

NOT RECOMMENDED FOR PUBLICATION

No. 19-2162

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Jul 14, 2020

DEBORAH S. HUNT, Clerk

THOMAS LEWIS,

Plaintiff-Appellant,

v.

DR. JONATHAN DECKER, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF
MICHIGAN

ORDER

Before: SUTTON, McKEAGUE, and NALBANDIAN, Circuit Judges.

Thomas Lewis, a Michigan prisoner proceeding pro se, appeals a district court judgment in favor of the defendants in his civil rights action filed pursuant to 42 U.S.C. § 1983. Lewis has also filed a motion to compel the Michigan Department of Corrections (“MDOC”) to provide him copies, to allow him access to legal supplies, and to stop denying him access to the courts. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Lewis filed a complaint alleging that the defendants were deliberately indifferent to his serious medical needs and that he was subjected to cruel and unusual treatment. After determining that Lewis failed to exhaust his administrative remedies, the district court granted the defendants' motions for summary judgment and entered a final judgment in their favor. *Lewis v. Decker*, No. 1:18-cv-01093, 2019 WL 4409451 (W.D. Mich. Sept. 16, 2019). On appeal, Lewis argues that the district court erred in determining that he failed to exhaust his administrative remedies and in determining that the administrative process was available to him. To the extent that Lewis argues

that he was denied access to the courts after the district court granted summary judgment in favor of the defendants and that the MDOC interfered with his legal mail, we decline to consider those arguments because they were not properly raised before the district court. *See United States v. Ellison*, 462 F.3d 557, 560 (6th Cir. 2006).

We review de novo a district court's dismissal of a prisoner's suit for failure to exhaust administrative remedies. *Risher v. Lappin*, 639 F.3d 236, 239 (6th Cir. 2011). Failure to exhaust administrative remedies is an affirmative defense under the Prison Litigation Reform Act ("PLRA"), which the defendants bear the burden of establishing. *Napier v. Laurel County*, 636 F.3d 218, 225 (6th Cir. 2011). Summary judgment is appropriate only if the defendants "establish the absence of a 'genuine dispute as to any material fact' regarding non-exhaustion." *Risher*, 639 F.3d at 240 (quoting Fed. R. Civ. P. 56(a)).

The PLRA provides 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 confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Proper exhaustion demands that a prisoner "complete the administrative review process in accordance with the applicable procedural rules." *Woodford v. Ngo*, 548 U.S. 81, 88 (2006). Lewis failed to properly exhaust his claim that Dr. Jonathan Decker and Physician's Assistant Barbara Hoover were deliberately indifferent to his serious medical needs because the grievances that he filed against these defendants were denied as untimely. *See Scott v. Ambani*, 577 F.3d 642, 647 (6th Cir. 2009). Moreover, although it appears that Lewis did attempt to file a Step III grievance regarding his claim that the defendants assented to or participated in his cruel and unusual treatment, he failed to properly exhaust this grievance because it was rejected at Step I and II for raising multiple unrelated issues. *See* MDOC Policy 03.02.130 ¶ G. Accordingly, the district court did not err in determining that Lewis failed to exhaust his administrative remedies. ✓

Although an inmate must exhaust available administrative remedies, he need not exhaust unavailable remedies. *Does 8-10 v. Snyder*, 945 F.3d 951, 962 (6th Cir. 2019). An administrative remedy is unavailable when: (1) it "operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates," (2) the grievance process is so

incomprehensible that “no ordinary prisoner can discern or navigate it,” or (3) “prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation.” *Ross v. Blake*, 136 S. Ct. 1850, 1859-60 (2016). Although Lewis argues that there was no functioning available remedy because Warden Sherry Burt violated the MDOC grievance policy by reviewing and responding to his grievance concerning his cruel and unusual treatment claim, Lewis has failed to show that this alleged violation rendered the grievance policy unavailable. Because the Warden merely affirmed a procedural ruling without addressing the merits of the grievance, Lewis is unable to demonstrate that she thwarted him from taking advantage of the grievance process. *See. id.* Moreover, MDOC Policy 03.02.130 ¶ DD designates the warden or deputy warden as the Step II grievance coordinator. Because Lewis was not prevented from accessing the grievance process, the district court did not err in granting summary judgment in favor of the defendants.

