

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT ALLEN FOX, JR. #208615

Plaintiff,

v.

Case No. 1:06-CV-637

MICHAEL R. SMITH, *et al.*,

HON. GORDON J. QUIST

Defendants.

ORDER ADOPTING REPORT AND RECOMMENDATION

The Court has before it Plaintiff's Objection to the report and recommendation dated July 27, 2009, in which Magistrate Judge Brenneman recommended that Defendant Hillsdale County Circuit Court's, a/k/a "Hillsdale County Judicial System," Motion to Dismiss be granted on the ground that the Hillsdale County Circuit Court is part of the State of Michigan and is thus entitled to Eleventh Amendment immunity. The magistrate judge also recommended that the "Notice to Plaintiff" filed by Defendants Hillsdale County and the Hillsdale County Sheriff's Department be stricken and that those Defendants be directed to file an answer, motion to dismiss, or motion for summary judgment within fourteen days.

After conducting a *de novo* review of the report and recommendation, the Court concludes that it should be adopted.

Plaintiff's primary objection is that the Hillsdale County Circuit Court never raised Eleventh Amendment immunity as a defense, and the magistrate judge did not cite Eleventh Amendment immunity as a basis for dismissing Plaintiff's complaint in his prior report and recommendation issued November 17, 2006. In sum, Plaintiff asserts that the court may not raise Eleventh

Amendment immunity on its own and that the Hillsdale County Circuit Court has waived this defense.

Plaintiff is wrong about the Court's authority to raise Eleventh Amendment immunity. A court "may sua sponte raise the issue of lack of jurisdiction because of the applicability of the eleventh amendment." *Ritter v. Univ. of Mich.*, 851 F.2d 846, 851 (6th Cir. 1988). Moreover, 28 U.S.C. § 1915(e)(2) authorizes a federal court to "dismiss the case at any time if the court determines that . . . the action . . . seeks monetary relief against a defendant who is immune from such relief." Finally, it appears that any previous failure to identify Eleventh Amendment immunity as a proper basis for dismissal of the Hillsdale County Circuit Court may have stemmed from confusion regarding Plaintiff's incorrect identification of this Defendant as the "Hillsdale County Judicial System."

Plaintiff also contends that the Court should not allow the other Defendants additional time to answer because they did not comply with the Magistrate Judge's order issued December 3, 2008. This argument fails because, while it appears that no Defendant has yet filed an answer, the Hillsdale County Circuit Court filed a motion to dismiss in lieu of an answer, as permitted, and the other Defendants relied on this motion by joining in. While, as the magistrate judge observed, the "Notice to Plaintiff" filed by Hillsdale County and the Hillsdale County Sheriff's Department is not a recognized pleading, the Court finds no reason to preclude these Defendants from answering or filing a motion to dismiss or a motion for summary judgment.

Finally, Plaintiff, apparently recognizing that the Hillsdale County Sheriff's Department may not be an entity subject to suit, requests that he be permitted to simply drop "Department" and proceed against the Hillsdale County Sheriff. The Court declines to grant this request. As Plaintiff recognizes, the proper method for adding a new defendant is through a motion to amend pursuant

to Fed. R. Civ. P. 15. Because Plaintiff has not filed the proper motion along with a proposed amended complaint, the Court will not grant such relief. Therefore,

IT IS HEREBY ORDERED that the Magistrate Judge's Report and Recommendation issued July 27, 2009 (docket no. 74) is **APPROVED AND ADOPTED** as the Opinion of this Court.

IT IS FURTHER ORDERED that Defendant Hillsdale County Circuit Court's, a/k/a "Hillsdale County Judicial System," Motion to Dismiss (docket no. 54) is **GRANTED**.

IT IS FURTHER ORDERED that the "Notice to Plaintiff" (docket no. 57) is **STRICKEN AND REMOVED** from the docket, and Defendants Hillsdale County and the Hillsdale County Sheriff's Department shall file an answer, motion to dismiss, or motion for summary judgment in response to the complaint within **fourteen (14) days** of the date of this Order.

Dated: September 23, 2009

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE