

TENTH APPELLATE DISTRICT

Ricky K. Wassenaar,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 10AP-395
v.	:	(C.C. No. 2010-01026)
	:	
Ohio Department of Rehabilitation	:	(ACCELERATED CALENDAR)
and Correction,	:	
	:	
Defendant-Appellee.	:	
	:	

D E C I S I O N

Rendered on December 14, 2010

Ricky K. Wassenaar, pro se.

Richard Cordray, Attorney General, and Stephanie Pestello-Sharf, for appellee.

APPEAL from the Court of Claims of Ohio.

FRENCH, J.

{¶1} Plaintiff-appellant, Ricky K. Wassenaar ("appellant"), appeals the judgment of the Court of Claims of Ohio, which dismissed his complaint against defendant-appellee, Ohio Department of Rehabilitation and Correction ("ODRC"). Having concluded that appellant's complaint did not state a claim upon which relief could be granted, we affirm.

{¶2} Appellant is an inmate in the custody and control of ODRC. He was transferred to Ohio from the Arizona Department of Correction in 2005 pursuant to the Interstate Corrections Compact, which is codified at R.C. 5120.50. On January 4, 2010, appellant filed a complaint against ODRC in the Court of Claims. His complaint alleged the following.

{¶3} On September 19, 2006, appellant received notice that ODRC had seized five magazines that were shipped to him. The notice indicated that these publications were sexually explicit and, therefore, violated ODRC policy. Appellant sought further review and objected to the seizure based on R.C. 5120.50(D)(6), which he says extends to him the same rights he would have had as an Arizona inmate. ODRC denied all of appellant's administrative attempts to reverse the ODRC seizure.

{¶4} In his complaint, appellant sought damages in the amount of \$75, the value of the five magazines. He also sought injunctive relief, asking that the court enjoin ODRC from any further seizures. Appellant subsequently moved to supplement his complaint, alleging that, on January 6, 2010, he received notice that ODRC had seized another magazine, valued at \$20.

{¶5} On February 3, 2010, ODRC moved to dismiss appellant's initial complaint pursuant to Civ.R. 12(B)(6). ODRC argued that the complaint was time-barred because it was filed more than two years after ODRC's 2006 notice.

{¶6} On February 16, 2010, the court granted appellant's motion to supplement his complaint. ODRC thereafter opposed the supplement, arguing that appellant had failed to exhaust administrative remedies.

{¶7} On March 25, 2010, the trial court granted ODRC's motion to dismiss appellant's complaint. The court concluded that (1) appellant did not have a legal right to possess the magazines, and (2) because prison officials hold a high degree of official discretion, ODRC is entitled to discretionary immunity. Accordingly, the court dismissed appellant's complaint.

{¶8} Appellant moved for relief from the court's judgment. Our record contains no ruling on that motion.

{¶9} Appellant filed a timely appeal. He raises the following assignments of error:

- 1) [ODRC] is "entitled to discretionary immunity" for decisions it made based on administrative policy. However, said policy is in conflict with a clearly stated statutory enactment, i.e. R.C. 5120.50. Thus, ruling implies that administrative policy a[b]rogates the statute;
- 2) "[Appellant] does not have a 'legal right' to possess sexually explicit magazines." This ruling is in conflict with R.C. 5120.50, and the related laws;
- 3) The Court dismissed the complaint for reasons wholly unrelated to [ODRC's] motion to dismiss. Thus, the court sua sponte dismissed the complaint.

{¶10} We address appellant's assignments of error together. As an initial matter, we agree with appellant that the trial court's dismissal was essentially sua sponte. While ODRC had moved to dismiss appellant's complaint, it did so on the grounds that the complaint was time-barred. ODRC opposed appellant's supplemental complaint on the grounds that he had failed to exhaust administrative remedies to resolve ODRC's 2010 seizure. At no time, however, did ODRC argue that the complaint should be dismissed because appellant had no legal right to possess the material.

{¶11} The trial court dismissed appellant's complaint under Civ.R. 12(B)(6) for failure to state a claim on which relief may be granted. A motion to dismiss for failure to state a claim is procedural and tests whether the complaint is sufficient. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548, 1992-Ohio-73. In considering a Civ.R. 12(B)(6) motion to dismiss, a trial court may not rely on allegations or evidence outside the complaint. *State ex rel. Fuqua v. Alexander*, 79 Ohio St.3d 206, 207, 1997-Ohio-169. Rather, the trial court may only review the complaint and may dismiss the case only if it appears beyond a doubt that the plaintiff can prove no set of facts entitling the plaintiff to recover. *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, syllabus. The court must presume that all factual allegations in the complaint are true and draw all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192. We review de novo a judgment on a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶5.

{¶12} The Supreme Court of Ohio has stated that "[t]he Rules of Civil Procedure neither expressly permit nor forbid courts to *sua sponte* dismiss complaints." *State ex rel. Edwards v. Toledo City School Dist. Bd. of Edn.*, 72 Ohio St.3d 106, 108, 1995-Ohio-251. In general, a court may dismiss a complaint on its own motion for failure to state a claim only after the court gives the parties notice of its intention to dismiss and an opportunity to respond. *Id.* Some courts have recognized an exception to this general rule, however, and have allowed "*sua sponte* dismissal without notice where the complaint is frivolous or the claimant obviously cannot possibly prevail on the facts

alleged in the complaint." *Id.* We turn, then, to the facts alleged in appellant's complaint.

