[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-12906
Non-Argument Calendar

D.C. Docket No. 0:14-cv-60773-WJZ

CALVIN LAVELLE COUCH,

Plaintiff - Appellant,

versus

OFFICER JOHN CLARK, III,
Individually and as a Police Officer for
Hollywood Police Department,
FRANK FERNANDEZ,
Individually and as Director/Chief of
Police of City of Hollywood Police Department
a political subdivision of Broward County Florida,
BROWARD COUNTY,
SHERIFF SCOTT ISRAEL,
Sheriff as Head of Agency,
DANIEL GONZALEZ, Individually and as an Assistant
Public Defender for Broward County, et al.,

Defendants - Appellees,

CITY OF HOLLYWOOD, et al.,

Defendants.

Appeal from the United States District Court
for the Southern District of Florida

Before MARTIN, ROSENBAUM, and JILL PRYOR, Circuit Judges.

PER CURIAM:

Calvin L. Couch, a Florida prisoner proceeding pro se, appeals the district court's grant of summary judgment in favor of Officer John Clarke III. Couch sued Officer Clarke alleging false arrest and excessive force under 42 U.S.C. § 1983 and false arrest and false imprisonment under Florida law. Couch argues here that the district court was wrong to grant summary judgment to Officer Clarke, because Couch did not receive notice of Officer Clarke's motion for summary judgment. Couch has persuaded us on this point, and we vacate and remand for further proceedings.

I

Couch filed a verified complaint alleging that Officer Clarke violated the United States Constitution and state law when Officer Clarke arrested him on July 10, 2010. Couch's complaint included the following exhibits: Officer Clarke's arrest reports; docket sheets and a plea offer memorandum for the criminal case that followed from Couch's arrest; and a motion to compel the production of video evidence from Officer Clarke and other sources. Couch's claims against Officer Clarke survived a motion to dismiss.[1]

[1] The district court dismissed Couch's claims against parties other than Officer Clarke.

After the court ruled on the motion to dismiss, Couch gave the district court notice of his change of address in January 2015. The notice showed that Couch had been transferred from the Joseph V. Conte Facility (P.O. Box 407016) to the Broward County Main Jail (P.O. Box 9356). Then on September 2, 2015, Couch filed a motion for summary judgment, which he mailed from his new address at the Broward County Main Jail. Couch's motion was just four pages long. It recited the basic standard for summary judgment and some of the allegations from Couch's amended complaint.

The day after Couch filed his motion for summary judgment, Office Clarke filed his own. However, Officer Clarke's motion was twenty pages, with eight pages of exhibits. Even though Couch had been at Broward County Main Jail since January 2015, Officer Clarke served his motion on Couch at the Joseph V. Conty Facility. This record bears no indication that Officer Clarke made any other attempts to serve Couch with his motion.

On September 4, 2015, the day after Officer Clarke filed his summary judgment motion, the magistrate judge sent Couch a pro se notice explaining the rules of summary judgment. The pro se notice said "[t]he attention of the plaintiff is particularly drawn to all provisions of Fed. R. Civ. P. 56" and recited Rule 56(e) in its entirety. It cautioned that "[t]he plaintiff cannot rely solely on his complaint and other initial pleadings, but must respond with affidavits, depositions, or

otherwise, to show that there are material issues of fact which require a trial." The pro se notice directed Couch to file a response to Officer Clarke's motion by October 5. This notice went to Couch's address at the Broward County jail, which was current as of the date the notice was mailed.

However, on September 17, 2015, Couch filed another notice of address change, indicating that he was now located at the South Florida Reception Center in Duval, Florida. This notice was dated September 9, 2015 and was mailed on September 14, 2015. Couch then filed yet another notice of change of address on October 20, 2015, this time documenting his transfer from the South Florida Reception Center to Moore Haven Correctional Facility ("the Moore Haven facility") in Moore Haven, Florida.

On September 24, 2015, the pro se notice that had been sent to Couch on September 4, 2015 was returned to the court as undeliverable.[2] The record does not reflect that the district court made any further attempt to serve Couch with the pro se notice.

