer would do a better job than the pro se litigant. Id. at 323; see also Luttrell v. Nickel, 129 F.3d 933, 936 (7th Cir. 1997).

The Court of Appeals for the Seventh Circuit has held that before a district court can consider a motion for appointment of counsel made by an indigent plaintiff in a civil action, it must first find that the plaintiff made reasonable efforts to find a lawyer on his own and was unsuccessful or was prevented from making such efforts. Jackson v. County of McLean,

953 F.2d 1070 (7th Cir. 1992). To show that he has made reasonable efforts to find a lawyer, a petitioner s required to submit the names and addresses of at least three lawyers that he asked to represent him and who turned him down. Plaintiff does not suggest that he has complied with this preliminary step. Consequently, I must deny his motion. Plaintiff remains free to renew his motion after he has sought representation from at least three lawyers without success.

C. Motion for Lien

In his "Petitioner for Ownership or Property Lean [sic]," plaintiff asks the court to "issue a property of ownership lean [sic] on [defendant Gothner] in his personal capacity [t]o prevent any alteration of property, money, titles, ownership, deeds, accounts, etc. from his person." A lien is defined as a "[q]ualified right of property which a creditor has in or over specific property of his debtor. . . ." Dorr v. Sacred Heart Hospital, 228 Wis. 2d 425, 437-438, 597 N.W.2d 462, 470 (Ct. App. 1999) (citing Black's Law Dictionary 832 (5th ed. 1979). Because a lien is a right to encumber property until a debt is paid, it presupposes the existence of a debt. Id.

At this stage in the lawsuit, plaintiff has made allegations against defendant Gothner. He has not proven them, or shown that he is entitled to any money damages from defendant Gothner. Defendant Gothner does not owe plaintiff a debt yet; therefore, a lien would be

wholly premature. Plaintiff's motion for a lien will be denied.

D. Notice of Appeal

Along with his other filings, plaintiff has submitted a document titled "Notice of Appeal," in which he states:

> Consider this affidavit a notice of intent to appeal if the District Court listed above denies the "petition for reconsideration", attached to this notice of appeal. (If denied in part or in full).

Because plaintiff's notice of appeal is not accompanied by the $455 fee for filing an appeal, I construe the notice to include a request for leave to proceed in forma pauperis on appeal.

The first obstacle plaintiff faces here is the fact that neither this order nor the court's March 13 order are final judgments that may be appealed.

In rare instances, a party may appeal a non-final decision. 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.

I purposely did not include in the March 13 order a finding that an interlocutory appeal would be proper. Neither that order nor this one involves a controlling question of

law as to which there is substantial ground for difference of opinion, and a prompt appeal from the orders will not materially advance the ultimate termination of this litigation. Indeed, it will serve only to delay it.

Even if I were to construe plaintiff's motion as including a motion for entry of final judgment with respect to defendant LaGeese, the motion would not be granted. Rule 54(b) of the Federal Rules of Civil Procedure provides in pertinent part that:

> when multiple parties are involved [in a lawsuit], 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. Entering a partial final judgment requires a court to determine that no just reason for delay exists. Fed. R. Civ. P. 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. Although LaGeese's action took place after defendant Gothner shot plaintiff, his investigation rested on the incident at issue in this lawsuit. Under such circumstances, it is more efficient to resolve the case as a whole than to do so through piecemeal appeals.

Unfortunately therefore, plaintiff's impulsive submission of his notice of appeal is both costly and futile. As plaintiff should be aware, because he is a prisoner, he must pay the full cost of filing a notice of appeal. He owes the money whether his appeal is meritorious, procedurally defective, or lacking in legal merit. If he were to qualify for indigent status, he would be allowed to pay the fee in monthly installments, beginning with an initial partial payment. However, if his appeal is certified as not having been taken in good faith, he may not proceed in forma pauperis and instead, he must pay the full amount of the fee immediately.

I must certify that plaintiff's appeal is not taken in good faith. As I told plaintiff in the March 13 order and have reiterated here, LaGeese's investigation and recommendations regarding defendant Gothner were not directed at plaintiff and did not violate his

constitutional rights. Consequently, plaintiff has no legal claim against LaGeese. Because plaintiff has advanced no legally meritorious reason for taking an appeal from the March 13, 2007 order or from this order denying in part his motion for reconsideration, I will certify that the appeal is not taken in good faith.

Because I am certifying plaintiff's appeal as not having been taken in good faith, plaintiff cannot proceed with his appeal without prepaying the $455 filing fee unless the court of appeals gives him permission to do so. Pursuant to Fed. R. App. P. 24, plaintiff has 30 days from the date of this order in which to ask the court of appeals to review this court's denial of leave to proceed in forma pauperis on appeal. His motion must be accompanied by an affidavit as described in the first paragraph of Fed. R. App. P. 24(a) and a copy of this order. Plaintiff should be aware that if the court of appeals agrees with this court that the appeal is not taken in good faith, it will send him an order requiring him to pay all of the filing fee by a set deadline. If plaintiff fails to pay the fee within the deadline set, the court of appeals ordinarily will dismiss the appeal and order this court to arrange for collection of the fee from plaintiff's prison account.

ORDER

IT IS ORDERED that plaintiff's

1. Motion to stay screening of his complaint is DENIED as moot;

2. Motion to substitute the City of Superior Police Department for former defendant City of Superior Police Station is GRANTED;

3. Motion for reconsideration is GRANTED in part and DENIED in part;

4. Motion for appointment of Counsel is DENIED without prejudice;

5. Motion to alter the caption of the complaint is GRANTED in part and DENIED in part.

6. Motion for ownership or property lien is DENIED.

Further, IT IS ORDERED that

7. A copy of plaintiff's complaint, supplemental complaint (now construed as a motion to substitute) and all orders in this case are being forwarded to the United States Marshal for service on defendant City of Superior Police Department;

8. Defendant Gothner may have 10 days from the date of this order in which to answer the amended complaint or advise the court and plaintiff that he will stand on the answer he filed in response to the original complaint.

9. Defendant Douglas County may have ten days from the date of this order or until the time its response to the original complaint is due, whichever is longer, in which to file a response to plaintiff's amended complaint.

Finally, IT IS ORDERED that

10. Plaintiff's request for leave to proceed in forma pauperis on appeal is DENIED

and I certify that plaintiff's appeal is not taken in good faith.

11. The clerk of court is requested to insure that plaintiff's obligation to pay the $455 fee for filing his appeal is reflected in this court's financial records.

Entered this 4th day of April, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge