

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

Randall Eugene Parran,	:	
	:	
Appellant	:	
	:	
v.	:	
	:	No. 239 C.D. 2012
Gerald Rozum, Robert Snyder, Gary	:	Submitted: October 26, 2012
Smith, Tracy Williams, Dorina Varner,	:	
Jeffery Beard, Patt Miller, Bobbi	:	
McAllister, John Wetzal, Mike Scott	:	
Kordish, Rice, Rzasa, Stern, Coutts and	:	
John Doe 1, 2	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE JAMES GARDNER COLINS, Senior Judge

**OPINION NOT REPORTED**

**MEMORANDUM OPINION BY  
SENIOR JUDGE COLINS**

**FILED: January 4, 2013**

This matter is an appeal from an order of the Court of Common Pleas of Somerset County (the trial court) dismissing an action filed by Randall Eugene Parran (Parran) *pro se* against fourteen Department of Corrections (DOC) officials and a physician’s assistant who worked at the DOC’s State Correctional Institution (SCI)-Somerset. The trial court dismissed the action *sua sponte* pursuant to the Prison Litigation Reform Act (PLRA).<sup>1</sup> For the reasons that follow, we vacate the trial court’s dismissal of Parran’s claims against seven of the defendants and

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<sup>1</sup> 42 Pa. C.S. §§ 6601-6608.

remand the claims against those defendants for further proceedings. With respect to the other eight defendants, we affirm the trial court's dismissal of the complaint against them, but on grounds different from those relied on by the trial court.

On September 26, 2011, Parran, an inmate at SCI-Camp Hill who was previously incarcerated at SCI-Somerset, filed a petition to proceed *in forma pauperis* and a complaint seeking damages for alleged mistreatment at SCI-Somerset. Parran named as defendants Superintendent of SCI-Somerset Gerald Rozum, present and former DOC Secretaries John Wetzel and Jeffrey Beard, DOC Grievance Officers Dorina Varner and Tracy Williams, eight SCI-Somerset corrections officers, Robert Snyder, Gary Smith, Mike Scott, Officer Kordish, Officer Rice, Officer Stern, Sgt. Rzasa, and Officer Coutts,<sup>2</sup> SCI-Somerset Licensed Practical Nurse Patricia Miller and a physician's assistant who worked at SCI-Somerset, Bobbi McAllister.

In both his complaint and an amended complaint that he filed on November 17, 2011, Parran alleges that on October 29, 2009, he witnessed defendants Rzasa, Stern, Rice and Smith assaulting another inmate, and that he called out to them to stop. (Complaint ¶¶ 11-16; Amended Complaint ¶¶11-17.) Parran alleges that defendant Rzasa in response told him to "shut the fuck up or you will not eat," and that defendants Scott and Kordish later that day refused to let him eat lunch, telling him, "[n]ext time don't piss Sgt. Rzasa off." (Complaint ¶¶ 17, 24-25 & Ex. 1; Amended Complaint ¶¶18, 25-26.) On November 17, 2009, Parran filed a grievance with respect to that incident. (Complaint Ex. 1.) Parran alleges that defendant Stern accused Parran of lying in his grievance and said that he would show him to mind his own business, and that on November 23, 2009, six

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<sup>2</sup> The full names of defendants Kordish, Rice, Stern, Rzasa, and Coutts do not appear in the complaints or elsewhere in the record.

days after he filed the grievance, defendants Stern and Coutts assaulted him, pushing him face-forward into a steel bed frame while his hands were in handcuffs behind him, punching him in the back of the head, and kneeling him in the ribs. (Complaint ¶¶30-31; Amended Complaint ¶¶31-32.) Parran alleges that he sought medical treatment from defendants Miller and McAllister for injuries and pain from the assault, that defendant Coutts told defendant Miller not to treat him, and that both defendant Miller and defendant McAllister refused to treat him. (Complaint ¶¶32, 36 & Exs. 6-8; Amended Complaint ¶¶33-35, 40.)

On February 2, 2012, before service on any defendant was permitted, the trial court denied the petition to proceed *in forma pauperis* and dismissed the action without prejudice as frivolous, on the ground that the action was barred by the affirmative defense of failure to exhaust administrative remedies. (Trial Court February 2, 2012 Order and Opinion.) On February 10, 2012, Parran filed the instant appeal. Our review of the trial court’s *sua sponte* dismissal of this action is plenary. *McCool v. Department of Corrections*, 984 A.2d 565, 568 n.4 (Pa. Cmwlth. 2009).

Parran’s action, alleging mistreatment in prison by corrections officers and denial of health care in prison, constitutes “prison conditions litigation” under the PLRA. 42 Pa. C.S. § 6601 (defining “prison conditions litigation” to include any “civil proceeding ... with respect to the conditions of confinement or the effects of actions by a government party on the life of an individual confined in prison”). Section 6602(e) of the PLRA provides in relevant part that:

Notwithstanding any filing fee which has been paid, the court shall dismiss prison conditions litigation at any time, including prior to service on the defendant, if the court determines any of the following:

\* \* \*

(2) The prison conditions litigation is frivolous or malicious or fails to state a claim upon which relief may be granted or the defendant is entitled to assert a valid affirmative defense, including immunity, which, if asserted, would preclude the relief.

