DeLee v. Russo et al Doc. 65

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

MAURICE LARRY DeLEE,

Plaintiff,

DECISION AND ORDER 17-CV-448-A

٧.

MR. RUSSO, et al.,

Defendants.

Plaintiff Maurice Larry DeLee has filed a *pro se* motion for reconsideration of an October 18, 2019 Decision and Order dismissing his prisoner's civil rights action pursuant to 42 U.S.C. § 1997e(a) and Fed. R. Civ. P. 12(b)(6) because plaintiff DeLee failed to exhausted administrative remedies before commencing the action. For the reasons that follow, the motion is denied.

In his motion for reconsideration, plaintiff DeLee overlooks that the Court explicitly dismissed the action without prejudice. *See* Dkt. Nos. 56, 57, and 61, p.1. Accordingly, to the extent that the relief the plaintiff is seeking is the option to re-file the action because his administrative remedies were exhausted after the case was filed, the motion for reconsideration is moot. He can re-file.

Plaintiff DeLee argues that the Court should reconsider the October 18, 2019

Decision and Order because it "failed to address" that his administrative remedies

were exhausted after the action was filed. That is incorrect. See Dkt. No. 56, pp. 2-5.

The Court noted that plaintiff filed the case before his final administrative appeal was

due to be decided by the Central Office Review Committee, listed the steps plaintiff

took to exhaust his administrative remedies, and acknowledged that his final

administrative appeal was decided on or about June 13, 2018, which was more than a

year after the case was filed. Id.

Finally, none of the case law upon which plaintiff DeLee relies in his motion for

reconsideration supports his request that the Court excuse his failure to exhaust his

administrative remedies before filing this action. Plaintiff overlooks that the Supreme

Court's decision in Ross v. Blake, 136 S.Ct. 1850 (2016), changed the applicable

standard under 42 U.S.C. § 1997e(a) and the "special circumstances test" for

excusing a prisoner's failure timely to exhaust administrative remedies. The plaintiff

cites no controlling decision that the Court overlooked or misapprehended in

dismissing his action without prejudice, no intervening change in law, and the Court

therefore finds for all of the above reasons that plaintiff's motion for reconsideration is

without merit. The motion for reconsideration (Dkt. No. 61) is therefore denied.

IT IS SO ORDERED.

s/Ríchard J. Arcara

HONORABLE RICHARD J. ARCARA

UNITED STATES DISTRICT COURT

Dated: November 5, 2019

2