FILED: October 15, 2019

Rec'd 10/17/19

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6425
(5:16-ct-03099-BO)

CHRIS FORDHAM

Plaintiff - Appellant

v.

CORRECTIONS OFFICER MANZOLA; CORRECTIONS OFFICER STEED; SERGEANT LEE LEWIS; W. FOX; MR. WILLIAMS; RN LEWIS; LPN AKUCHE; CORRECTIONS OFFICER THOMAS

Defendants - Appellees

and

WARDEN BRANKER

Defendant

ORDER

The petition for rehearing en banc was circulated to the full court. No judge

UNPUBLISHED

Rec'd 9/9/19

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6425

CHRIS FORDHAM,

Plaintiff - Appellant,

v.

CORRECTIONS OFFICER MANZOLA; CORRECTIONS OFFICER STEED; SERGEANT LEE LEWIS; W. FOX; MR. WILLIAMS; RN LEWIS; LPN AKUCHE; CORRECTIONS OFFICER THOMAS,

Defendants - Appellees,

and

WARDEN BRANKER,

Defendant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, Chief District Judge. (5:16-ct-03099-BO)

Submitted: August 20, 2019 Decided: September 5, 2019

Before NIEMEYER and MOTZ, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Christopher James Fordham, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Christopher James Fordham appeals the district court's order dismissing his 42 U.S.C. § 1983 (2012) complaint without prejudice for failure to exhaust administrative remedies. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Fordham v. Manzola*, No. 5:16-ct-03099-BO (E.D.N.C. Mar. 13, 2019). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

Rec'd
3/18/19

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:16-CT-3099-BO

CHRIS FORDHAM,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ORDER
	)	
C/O MANZOLA, *et al.*,	)	
	)	
Defendants.	)	

Plaintiff, a state inmate proceeding pro se, filed this action pursuant to 42 U.S.C. § 1983. This matter is before the court upon defendants LPN Akuche's, W. Fox's, Lee Lewis's, R.N. Lewis's, C/O Manzola's, C/O Steed's, and Mr. Williams's motion for summary judgment [DE-47] and defendant C/O Thomas's motion for judgment on the pleadings [DE-59]. For the following reasons, these motions are allowed.

I. Statement of the Case

In April 2016, plaintiff filed a complaint alleging Manzola harassed and assaulted him, and that other prison officials either failed to protect him from Manzola or were deliberately indifferent to the injuries he sustained during the assault. Compl. [DE-1], p. 5. Plaintiff's claims survived frivolity review. [DE-15].[1]

After frivolity review, plaintiff submitted numerous requests to amend and supplement his claims. See [DE-28, 38, 39]. The court partially allowed these motions, allowing plaintiff to

[1] The court dismissed defendant Warden Branker, who was named solely in his supervisory capacity.

elaborate upon his original claims, but denying several proposed amendments as either futile or unrelated to this action. [DE-43]. In light of plaintiff's amendment, the court added Thomas as a defendant.

Akuche, Fox, Lee Lewis, R.N. Lewis, Manzola, Steed, and Williams filed this motion for summary judgment in May 2018. [DE-47]. Plaintiff filed numerous responses to the summary judgment motion. [DE-67, 69, 70, 72, 74]. In July 2018, Thomas filed his answer jointly with this motion for judgment on the pleadings. [DE-59].[2] Plaintiff also responded to the motion for judgment on the pleadings. [DE-66]. Accordingly, these matters are ripe for adjudication.

II. Statement of the Facts

Plaintiff contends that, while he was incarcerated at Central Prison, defendant Manzola engaged in a "harassment campaign" against him which culminated in an April 21, 2013 assault. Compl. [DE-1], pp. 6, 11-13. This assault consisted primarily of Manzola slamming plaintiff's arms and hands in a cell trapdoor as he delivered a food tray to plaintiff. See id. at 12-14. Plaintiff alleges that defendants Steed and Thomas witnessed the assault and failed to intervene or promptly report it afterwards. Id. at 13; Am. Compl. [DE-28], pp. 4-5. In addition, plaintiff asserts that defendant Steed was involved in planning the assault. Compl. [DE-1], p. 11. Plaintiff further alleges that he informed defendants Williams, Fox, and Lee Lewis about Manzola's allegedly hostile behavior, and they failed to take any steps to prevent Manzola's eventual assault. Id. at 7. Finally, plaintiff contends that defendants R.N. Lewis and Akuche were deliberately indifferent to the injuries he sustained as a result of the assault. Id. at 14. Plaintiff did not fully exhaust his administrative remedies prior to filing the instant complaint relating to his claims. See Compl. [DE-1], p. 6; Grande

[2] The North Carolina Attorney General's Office represents all defendants.

Aff. [DE-75-1] ¶ 8.