Accordingly, we **AFFIRM** the judgment of the district court and **DENY** the motion to compel as moot.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THOMAS LEWIS, # 133200,)	
)	
Plaintiff,)	
)	Case No. 1:18-cv-1093
v.)	
)	Honorable Paul L. Maloney
JONATHAN DECKER, D.O.,)	
)	
Defendants.)	

MEMORANDUM OPINION AND ORDER

This is a civil rights action brought *pro se* by a state prisoner under 42 U.S.C. § 1983. This lawsuit arises out of conditions of plaintiff's confinement between January 29, and February 7, 2018, at the Muskegon Correctional Facility. The defendants are Jonathan Decker, D.O., Physician's Assistant Barbara Hoover, Health Unit Manager Michael Wilkinson, Registered Nurse Megan Tanner, Warden Sherry Burt, Lieutenant (unknown) More, and four John Doe defendants. Plaintiff alleges that defendants permitted deplorable cell conditions and were deliberately indifferent to his serious medical needs in violation of his Eighth Amendment rights.

The matter is before the Court on thirteen motions filed by plaintiff: a motion to compel copying of documents (ECF No. 9); a motion to serve the complaint (ECF No. 31); a motion to limit service (ECF No. 32); "objections" to Dr. Decker's interrogatory responses (ECF No. 45); a motion to compel answers to interrogatories and discovery (ECF No. 49); a motion to compel defendants to serve first exhibits

(ECF No. 52); a motion to supplement a response to motion for summary judgment (ECF No. 53); a motion to defer consideration of a motion for summary judgment that had not yet been filed (ECF No. 59); a motion for an extension of time to complete discovery (ECF No. 61); "objections" to P.A. Hoover's interrogatory responses (ECF No. 64); a motion for an extension of time to file a response (ECF No. 73); a Rule 56(d) motion (ECF No. 76); and a "Motion to Restrain MDOC Defendants Awhile" (ECF No. 83).

The Court will address each motion seriatim. For the reasons set forth herein, plaintiff's motion to supplement his response will be granted. Plaintiff's Rule 56(d) motion will be granted in part. The Court will not be considering the portion of the motion for summary judgment by Dr. Decker and P.A. Hoover seeking summary judgment on the merits, but the Court will be considering the portion of the motion seeking summary judgment based on the affirmative defense of plaintiff's failure to exhaust administrative remedies, as required by 42 U.S.C. § 1997e(a). Plaintiff's motion for an extension of time to file a response and his "Motion to Restrain the MDOC Defendants Awhile" will be dismissed for failure to comply with Rule 7.1(d) of the Local Civil Rules. All other motions will be denied.

1. Motion to Compel Copying of Documents

On October 12, 2018, before any defendant in this lawsuit had been served with process or made an appearance, plaintiff filed a motion to compel asking the Court to compel "defendants' agents" to provide him with copies of various documents. (ECF No. 9). Plaintiff's motion was premature, and it will be denied as such.

2. Motion to Serve the Complaint

On December 3, 2018, plaintiff filed a Motion to Order Service on "Lieutenant Moore." (ECF No. 31). Plaintiff states that he misspelled this defendant's name as "More" in his complaint and that he would like the Court to order service on Lieutenant Moore. (*Id.* at PageID.150). Plaintiff ignores the fact that the waiver of service was addressed to "Unknown Moore, Lieutenant." (ECF No. 14, PageID.105). October 18, 2018, correspondence from the litigation coordinator states: "Muskegon Correctional Facility currently does not have any staff member by the name Moore, nor have they had a staff person by the name of Moore assigned to the facility, from October 2012 to present date." (ECF No. 14-1, PageID.107). Plaintiff's motion will be denied.

3. Motion to Limit Service

Plaintiff filed a "Motion to Limit Service." (ECF No. 32). He invokes Rule 5(c)(1)(A), which states: "If an action involves an unusually large number of defendants, the court may, on motion or on its own, order that (A) defendants pleadings and replies to them need not be served on other defendants." FED. R. CIV. P. 5(c)(1)(A). This case does not involve an unusually large number of defendants. Further, Rule 5(c)(1)(A) does not authorize the Court to provide plaintiff with relief from his obligation to serve his pleadings. Plaintiff's motion will be denied.

4. Objections to Dr. Decker's Interrogatory Responses

Plaintiff filed "objections" to the interrogatory responses by Dr. Decker. (ECF No. 45). Rule 7(b)(1) of the Federal Rules of Civil Procedure requires that a "request for a court order must be made by motion." FED. R. CIV. P. 7(b)(1). In addition, plaintiff did not comply with Rule 7.1(d) which requires:

With respect to all motions, the moving party shall ascertain whether the motion will be opposed. In addition, in the case of all nondispositive motions, counsel or *pro se* parties involved in the dispute shall confer in a good faith effort to resolve the dispute. All non dispositive motions shall be accompanied by a separately filed certificate setting forth in detail the efforts of the moving party to comply with the obligation created by this rule.

W.D. MICH. LCivR 7.1(d). Plaintiff cannot avoid his obligations under Rule 7.1(d) of the Local Civil Rules by labeling his motion as "objections." Plaintiff's motion will be denied.

5. Motion to Compel Answers to Interrogatories and Discovery

On January 22, 2019, plaintiff filed a "Motion to Compel Answers to Interrogatories and Discovery." (ECF No. 49). Under the Court's Standard Case Management Order in a Prisoner Civil Rights Case, "[i]f any defendant files a summary judgment motion raising only failure to exhaust remedies, a period of 45 days will be allowed for plaintiff's discovery, *limited to the exhaustion issue only.*" (ECF No. 16, PageID.111). Discovery was limited to the issue of exhaustion because defendants Wilkinson, Tanner, and Burt filed a motion for summary judgment based on the affirmative defense of plaintiff's failure to exhaust his administrative remedies, as required by 42 U.S.C. § 1997e(a). (ECF No. 34). Plaintiff's motion to

compel will be denied because his discovery requests were not limited to the issue of exhaustion of his administrative remedies.

6. Motion to Compel Defendants to Serve First Exhibits

On December 12, 2018, the Court granted a motion by defendants Burt, Wilkinson, and Tanner (collectively referred to as the MDOC defendants) to withdraw or strike Exhibit B filed in support of their motion for summary judgment and to allow the filing of a corrected Exhibit B. (12/12/18 Order, ECF No. 40). The initial Exhibit B had inadvertently included an email and grievances that were either not relevant to the claims at issue in this lawsuit or the grievances had not been pursued through a Step III decision. On February 1, 2019, plaintiff filed a motion for an order compelling the MDOC defendants to provide him with a copy of defendants' initial Exhibit B. (ECF No. 52). Plaintiff has not presented any coherent argument why the Court should compel defendants to provide him with copies of documents that the Court will not be considering when it decides defendants' motion for summary judgment. Plaintiff's motion will be denied.

7. Motion to Supplement

On February 1, 2019, plaintiff filed a motion to supplement his response to the MDOC defendants' motion for summary judgment. (ECF No. 53). Plaintiff's motion will be granted, and the arguments and legal authorities set forth in his motion will be considered when the Court addresses the MDOC defendants' motion for summary judgment.

8. Motion to Defer Consideration of Summary Judgment Motion

On February 11, 2019, plaintiff filed a "Motion to Defer Consideration of Chapman Law Group's Motion for Summary Judgment." (ECF No. 59). The Chapman Law Group represents Dr. Decker and P.A. Hoover in this lawsuit, and as of February 11, 2019, the law firm had not filed a motion for summary judgment on behalf of those defendants. Plaintiff's motion will be denied because it was premature.

9. Motion to Extend Discovery

On February 11, 2019, plaintiff filed a motion extend discovery. (ECF No. 61). The case management order limited discovery to the issue of exhaustion of administrative remedies. (ECF No. 16, PageID.111). The merits discovery that plaintiff sought in violation of the order is not good cause to modify it. See FED. R. Civ. P. 16(b)(4). Plaintiff's motion will be denied.

10. Objections to P.A. Hoover's Interrogatory Responses

On February 25, 2019, plaintiff filed "objections" to P.A. Hoover's responses to his interrogatories. (ECF No. 64). Rule 7(b)(1) of the Federal Rules of Civil Procedure requires that a "request for a court order must be made by motion" and plaintiff cannot avoid his obligations under Rule 7.1(d) of the Local Civil Rules by labeling his motion as "objections." Plaintiff's motion will be denied.

11. Motion for an Extension of Time to File a Response

On April 15, 2019, plaintiff filed a motion for an extension of time to file a response to the motion for summary judgment filed by Dr. Decker and P.A. Hoover. (ECF No. 73). Plaintiff did not comply with Local Civil Rule 7.1(d).