Unsurprisingly, Couch filed no response to Officer Clarke's motion. Even so, the magistrate judge issued a thirty-one-page report and recommendation

[2] The docket entry reads:

> Clerk's First Notice of Undeliverable Mail re 55 Order of Instructions to Pro Se Litigant, Set/Reset Motion/R&R Deadlines and Hearings. US Mail returned for: Calvin Lavelle Couch. Updated address found and updated prior to this event. No additional action is needed at this time. (drz) (Entered: 09/24/2015).

("R&R") granting Officer Clarke's motion. The R&R assumed that Couch received the pro se notice, despite that notice having been returned to the court as undelivered. The R&R explained that Couch had been "advised of the summary judgment rules, the right to file affidavits or other materials in opposition, and the consequences of default."

The magistrate judge noted that Couch did not respond to Officer Clarke's motion. Because he had no response from Couch, the magistrate judge instead considered Couch's verified complaint in opposition. The magistrate judge then concluded that Officer Clarke was entitled to qualified immunity on all of Couch's claims and recommended granting Officer Clarke's summary judgment motion. The magistrate judge also recommended denying Couch's summary judgment motion. The R&R included the direction that an objecting party had fourteen days to "file specific written objections with the Clerk of this court" and that "[f]ailure to do so will bar a de novo determination by the district judge of anything in the recommendation and will bar an attack, on appeal, of the factual findings of the Magistrate Judge." The court sent the R&R to Couch at the Moore Haven facility.

From the Moore Haven facility, Couch filed objections to the R&R, as well as a reply to Officer Clarke's response to his objections. In his objections, Couch advised the court that he had not received either Officer Clarke's motion or the pro se notice. Couch argued that it would not be appropriate for the court to grant

summary judgment to Officer Clarke in this instance, where Couch had never received a copy of Officer Clarke's motion. Even so, the district court "conduct[ed] a de novo review of the entire record," overruled Couch's objections and adopted the R&R, thereby granting Officer Clarke's motion for summary judgment. Couch then timely filed this appeal.

Here, Couch repeats his argument that the district court was wrong to grant Officer Clarke's summary judgment motion, when Couch had never received a copy of it or the pro se notice. And because he did not receive "notice of summary judgment," he argues he "was unable to present disputed, genuine material facts for purposes of summary judgment or jury trial." Couch says this deficient notice violated his constitutional right to due process as well as the right to notice and an opportunity to respond given him by Rule 56.[3]

II

A district court may enter summary judgment in favor of a party only after providing his opponent "notice and a reasonable time to respond." Fed. R. Civ. P. 56(f). "[T]his notice provision is not an unimportant technicality, but a vital procedural safeguard." Massey v. Cong. Life Ins. Co., 116 F.3d 1414, 1417 (11th

[3] In his notice of appeal, Couch indicated that he would be challenging every district court decision adverse to him. However, his brief on appeal addresses only the district court's grant of Officer Clarke's summary judgment motion. Because Couch preserved only his arguments as to the decision on Officer Clarke's summary judgment motion, it is only those we consider here. See Access Now, Inc. v. Sw. Airlines Co., 385 F.3d 1324, 1330 (11th Cir. 2004).

Cir. 1997). When no notice is given, litigants are deprived of their opportunity to formulate and prepare thorough and thoughtful responses to the motion before the court. See id. In light of the fundamental importance of notice, our court has "strictly enforced the requirement that a party threatened by summary judgment must receive notice and an opportunity to respond." Id.

This court has long enforced notice rules with even greater care in cases involving pro se litigants. See, e.g., Griffith v. Wainwright, 772 F.2d 822, 825 n.6 (11th Cir. 1985) (per curiam) (noting that the court was "adopting a requirement of particular care in cases involving indigent, pro se litigants."). "We have [] recognized the especial care which must be exercised when an action is brought alleging denial of basic constitutional liberties by an indigent prisoner lacking formal legal training," id. at 825, with "limited access to legal materials." Moore v. Florida, 703 F.2d 516, 520 (11th Cir. 1983) (per curiam) (recognizing that indigent incarcerated persons "occupy a position significantly different from that occupied by litigants represented by counsel."). In cases like this one, our charge is to be "particularly careful to ensure proper notice." Herron v. Beck, 693 F.2d 125, 127 (11th Cir. 1982). In carrying out this charge, we must ensure "that any rights that such a litigant might have will not be extinguished merely through failure to appreciate the subtleties of modern motion practice." Griffith, 772 F.2d at 825.