42 Pa. C.S. § 6602(e) (emphasis added). A trial court can properly dismiss an action under the PLRA *sua sponte* before any answer is filed on the ground that the action is barred by an affirmative defense, including the defense of failure to exhaust administrative remedies, even though no affirmative defenses have yet been pleaded by any defendant. *Watson v. Department of Corrections*, 990 A.2d 164, 167-68 (Pa. Cmwlth. 2010); 42 Pa. C.S. § 6602(e).

An action may not be dismissed for failure to exhaust remedies, however, where there is evidence from the complaint that the inmate attempted to exhaust administrative remedies and the record does not clearly show a failure to exhaust those remedies. *Compare Miles v. Beard*, 847 A.2d 161, 163 & n.2, 166 (Pa. Cmwlth. 2004) (reversing dismissal for failure to exhaust administrative remedies where complaint and attachments showed that plaintiff filed a grievance and there was conflicting evidence as to whether defendants had failed to respond to a properly filed grievance or whether the lack of response was due to failure by plaintiff to comply with grievance procedures) with *Watson*, 990 A.2d at 167-68 & n.5 (dismissal for failure to exhaust administrative remedies upheld where complaint exhibits showed that plaintiff filed his complaint before expiration of the period to review the appeal of his grievance). In addition, failure to exhaust administrative remedies is not a valid defense to an action unless there is an adequate administrative remedy that applies to the claim. *Holloway v. Lehman*, 671 A.2d 1179, 1181 (Pa. Cmwlth. 1996) (*en banc*); *St. Clair v. Pennsylvania Board of Probation & Parole*, 493 A.2d 146, 152 (Pa. Cmwlth. 1985).

The record in this case does not support the trial court's conclusion that Parran's action is barred by failure to exhaust administrative remedies. Contrary to the trial court's assertion that "Plaintiff has failed to include any evidence of the exhaustion of his civil remedies pursuant to the filing through the civil grievance process" (Trial Court February 2, 2012 Opinion at 2), the documents attached to Parran's initial complaint indicate that he timely filed a grievance with respect to the first retaliation incident and pursued that grievance through the full appeals process. (Complaint Exs. 1, 4, 5.) With respect to the second and third incidents, the November 23, 2009 assault and the refusal to provide treatment for it alleged by Parran, no documentation of a grievance is attached to either the complaint or amended complaint. Parran pleaded in his amended complaint, however, that he exhausted all administrative remedies and the documents attached to the original complaint show contemporaneous reporting of the assault and contemporaneous requests for medical treatment. (Amended Complaint ¶43; Complaint Exs. 6-8.)

It is also unclear from this record that there is an adequate and applicable administrative procedure that Parran was required to pursue with respect to these claims, which are for personal injuries and damages for past alleged abuse by prison employees, not disputes with respect to prison policies or requests for future relief or for changes to an action taken by the prison or DOC. DOC regulations provide that the "inmate grievance system ... will permit any inmate to seek review of problems which the inmate experiences during the course of confinement," but state that "[i]nmates may also pursue available remedies in State and Federal court." 37 Pa. Code § 93.9. This grievance system

addresses such problems as the initial decisions regarding cell and work assignments along with the day-to-day living problems associated with incarceration. Problems arising during confinement could include opportunities to make and receive phone calls, availability of legal materials and assistance, visitations, recreation, counseling, and a myriad of other considerations that occur in a system that houses large numbers of persons in confined spaces.

*McCray v. Department of Corrections*, 582 Pa. 440, 448, 872 A.2d 1127, 1131 (2005). While DOC policy DC-ADM 804 provides that claims of inmate abuse can be the subject of a grievance (DC-ADM 804 Procedures Manual § 1(B)(10)), the DOC policy governing inmate abuse, DC-ADM 001, provides that inmates are not required to use the prison grievance procedure to report abuse, and may also proceed by other means, including notifying a staff member of the abuse. DC-ADM 001 § IV(D). Neither the trial court nor defendants offer any explanation as to how the grievance procedure could provide an adequate remedy for Parran's claims or discuss whether the grievance procedure is mandatory for abuse claims, in light of the language in DC-ADM 001. Accordingly, we conclude that the trial court erred in dismissing this action for failure to exhaust administrative remedies on this limited record and at this juncture of the proceedings.

