

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
No. 12-1-20 Wncv

ALFRED BROCHU,
Plaintiff,

v.

MICHAEL P. TOUCHETTE,
Defendant.

RULING ON THE STATE'S MOTION FOR RECONSIDERATION

Petitioner Alfred Brochu is a Vermont inmate in an out-of-state facility located in Tutwiler, Mississippi operated by CoreCivic. In this case, he sought to raise three claims relating to the conditions of his confinement: (1) that corrections officers improperly seized his personal property; (2) that one officer is racially biased; and (3) that the facility does not make grievance forms reasonably available. Following a motion to dismiss, the court dismissed (March 19, 2021) the first claim for failure to exhaust CoreCivic's grievance process related specifically to property and the second claim principally for failure to allege any racial discrimination. The availability-of-grievance-forms claim was not dismissed. Mr. Brochu filed a motion to reconsider that decision, and the State filed a motion for summary judgment addressing the availability-of-grievance-form claim.

In a July 30, 2021 decision, the court addressed both motions. It granted reconsideration of the property claim, specifically rescinding so much of the March 19 decision that addressed it. It determined that the facts with regard to the availability-of-grievance-form claim were disputed and thus not amenable to summary judgment. The State now seeks reconsideration of both rulings.

With regard to the property claim, it asserts that the court now has conflated the grievance procedure with the property procedure. This argument fails to grasp the degree to which the record has become confused and may also be incomplete. The State's fundamental argument is that Mr. Brochu has failed to exhaust his property claim because he failed to pursue it under CoreCivic Policy 14-6, as the court had initially ruled. This may yet prove to be the case. However, after the court's dismissal ruling, the record became confused as to which grievance policies (Vermont's or CoreCivic's) Vermont inmates are supposed to use and to whom they are to be submitted (Vermont or CoreCivic personnel). The State's position appears to be that they should use some of both, but it has not, thus far anyway, convincingly explained exactly which, under what circumstances, and how Vermont inmates in Mississippi are reasonably to understand all that. Inmates should not have to analyze Vermont's contract with CoreCivic to understand which grievance

policies apply.

Vermont has a general grievance procedure, Directive 320.01, and a more specific property claim procedure, Directive 321.02. CoreCivic has a general grievance procedure, Policy 14-5, and a more specific property claim procedure, Policy 14-6. Vermont Directive 320.01 expressly directs Vermont inmates in Mississippi to use Mississippi procedures *for conditions of confinement issues*. However, according to the Vermont–CoreCivic contract, CoreCivic is bound to implement Vermont Directive 320.01 in Mississippi, not its own procedure. Thus, Vermont inmates in Mississippi are directed by the Vermont policy to use the CoreCivic policy which really is the Vermont policy. At least for general “grievances” about conditions of confinement issues.

CoreCivic Policy 14-5 commands: “[A]ll property issues must be addressed in accordance with property procedures in place at the facility.” However, Policy 14-5 does not apply to Vermont inmates because Directive 320.01 does, and Directive 320.01 says no such thing. Assuming in any event that Policy 14-6 properly applies to Vermont inmates in Mississippi in general, unlike Directive 321.01, Policy 14-6 expressly applies to claims of “lost,” “stolen,” or “damaged” property due to an employee’s “negligence” only. See Policy 14-6 at 17. None of that is the issue here. On its face, Policy 14-6 does not appear to apply to all claims of loss, which could encompass seizure (assuming no more specific other policy does). Thus, Mr. Brochu would appear to have an ordinary grievance subject to Directive 321.01, which in fact is the process he pursued. Mr. Brochu has repeatedly made this argument in this case, and the State has never addressed it other than to flatly assert that all property claims must be addressed under Policy 14-6 without explaining how Policy 14-6, by its terms, encompasses the intentional seizure of inmate property. Its semantic argument that a grievance related to property somehow is not really a grievance, and thus cannot fall under Directive 320.01, is not helpful.

Also, Mr. Brochu has repeatedly alleged that he filed his property claim as a Directive 320.01 grievance because Unit Manager D. Johnson expressly directed him to do precisely that. This is a waiver argument. The State has never disputed Mr. Brochu’s allegation. Additionally, it never denied his claim because he used the wrong procedure. Rather, at one level of the grievance process, the State clearly denied the claim because he had failed to provide proof of ownership—property slips or receipts—only. These circumstances may well amount to a waiver of the State’s exhaustion argument.

Mr. Brochu has a due process interest in the seized property. He claims that he has never been given a post-deprivation opportunity to prove ownership. The State insists that he has because he was able to provide receipts or property slips for some of the property. But his claim is that he has never been given an opportunity to prove that CoreCivic permitted him to keep the seized property and failed to give him receipts for it. The State has never responded to that argument, other than to assert that he has not provided those receipts, which is nonresponsive.

The State also has repeatedly argued that Mr. Brochu’s property claim is not cognizable under Rule 75. It may not be, but one need look no further than 42 U.S.C. § 1983 when claiming a violation of due process. He has no need of Rule 75 for this claim. To the extent that the court may have implied otherwise previously, that portion of the dismissal decision already was rescinded and will not be reinstated.

As for the availability-of-grievance-forms claim, the court already has ruled that Mr. Brochu has a statutory right to the reasonable availability of those forms in the Mississippi facility. Mandamus should be fully sufficient to enforce that right. The court has never ruled that this issue somehow presents a conditions-of-confinement question beyond its reach.

The court sees no need to modify its July 30, 2021 decision.

Order

For the foregoing reasons, the State's motion to reconsider is denied.

SO ORDERED this 4th day of October, 2021.


Robert A. Mello
Superior Judge