

2012 IL App (2d) 101128-U  
No. 2-10-1128  
Order filed June 5, 2012

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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ELLIS HENDERSON,	)	Appeal from the Circuit Court
	)	of Lee County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 08-CH-104
	)	
DR. MAGI, DR. LAWRENCE NGU,	)	
DR. ARTHUR FUNK, DR. VADA,	)	
DR. ANTREAS MESROBIAN, and	)	
WEXFORD HEALTH SOURCES, INC.,	)	Honorable
	)	Daniel A. Fish,
Defendants-Appellees.	)	Judge, Presiding.

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JUSTICE BURKE delivered the judgment of the court.  
Justices Bowman and Birkett concurred in the judgment.

**ORDER**

*Held:* Where prison inmate filed an amended complaint claiming he received inadequate medical care and later filed an invalid petition to remove matter to federal court, the trial court did not abuse its discretion in dismissing with prejudice the amended complaint for want of prosecution.

¶ 1 Defendants Wexford Health Sources, Inc. (Wexford), and its employees, Dr. Magi, Dr. Lawrence Ngu, Dr. Arthur Funk, Dr. Vada, and Dr. Antreas Mesrobian, were among those responsible for the medical treatment of inmates at Dixon Correctional Center. Plaintiff, Ellis

Henderson, an inmate at Dixon, filed in the circuit court a complaint alleging that defendants provided inadequate medical treatment for his right-knee injury, which he allegedly suffered while working at Dixon. After giving plaintiff opportunities to amend his pleadings, the circuit court eventually dismissed the amended complaint with prejudice.

¶ 2 Plaintiff appeals, arguing that (1) the circuit court lacked authority to dismiss the amended complaint while plaintiff's petition for removal was pending in federal district court; (2) his claims of an eighth amendment violation and deliberate indifference have merit; and (3) the circuit court should have treated him more leniently because he appeared *pro se*. We reject each of plaintiff's allegations of error and conclude that the circuit court did not abuse its discretion in dismissing the amended complaint. We affirm.

¶ 3 **FACTS**

¶ 4 On October 6, 2008, plaintiff, with the assistance of counsel, filed a complaint seeking medical treatment for his knee. Plaintiff alleged that he was a resident at Dixon and that Wexford was a corporation that had entered into a contract with the Illinois Department of Corrections to provide medical care to inmates at Dixon. Plaintiff further alleged that defendant doctors were physicians and surgeons employed by Wexford. In particular, Dr. Funk was in charge of providing and approving expenditures for medical care to inmates.

¶ 5 The complaint alleged that, on November 15, 2006, plaintiff was working in Dixon's healthcare unit when he injured his right knee while pushing a heavy patient in a wheelchair up an incline. Plaintiff alleged that he repeatedly sought medical care from defendants, but he was denied care. Plaintiff claimed that defendants owed and breached a duty to provide plaintiff with necessary medical care to treat the injury. Specifically, plaintiff requested magnetic resonance imaging (MRI)

to diagnosis the injury and facilitate proper treatment. Plaintiff alleged that he had frequently seen Dr. Ngu and Dr. Magi for his continuing pain and swelling, but they had never ordered appropriate tests, including MRI. Plaintiff alleged that, as a result of the doctors' delay, his right knee has degenerated, as shown in a September 2007 x-ray. Plaintiff asserted that, unless diagnosed and treated soon, his right knee would continue to suffer degeneration and risk permanent damage. The complaint sought an order directing defendants to provide plaintiff with an MRI of his right knee and consultation with an orthopedic specialist for diagnosis and treatment of his knee.

¶ 6 On December 18, 2008, the circuit court granted plaintiff leave to amend the complaint to name Dr. Vada and Dr. Mesrobian, his new physicians, as additional defendants. On January 5, 2009, plaintiff, with the assistance of counsel, filed an amended complaint to allege that, like Dr. Ngu and Dr. Magi, Dr. Mesrobian and Dr. Vada had refused to order an MRI or refer plaintiff to a specialist. The amended complaint added the allegation that he was experiencing severe pain, limping, and a popping sensation in his right knee.

¶ 7 Nearly a year later, on December 8, 2009, the circuit court granted plaintiff's counsel leave to withdraw, and plaintiff entered his appearance to proceed *pro se*.

¶ 8 On April 14, 2010, the circuit court granted a motion to dismiss filed on behalf of Dr. Mesrobian, who had passed away on January 19, 2010. The court concluded that the claim against defendants, including Dr. Mesrobian, was injunctive, and thus was barred by the doctrine of impossibility. See *Jackson v. Hammer*, 274 Ill. App. 3d 59, 69 (1995), ("courts will deny the granting of an injunction if enforcement is infeasible or impossible"). At the hearing, plaintiff moved for leave to further amend the complaint to add the new medical director as a defendant. The court granted plaintiff leave to file until May 14, 2010. On June 16, 2010, Wexford informed the

circuit court that plaintiff had not yet amended the complaint and asked that the case be dismissed for want of prosecution. At a case management conference on July 14, 2010, the court granted plaintiff “one final extension” to file the amended complaint by October 13, 2010. The court informed plaintiff that if he failed to proceed with the action, it would be dismissed.