In addition to ensuring that a pro se litigant receives the relevant motion for summary judgment, we must ensure that the non-moving party gets "express . . . notice" (1) of the rules of summary judgment, (2) "of his right to file affidavits or other material in opposition to the motion," and (3) "of the consequences of default." Griffith, 772 F.2d at 825 (emphasis added). This notice should be explicit, but "clear implication[s]" of notice in the record may suffice. See Coleman, 828 F.2d at 716.

III

Here, Couch received neither Officer Clarke's summary judgment motion nor the pro se notice before the district court entered judgment for Officer Clarke. On this record, our court's binding precedent calls for us to rule in Couch's favor, unless we are satisfied that he otherwise received express or clearly implied notice and an adequate opportunity to respond.

We are not. Couch indicates here on appeal that he has still not received a copy of the motion that resulted in the dismissal of his case. We are persuaded that Couch's lack of receipt of Officer Clarke's motion was not for Couch's lack of trying. Couch plainly stated in his objections to the R&R and his reply to Officer Clarke's response to those objections that he still did not have a copy of Clarke's motion. It is true that Couch might have been able to glean the substance of Officer Clarke's motion from the R&R. But an R&R recommending a ruling

against Couch is hardly a bona fide substitute for proper notice. The R&R did not give Couch an adequate opportunity to prepare a complete, deliberate response to Officer Clarke's motion. Massey, 116 F.3d at 1417. Concluding to the contrary would not be consistent with Griffith's emphasis on the importance of express notice. Indeed it would amount to allowing Couch's rights to be "extinguished merely through failure to appreciate the subtleties of modern motion practice." Griffith, 772 F.2d at 825. On this basis alone, Couch is entitled to the relief he requests.

There is another reason we do not accept the R&R as a substitute for Griffith notice. The R&R does not make clear to Couch that could present additional evidence before the district court rendered a final decision. See Fed. R. Civ. Pro. 72(b)(3); see also S.D. Fla. L. R., Mag. J. R. 4(b). The R&R does note that any objecting party must file specific written objections, but there was no indication that Couch could still submit evidence for the district judge's consideration.

Couch's two responsive filings sent after he got the R&R underscore how it failed to serve as a substitute for proper Griffith notice. In both filings, Couch repeated much of what he said in his amended complaint. As he had never seen Officer Clarke's motion, he had no opportunity to point to evidence that might be responsive to Clarke's arguments. See Griffith, 772 F.2d at 826 (finding "the fact that [the plaintiff] filed two objections to [the defendant's] motion unpersuasive on

[the] question [of notice] because we find no evidence in those pleadings that the arguments advanced were in any meaningful way responsive to a motion for summary judgment."). Had Couch been able to read Officer Clarke's motion, he may well have included additional evidence with his objections, including, for example, sworn affidavits from witnesses like Joseph Batten, Eugene Couch, and his father's neighbors, as well as any existing recordings or photographs of the incident.

We affirm the district court's dismissal of the parties other than Officer Clarke, as well as that court's denial of Couch's motion for summary judgment. However, we conclude that the district court erred in granting summary judgment to Officer Clarke. As we have decided this question on Rule 56 grounds, there is no need to reach Couch's constitutional argument. On remand, the district court should ensure that Couch receives proper notice of and an adequate opportunity to respond to Officer Clarke's motion for summary judgment. And in considering Officer Clarke's motion, the court should take care to evaluate whether Officer Clarke is entitled to qualified immunity only after "reconstruct[ing] the event in the light most favorable to [Couch]." Fils v. City of Aventura, 647 F.3d 1272, 1288 (11th Cir. 2011).

AFFIRMED in part, VACATED and REMANDED in part.