No basis for dismissal of this action in its entirety other than failure to exhaust remedies was found by the trial court or is argued by defendants. The trial court, in its second opinion in support of its order, suggested that this action might be barred by the "three strikes rule" of Section 6602(f) of the PLRA, which allows a court to dismiss an *in forma pauperis* prison conditions action where the inmate has filed three or more prior such complaints that were dismissed as frivolous. *See* 42 Pa. C.S. § 6602(f); *Jae v. Good*, 946 A.2d 802 (Pa. Cmwlth. 2008). However, the trial court did not find that Parran had the requisite three dismissals and did not

identify any cases of his that had been dismissed as frivolous. (Trial Court May 24, 2012 Opinion at 2-3.) Defendants, moreover, do not contend that Parran has filed three previously dismissed actions or the trial court's order can be affirmed on the basis.

While the trial court based its dismissal on Rule 240(j) of the Pennsylvania Rules of Civil Procedure, in addition to Section 6602 of the PLRA, that likewise cannot provide a basis for affirmance. Rule 240(j) sets forth no additional grounds for dismissal or for finding an action frivolous beyond those provided in the PLRA; it only permits that where "a party has filed a petition for leave to proceed in forma pauperis, the court prior to acting upon the petition may dismiss the action, proceeding or appeal ... if it is satisfied that the action, proceeding or appeal is frivolous." Pa. R.C.P. No. 240(j). Neither the trial court nor defendants contend that Parran's allegations, if true, fail to state a cause of action or can be viewed as frivolous. Allegations that corrections officers retaliated against an inmate for speaking up about a corrections officer's assault, that corrections officers maliciously assaulted an inmate and that medical care was deliberately withheld may state causes of actions for violations of federal constitutional rights under 42 U.S.C. § 1983. *See, e.g., Ortiz v. Jordan*, \_\_ U.S. \_\_, \_\_, 131 S. Ct. 884, 892-93 (2011); *Wilkins v. Gaddy*, \_\_ U.S. \_\_, \_\_, 130 S. Ct. 1175, 1178-80 (2010); *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976).

The fact that this action cannot be regarded as frivolous or dismissed in its entirety at this stage of the proceedings does not, however, mean that it must proceed as to all fifteen defendants. Under the PLRA, a court may properly dismiss an inmate's claims against defendants as to whom the complaint fails to state any cause of action, even if the complaint is not barred on that ground as to

other defendants. *McCool*, 984 A.2d at 569-72. This Court may affirm a lower court's dismissal of a claim against a defendant on grounds different from those relied on by the trial court, even if those grounds are not argued by the parties. *Municipal Authority of Borough of West View v. Public Utility Commission*, 41 A.3d 929, 934 n.7 (Pa. Cmwlth. 2012) (*en banc*); *McCool*, 984 A.2d at 569-72; *Guy M. Cooper, Inc. v. East Penn School District*, 903 A.2d 608, 618 n.9 (Pa. Cmwlth. 2006).

Neither the complaint nor the amended complaint alleges any involvement by eight of the defendants in any harm that Parran claims was inflicted on him. Parran does not allege that defendants Rozum, Snyder, Williams, Varner, Beard or Wetzel participated in any assault or had any connection to the retaliation, assault or other mistreatment that he alleges that he suffered. (Complaint ¶¶27-28, 34-35; Amended Complaint ¶¶28-29, 38-39.) While Parran alleges that defendants Smith and Rice participated in an assault on another inmate, he does not allege that they participated in or directed the retaliation against him for complaining about that assault or that they assaulted him. (Complaint ¶¶11-31; Amended Complaint ¶¶11-32.) Accordingly, the dismissal of the complaint as to these defendants is affirmed on the ground that Parran has failed to state a claim against them on which relief may be granted.

For the foregoing reasons, we affirm the trial court's dismissal of Parran's claims against defendants Rozum, Snyder, Smith, Williams, Varner, Beard, Wetzel and Rice, and vacate the trial court's dismissal of Parran's claims against defendants Rzasa, Stern, Coutts, Scott, Kordish, Miller and McAllister. We remand this matter to the trial court for further proceedings on the claims against defendants Rzasa, Stern, Coutts, Scott, Kordish, Miller and McAllister, in



which those defendants may assert all defenses they have to Parran's claims against them and the trial court may address such defenses and Parran's claims on a sufficient record.

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JAMES GARDNER COLINS, Senior Judge

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**ORDER**

AND NOW, this 4<sup>th</sup> day of January, 2013, the Order of February 2, 2012 of the Court of Common Pleas of Somerset County is AFFIRMED IN PART and VACATED IN PART. Said Order is AFFIRMED insofar as it dismissed Appellant's claims against defendants Rozum, Snyder, Smith, Williams, Varner, Beard, Wetzel and Rice. Said Order is VACATED insofar as it dismissed Appellant's claims against defendants Rzasa, Stern, Coutts, Scott, Kordish, Miller and McAllister, and this matter is remanded to the Court of Common Pleas of Somerset County for further proceedings on Appellant's claims against defendants Rzasa, Stern, Coutts, Scott, Kordish, Miller and McAllister in accordance with the foregoing opinion.

Jurisdiction relinquished.

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JAMES GARDNER COLINS, Senior Judge