NO. 12-10-00324-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

CLIFFORD FAIRFAX, APPELLANT	***§***	***APPEAL FROM THE 349TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
SHERRI MILLIGAN, KATHLEEN O'NEAL, BRIAN GORDY AND CHRISTY HOISINGTON, APPELLEES	***§***	***ANDERSON COUNTY, TEXAS***

MEMORANDUM OPINION

Clifford Fairfax appeals from the trial court's dismissal of his suit under Chapter Fourteen of the Texas Civil Practice and Remedies Code. He raises three issues on appeal. We affirm.

BACKGROUND

Fairfax alleges that, on January 11, 2010, during an "annual lockdown shakedown," he was ordered to go to a section of the prison with all his personal property, including his legal materials, for a contraband search. During this search, Fairfax alleges, his legal materials, as well as several items he purchased at the commissary, were seized from him by Appellees, employees of the Texas Department of Criminal Justice (TDCJ). Specifically, he alleges that Sherri Milligan threw some of the materials in his face and stated that she was confiscating all his legal materials. Fairfax alleges that a sergeant "grabbed [his] coat, slung [him] around, threw [his] medical cane down, handcuff[ed] and escorted [him] to lock-up/pre-hearing detention." According to Fairfax, nineteen days later, he was allowed to retrieve many of these seized items from storage, which were handed back to him by Kathleen O'Neal. He states that his legal

materials and the commissary items were handed back to him in three "chain bags." When he inspected the bags, Fairfax allegedly saw three mice or rats escape from the bags. He stated that

> [a]t this time, [he] discovered that the rats/mice[ ] damaged all his soups, meat [products], tubes of toothpaste and blue magic hair grease, and also that his padlock & key, soups, 2 bags & a 3/4 of a jar of coffee-black, 2 packs of cookies, 1 bag & a half of corn chips, mint sticks, fruit sticks, commissary bag, stamps, legal storage folders, ditigal [sic] family photos of [his] son's fiancée, sexual photos of women, law books, attorney correspondence, legal notes and grievances were missing . . . .

He hypothesizes that these acts were conducted in retaliation for his repeated filing of internal grievances and lawsuits, as well as similar complaints he filed on behalf of other inmates, related to the seizure of his and other inmates' legal materials by TDCJ staff including Appellees, without following proper TDCJ administrative protocol.

Fairfax filed suit asserting several causes of action against Sherri Milligan, Kathleen O'Neal, Brian Gordy, and Christy Hoisington, who are the TDCJ officers alleged to have played a part in the search, seizure, and return of Fairfax's property. The trial court dismissed his suit without a hearing. The trial court recited three grounds for dismissal in its order of dismissal; namely that it found the claim to be frivolous or malicious, the "same operative facts of this lawsuit were [brought by Fairfax] in Cause #3-41159," and that Fairfax "failed to comply with Section 14.004 concerning the affidavit [of] previous filings." This appeal followed.

THE TRIAL COURT'S DISMISSAL OF FAIRFAX'S LAWSUIT

In his second issue, Fairfax argues that the trial court abused its discretion in dismissing his suit for failing to comply with the affidavit of previous filings required in Section 14.004 of the civil practice and remedies code.

Standard of Review

We review the trial court's dismissal of an *in forma pauperis* suit under an abuse of discretion standard. ***Hickson v. Moya***, 926 S.W.2d 397, 398 (Tex. App.—Waco 1996, no writ). A trial court abuses its discretion if it acts arbitrarily, capriciously, and without reference to any guiding rules or principles. ***Lentworth v. Trahan***, 981 S.W.2d 720, 722 (Tex. App.—Houston [1st Dist.] 1998, no pet.). We will affirm a dismissal if it was proper under any legal theory. ***Johnson v. Lynaugh***, 796 S.W.2d 705, 706-07 (Tex. 1990); ***Birdo v. Ament***, 814 S.W.2d 808,

810 (Tex. App.—Waco 1991, writ denied). The trial courts are given broad discretion to determine whether a case should be dismissed because (1) prisoners have a strong incentive to litigate; (2) the government bears the cost of an *in forma pauperis* suit; (3) sanctions are not effective; and (4) the dismissal of unmeritorious claims accrue to the benefit of state officials, courts, and meritorious claimants. *See* ***Montana v. Patterson***, 894 S.W.2d 812, 814-15 (Tex. App.—Tyler 1994, no writ).

Applicable Law

Chapter Fourteen of the Texas Civil Practice and Remedies Code controls suits brought by an inmate in which the inmate filed an affidavit or unsworn declaration of inability to pay costs.[1] TEX. CIV. PRAC. & REM. CODE ANN. § 14.002(a) (Vernon 2002); ***Hickson***, 926 S.W.2d at 398. The inmate must comply with the procedural requirements set forth in Chapter Fourteen. TEX. CIV. PRAC. & REM. CODE ANN. §§ 14.002(a), 14.004, 14.005 (Vernon 2002). Failure to fulfill those procedural requirements will result in the dismissal of an inmate's suit. *See* ***id.*** § 14.003 (Vernon 2002); ***Brewer v. Simental***, 268 S.W.3d 763 (Tex. App.—Waco 2008, no pet.) (citing ***Bell v. Texas Dep't of Crim. Justice-Institutional Div.***, 962 S.W.2d 156, 158 (Tex. App.—Houston [14th Dist.] 1998, pet. denied)).

One such procedural requirement is that, under Section 14.004, entitled "Affidavit Relating to Previous Filings," an inmate who files an affidavit or unsworn declaration of inability to pay costs must file a separate affidavit or declaration setting out the following information:

> (1) identifying each suit, other than a suit under the Family Code, previously brought by the person and in which the person was not represented by an attorney, without regard to whether the person was an inmate at the time the suit was brought; and
>
> (2) describing each suit that was previously brought by:
>
> (A) stating the operative facts for which relief was sought;
>
> (B) listing the case name, cause number, and the court in which the suit was brought;
>
> (C) identifying each party named in the suit; and
>
> (D) stating the result of the suit, including whether the suit was dismissed as frivolous or malicious under Section 13.001 or Section 14.003 or otherwise.

TEX. CIV. PRAC. & REM. CODE ANN. § 14.004(a).

[1] Chapter Fourteen does not apply to an action brought under the Texas Family Code. TEX. CIV. PRAC. & REM. CODE ANN. 14.002(b) (Vernon 2002).

Substantial compliance with the affidavit of previous filings requirement has been held to be sufficient. ***Gowan v. TDCJ***, 99 S.W.3d 319, 322 (Tex. App.—Texarkana 2003, no pet.) (affidavit of previous suits requirement met when only missing information was cause number). However, the inmate must always include a sufficient description of the operative facts of prior suits, because that is the only way in which a court may evaluate whether the prior suit is substantially similar to the present suit. *See* ***Bell***, 962 S.W.2d at 158; ***Clark v. Unit***, 23 S.W.3d 420, 422 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) (stating that although appellant "did list previous filings, he did not state the operative facts for which relief was sought in those suits[, and] [w]ithout this information, the trial court was unable to consider whether [appellant's] current claim is substantially similar to a previous claim"). The inmate's failure to sufficiently describe the operative facts of his past suits in his affidavit entitles the trial court to presume that the instant suit is substantially similar to one previously filed by the inmate, and therefore, frivolous. *See* ***id.*** Accordingly, a trial court may dismiss an indigent inmate's suit as frivolous or malicious when an inmate fails to comply with the statutory requirements of Section 14.004. *See* ***id.***

Discussion

When Fairfax first filed his suit, his initial affidavit of prior filings merely stated that he could not comply with the statute because staff at TDCJ had confiscated all his legal materials that would have assisted him in preparing the affidavit. The trial court gave Fairfax the opportunity to amend his affidavit. When Fairfax amended his affidavit, he listed some of his prior filings as in ***Clark***. He even provided detailed operative facts in describing some of his suits. *See* ***Clark***, 23 S.W.3d at 422. However, he identified at least five suits filed in several different courts in which he included no statement of the operative facts. Rather, Fairfax stated that he was unable to provide the required information because TDCJ staff had confiscated his legal materials. Although he may not have recalled all the cause numbers and other technical information related to those suits, he was required to disclose the operative facts of those suits.[2] But Fairfax did not include this information in his affidavit. Therefore, the trial court was entitled to presume that the instant suit was substantially similar to the prior filings that Fairfax

[2] Although it has been held by at least one court that substantial compliance is sufficient, s*ee* ***Gowan***, 99 S.W.3d at 322, we do not hold here that including *only* the operative facts would be sufficient to comply with the statutory requirements.

failed to sufficiently describe. *See* ***Clark***, 23 S.W.3d at 422; ***Bell***, 962 S.W.2d at 158. Consequently, the trial court did not err in dismissing Fairfax's suit.

Fairfax's second issue is overruled.

REMAINING ISSUES

Since it was proper for the trial court to dismiss Fairfax's suit because he failed to comply with the affidavit of previous filings requirement in Section 14.004, we need not consider his first issue in which he argues that the trial court erred when it alternatively dismissed his suit on the ground that "the same operative facts of this lawsuit were in Cause #3-41159." *See* TEX. R. APP. P. 47.1. For the same reason, we need not consider Fairfax's third issue in which he argues that the trial court abused its discretion in dismissing his suit as frivolous or malicious because it had no arguable basis in law. *See* ***id.***

DISPOSITION

Having overruled Fairfax's second issue, and having determined that we need not address his remaining two issues, we ***affirm*** the judgment of the trial court.

BRIAN HOYLE
Justice

Opinion delivered July 13, 2011.
Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.

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