

STATE OF MICHIGAN
COURT OF CLAIMS

MICHAEL D. MIER,

Plaintiffs,

v

MICHIGAN DEPARTMENT OF
CORRECTIONS,

Defendants.

OPINION AND ORDER

Case No. 23-000116-MB

Hon. Douglas B. Shapiro

OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY
DISPOSITION AS TO PLAINTIFF'S CLAIMS REGARDING A GUITAR, GUITAR
STRINGS AND THE TAKING OF PRISONER FUNDS TO PAY COURT COSTS, FEES
AND RESTITUTION, GRANTING IN PART DEFENDANT'S MOTION FOR SUMMARY
DISPOSITION AS TO PLAINTIFFS' REQUEST FOR RETURN OF A USB DRIVE,
GRANTING PLAINTIFF SUMMARY DISPOSITION PURSUANT TO MCR 2.116(I)(2) AS
TO HIS ACCESS TO A CD/DVD CONTAINING TRIAL EXHIBITS, DENYING
PLAINTIFF'S MOTION FOR POSSESSION PENDING FINAL DECISION AND DENYING
DEFENDANT'S MOTION FOR STAY

Pending before the Court is defendant's motion for summary disposition. For the reasons stated in this opinion and order, defendant's motion is GRANTED as to plaintiff's claims regarding a guitar, guitar strings and reduction in his prisoner account for payment of court-ordered costs. However, plaintiff is GRANTED relief pursuant to MCR 2.116(I)(2) as to his claim for access to a CD/DVD. In addition, plaintiff's motion for possession of a USB drive is DENIED as moot and defendant's motion for stay of any relief to plaintiff is DENIED.

I. BACKGROUND

Plaintiff, Michael Mier, is an inmate at the Earnest C. Brooks Correctional Facility in Muskegon Heights, MI. Plaintiff was convicted of multiple counts of False Report or Threat of Terrorism, MCL 750.543; Bank Robbery, MCL 750.531A; and Armed Robbery, MCL 750.529. He was sentenced on September 8, 2021, as a fourth offense habitual offender, MCL 769.12, to concurrent terms with the longest sentence being 47 years 6 months to 70 years. He has claimed an appeal from that conviction, and he is representing himself before the Court of Appeals, having dismissed at least one appointed attorney. Plaintiff also has a motion hearing for a new trial set for February 5, 2024.

Plaintiff initially filed a complaint in this action on August 16, 2023. In Count I, plaintiff requested this Court order defendant to credit plaintiff's prison account for guitar strings and a guitar that the Department of Corrections (DOC) confiscated and destroyed. In Count II, plaintiff alleged that the DOC improperly seized funds from his prisoner account for court costs and restitution when the DOC had already received satisfaction of financial obligation forms and there was no new court order providing for the removal of the funds.

Plaintiff later amended his complaint in order to add a request for treble damages in Counts I and II, and he added two new counts. Count III alleges that the DOC improperly seized a USB drive that plaintiff claims contains legal material relevant to a motion for a new trial in his underlying criminal case. Count IV alleges that the DOC improperly refused to deliver a CD or DVD to him that was received by the DOC from the Ogemaw County Clerk that contained exhibits from his criminal trial.

Plaintiff additionally filed a number of motions, for which this Court conducted a hearing on January 2, 2024. On January 8, 2024, this Court issued an order in response to plaintiff's motions. This Court granted plaintiff's motion for a temporary restraining order to prevent defendant from disposing of the USB. This Court further admitted plaintiff's supplemental pleadings and proofs. However, this Court denied plaintiff's motion to holds Counts II, III, and IV in abeyance. Finally, this Court granted plaintiff 28 days in order to file an amended complaint seeking a declaratory ruling regarding DOC prisoner access to electronically maintained trial records and exhibits.

Defendant moved for summary disposition on October 27, 2023, under MCR 2.116(C)(7), (8), and (10). Plaintiff responded in opposition, also requesting summary disposition. Defendant replied, and the motion is now before the Court.

