IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GREGORY SEAN GORAK,

Plaintiff,

v.

JOHN PAQUIN, AMY SMITH,
RUSSELL BAUSCH and KAREN SOLOMON,

Defendants.

ORDER

11-cv-130-bbc

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Plaintiff Gregory Sean Gorak has filed a motion under Fed. R. Civ. P. 59(e) to reconsider the order granting defendants' motion for summary judgment on plaintiff's claim that defendants violated his right to due process by failing to consider certain evidence at a disciplinary hearing. I dismissed plaintiff's claim because he failed to show that any of the documents he wished to present were relevant to his defense.

The first question is whether plaintiff's motion is timely. Under Rule 59(e), a party has 28 days after entry of judgment to file a motion to alter or amend the judgment. In this case, judgment was entered on June 13, 2012. Dkt. #72. Plaintiff filed his motion with the court on July 16, 2012, but under the "mailbox rule," a prisoner's motion is "filed" at the time he gives the motion to prison authorities for mailing. Edwards v. United States, 266 F.3d 756, 758 (7th Cir. 2001). In this case, the mailbox rule does not necessarily help plaintiff because he certified at the bottom of his motion that he had placed it in the prison

mailbox on July 12, 2012, dkt. #73, which means his motion was a day late. Under Fed. R. Civ. P. 6(b)(2), a court may not extend the time for filing a Rule 59 motion.

Plaintiff says now that the date on the certification is a typographical error and that he placed his motion in the prison mailbox on July 11, 2012. As proof, he points to the cover letter accompanying his motion for reconsideration, which is dated July 11. Dkt. #73-1.

I am reluctant to accept plaintiff's after-the-fact, self-serving representation. At the time he filed his motion, he certified "under penalty of perjury" that he "placed this motion in the prison mailbox on July 12, 2012." He identifies no reason why he would have put the wrong date on his certification. The date on the cover letter provides little support because he may have completed the cover letter before his certification. Although he includes a new certification in his brief stating that he submitted the motion on July 11, the new certification contains a puzzling qualifier that "the envelope was properly addressed to Clerk of Courts Sanfilippo," dkt. #78 at 3, so its evidentiary value is questionable.

Even if I assume that plaintiff's motion is timely, he has not shown that the summary judgment decision should be altered. He makes several arguments, but none are persuasive. First, he says that "the court has found for the defendants based exclusively upon their assertion that Gorak's evidence could not have been exculpatory and/or relevant because he was ultimately found guilty by the same committee members at the final hearing." Plt.'s Br., dkt. #78, at 3. That is incorrect. I granted defendants' summary judgment motion for a simple reason: plaintiff failed to make *any* showing that the evidence he wished to submit

at the disciplinary hearing was relevant to his defense, even though it is well established that prisoners do not have a right to submit irrelevant evidence at a disciplinary hearing, Scruggs v. Jordan, 485 F.3d 934, 940 (7th Cir. 2007); Forbes v. Trigg, 976 F.2d 308, 318 (7th Cir. 1992), and even though defendants argued in their summary judgment brief that the documents plaintiff wished to submit were not relevant. I did not make any reference to the second hearing, except to say that plaintiff could not amend his complaint to include new claims about that hearing.

Second, plaintiff says that the court was required to assume that the documents were relevant and allow the jury to make a final determination. That is also incorrect. The question whether evidence is relevant is for the court to decide, not the jury. United States v. Torniero, 735 F.2d 725, 730 (2d Cir. 1984) ("Relevance is a question of law."). By failing to develop an argument that the documents were relevant, plaintiff forfeited his claim. APS Sports Collectibles, Inc. v. Sports Time, Inc., 299 F.3d 624, 631 (7th Cir. 2002) ("[I]t is not this court's responsibility to research and construct the parties' arguments, and conclusory analysis will be construed as waiver.").

In any event, even if it were a factual question, that would not relieve plaintiff of the burden to show relevance. A plaintiff has the same burden at summary judgment that he does at trial. Hammel v. Eau Galle Cheese Factory, 407 F.3d 852, 859 (7th Cir. 2005) (quoting Schacht v. Wisconsin Dept. of Corrections, 175 F.3d 497, 504 (7th Cir.1999)) ("Summary judgment is not a dress rehearsal or practice run; it 'is the put up or shut up moment in a lawsuit, when a party must show what evidence it has that would convince a

trier of fact to accept its version of the events.'"). He may not rely on conclusory allegations to prove his claim. Economy Folding Box Corp. v. Anchor Frozen Foods Corp., 515 F.3d 718, 721 (7th Cir. 2008) ("It is the parties' responsibility to allege facts and indicate their relevance under the correct legal standard."); Drake v. Minnesota Mining & Manufacturing Co., 134 F.3d 878, 887 (7th Cir. 1998) ("Rule 56 demands something more specific than the bald assertion of the general truth of a particular matter[;] rather it requires affidavits that cite specific concrete facts establishing the existence of the truth of the matter asserted.").

Plaintiff says that he did not make an argument about the relevance of his documents because "to do so would have been trying to litigate the actual decision of the" disciplinary committee. Plt.'s Br., dkt. #73, at 4. Again, plaintiff is wrong. Plaintiff was not required to explain the relevance of his documents to show that the committee was wrong to find him guilty; rather, an explanation was necessary because the due process clause does not give prisoners a right to present irrelevant evidence.

Third, plaintiff says that his "written statements accompanying the other documents already explain in great detail how they supported his defense." Plt.'s Br., dkt. #73, at 5. Plaintiff does not point to any particular explanation in these statements, but even if I assume that an explanation of the relevance of the documents may be found somewhere in the record, "[i]t is not the duty of the court to scour the record in search of evidence to defeat a motion for summary judgment; rather, the nonmoving party bears the responsibility of identifying the evidence upon which he relies." Harney v. Speedway SuperAmerica, LLC,

526 F.3d 1099, 1104 (7th Cir. 2008). See also DeSilva v. DiLeonardi, 181 F.3d 865, 867 (7th Cir. 1999) ("[A] brief must make all arguments accessible to the judges, rather than ask them to play archaeologist with the record."). By failing to explain his position in his brief or proposed findings of fact, plaintiff forfeited this issue.

Plaintiff attempts to make up for the deficiencies in his summary judgment materials by making new arguments in his motion for reconsideration, but it is too late. "A party may not introduce evidence or make arguments in a Rule 59 motion that could or should have been presented to the court prior to judgment." United States v. 47 West 644 Route 38, Maple Park, Illinois, 190 F.3d 781, 783 (7th Cir. 1999). See also Frietsch v. Refco, Inc., 56 F.3d 825, 828 (7th Cir. 1995) ("It is not the purpose of allowing motions for reconsideration to enable a party to complete presenting his case after the court has ruled against him."). Plaintiff had a full opportunity to present his case in response to defendants' motion for summary judgment.

Finally, plaintiff says that, even if his documents were not relevant, defendants violated his due process rights by failing to consider written statements he prepared. Plaintiff did not develop that argument in his summary judgment materials, so it is forfeited as well. Further, plaintiff acknowledged in his proposed findings of fact that he provided both an oral and written statement at the December 19, 2008 hearing. Plt.'s PFOF ¶¶ 21-22, dkt. #50. Apparently, plaintiff believes he was entitled to submit a second statement later, but this argument fails because he does not cite any authority for that proposition or explain how an additional statement might have helped his defense.

ORDER

IT IS ORDERED that plaintiff Gregory Sean Gorak's motion for reconsideration, dkt. #73, is DENIED.

Entered this 19th day of September, 2012.

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