

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-263

FEBRUARY TERM, 2008

Byron Martin	}	APPEALED FROM:
	}	
v.	}	Windsor Superior Court
	}	
Joshua Rutherford	}	DOCKET NO. 27-1-07 Wrcv

Trial Judge: Theresa S. DiMauro

In the above-entitled cause, the Clerk will enter:

Plaintiff Byron Martin appeals pro se from the trial court's order granting summary judgment to defendant on his 42 U.S.C. § 1983 claim. He argues that the court erred in finding that he failed to exhaust his administrative remedies. We affirm.

In January 2007, plaintiff, a prison inmate, sued defendant, a correctional officer, alleging that defendant had mistreated him. Defendant moved for summary judgment, arguing that plaintiff's suit was barred under 42 U.S.C. § 1977e(a) because plaintiff had not exhausted his administrative remedies. Defendant explained that the Department of Corrections (DOC) employed a multi-step grievance process. The first step was the filing of a complaint, referred to as a grievance form #1, the response to this complaint was referred to as a grievance form #2, and if an inmate was dissatisfied with the response that he received, he could file a grievance form #3 with the DOC Commissioner. In this case, defendant argued, plaintiff failed to submit a grievance form #3. In support of this assertion, defendant submitted an affidavit from the DOC employee responsible for investigating level three grievances who averred that DOC had no record that such a grievance had been filed. Plaintiff responded that he had in fact filed this form, and he submitted copies of his grievances #1, #2, and #3 to the court. Plaintiff asserted that he sent his grievance #3 to the Commissioner but that he did not receive a response.

In April 2007, the court informed plaintiff that his response to defendant's summary-judgment motion was insufficient under V.R.C.P. 56(e), because plaintiff had not signed the document before a notary public. The court allowed plaintiff thirty days to submit an affidavit, signed under oath before a notary public or some other public officer authorized to administer oaths or affirmations, describing exactly what plaintiff did to satisfy the requirement of filing his grievance form #3 with the Commissioner. In addition, the court noted, it would be helpful if plaintiff could explain why there was writing in blue ink on top

of what appeared to be a black-and-white copy of the grievance #3 form, and why there was a references to a different court case at the top of the form.

In response to this request, plaintiff submitted an “affidavit,” ostensibly signed by a notary public. In this document, plaintiff stated that he had exhausted the prison grievance procedure by sending grievance #3 to the Commissioner. Plaintiff explained that the use of blue ink on some of the grievances were his attempt to darken writing that was too light. Plaintiff signed this document, as did someone named “Bob,” who indicated that he was a notary public whose term expired on what appeared to be April 21, 2002. Defendant challenged the validity of this document.

In a June 2007 entry order, the court granted summary judgment to defendant, finding plaintiff’s letter insufficient to demonstrate that a material question of fact existed as to whether plaintiff exhausted his administrative remedies. As the court explained, plaintiff’s letter did not meet the standards of a proper affidavit. It was written in pencil and witnessed by someone named “Bob,” who provided a legally incorrect date for the expiration of his commission as a notary public. In the document, plaintiff stated in vague terms that he sent copies of the necessary documents to the Commissioner, but he did not say when he sent the materials nor by what procedure. Given these inadequacies, as well as other deficiencies in the material submitted by plaintiff, the court concluded despite being provided with a second chance, plaintiff had not met his burden of supporting his claim with evidence that met the standards of V.R.C.P. 56(e). The court thus granted summary judgment to defendant, and this appeal followed.

On appeal, plaintiff argues that the court erred in finding his “affidavit” insufficient to defeat defendant’s motion for summary judgment. He asserts that the person who signed the document was actually a notary public and that he should not be held responsible for that individual’s illegible signature and the fact that he wrote down an improper expiration date for his commission. He also argues that the court should not have granted summary judgment based on his failure to comply with the exhaustion requirement when that requirement had nothing to do with the merits of his claim against defendant.

These arguments are unavailing. The law requires that plaintiff exhaust his administrative remedies before bringing any action with respect to prison conditions under 42 U.S.C. § 1983. 42 U.S.C. § 1997e(a). As recounted above, defendant asserted that plaintiff failed to meet the exhaustion requirement and that he provided a sworn affidavit from a DOC official supporting this assertion. Pursuant to V.R.C.P. 56(e), plaintiff was required to respond to this allegation, by affidavits or as otherwise provided in Rule 56, setting forth specific facts showing that there was a genuine issue for trial. Plaintiff failed to do so. The document he provided did not include a legible signature by a notary public, and as the trial court found, the expiration date provided by the alleged notary was incorrect. See 24 V.S.A. § 441. Plaintiff also failed to allege specific facts regarding his alleged submission of the grievance #3 to the Commissioner. While the alleged notary’s mistakes may not be plaintiff’s fault, plaintiff remains responsible for submitting a document that complied with Rule 56(e). His response to defendant’s motion was insufficient, and thus,

the factual allegation made by defendant stands. Because exhaustion of administrative remedies was required before plaintiff could file suit, summary judgment was properly granted to defendant. See V.R.C.P. 56(e) (where party opposing summary judgment fails to respond as required by rule, summary judgment, if appropriate, shall be entered against the adverse party); V.R.C.P. 56(c) (summary judgment appropriate when, taking all allegations made by the nonmoving party as true, there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law).

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice