Miller v. Walton et al Doc. 224

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF ILLINOIS**

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| ROBERT ETHAN MILLER, JR., | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | Case No. 15-cv-00533-JPG-DGW |
| | ) | |
| J.S. WALTON, *et al*., | ) | |
| | ) | |
| Defendants. | ) | |

**MEMORANDUM AND ORDER**

This matter comes before the court on the Report and Recommendation ("R & R") (Doc. 221) of Magistrate Judge Donald G. Wilkerson with regard to Defendants' Motion (Doc. 204) for Summary Judgment. Plaintiff filed a timely objection (Doc. 222) and the defendant filed a response to the objection (Doc. 223).

The Court may accept, reject or modify, in whole or in part, the findings or recommendations of the magistrate judge in a report and recommendation. Fed. R. Civ. P. 72(b)(3). The Court must review *de novo* the portions of the report to which objections are made. The Court has discretion to conduct a new hearing and may consider the record before the magistrate judge anew or receive any further evidence deemed necessary. *Id.* "If no objection or only partial objection is made, the district court judge reviews those unobjected portions for clear error." *Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 739 (7th Cir. 1999). In this matter, the Court has received an objection to the R & R and will review those portions of the R & R *de novo*.

1. **Background**.

Upon threshold review, the plaintiff was allowed to proceed on one count. Specifically:

> **COUNT 12:** Prison officials will soon transfer Miller into a gang violence program or to a Communications Management Unit with ISIS members, both of which will expose Miller to inmates who have "hits" out on his life, in violation of his constitutional and statutory rights.



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The remainders of plaintiff's claims were dismissed without prejudice as the plaintiff had incurred more than three strikes under the Prison Litigation Reform Act. *See Miller v. Mines*, No. 7:12-cv-00382, 2012 WL 5178005, at *1 (W.D. Va. Oct. 18, 2012) (recounting Miller's strikes). Because Miller had accrued more than three strikes, he could not avail himself of pauper status and could not proceed with his case by paying the filing fee in installments, unless a claim alleges an "imminent danger of serious physical injury." *See* 28 U.S.C. § 1915(g). Count 12 was the only claim determined by the Court which contained an "imminent danger of serious physical injury."

2. **Standard.**

Summary judgment must be granted, "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Spath v. Hayes Wheels Int'l-Ind., Inc.*, 211 F.3d 392, 396 (7th Cir. 2000). The reviewing court must construe the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in favor of that party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Chelios v. Heavener*, 520 F.3d 678, 685 (7th Cir. 2008); *Spath*, 211 F.3d at 396.

The initial summary judgment burden of production is on the moving party to show the Court that there is no reason to have a trial. *Celotex*, 477 U.S. at 323; *Modrowski v. Pigatto*, 712 F.3d 1166, 1168 (7th Cir. 2013). Where the non-moving party carries the burden of proof at trial, the moving party may satisfy its burden of production in one of two ways. It may present evidence that affirmatively negates an essential element of the non-moving party's case, *see* Fed. R. Civ. P. 56(c)(1)(A), or it may point to an absence of evidence to support an essential element of the non-moving party's case without actually submitting any evidence, *see* Fed. R. Civ. P.

56(c)(1)(B). *Celotex*, 477 U.S. at 322-25; *Modrowski*, 712 F.3d at 1169.

Where the moving party fails to meet its strict burden, a court cannot enter summary judgment for the moving party even if the opposing party fails to present relevant evidence in response to the motion. *Cooper v. Lane*, 969 F.2d 368, 371 (7th Cir. 1992).

In responding to a summary judgment motion, the nonmoving party may not simply rest upon the allegations contained in the pleadings, but must present specific facts to show that a genuine issue of material fact exists. *Celotex*, 477 U.S. at 322-26; *Anderson*, 477 U.S. at 256-57; *Modrowski*, 712 F.3d at 1168. A genuine issue of material fact is not demonstrated by the mere existence of "some alleged factual dispute between the parties," *Anderson*, 477 U.S. at 247, or by "some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, a genuine issue of material fact exists only if "a fair-minded jury could return a verdict for the [nonmoving party] on the evidence presented." *Anderson,* 477 U.S. at 252.

3. **Analysis**.

The R & R recommends that the Court grant defendants' motion for summary judgment for plaintiff's failure to exhaust his administrative remedies. The R & R correctly sets forth the exhaustion requirements so they will not be repeated here. The R & R also addressed the two issues raised by the parties: "(1) the date on which Plaintiff filed his complaint; and (2) whether the General Counsel properly extended its response time." (Doc. 221 at 7).

On the first issue, the plaintiff argued that the "prisoner mailbox rule" did not apply it fell within an "exceptional situation." The plaintiff puts forth this same argument in his objection stating that this Court should reject the R & R and find, "that Miller's situation was exceptional and that the mailbox rule should not apply."

However, the Court does not agree. As noted earlier, the plaintiff has incurred more than three strikes under the Prison Litigation Reform Act - indicating to the Court that he is familiar with prison litigation and the necessity of exhaustion. He failed to wait the time allowed for his issue to be addressed and had already drafted and submitted his complaint prior to receiving a final decision on his grievance. The "prison mailbox rule" is there to assist prisoners to ensure that they are not penalized for any filing delays in which they have no control. However, an early filing is within the defendant's control and as such, the Court does not find it an "exceptional situation" simply because the defendant jumped the gun in filing his complaint.

There were no other objections with regard to R & R and the Court has reviewed the remainder of the R & R and finds no clear error.

4. **Conclusion**.

Based on the above, the Court hereby **ADOPTS** the Report and Recommendation in its entirety (Doc. 221) and **GRANTS** Defendants' Motion (Doc. 204) for Summary Judgment. This matter is **DISMISSED** with prejudice and the Clerk of Court is **DIRECTED** to enter judgment accordingly and terminate all pending motions as moot.

**IT IS SO ORDERED.**

**DATE:** 7/31/2017

*s/J. Phil Gilbert*
**J. PHIL GILBERT**
**U.S. DISTRICT JUDGE**