NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted February 3, 2023*
Decided February 3, 2023

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

No. 22-1642

KEITH MYERS,
Plaintiff-Appellant,

v.

JON NOBLE, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Wisconsin.

No. 22-C-3

Lynn Adelman,
Judge.

O R D E R

Keith Myers, a Wisconsin prisoner, sued prison officials under 42 U.S.C. § 1983 after the time to sue expired, and the district court dismissed the suit as time-barred. On

* The appellees were not served with process and are not participating in this appeal. We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C). We have also substituted one appellee, Jon Noble, the current warden at Kettle Moraine Correctional Institution. FED. R. APP. P. 43(c)(2).

appeal, Myers raises a new argument about tolling. Because in a civil case we need not consider unpreserved arguments, and in any case this one is meritless, we affirm.

Myers alleges that, on December 14, 2018, after an argument about a conduct report, officials seized him, pressed their knees on him, and restrained him in what he called a "human wrap." The district court dismissed the complaint because, based on the date that Myers alleged, it was untimely. The statute of limitations from Wisconsin (which § 1983 borrows) was three years, WIS. STAT. § 893.54 (2018), and Myers filed his suit on January 3, 2022, more than two weeks past the deadline.

Myers filed two motions after judgment, and the district court denied both. First, within 28 days of judgment (the time for a motion under Federal Rule of Civil Procedure 59(e)), Myers moved for more time to challenge the dismissal, but gave no reasons for the challenge. The court denied that motion, as it had to. *See* FED. R. CIV. P. 6(b)(2) ("A court must not extend the time to act under Rules … 59(b), (d), and (e)."). Next, Myers moved for reconsideration. He now asserted a basis for tolling the statute of limitation: he said that he filed his complaint two weeks late because he was in quarantine from December 28, 2021, through January 18, 2022, after testing positive for COVID-19. The district court construed the motion under Rule 60(b) (because it was filed more than 28 days after judgment), considered on the merits that argument, but denied relief. It explained that, because the quarantine occurred after the limitations period had already expired on December 14, 2021, it could not justify altering the judgment.

On appeal, Myers abandons his argument about quarantine and asserts a new ground for tolling that he did not present to the district court in his post-judgment submissions. He contends that, as reflected in a psychological report attached to his appellate brief, he has mental-health issues that excuse his late filing.

We review dismissal orders de novo, *Collins v. Village of Palatine*, 875 F.3d 839, 842 (7th Cir. 2017), and rulings under Rule 60(b) for abuse of discretion, *Jones v. Ramos*, 12 F.4th 745, 749 (7th Cir. 2021), and the district court did not err under either standard of review. Although a plaintiff need not, in a complaint, anticipate an affirmative defense (such as the expiration of the statute of limitations), if a plaintiff pleads facts showing that he must lose under that defense, a district court may dismiss the complaint on that basis. *Collins*, 875 F.3d at 842. That occurred here: Myers pleaded the date of the incident on which he bases his claim, and he sued on that claim more than three years later, after the expiration of the three-year statute of limitations. We are

mindful that, because no defendants were served (and thus never moved to dismiss the complaint), Myers's first chance to raise the issue of tolling came after judgment. But the district court properly considered Myers's two post-judgment motions in which he could have argued that his mental health warranted tolling. Yet he never did. In the first, Myers offered no arguments, and in his second, he raised an unrelated argument about quarantine. By failing to present his mental-health argument when the district court considered his response to the limitations bar, Myers waived it for appeal. *See Alioto v. Town of Lisbon*, 651 F.3d 715, 721 (7th Cir. 2011).

In any case, on the merits his tolling argument does not warrant appellate relief. True, mental illness can be grounds for tolling. WIS. STAT. § 893.16; *see Shropshear v. Corp. Counsel*, 275 F.3d 593, 596 (7th Cir. 2001) (applying state doctrines of tolling to § 1983). But, to justify a remand to explore tolling, an asserted mental illness must render the litigant "functionally unable to understand legal rights and appreciate the need to assert them." *Storm v. Legion Ins. Co.*, 665 N.W.2d 353, 369 (Wis. 2003). Myers does not contend that he meets this standard. Likewise, his psychological report does not suggest that he does. To the contrary, the report notes that "[h]is thought process appeared linear and logical" and does not state that he had an impaired ability to litigate in the three years before he sued. He thus presents no basis for a remand.

AFFIRMED