II. ANALYSIS

MCR 2.116(C)(7) provides for summary disposition on the basis of “release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate or litigate in a different forum, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.” When determining whether a claim is barred under MCR 2.116(C)(7), this Court examines “all documentary evidence submitted by the parties, accept[s] all well-pleaded allegations as true, and construe[s] all evidence and pleadings in the light most favorable to the nonmoving party.” *Dougherty v Detroit*, 340 Mich App 339, 345; 986 NW2d 467 (2021) (quotation marks and citation omitted).

MCR 2.116(C)(8) provides for summary disposition when a party “has failed to state a claim on which relief can be granted.” A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim on the pleadings alone. *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013). See also MCR 2.116(G)(5). In analyzing the claim, courts must accept as true all factual allegations in the complaint and only grant the motion “when a claim is so clearly unenforceable that no factual development could possibly justify recovery.” *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019).

MCR 2.116(C)(10) provides for dismissal when “there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.” A party moving for summary disposition under MCR 2.116(C)(10) may satisfy its burden “by submitting affirmative evidence that negates an essential element of the nonmoving party’s claim, or by demonstrating to the court that the nonmoving party’s evidence is insufficient to establish an essential element of the nonmoving party’s claim.” *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 7; 890 NW2d 344 (2016) (cleaned up). When deciding a motion under this rule, “a trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion.” *El-Khalil*, 504 Mich at 160. “A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ.” *Id.* (quotation marks and citation omitted).

A. GUITAR AND GUITAR STRINGS

In Count I, plaintiff requests that this Court grant him treble damages as a result of defendant confiscating and destroying his guitar and guitar strings. Defendant is entitled to dismissal of this count on the basis that plaintiff has failed to exhaust administrative remedies.

MCL 600.5503(1) provides that “[a] prisoner shall not file an action concerning prison conditions until the prisoner has exhausted all available administrative remedies.” DOC Policy Directive 03.02.130 provides the process that prisoners must follow in order to exhaust their claims. First, a “grievant shall attempt to resolve the issue with the staff member involved within two business days after becoming aware of a grievable issue.” 03.02.130(Q). If the grievant cannot resolve the issue, he or she may file a Step I grievance, which must be filed within five business days after the attempt to resolve the issue. *Id.* The DOC must respond within 15 business days after receiving the grievance unless an extension is granted, or within two business days if the issue is emergent. 03.02.130(Z).

Next, “[a] grievant may file a Step II grievance if they are dissatisfied with the response received at Step I or if they did not receive a timely response.” 03.02.130(DD). The grievant must submit the appeal “within ten business days after receiving the Step I response, or, if no response was received, within ten business days after the date the response was due.” *Id.* Finally, “[a] grievant may file a Step III grievance if they are dissatisfied with the Step II response or does not receive a timely response” by filing an appeal “within ten business days after receiving the Step II response or, if no response was received, within ten business days after the date the response was due.” 03.02.130(HH).

As defendant argues, plaintiff failed to timely file a grievance regarding the guitar and strings. Plaintiff pleaded in his complaint that defendant confiscated his guitar and strings on January 24, 2023, but he only filed his grievance on February 23, 2023, well beyond the maximum seven days, including two days to resolve the issue with the staff member and five days to file the grievance afterward, provided for by policy. Plaintiff, therefore, did not timely file his grievance according to MDOC Policy Directive 03.02.130.

Defendant attached to its motion for summary disposition an affidavit from Carolyn Nelson, Departmental Analyst, in which she stated that the Step III Grievance Report and underlying grievance documentation for plaintiff's grievance were included. The documentation shows that, on February 23, 2023, plaintiff's grievance was denied for being untimely. The warden upheld the Step I rejection, and the Grievance Manager affirmed the Step II decision in his Step III Grievance Decision.

Although plaintiff argues that he attempted to resolve the issue after he learned that he was entitled to a hearing, the policy requires that plaintiff "attempt to resolve the issue with the staff member involved within two business days after becoming aware of a grievable *issue*." 03.02.130(Q) (emphasis added). It does not provide for two business days after plaintiff becomes aware of the grievance *process*. Therefore, plaintiff did not exhaust his administrative remedies, defendant's rejection of his grievance was not improper, and defendant is now entitled to dismissal of Count I.

B. FUNDS

In Count II, plaintiff requested a mandamus order and treble damages as a result of defendant removing funds from his account. Defendant requests dismissal of this Count on the basis that plaintiff failed to exhaust his administrative remedies on the issue and because plaintiff has outstanding court obligations, supporting the removal of plaintiff's funds. The Court agrees.

Michigan Admin Code R 791.6639(8)(b) provides that the DOC may remove funds in a prisoner's account "[p]ursuant to an order of a court." With its motion for summary disposition, defendant included exhibits establishing that plaintiff has outstanding balances for restitution, costs, and fines in Case 19-5274-FC in Ogemaw County, as a result of his September 9, 2021

judgment of sentence, totaling \$4,686.35, as of October 20, 2023. Defendant has additionally provided plaintiff's judgments of sentence in 20-5349-FH and 19-5274-FH, which each provide for restitution, costs, and fines.

Plaintiff argues that there are no current orders to remove funds from his account, and he provided resolved grievance paperwork and satisfaction of financial obligation documentation in order to support his argument. However, the grievance resulting in plaintiff having funds returned to him on 1/28/2022 pertained to cases 13-003780-FH and 13-3795-FH. The satisfaction of financial obligation forms pertained to files 20-5349-FH and 19-5274-FH, but were dated December 21, 2021. The accounting paperwork that defendant has provided show a balance owed, in accordance with plaintiff's judgment of sentence, as of October 20, 2023. Therefore, defendant is abiding by Michigan Admin Code R 791.6639 when it withdraws funds pursuant to plaintiff's judgment of sentence. Michigan Admin Code R 791.6639 does not require a court order specifically directing the DOC remove funds from a prisoner account. Instead, the rule unambiguously permits defendant to remove funds from plaintiff's account on the basis of the court orders requiring plaintiff to pay restitution, costs, and fines.

Further, as with Count I, plaintiff failed to exhaust his administrative remedies related to these funds. See MCL 600.5503(1) (providing that “[a] prisoner shall not file an action concerning prison conditions until the prisoner has exhausted all available administrative remedies”). Plaintiff asserts that he could not file a grievance in the matter because he had already filed a grievance. However, his previous grievance related to his 2013 cases, and was completed on January 28, 2022. The withdrawal of funds at this point is related to different cases. If, as plaintiff claims, the DOC improperly *resumed* withdrawing funds from his account in May 2023, that would establish a new issue for which plaintiff could file a grievance.

Accordingly, there is no question of material fact regarding whether defendant was permitted to withdraw funds from plaintiff's account in accordance with a court order. See MCR 2.116(C)(10). Further, plaintiff failed to exhaust administrative remedies before filing this action. See MCL 600.5503(1). Therefore, defendant is entitled to dismissal of Count II.

C. USB

In Count III, plaintiff requested that this Court order defendant to return the USB to plaintiff. Defendant requests dismissal on the basis that plaintiff failed to exhaust his administrative remedies, plaintiff did not have a right to possess the USB, and plaintiff is engaging in a collateral attack. Because plaintiff did not have the right to possess the USB, defendant is entitled to dismissal of Count III.

MCR 3.105(A) provides that a replevin action is a civil action for recovery of "goods or chattels which have been unlawfully taken or unlawfully detained" and for "damages sustained by the unlawful taking or unlawful detention." MCL 600.2920 provides, in relevant part, as follows:

(1) A civil action may be brought to recover possession of any goods or chattels which have been unlawfully taken or unlawfully detained and to recover damages sustained by the unlawful taking or unlawful detention, subject to the following conditions:

...

(c) An action may not be maintained under this section by a person who, at the time the action is commenced, does not have a right to possession of the goods or chattels taken or detained.

MDOC Policy Directive 04.07.112 provides that general population prisoners in the MDOC facilities "shall be allowed to purchase and possess only that personal property that is authorized by this policy." Section (DD) defines contraband "as any personal property that is not specifically authorized by this policy, authorized property that is in excess of allowable limits,

authorized property that has been altered, authorized property that was obtained or sent from an unauthorized source, metered envelopes that reflect tampering, and authorized property that belongs to another prisoner.” PD 04.07.112(O) provides that “[p]risoners shall be permitted to possess legal property” and includes as legal property the following:

1. Pleadings such as complaints, petitions, motions, briefs, and other documents ordinarily filed with a court, transcripts, court issued documents such as opinions, orders, notices, judgments, research notes, exhibits, affidavits, correspondence to or from courts or other forums in which a suit may be filed; correspondence to or from attorneys or persons employed by an attorney or legal clinic, innocence project, ombudsman, or similar entity and acting in a legal capacity, correspondence to or from legislative or other government persons acting in an official capacity, law books, legal periodicals, and similar written documents and items that are necessary for litigation
2. Pleadings, transcripts, court orders, and court opinions arising out of the criminal case for which the prisoner is currently serving, even if there is no pending litigation.
3. Court opinions and orders in any cases. This includes an opinion or order in a case involving another prisoner.
4. Documents and correspondence related to prisoner’s pending misconducts or grievances, including administrative appeals, and/or parole or parole violations.

Plaintiff relies on MCL 800.42 in order to argue that he is permitted to possess the USB. However, this section does not provide that plaintiff may possess a USB. Regarding legal materials, MCL 800.42(4) provides that a prisoner may possess more property than provided for in subsection (3) “if that property consists of legal materials that are not available in the institutional law library to which the prisoner has access.” MCL 800.42(7) explains that “legal materials” include:

- (i) Pleadings and other documents ordinarily filed with a court, letters, research notes, necessary exhibits, books, periodicals, and similar items that are needed for litigation which the prison is currently pursuing on his or her own behalf, or on behalf of another prisoner if that assistance has been approved by the institution head.

(ii) Pleadings, transcripts, court orders, and court opinions arising out of the offense for which the prisoner is currently incarcerated.

As defendant argues, MCL 800.42 does not permit plaintiff to possess the USB. Instead, the statute permits plaintiff to possess documents or other physical legal materials, which defendant does not deny. Plaintiff argues that under MCR 1.109(1)(a), the USB is a document that he is permitted to possess under MCL 800.42. MCR 1.109(1)(a), however, defines *court records*, rather than legal materials a person is entitled to possess in prison. The DOC Policy Directive more specifically outlines what plaintiff is permitted to possess, which does not include a USB.

Moreover, plaintiff did not obtain the USB through an authorized source, and 04.07.112 (DD) specifically defines contraband to include even “authorized property that was obtained or sent from an unauthorized source.” It is undisputed that the USB was found inside a bar of soap, and plaintiff admits that he hid the USB. It was not sent to him from an authorized source. Plaintiff has not demonstrated that the USB contains trial exhibits not otherwise accessible on paper or on the CD/DVD, and plaintiff has alternative mechanisms to access the USB files. Therefore, the Court finds that plaintiff has an adequate remedy to obtain those files through normal mechanisms.

Accordingly, defendant’s request for dismissal of Count III is GRANTED. Defendant is to maintain possession of the USB for an additional 28 days from the issuance of this order. If, during that time, plaintiff directs defendant where to send the USB, defendant shall comply so long as the recipient is not incarcerated. If plaintiff does not so direct defendant, defendant may dispose of the USB.

D. CD/DVD

In Count IV, plaintiff requested that the CD/DVD be returned to him. Defendant requests dismissal in its favor on the basis that plaintiff did not exhaust administrative remedies and that plaintiff has another pending action in Ingham County. Because plaintiff has a right to access the materials on the CD/DVD, this Court grants summary disposition in Plaintiff's favor. See MCR 2.116(I)(2).

