IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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COREY C. ISAACSON,

Plaintiff,

v.

ORDER

07-121-C

GOERGE GOTHNER,
DOUGLAS COUNTY, and
CITY OF SUPERIOR POLICE DEPARTMENT,

Defendants.

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In an order dated March 13, 2007, I screened plaintiff's complaint as I was required to do under the 1996 Prison Litigation Reform Act and 28 U.S.C. § 1915(e)(2). At that time, I granted plaintiff leave to proceed on his claims that defendant Gothner used excessive force against him in violation of the Fourth Amendment and that defendant Douglas County failed to adequately train and supervise Gothner in violation of plaintiff's Fourth Amendment rights. I denied plaintiff leave to proceed on additional claims against Charles LaGeese and the City of Superior Police Station. Subsequently, however, on April 4, 2007, I granted plaintiff's motion for reconsideration of the March 13 order, and allowed him to substitute the City of Superior Police Department for the former defendant City of Superior

Police Station. In modifying the order, I noted that in his original complaint, plaintiff had 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. In support of his motion for reconsideration, plaintiff admitted he did not know whether defendant Gothner was employed by defendant Douglas County or by the City of Superior Police Department. For that reason alone, I allowed him to proceed against the police department as an alternative defendant with respect to plaintiff's claim of failure to train or supervise.

Now defendant Douglas County has filed documents titled "Motion to Reconsider Order and Opinion" and "Affidavit of Charlie Law." In its motion and supporting affidavit, the county contends that I should reconsider the order of March 13, 2007, and deny plaintiff leave to proceed against it because it did not hire defendant George Gothner and it does not have authority or control over defendant Gothner or the City of Superior Police Department, for whom defendant Gothner worked at the time at issue in this case.

Because defendant Douglas County is asking this court to rely on matters outside the pleadings, its motion is not appropriately brought as a motion for reconsideration of the March 13 order. 28 U.S.C. § 1915(e)(2) allows the district court to dismiss a prisoner's complaint at the outset if it determines that the complaint is frivolous or malicious, fails to state a claim upon which relief may be granted or seeks relief from a defendant who is

immune from suit. Plaintiff's complaint did not include allegations so preposterous as to be legally frivolous or malicious, and did not seek relief against defendants who are immune from suit. Thus, in determining whether plaintiff's allegations stated a claim upon which relief may be granted, it was this court's task to determine the sufficiency of plaintiff's allegations, not test the merits of his complaint. Gibson v. City of Chicago, 910 F.2d 1510, 1520 (7th Cir. 1990). The court was required to accept as true the well-pleaded factual allegations, drawing all reasonable inferences in plaintiff's favor. Moranski v. General Motors Corp., 433 F.3d 537, 539 (7th Cir. 2005). Dismissal for failure to state a claim is proper only if "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Lee v. City of Chicago, 330 F.3d 456, 459 (7th Cir. 2003) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). That was not the case here. It was conceivable from plaintiff's allegation that he could prove that his Fourth Amendment rights had been infringed by defendant Gothner's alleged use of excessive force and either the defendant police department's or Douglas County's failure to train or supervise defendant Gothner.

In order to find that defendant Douglas County does not employ defendant Gothner and had no responsibility for his training or supervision, and to conclude that Douglas County should be dismissed from the action, this could would have to consider the affidavit attached to defendant Douglas County's motion. Normally, a court may not consider

matters outside the pleadings in the context of a motion to dismiss. Fed. R. Civ. P. 12(b); Fleischfresser v. Directors of School District 200, 15 F.3d 680, 684 (7th Cir. 1994). Instead, if the court intends to consider additional evidence, the motion must be converted to a motion for summary judgment.

This court requires the parties to follow certain procedures in connection with a motion for summary judgment, a copy of which are attached to this order. At the preliminary pretrial conference order scheduled in this case for tomorrow, May 15, 2007, the magistrate judge will schedule briefing on this motion, unless plaintiff advises the magistrate judge that he does not intend to oppose the motion and is willing to dismiss defendant Douglas County voluntarily. Whatever the scenario, defendant's motion will be construed as a motion for summary judgment and its request for reconsideration of the order of March 13, 2007 will be denied.

ORDER

IT IS ORDERED that defendant Douglas County's request that this court reconsider its order of March 13, 2007 is DENIED.

Further, IT IS ORDERED that defendant Douglas County's "Motion to Reconsider Order and Opinion" is construed as a motion for summary judgment, to be discussed at the

preliminary pretrial conference scheduled in this case for May 15, 2007.

Entered this 14th day of May, 2007.

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