III. Discussion

A. Motion for Judgment on the Pleadings

Rule 12(c) of the Federal Rules of Civil Procedure allows a party to move for judgment on the pleadings, "after the pleadings are closed – but early enough not to delay trial. . . ." Fed. R. Civ. P. 12(c). In reviewing a motion for judgment on the pleadings, the court applies "the same standard" as for Rule 12(b)(6) motions. Burbach Broad. Co. of Del. v. Elkins Radio Corp., 278 F.3d 401, 406 (4th Cir. 2002). Thus, when a party moves for judgment on the pleadings pursuant to Rule 12(c), the factual allegations of the complaint are taken as true, whereas those of the answer are taken as true only to the extent that they have not been denied or do not conflict with those in the complaint. Pledger v. N.C. Dep't of Health and Human Services, 7 F. Supp. 2d 705, 707 (E.D.N.C. 1998); see also Massey v. Ojaniit, 759 F.3d 343, 353 (4th Cir. 2014) (noting court must accept all well-pleaded allegations in plaintiff's complaint as true when resolving motion for judgment on the pleadings).

The primary argument Thomas advances in his motion is that plaintiff misidentified him.[3] Plaintiff's amended complaint describes Thomas as follows:

> C/O Thomas, then about 200lbs, 5ft.4in., medium brown complexion, afr-am, black curly short hair, then employed at [Central Prison] as a correctional officer.

Am. Compl. [DE-28], p. 2.

Thomas argues he does not fit this description. Despite his potentially inaccurate description, plaintiff responds by insisting that Thomas is a proper defendant. See Pl. Resp. [DE-66], p. 2.

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[3] Thomas's memorandum in support [DE-60] focuses exclusively on this issue, although the motion itself also argues the untimeliness of plaintiff's claims and plaintiff's failure to exhaust. See [DE-59], p. 6.

Because the factual allegations of the complaint are taken as true, the court declines to dismiss Thomas based on this potential misidentification. However, for the reasons stated below, Thomas's motion for judgment on the pleadings is ALLOWED based on plaintiff's failure to exhaust his administrative remedies.

B. Summary Judgment

Summary judgment is appropriate when there exists no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Anderson v. Liberty Lobby, 477 U.S. 242, 247 (1986). The party seeking summary judgment bears the burden of initially coming forward and demonstrating an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the nonmoving party then must affirmatively demonstrate that there exists a genuine issue of material fact requiring trial. Matsushita Elec. Industrial Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. Anderson, 477 U.S. at 250.

1. Untimeliness

Defendants argue plaintiff's claims are barred by the applicable statute of limitations. There is no federal statute of limitations for actions brought under 42 U.S.C. § 1983. Instead, the analogous state statute of limitations applies. See Wallace v. Kato, 549 U.S. 384, 387 (2007). Specifically, the state statute of limitations for personal injury actions governs claims brought under 42 U.S.C. § 1983. See id. North Carolina has a three-year statute of limitations for personal injury actions. N.C. Gen. Stat. § 1-52(5); see Brooks v. City of Winston-Salem, 85 F.3d 178, 181 (4th Cir. 1996). Although the limitations period for claims brought under § 1983 is borrowed from state law,

the time for accrual of an action is a question of federal law. Wallace, 549 U.S. at 388; Brooks, 85 F.3d at 181. A claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action. Owens v. Baltimore City State's Attorneys Office, 767 F.3d 379, 389 (4th Cir. 2014).

Here, plaintiff's complaint describes a series of events that allegedly culminated in an April 21, 2013 assault. See, e.g., [DE-1], pp. 11-13. Plaintiff filed his complaint on April 15, 2016. See id. at p. 18.[4] Therefore, plaintiff's claims are not barred by the statute of limitations.

2. Failure to Exhaust

Title 42 U.S.C. § 1997e(a) of the Prison Litigation Reform Act ("PLRA") requires a prisoner to exhaust his administrative remedies before filing an action under 42 U.S.C. § 1983 concerning his confinement. Ross v. Blake, __ U.S. __, 136 S. Ct. 1850, 1856 (2016) ("[A] court may not excuse a failure to exhaust, even to take [special circumstances] into account."); Woodford v. Ngo, 548 U.S. 81, 83-85 (2006); see Jones v. Bock, 549 U.S. 199, 217 (2007) ("failure to exhaust is an affirmative defense under [42 U.S.C. § 1997e]"). The PLRA states 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 . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a); see Woodford, 548 U.S. at 84. Exhaustion is mandatory. Woodford, 548 U.S. at 85; Porter v. Nussle, 534 U.S. 516, 524 (2002) ("Once within the discretion of the district court, exhaustion in cases covered by § 1997e(a) is now mandatory."); Anderson, 407 F.3d at 677. A

[4] Plaintiff's original complaint is dated April 15, 2016 and was filed by the clerk of court on April 22, 2016. The court gives plaintiff the benefit of the mailbox rule. See Houston v. Lack, 487 U.S. 266, 276 (1988) (holding that a pro se prisoner's notice of appeal is filed at the moment it is delivered to prison authorities for mailing to the district court).

prisoner must exhaust his administrative remedies even if the relief requested is not available under the administrative process. Booth v. Churner, 532 U.S. 731, 741 (2001). "[U]nexhausted claims cannot be brought in court." Jones, 549 U.S. at 211.