{¶13} As we detailed above, appellant alleged that ODRC had confiscated six magazines from him. The complaint and amended complaint name the publications, but they are not in the record. According to the complaint, the notice from ODRC stated that the magazines were seized because of their sexually explicit content, but the complaint does not admit or state that they are sexually explicit. Without going outside the pleadings, we cannot make that assumption or determination. Therefore, for purposes of our review under Civ.R. 12(B)(6), we will assume that ODRC made an administrative decision to seize six magazines belonging to appellant, they are worth \$95, and they may or may not contain sexually explicit material.

{¶14} Regardless of whether the magazines actually are sexually explicit, ODRC determined that they are prohibited pursuant to Ohio Adm.Code 5120-9-19. The question we consider, then, is whether ODRC's decision to seize the magazines creates a cognizable cause of action against ODRC in the Court of Claims.

{¶15} The state of Ohio has consented to "have its liability determined * * * in accordance with the same rules of law applicable to suits between private parties." R.C. 2743.02(A)(1). In *Reynolds v. State* (1984), 14 Ohio St.3d 68, the Supreme Court of Ohio explained that this "means that the state cannot be sued for its legislative or judicial functions or the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion." *Id.* at 70. Nevertheless, once a decision has

been made to engage in certain activity, the state may be held liable for its employees' negligent actions in the performance of that activity. *Id.*

{¶16} This court has clarified that this discretionary immunity precludes *tort* liability against the state, including ODRC. See *Hughes v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 09AP-1052, 2010-Ohio-4736, ¶16 (holding that discretionary immunity precluded claims against ODRC for its decisions relating to allocation and location of prison staff). Compare *Bugh v. Grafton Correctional Inst.*, 10th Dist. No. 06AP-454, 2006-Ohio-6641 (holding that sovereign immunity did not preclude claims that ODRC staff acted negligently by failing to procure special footwear for inmate). Discretionary immunity does not, however, preclude claims for declaratory relief. *Bradley v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 07AP-506, 2007-Ohio-7150, ¶18 (reversing trial court's dismissal of inmate's claim for \$75 payment pursuant to ODRC policy to provide payment to inmates lawfully released).

{¶17} As the trial court concluded, discretionary immunity precludes an attack on ODRC's basic policy decisions. In his complaint, however, appellant appears to present a claim for declaratory relief, i.e., a declaration that he has a "legal right" to possess his magazines, even if they are deemed inappropriate by ODRC. Discretionary immunity would not preclude appellant's claim for declaratory relief.

{¶18} Nevertheless, we return to the basis for ODRC's motion to dismiss, which argued that the two-year statute of limitations contained in R.C. 2743.16 precluded appellant's complaint. See also R.C. 2743.02(H) (prescribing process for inmate suits to recover lost or damaged property). Here, ODRC seized the first five magazines in September 2006. Therefore, appellant's cause of action expired in September 2008.

Because he did not file suit until January 2010, appellant's initial complaint was time-barred and, therefore, subject to dismissal under Civ.R. 12(B)(6).

{¶19} In his supplemental complaint, dated January 9, 2010, appellant alleged that, on January 6, 2010, he had received notice that ODRC seized a sixth magazine. Appellant did not, however, allege that he had followed the administrative appeal process provided by ODRC rules. Such an allegation was necessary to establish his standing to file suit. See *Johnson v. Silber* (Nov. 21, 1984), 3d Dist. No. 9-83-28 (affirming trial court's dismissal of inmate's complaint for declaratory judgment and injunctive relief where inmate failed to allege he had exhausted administrative remedies). Because appellant's complaint did not establish his standing, it was properly dismissed under Civ.R. 12(B)(6).

{¶20} Finally, for one additional reason, we conclude that appellant has failed to state a claim upon which relief may be granted. In essence, appellant claims a constitutional right to possess the magazines. The alleged basis of this right is a 1973 federal court consent decree (the "Hook Consent Decree"), the requirements of which were incorporated into Arizona Department of Corrections internal management policies. See *Broulette v. Starns* (Ariz.D.C.2001), 161 F.Supp.2d 1021 (concluding that seizure of inmate's magazines violated his rights under the First Amendment). It is well-established, however, that the Court of Claims lacks jurisdiction to consider claims alleging violations of constitutional rights. See *Triplett v. S. Ohio Correctional Facility*, 10th Dist. No. 06AP-1296, 2007-Ohio-2526, ¶11, citing *Bleicher v. Univ. of Cincinnati College of Medicine* (1992), 78 Ohio App.3d 302, 306. Therefore, for this additional reason, dismissal of appellant's complaint was proper under Civ.R. 12(B)(6).

{¶21} For all these reasons, we conclude that appellant did not state a claim for relief under Civ.R. 12(B)(6). Therefore, the trial court did not err by dismissing appellant's original and supplemental complaints. Accordingly, we overrule appellant's three assignments of error. We affirm the judgment of the Court of Claims of Ohio.

Judgment affirmed.

TYACK, P.J., and BRYANT, J., concur.
