

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

EMMANUEL PALMER,

Plaintiff,

v.

Case Number 09-14642

Honorable David M. Lawson

Magistrate Judge Mona K. Majzoub

BARBRA HESSBROOK, KENNETH  
FLORE, GARY HENSLEY, DOBALD  
BEAURGARD, JOHN CHAPELO,  
GLEN THELEN, and ERIC SHAW,

Defendants.

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**OPINION AND ORDER REJECTING MAGISTRATE JUDGE'S REPORT  
AND RECOMMENDATION, SUSTAINING PLAINTIFF'S OBJECTIONS  
TO REPORT AND RECOMMENDATION, DENYING  
MOTION FOR SUMMARY JUDGMENT BY DEFENDANT CHAPELO,  
AND CONTINUING ORDER OF REFERENCE**

The matter is before the Court on the plaintiff's objections the report filed by Magistrate Judge Mona K. Majzoub recommending that the motion for summary judgment by defendant John Chapelo be granted for the plaintiff's failure to exhaust his administrative remedies. The Court entered a general order of reference to conduct all pretrial matters, after which several defendants filed their first round of summary judgment motions. Defendant Chapelo was not among them. Judge Majzoub filed her report on November 18, 2010 recommending that the motions asserting failure to exhaust administrative remedies be denied because a question of fact existed. The Court adopted that report. Defendant Chapelo then filed the present motion asserting failure to exhaust and qualified immunity. The plaintiff failed to respond to the motion. Judge Majzoub filed her report on the present motion on June 19, 2012 recommending that the motion be granted on













plaintiff, as the Court must take it at this stage of the case), it only supports a finding that there is no general policy that prisoners are prohibited from filing; it does not support the specific assertions Chapelo makes about opportunities to file or resident unit supervisors.

Moreover, Chapelo has offered no evidence to rebut the plaintiff's specific testimony that, regardless of the general grievance policies, he was individually denied access to the grievance process while he was in the segregation unit. As the plaintiff testified:

I sent out medical kites. I had guys across the hall from me sending me strings to, you know, send out these grievances and all types of stuff. I tried to get them so they could send it out instead of me sending it straight out, but apparently once they get it up front, they see who it is and probably dump it to the side because they don't want to, you know, deal with it or something. I don't know. But yeah, I never got any response back. I sent plenty, several kites, several medical request forms. I sent several grievances, which I still have a lot of it.

...

I started ripping the backs of the carbon copy and just sending in the white sheet because I knew that they don't, you know, give you any type of receipt as far as you sending it in, and I knew that they weren't going to let me see medical, so I started taking the back of the carbon copy off and sending the white part out just to get to medical . . . .

Def.'s Mot. for Summ. J., Ex. A, Palmer dep. 83-84.

The defendant's argument then rests on the Step I grievance form, which shows no indication that it was received by the MDOC. But this Court already has considered the same grievance form when concluding that a fact question remained as to whether administrative remedies were available to the plaintiff and whether he was prevented from exhausting his administrative remedies as to the other defendants involved in the July 3 incident. The form Chapelo attached to his motion was submitted previously by the plaintiff to this Court to support the plaintiff's argument that he was denied access to the grievance process. *See* Pl.'s Resp. to Mot. for Summ. J. at 15 [dkt. #28]. In addition, the form was accompanied by the plaintiff's affidavit asserting that he filed Step I



grievances regarding the July 3 incident, did not receive a response, and was not furnished Steps II and III forms. *Id.* at 3-4. Based on that evidence, Judge Majzoub found that a question of fact existed on whether administrative remedies were available to the plaintiff while in segregation and whether he was prevented from exhausting his remedies as to defendants Flore, Shaw, Thelen, Beauregard, and Romatz. Rep. & Rec. at 7 [dkt. #32]. This Court agreed, concluding that the state of the record at the time did not permit a conclusion that the defendants' version of the events is true and the plaintiff's is not. Op. & Order at 11 [dkt. #48]. Defendant Chapelo was not included in the previous order because he had not been served by the plaintiff. However, Chapelo's involvement in the July 3 incident is indistinguishable from the other five defendants. After completing discovery, it appears Chapelo has not offered evidence to rebut the plaintiff's assertion that he filed the grievances and that the remainder of the process was not available to him. As was the case with the prior motion for summary judgment by the other defendants, there still remains a question of fact as to whether administrative remedies were available to the plaintiff while he was in segregation and whether he was prevented from exhausting his administrative remedies as to Chapelo.

For that reason, defendant Chapelo's motion for summary judgment based on failure to exhaust administrative remedies must be denied.

The defendant's other argument in his motion is that he is entitled to qualified immunity because the plaintiff failed to show the defendant's personal involvement in the conduct that forms the basis of the complaint. The defendant contends that since he was not "present" when the plaintiff fell down the stairs on July 1, the plaintiff has failed to meet this threshold burden. The magistrate judge declined to address that argument because the amended complaint did not allege

improper conduct by Chapelo in the July 1 incident. A review of the amended complaint shows that the magistrate judge is correct on this point, and thus appropriately disposed of this argument.

Finally, Chapelo inexplicably concludes that “this Court previously dismissed the claims against Flore, Beauregard, Shaw, and Thelen regarding the July 3, 2008, incident (D/E #32 and 48).” Def.’s Mot. for Summ. J. at 6. That is not accurate. The Court’s order on the prior motion for summary judgment only dismissed (1) the plaintiff’s state law claims for negligence; (2) all claims against defendants Ludwick, Jackson, Harrington, and Ramatz; and (3) the plaintiff’s claim for violation of the Eight Amendment against defendant Hensley for deprivation of food. The Court did not dismiss any of the other claims against any of the remaining defendants.

The Court finds that the plaintiff’s objections have merit. A fact question precludes summary judgment on defendant John Chapelo’s exhaustion defense.

Accordingly, it is **ORDERED** that the magistrate judge’s report and recommendation [dkt #64] is **REJECTED**.

It is further **ORDERED** that the plaintiff’s objections to the magistrate judge’s report and recommendation [dkt #68] are **SUSTAINED**.

It is further **ORDERED** that the motion for summary judgment by defendant John Chapelo [dkt. #61] is **DENIED**.

It is further **ORDERED** that the matter is referred to Magistrate Judge Mona K. Majzoub under the previous reference order [dkt. #5] to ready the matter for trial, and to conduct a trial if the parties consent under 28 U.S.C. § 626(b)(1)(c).

s/David M. Lawson  
DAVID M. LAWSON  
United States District Judge

Dated: September 25, 2012

**PROOF OF SERVICE**

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on September 25, 2012.

s/Deborah R. Tofil  
DEBORAH R. TOFIL