DPS has a three step administrative remedy procedure which governs the filing of grievances. See, e.g., Moore v. Bennette, 517 F.3d 717, 721 (4th Cir. 2008); Def. Ex. A [DE-75-2]. The North Carolina Department of Public Safety's ("DPS") Administrative Remedy Procedure ("ARP") first encourages inmates to attempt informal communication with responsible authorities at the facility in which the problem arose. DPS ARP § .0301(a). If informal resolution is unsuccessful, the DPS ARP provides that any inmate in DPS custody may submit a written grievance on Form DC-410. DPS ARP § .0310(a). If the inmate is not satisfied with the decision reached at the step one level of the grievance process, he may request relief from the Facility Head. Id. at § .0310(b)(1). If the inmate is not satisfied with the decision reached by the Facility Head, he may appeal his grievance to the Secretary of Correction through the inmate grievance examiner. Id. § .0310(c)(1). The decision by the Inmate Grievance Examiner or a modification by the Secretary of Correction shall constitute the final step of the Administrative Remedy Procedure. Id. § .0310(c)(6).

Here, plaintiff's own filings as well as prison records indicate that he did not fully exhaust his administrative remedies prior to filing his complaint in this court. See Compl. [DE-1], p. 6; Grande Aff. [DE-75-1] ¶ 8. In Ross, the Supreme Court emphasized the PLRA's "mandatory language" concerning exhaustion. Ross, 136 S. Ct. at 1856–57 (stating that "mandatory exhaustion statutes like the PLRA establish mandatory exhaustion regimes, foreclosing judicial discretion"). Nevertheless, the Court identified "three kinds of circumstances in which an administrative remedy, although officially on the books, is not capable of use to obtain relief." Id. at 1859. First, an

administrative remedy may be unavailable when "it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates." Id. Second, a remedy might be "so opaque that it becomes, practically speaking, incapable of use" because "no ordinary prisoner can discern or navigate it" or "make sense of what it demands." Id. (citations omitted). Third, an administrative remedy may be unavailable "when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." Id. at 1860; see Hill v. Haynes, 380 F. App'x 268, 270 (4th Cir. 2010) (per curiam) (unpublished).

In his responses, plaintiff essentially argues that administrative remedies were unavailable to him. See Pl. Resp. [DE-66-2]. However, the fact that plaintiff was able to fully exhaust at least 22 other grievances unrelated to this action belies this assertion. Grande Aff. [DE-75-1] ¶ 8. Plaintiff also argues prison officials denied him access to the supplies, such as pens and paper, necessary to complete a grievance form. See [DE-67-1], p. 3. As the court previously noted, any argument that prison officials have denied plaintiff access to this court or the requisite supplies to complete a grievance are belied by his prolific filings in this case. See Order [DE-43], p. 3.

Finally, any claim by plaintiff that exhaustion would have been futile does not excuse his failure to exhaust. Exhaustion is mandatory "even where the inmate claims that exhaustion would be futile." Reynolds v. Doe, 431 F. App'x 221, 222 (4th Cir. 2011) (unpublished decision) (citing Booth, 532 U.S. at 741 n. 6); see Booth, 532 U.S. at 741 n. 6 ("[W]e will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise . . ."); Massey v. Helman, 196 F.3d 727, 733 (7th Cir. 1999) ("[T]here is no futility exception to the PLRA's exhaustion requirement"); Owens v. FCI Beckley, No. 5:12-CV-03620, 2013 WL 4519803,

at * 10 (S.D.W. Va. Aug. 27, 2013) (same).

In sum, plaintiff failed to exhaust his available administrative remedies. Filing suit before exhausting administrative remedies dooms plaintiff's claims. See, e.g., 42 U.S.C. § 1997e(a); Hayes v. Stanley, 204 F. App'x. 304, 304 n. 1 (4th Cir. 2006) (per curiam) (holding that failure to exhaust administrative remedies may not be cured by amendment of the complaint). Therefore the court allows defendants' dispositive motions based on plaintiff's failure to exhaust.

IV. Conclusion

In sum, for the aforementioned reasons, defendants' motion for summary judgment [DE-47] and motion for judgment on the pleadings [DE-59] are ALLOWED, and plaintiff's claims are DISMISSED without prejudice for failure to exhaust. The clerk of court shall close the case.

SO ORDERED. This the 12 day of March 2019.

Terrence Boyle

TERRENCE W. BOYLE
Chief United States District Judge