On April 22, 2019, the Court ordered plaintiff to file the certificate required by Rule 7.1(d) within five days. (ECF No. 75). Further, the Court advised plaintiff that failure to timely file the certificate would result in the dismissal of his motion. (*Id.*). Plaintiff did not comply with the Court's order and his motion for an extension of time will be dismissed.¹

12. Rule 56(d) Motion

Dr. Decker and P.A. Hoover filed a motion for summary judgment based on the affirmative defense of failure to exhaust administrative remedies, as required by 42 U.S.C. § 1997e(a), and on the merits. (ECF No. 71). On April 22, 2019, plaintiff filed a motion invoking Rule 56(d) of the Federal Rules of Civil Procedure and, among other things, he claimed a need for an opportunity to conduct merits-based discovery. (ECF No. 76). Dr. Decker and P.A. Hoover did not file a response to this motion.

¹ The Court notes that the certification that plaintiff filed on May 29, 2019 (ECF No. 80) does not address plaintiff's motion for an extension of time to file a response brief. His certification is not a discovery motion, and if it was intended as such, it was filed long after the deadline for filing discovery motions. (see ECF No. 16, PageID.111). Plaintiff's certification does not retroactively cure the deficiencies in his earlier discovery motions. Rule 7.1(d) states that motions "shall be accompanied by" the certification. W.D. MICH. LCivR 7.1(d).

Rule 56(d) provides that if plaintiff shows that for specified reasons, he cannot present facts essential to justify his opposition to defendants' motion, " 'the court *may*: (1) defer considering the motion or deny it; (2) allow time . . . to take discovery; or (3) issue any other appropriate order.' " *Scadden v. Werner*, 677 F. App'x 996, 999 (6th Cir. 2017) 677 F. App'x at 999 (quoting FED. R. CIV. P. 56(d)) (emphasis added). Under the case management order, discovery was limited to exhaustion of plaintiff's administrative remedies. Plaintiff's motion will be granted in part and denied in part. Plaintiff's motion will be granted to the extent that the Court will defer consideration of the portion of the motion by Dr. Decker and P.A. Hoover seeking summary judgment on the merits.

13. Motion to Restrain

On July 24, 2019, plaintiff filed a "Motion for Order to Restrain MDOC Defendants Awhile." (ECF No. 83). Plaintiff made no attempt to comply with Local Civil Rule 7.1(d). This motion will be dismissed. Accordingly,

IT IS ORDERED that plaintiff's motion to supplement his response (ECF No. 53) is **GRANTED** and the arguments and legal authorities set forth in plaintiff's motion will be considered when the Court addresses the MDOC defendants' motion for summary judgment.

IT IS FURTHER ORDERED that plaintiff's Rule 56(d) motion (ECF No. 76) is **GRANTED in part** and **DENIED in part**. The motion is granted to the extent that the Court will defer consideration of the portion of the motion by Dr. Decker and P.A. Hoover seeking summary judgment on the merits. It is otherwise denied.

IT IS FURTHER ORDERED that plaintiff's motions (ECF No. 9, 31, 32, 45, 49, 52, 59, 61, 64) are **DENIED**.

IT IS FURTHER ORDERED that plaintiff's motions (ECF No. 73, 83) are **DISMISSED**.

IT IS SO ORDERED.

Dated: August 7, 2019

/s/ Phillip J. Green
PHILLIP J. GREEN
United States Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THOMAS LEWIS, #133200,)	
Plaintiff,)	
)	No. 1:18-cv-1093
-v-)	
)	Honorable Paul L. Maloney
JONATHAN DECKER, D.O., <i>et al</i> ,)	
Defendants.)	
_____)	

ORDER ADOPTING REPORT AND RECOMMENDATION

Plaintiff Thomas Lewis, a prisoner under the control of the Michigan Department of Corrections, filed a civil rights lawsuit in which he complains about his treatment. Two groups of defendants filed motions for summary judgment raising administrative exhaustion. Lewis filed his own motion for summary judgment. The Magistrate Judge issued a report recommending defendants' motions be granted, Lewis' motion be denied, and the unserved defendants be dismissed. (ECF No. 87.) Lewis filed objections. (ECF No. 93.)

After being served with a report and recommendation (R&R) issued by a magistrate judge, a party has fourteen days to file written objections to the proposed findings and recommendations. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(2). A district court judge reviews de novo the portions of the R&R to which objections have been filed. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3). Only those objections that are specific are entitled to a de novo review under the statute. *Mira v. Marshall*, 806 F.2d 636, 637 (6th Cir. 1986) (*per curiam*).

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1. Unserved Defendants. The Magistrate Judge recommends dismissing Defendant John Does and More because, more than one year after the complaint was filed, the two defendants have not been served. Lewis objects on the basis that the case management order did not permit discovery regarding the identity of the unknown defendants.

Lewis' objection is overruled. Rule 4 of the Federal Rules of Civil Procedure obligates the plaintiff to serve the summons and complaint within the time allowed. Here, Lewis was obligated to provide the names of individuals to the US Marshal for service of the summons and complaint. Lewis did not do so. The record demonstrates no attempts by Lewis to identify or serve the Doe defendants. The case management order limited the scope of discovery only as to those defendants who filed a motion for summary judgment on the basis of administrative exhaustion. (ECF No. 16.) The order did not prevent Lewis from attempting to learn the names of the unknown people involved. In response to the service of process on Defendant More (or Moore), the MDOC indicated that no such person works or worked at the relevant facility. (ECF No. 14-1 PageID.107.)

2. Plaintiff's Motion for Summary Judgment (ECF No. 68.) Lewis argued he was entitled to summary judgment because of claim or issue preclusion. The magistrate judge explained why neither claim nor issue preclusion applied. (R&R at 10 n.3 PageID.1055.) Having reviewed the objections, the Court does not find a specific objection to the Magistrate Judge's findings and recommendation concerning Lewis' motion for summary judgment. In the event the Court overlooked an objection, the Court agrees with the Magistrate Judge's summary of the motion, the description of the relevant law, and the recommendation.

3. Defendants' Motions for Summary Judgment. The Magistrate Judge identified the grievances that were exhausted through Step III. All of the exhausted grievances were rejected, through Step III, as untimely. Lewis objects, asserting that the manner in which the defendants responded to the grievances made the process functionally unavailable. Lewis' objection is overruled. The Magistrate Judge accurately summarized the facts in the record and correctly applied the law to those facts. To be clear, the incidents alleged in the grievances that were properly exhausted occurred long before Lewis filed the grievances, which is why each was denied as untimely. None of Lewis' arguments address this conclusion.

4. Preliminary Matters. The Magistrate Judge found that Lewis' complaint and other declarations were not properly verified and, therefore, the asserted facts could not be considered in opposition to the defendants' motions. Lewis objects. Lewis contends the phrase "under oath" is the functional equivalent of "under penalty of perjury." Lewis also asserts that he submitted a document curing this problem by swearing under penalty of perjury.

Lewis' objection is overruled. First, the supplemental document suffers the same deficiency—he does not use the "under penalty of perjury" language required by § 1746. (*See* ECF No. 66 PageID.514.) The declaration submitted with his objections uses the correct language. (*See* ECF No. 94 PageID.1130.) Second, assuming that Lewis is correct and that the Court should consider the factual statements in the complaint and response to the motions to be true, Lewis has not established that the outcome of the motions would be

different. The exhaustion documents referenced in the motions and the in the R&R speak for themselves.

Accordingly, the Report and Recommendation (ECF No. 87) is **ADOPTED**. Plaintiff Lewis' motion for summary judgment (ECF No. 68) is **DENIED**. The motion for summary judgment filed by Defendants Burt, Wilkerson and Tanner (ECF No. 34) is **GRANTED**. The motion for summary judgment filed by Defendants Hoover and Decker (ECF No. 71) is **GRANTED**. And, Defendants Does and More are **DISMISSED**. All of the claims and defendants are dismissed without prejudice. **IT IS SO ORDERED.**

Date: September 16, 2019

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge

No. 19-2162

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 28, 2020
DEBORAH S. HUNT, Clerk

THOMAS LEWIS,

Plaintiff-Appellant,

v.

DR. JONATHAN DECKER, ET AL.,

Defendants-Appellees.

ORDER

BEFORE: Before: SUTTON, McKEAGUE, and NALBANDIAN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Rich L. Hunt

Deborah S. Hunt, Clerk

**Additional material
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available in the
Clerk's Office.**