Unlike the USB, the CD/DVD was mailed to plaintiff from the Ogemaw Circuit Court and is not contraband as the result of coming from an unauthorized source. See 04.07.112 (DD). The CD/DVD contains only exhibits from plaintiff's criminal cases that he seeks to use in his motion for a new trial and/or on appeal of his convictions. Plaintiff is unrepresented and therefore cannot have counsel review these materials outside the prison. He therefore must have access to them consistent with MCL 860.42(7) and the right to self-representation, *People v Anderson*, 398 Mich 361, 366; 247 NW2d 857 (1976); *People v Stephens*, 71 Mich App 33, 38; 246 NW2d 429 (1976) ("no meaningful distinction . . . can be drawn between the right to represent oneself at the trial level and the right to submit an appellate brief").

Although plaintiff indisputably had not exhausted administrative remedies prior to filing his action, plaintiff has provided an exhibit establishing that he has exhausted those remedies as of October 25, 2023. Exhibit 8 of plaintiff's response to defendant's motion for summary disposition shows a Step III Grievance Decision, in which the Grievance Manager upheld the rejection of plaintiff's grievance. Plaintiff attempted to resolve his issue through the available administrative remedies, and he exhausted those potential avenues. Because plaintiff requires the information on the DVD/CD in his own defense in his criminal matters, it is necessary that plaintiff

have access to it as a matter of due process. To dismiss plaintiff's claim as a result of his amending his original complaint in this case to add Count IV before he completed his administrative process, only for plaintiff to refile the case now that he has exhausted his administrative remedies, would not serve the interests of judicial economy. Further, because it is necessary to preserve plaintiff's right to represent himself in his criminal proceedings, defendant's motion for summary disposition of Count IV is DENIED and instead summary disposition granted to plaintiff.

It is therefore ORDERED that defendant shall print any exhibits from the CD/DVD that may be accurately reproduced in print form and provide them to plaintiff. Black and white exhibits shall be printed in black and white. Color exhibits shall be printed in color unless the prison lacks a color printer. The DOC may charge the costs of printing to plaintiff's prisoner account, but only at actual cost. It is further ORDERED that defendant shall permit plaintiff access to a computer in order to view those items that cannot be reproduced in hard copy prior to the hearing on his motion for new trial and a second time after that motion is heard but before his brief on appeal is due. On each occasion, defendant shall be permitted at least one hour to review the materials on the CD/DVD and be permitted to take notes during his review and retain his notes. Each one hour viewing time shall run from the time that plaintiff is actually seated at the computer with the materials from the CD/DVD ready to view. The DOC otherwise has reasonable discretion to determine when and how plaintiff may view the video/audio evidence on the CD/DVD. It is further ORDERED that the defendant shall retain the CD/DVD until such time as plaintiff's appeal has been decided after which they shall send it to any non-incarcerated person identified by plaintiff within 28 days after completion of his appeal or, to dispose of it if plaintiff fails to identify such a person within that time.

At the hearing on the motions, defendant requested that the Court stay any order that it issues granting relief to plaintiff. The motion for stay is DENIED. Plaintiff requires access to the exhibits introduced at his trial for purposes of both his motion for relief from judgment and his appeal of right both of which are now before the relevant courts. The burden to the defendant in complying with this Court's orders are modest at best and even a temporary stay would leave plaintiff without an opportunity to obtain relief as his need for access to the exhibits is immediate, and any delay is likely to render his request moot.

E. DECLARATORY RELIEF

On January 8, 2024, this Court granted plaintiff 28 days to file an amended complaint seeking a declaratory ruling regarding prisoner access to electronically maintained trial records and exhibits. This Court, now having ruled on the merits of plaintiff's case, vacates that portion of this Court's January 8, 2024 order as declaratory relief is not required. Accordingly, plaintiff's request to file an amended complaint is DENIED.

III. CONCLUSION

For the reasons stated in this opinion and order, this Court DENIES in part and GRANTS in part defendant's motion for summary disposition. The Court further ORDERS that defendant provide plaintiff access to the materials on the CD/DVD as set forth in this opinion and thereafter retain the CD/DVD until defendant's appeal of right from his conviction is decided. Plaintiff's motion for possession of the USB is DENIED. Defendant's motion for stay is DENIED.

IT IS SO ORDERED.

This is a final order and disposes of all claims in the case.

Date: January 30, 2024



Douglas B. Shapiro
Judge, Court of Claims