

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

BRUCE HOWARD,

Plaintiff,

v.

CASE NO. 10-CV-11470

HON. GEORGE CARAM STEEH  
MAG. JUDGE LAURIE J. MICHELSON

BETH GARDON, et al.,

Defendants.

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ORDER ACCEPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION  
(#54) AND DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (#45)

Plaintiff Bruce Howard, a prisoner currently incarcerated at the Kinross Correctional Facility in Michigan's Upper Peninsula, filed this prisoner civil rights case on April 13, 2010. On March 9, 2011, the court adopted the magistrate judge's report and recommendation and found: (1) defendants Gardon, Chadwell, and Lashley were not entitled to summary judgment on the basis that plaintiff failed to exhaust his administrative remedies; (2) defendants Gardon, Chadwell, and Lashley were not entitled to dismissal based on plaintiff's failure to state claims of retaliation, deliberate indifference, fraud and/or conspiracy against them; (3) defendants Scutt and Caruso were entitled to dismissal based upon plaintiff's failure to state a claim upon which relief may be granted; (4) defendants Jones and Russell were entitled to *sua sponte* dismissal based upon plaintiff's failure to state a claim of fraud against them; and (5) defendants' request for an award of costs was premature. In the report and recommendation, the magistrate judge noted the evidence presented by plaintiff to

counter defendants' evidence on the exhaustion issue and also noted defendants' failure to address the specific issue of exhaustion as to defendant Lashley. The court denied defendants' request for summary judgment on the exhaustion issue without prejudice. On August 8, 2011, defendants filed another motion for summary judgment on the exhaustion issue. Because defendants merely made the same argument as in the prior motion for summary judgment, and presented no additional evidence, the magistrate judge issued a report and recommendation to deny defendants' motion for summary judgment. On October 17, 2011, defendants filed objections to the magistrate judge's report and recommendation. Defendants argue this court's March 9, 2011 order denied defendants' motion for summary judgment without prejudice in order to allow plaintiff time to obtain discovery necessary to oppose the motion. Defendants therefore argue that plaintiff should bear the burden of providing additional evidence to oppose the motion. However, the magistrate judge correctly recognized that a fact issue regarding exhaustion precluded summary judgment on defendants' first motion for summary judgment and therefore precludes summary judgment on defendants' pending motion for summary judgment. The fact issue regarding whether plaintiff exhausted his grievance regarding his transfer to Kinross Correctional Facility, discussed on pages 3-4 of the October 3, 2011 report and recommendation, has not been resolved through the presentation of additional evidence. Thus, the magistrate judge correctly recommended that this court deny defendants' motion for summary judgment as defendants have not carried their burden of showing that there is no genuine issue of material fact. For the reasons stated above, the court hereby ACCEPTS and ADOPTS the magistrate judge's report and recommendation as its findings and conclusions in this matter and DENIES

defendants' motion for summary judgment.

SO ORDERED.

S/George Caram Steeh  
GEORGE CARAM STEEH  
UNITED STATES DISTRICT JUDGE

Dated: November 9, 2011

CERTIFICATE OF SERVICE

Copies of this Order were served on the attorneys of record on November 9, 2011, by electronic and/or ordinary mail and also to Bruce Howard #233473, Kinross Correctional Facility, 16770 S. Watertower Drive, Kincheloe, MI 49788.

S/Josephine Chaffee  
Secretary/Deputy Clerk