¶ 9 One day before the deadline, on October 12, 2010, plaintiff moved for removal to the United States District Court for the Northern District of Illinois, asserting that he had set forth a federal question and various civil rights violations, including what he called separate claims of deliberate indifference and a violation of the eighth amendment right to medical care. A prisoner’s treatment and the conditions of confinement are subject to scrutiny under the eighth amendment’s proscription against cruel and unusual punishment. See *Helling v. McKinney*, 509 U.S. 25, 31, (1993). However, deliberate indifference is an element of the eighth amendment claim, and thus plaintiff’s constitutional allegations are more accurately viewed as a single claim. See *Strickler v. Waters*, 989 F.2d 1375, 1379 (4th Cir.1993) (to establish an eighth amendment violation based on prison conditions, a plaintiff must show (1) a serious deprivation of a basic human need and (2) deliberate indifference to prison conditions on the part of prison officials).

¶ 10 On October 13, 2010, the circuit court dismissed plaintiff’s amended complaint, finding that “[i]nasmuch as plaintiff was granted one final extension to file an amended complaint by 10/13/10 per the court’s 7/14/10 order and the plaintiff having failed to do so, the matter is dismissed with prejudice.”

¶ 11 On October 25, 2010, the federal court dismissed plaintiff’s petition for removal on the grounds that (1) removal is not available to a plaintiff and (2) plaintiff was barred from seeking federal relief for non-compliance with the Prison Litigation Reform Act of 1995 (PLRA) (see 28

U.S.C. ¶ 1915(g)). In remanding the cause to the circuit court, the federal district court made the following findings of fact and conclusions of law:

“The plaintiff, a state prisoner, seeks removal of a *pro se* civil rights action he filed in the Lee County Circuit Court. The plaintiff alleges, essentially, that he was injured on his prison work assignment because he was assigned duties for which he was not properly trained; he also claims that he received inadequate care and treatment for his injuries. The plaintiff now seeks removal pursuant to 28 U.S.C. ¶ 1441.

\* \* \*

The plaintiff’s current complaint arises from incidents that allegedly occurred in 2007; therefore, this case does not involve imminent danger of serious physical injury. Accordingly, 28 U.S.C. ¶ 1915(g) bars the plaintiff from proceeding without the full prepayment of the \$350 filing fee.

Furthermore, the plaintiff cannot meet the requirements for removal. As the plaintiff has been previously informed, only the defendant in a civil case can seek removal. [Citations omitted.] Ignoring the plaintiff’s failure to comply with the proper procedures for removal, \*\*\* [the court concludes that] he is not permitted to seek removal. [Citation omitted.] Removal by the plaintiff is not appropriate.”

¶ 12 Following the dismissal of the petition for removal, plaintiff filed a notice of appeal in the circuit court on November 5, 2010.

¶ 13 ANALYSIS

¶ 14 On appeal, plaintiff argues that (1) the circuit court lacked authority to dismiss the amended complaint while plaintiff’s petition for removal was pending in federal district court; (2) his claim

of an eighth amendment violation has merit; and (3) the circuit court should have treated him more leniently because he appeared *pro se*. We disagree and conclude that the circuit court did not abuse its discretion in dismissing the amended complaint.

¶ 15 A. Dismissal of Amended Complaint

¶ 16 We agree with defendants that the trial court did not abuse its discretion in dismissing plaintiff's cause of action for want of prosecution. The circuit court's inherent authority to control its docket is a crucial method for the circuit court to "prevent undue delays in the disposition of cases caused by abuses of the litigation process." *J.S.A. v. M.H.*, 224 Ill. 2d 182, 196 (2007). The most common example of this power in action is dismissal of a complaint for want of prosecution. See *Bejda v. SGL Industries, Inc.*, 82 Ill. 2d 322, 329 (1980). Our supreme court has unequivocally held that the circuit court holds the inherent authority, independent of any other rule or statute, "to dismiss a cause of action with prejudice for failure to comply with court orders where the record shows deliberate and continuing disregard for the court's authority." *Sander v. Dow Chemical Co.*, 166 Ill. 2d 48, 67 (1995). The circuit court has relatively broad inherent authority to sanction a plaintiff if it finds that the plaintiff's actions demonstrated deliberate and continuing disregard for its authority.

¶ 17 In this case, the circuit court had the discretion to dismiss the cause of action as part of its authority to control its docket. Plaintiff filed his original complaint on October 6, 2008, and the court gave plaintiff two years, until October 13, 2010, to proceed with the cause before it was dismissed. On April 14, 2010, the court granted plaintiff leave to file an amended complaint by May 14, 2010. No amended complaint was filed by July 14, 2010, at which point the court gave plaintiff one final extension to October 13, 2010, to file the amendment.

