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2017 IL App (4th) 160581-U

NO. 4-16-0581

FILED
April 27, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

ROBERT GILBERT, Plaintiff-Appellant, v. GUY PIERCE and JOHN BALDWIN, Defendants (Guy Pierce, Defendant-Appellee).	))))))))	Appeal from Circuit Court of Livingston County No. 15MR208 Honorable Jennifer H. Bauknecht, Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Harris and Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err in granting defendant's motion to dismiss plaintiff's *mandamus* petition.

¶ 2 Plaintiff, Robert Gilbert, an inmate at Pontiac Correctional Center (Pontiac), appeals the circuit court's dismissal of his *mandamus* petition, naming defendants, Guy Pierce, the warden at Pontiac, and John R. Baldwin, the director of the Illinois Department of Corrections (DOC), and claiming a violation of his due-process rights. Plaintiff contends he requested witnesses that were not called to testify at his disciplinary hearing. He also claims the circuit court erred by denying his request for the appointment of counsel. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On December 18, 2015, plaintiff filed a petition for *mandamus*, alleging DOC staff had failed to comply with the administrative rules applicable to disciplinary hearings, as

those rules specifically relate to interviewing witnesses and the presentation of exonerating evidence. Plaintiff alleged his due-process rights were violated.

¶ 5 Plaintiff's disciplinary violation stemmed from an incident when he was housed at Lawrence Correctional Center on January 12, 2015. Plaintiff received a ticket for (1) disobeying a direct order, (2) insolence, and (3) assaulting a correctional officer. On the day of the incident, the staff informed plaintiff he was being moved to another housing unit. Correctional Officer J. Berry reported that plaintiff asked Berry about his move. Berry asked plaintiff to "hold on for one minute" because Berry was preoccupied. Plaintiff began kicking the door. Berry ordered plaintiff to "lock up in a secure shower." Plaintiff refused after being ordered three times to prepare himself for restraints. Plaintiff responded: "f— you; you don't have the right to cuff me up." Berry attempted to restrain plaintiff and, as he did so, plaintiff pulled away violently and swung a closed right fist, striking Berry in the back of the left arm. Plaintiff swung his fist again but missed Berry. Berry "called a code 1 (staff in distress)." Correctional Officer M. Nuemiller responded and assisted with restraining plaintiff.

¶ 6 Plaintiff's version of the incident differs. Plaintiff says he disregarded Berry's order because he told Berry he wanted to get his television for the move. When Berry grabbed plaintiff, plaintiff's jacket came off his shoulder so plaintiff swung his arm in such a manner as to put his jacket back on his shoulder. According to plaintiff, this action may have been misinterpreted as a swing. He claims other inmates witnessed the exchange and would support his version of the events.

¶ 7 On January 28, 2015, the prison adjustment committee conducted a hearing. Plaintiff pleaded guilty to insolence and disobeying a direct order. Plaintiff was found guilty of all three charges. The committee ordered plaintiff demoted to C-grade status for one year, placed

in segregation for one year, transferred for disciplinary reasons, and placed on a six-month restriction for contact visits. Plaintiff filed a grievance, alleging (1) the reviewing officer did not interview him within 14 days of the incident, (2) no hearing officer was assigned, and (3) plaintiff was not informed of the charges or the results of any investigation. Based on its the review of the "available information," the Administrative Review Board (Board) was "reasonably satisfied the offender committed the offenses and recommend[ed] the grievance be denied" without a hearing.

¶ 8 In December 2015, plaintiff sought an order of *mandamus*, asking DOC officials to conduct a new disciplinary hearing consistent with the administrative regulations. Plaintiff alleged (1) the reporting officer failed to conduct an adequate investigation into the incident by failing to contact witnesses, (2) exonerating evidence was withheld, (3) a member of the prison adjustment committee was biased against plaintiff due to a prior disciplinary proceeding, and (4) the evidence was insufficient to find plaintiff guilty. Plaintiff attached to his petition supporting documents, including, but not limited to, copies of the incident reports, the committee's decision, and the Board's decision. Plaintiff requested the appointment of counsel, which the circuit court denied.

¶ 9 In March 2016, defendant Pierce, the only defendant served with summons, filed a motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-615 (West 2014)). Pierce argued plaintiff failed to state a claim for *mandamus*. He claimed plaintiff's bare and conclusory allegations were insufficient to support *mandamus* relief. Further, he claimed plaintiff had no right to present witnesses at the hearing because the adjustment committee may, in its discretion, deny a request to call a witness. He also claimed the

evidence was sufficient to support the committee's finding of guilt. Finally, he noted plaintiff had stated no allegations against him in his petition.

¶ 10 In August 2016, the circuit court conducted a hearing on the motion to dismiss. In a docket entry, the court stated as follows:

> "In his *mandamus* petition, plaintiff contends that his due-process rights were violated in connection with the disciplinary hearing. Plaintiff contends that there was inadequate investigation, that a member of the adjustment committee was bias[ed], and there was insufficient evidence to find him guilty of the infraction. In his prayer for relief, plaintiff seeks another disciplinary hearing. Plaintiff is only entitled to *mandamus* relief if he can establish a clear right to the relief requested, a clear duty on the part of the public officer to act, and clear authority of the public officer to comply with the order. Here, plaintiff has failed to show what right he had that was specifically violated. It appears, based upon all information available, that his due-process rights under *Wolff* [*v. McDonnell*, 418 U.S. 539, 558 (1974)] were provided. Further, to the extent the actions of the defendants involved discretion, *mandamus* would not lie. For these reasons, defendants' motion to dismiss is granted."

¶ 11 This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 In this appeal, plaintiff claims the circuit court erred in dismissing his petition for writ of *mandamus*. He claims he stated a viable claim in his petition, requesting that the committee conduct a new disciplinary hearing at which his witnesses could testify. We affirm.

¶ 14 A. Jurisdiction and Standard of Review

¶ 15 Plaintiff served only one of the two named defendants, so only defendant Pierce filed a motion to dismiss. Normally, the dismissal of a plaintiff's claim with regard to less than all defendants would not be appealable and we would not have jurisdiction. *Merritt v. Randall Painting Co.*, 314 Ill. App. 3d 556, 558-59 (2000). However, we find the circuit court's order dismissed plaintiff's petition in its entirety, as the claims asserted in his petition named neither defendant, and thereby the dismissal applied equally to both. Thus, we find we have jurisdiction. See *Merritt*, 314 Ill. App. 3d at 559 (claims in the complaint applied equally to served and unserved defendants, so the appellate court had jurisdiction).

¶ 16 As for our standard of review, we note defendant Pierce filed a section 2-615 motion to dismiss. A motion to dismiss under section 2-615 of the Procedure Code challenges only the legal sufficiency of the complaint. *Pickel v. Springfield Stallions, Inc.*, 398 Ill. App. 3d 1063, 1066 (2010). In ruling on a section 2-615 motion to dismiss, "the question is 'whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted.' " *Green v. Rogers*, 234 Ill. 2d 478, 491 (2009) (quoting *Vitro v. Mihelcic*, 209 Ill. 2d 76, 81 (2004)). The circuit court should not grant the motion to dismiss "unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief." *Tedrick v. Community Resource Center, Inc.*, 235 Ill. 2d 155, 161 (2009). We review a dismissal pursuant to section 2-615 *de novo*. *Thurman v. Champaign Park District*, 2011 IL App (4th) 101024, ¶ 7.

¶ 17 B. *Mandamus*

¶ 18 *Mandamus* is an extraordinary remedy used to compel public officers to perform nondiscretionary official duties. *McFatridge v. Madigan*, 2013 IL 113676, ¶ 17. In order to

obtain *mandamus* relief, a plaintiff must establish (1) "a clear right to the requested relief," (2) "a clear duty of the public officer to act," and (3) "clear authority of the public officer to comply with the order." *Madigan*, 2013 IL 113676, ¶ 17. "A writ of *mandamus* is appropriate when used to compel compliance with mandatory legal standards but not when the act in question involves the exercise of a public officer's discretion." *Madigan*, 2013 IL 113676, ¶ 17.

¶ 19 "An allegation of a due-process-rights violation *** states a cause of action in *mandamus*." *Dye v. Pierce*, 369 Ill. App. 3d 683, 687 (2006). The United States Supreme Court has held that under the principles of due process, prisoners are entitled to the following process in disciplinary proceedings: (1) notice of the disciplinary charges at least 24 hours prior to the hearing; (2) when consistent with institutional safety and correctional goals, an opportunity to call witnesses and present documentary evidence in their defense; and (3) a written statement by the fact finder of the evidence relied on in finding the prisoner guilty of committing the offense and the reasons for the disciplinary action. *Wolff*, 418 U.S. at 564-66. The Court held a loss of good-time credit implicated a protected liberty interest, and the requirements of due process must be observed. *Wolff*, 418 U.S. at 558.

¶ 20 With regard to plaintiff's claim of error related to the committee's failure to consider witness statements, we adopt the Fifth District's conclusion, where the court stated:

> "Department rules specify that inmates may request that a witness be interviewed, by making a request in writing on the space at the bottom of the disciplinary report before the disciplinary hearing. 20 Ill. Adm. Code § 504.80(f)(2), amended at 27 Ill. Reg. 6229, 6230, eff. May 1, 2003. In general, '[p]rison officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal

> or undermine authority' or where their testimony would be irrelevant or unnecessary. *Wolff*, 418 U.S. at 566. 'Since it is within the committee's discretion to deny an inmate's witness request, such a decision may not be challenged in a *mandamus* petition.' [*Ford v. Walker*, 377 Ill. App. 3d 1120, 1125 (2007)]." *Taylor v. Frey*, 406 Ill. App. 3d 1112, 1118 (2011).

¶ 21 Because plaintiff was afforded all process he was due pursuant to *Wolff*, and because the committee's decision to deny an inmate's witness request was within its discretion, plaintiff cannot state a claim for *mandamus* on this record. Plaintiff failed to sufficiently allege facts in his petition that would support *mandamus* relief. Further, we note plaintiff failed to allege any claim against either defendant and, in fact, did not mention either one in his petition at all.

¶ 22 C. Appointment of Counsel

¶ 23 Plaintiff also claims the circuit court erred in refusing to appoint counsel to represent him in his *mandamus* proceedings. This court has previously addressed and rejected a similar claim by stating:

> "As previously stated, *mandamu*s is a civil remedy and as such, '[a] court has no duty to appoint counsel in a civil action.' [Citation.] Consequently, it is well established that an inmate does not have a constitutional right to the appointment of counsel in *mandamus* cases. [Citation.] Thus, we reject [the plaintiff's] claim that the trial court abused its discretion by not appointing counsel to represent him." *Dupree v. Hardy*, 2011 IL App (4th) 100351, ¶ 54 (quoting *Brewer v. Peters*, 262 Ill. App. 3d 610, 613 (1994)).

We likewise reject plaintiff's claim that the trial court abused its discretion by not appointing counsel to represent him in his *mandamus* proceedings.

¶ 24 D. Motion To Publish

¶ 25 After his appeal was filed, plaintiff filed a motion to publish the decision in this appeal. We ordered the motion to be taken with the case, and we now deny plaintiff's motion.

¶ 26 III. CONCLUSION

¶ 27 For the reasons stated, we affirm the circuit court's judgment.

¶ 28 Affirmed.