¶ 18 The court granted plaintiff a six-month extension to amend his complaint to add the new medical director as a defendant, and during that time, plaintiff failed to file an amendment or proceed with the complaint in its current form. Based on this record, the circuit court did not abuse its discretion in dismissing plaintiff's cause of action. See *Sander*, 166 Ill. 2d at 67 ("Reversal of a trial court's decision to impose a particular sanction is only justified when the record establishes a clear abuse of discretion).

¶ 19 B. Petition for Removal

¶ 20 Plaintiff filed his petition for removal on October 12, 2010, the circuit court dismissed the amended complaint with prejudice on October 13, 2010, and the federal district court denied the removal petition on October 26, 2010. Plaintiff argues that his petition for removal to the federal district court divested the circuit court of the authority to grant defendant's motion to dismiss. We disagree. Plaintiff relies on section 1446(d), which provides that, once a removal is effected, "the State court shall proceed no further unless and until the case is remanded." 28 U.S.C. 1446(d) (2006). However, the removal was not properly effected in this case, and therefore, the circuit court did not violate section 1446(d) in proceeding on plaintiff's action before the federal district court remanded the cause.

¶ 21 The removal was not effected in this case because removal is unavailable to a plaintiff in a civil case. Section 1441(a) provides that "[e]xcept as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed *by the defendant or the defendants*, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. 1441(a) (2006). Moreover, section 1446, which governs the procedure for removal, sets

forth the requirements for removal by a defendant and does not authorize a plaintiff to remove a cause of action to federal court. 28 U.S.C. 1446 (2006). For instance, section 1446(d), which plaintiff cites, states that “[p]romptly after the filing of such notice of removal of a civil action *the defendant or defendants* shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.” (Emphasis added.) 28 U.S.C. 1446(d) (2006). Continuation of state court proceedings is proper if the attempted removal lacks necessary jurisdictional requisites. *Wenrick v. Schloemann-Siemag Aktiengesellschaft*, 522 A.2d 52, 55 (Pa. Super. 1987); see also *Metropolitan Casualty Ins. Co. v. Stevens*, 312 U.S. 563 (1941) (where the attempted removal is invalid, the state court proceedings conducted after the attempted removal may be valid). Because plaintiff had no basis for filing the removal petition, we conclude that the statutory stay of state court proceedings under section 1446 is not a valid reason for reversing the dismissal of plaintiff’s amended complaint.

¶ 22

#### C. Eighth Amendment Claim

¶ 23 On appeal, plaintiff also argues the merits of his eighth amendment claim. It is undisputed that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the eighth amendment’s proscription against cruel and unusual punishment. *Helling*, 509 U.S. at 31. To establish “that prison conditions violate the Eighth Amendment, a plaintiff must show both ‘(1) a serious deprivation of a basic human need; and (2) deliberate indifference to prison conditions on the part of prison officials.’ ” *Strickler*, 989 F.2d at 1379 (quoting *Williams v. Griffin*, 952 F.2d 820, 824 (4th Cir.1991)). The first showing requires the court to determine whether the deprivation of the basic human need was objectively “sufficiently serious,”

and the second requires it to determine whether subjectively “the officials act[ed] with a sufficiently culpable state of mind.” *Wilson v. Seiter*, 501 U.S. 294, 298 (1991). A prisoner must suffer serious or significant physical or mental injury to be subjected to cruel and unusual punishment within the meaning of the eighth amendment. *White v. Gregory*, 1 F.3d 267, 269 (4th Cir.1993).

¶ 24 The circuit court did not rule upon plaintiff’s eighth amendment claim, and therefore, the issue is not properly before this court. Plaintiff’s amended complaint sought equitable relief in the form of an order compelling defendants to provide plaintiff with an MRI of his right knee and consultation with an orthopedic specialist for diagnosis and treatment of his knee. The dismissal of the amended complaint is the final order from which plaintiff appeals to this court, and we have concluded that the circuit court did not abuse its discretion in granting defendants the dismissal.

¶ 25 Plaintiff set forth the eighth amendment claim for the first time in the removal petition, which was ruled upon by the federal court. Any recourse plaintiff seeks for the denial of the removal petition must be sought in that court.

¶ 26 D. Plaintiff’s *Pro Se* Status

¶ 27 Finally, plaintiff argues that his *pro se* pleading should be held to “less stringent standards than formal pleadings drafted by lawyers.” Plaintiff cites *Haines v. Kerner*, 404 U.S. 519, 520 (1972), but that case applied a less stringent standard to a prisoner’s *pro se* complaint when determining whether it should be dismissed for failure to state a claim. *Haines* is distinguishable on its facts. In this case, plaintiff’s action was dismissed for want of prosecution because he failed to amend his complaint after requesting extensions to do so. The dismissal was not based on the failure to state a claim, but rather the undue delay caused by plaintiff’s deliberate and continuing disregard for the court’s orders.

¶ 28

CONCLUSION

¶ 29 For the preceding reasons, the judgment of the circuit court of Lee County is affirmed.

¶ 30 Affirmed.