

July 5, 2007

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-40192
Summary Calendar

MILTON CARBE,

Plaintiff-Appellant,

versus

HARVEY LAPPIN, Director of Federal Bureau of Prisons;
TYRONE SILVER, Assistant Regional Director, Federal Bureau
of Prisons; TC OUTLAW, Warden, USP Beaumont, TX; YOLANDA
LAFLORE, Factory Manager Unicor; UNIDENTIFIED WILSON,
SIS, USP Beaumont, TX; UNIDENTIFIED RIOS, Assistant Warden,
USP Beaumont, TX; UNIDENTIFIED MARTIN, Assistant Warden,
USP Beaumont, TX; UNKNOWN (1), Regional Director, South
Central Region of Federal Bureau of Prisons; UNKNOWN (2),
Executive Assistant to Warden TC Outlaw; UNKNOWN (3),
SOI, Unicor; UNKNOWN (4), Captain USP Beaumont, TX;
UNKNOWN (5), All Lieutenants USP Beaumont, TX,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas

Before KING, HIGGINBOTHAM, and GARZA, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Milton Carbe appeals the district court's dismissal without prejudice of his Bivens¹ complaint for failure to exhaust administrative remedies. He alleged that he was subjected to unconstitutional conditions of confinement when the defendants

¹ Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

ignored a mandatory evacuation order and left him and other inmates at the Beaumont prison during Hurricane Rita without, inter alia, adequate food, water, and ventilation. The court dismissed the complaint sua sponte prior to service on the defendants for failure to exhaust remedies. First there is a matter of jurisdiction and then we turn to the dismissal for want of exhaustion of remedies.

I

Carbe argues that because he claimed monetary damages and requested a jury trial the magistrate judge lacked jurisdiction. According to the magistrate judge's report and recommendation, the matter was referred to him by the district court for review, report, and recommendation in accordance with 28 U.S.C. § 636(b)(1)(B). The Supreme Court has interpreted § 636(b)(1)(B) "to authorize the nonconsensual reference of all prisoner petitions to a magistrate [judge]."² The magistrate judge did not enter judgment pursuant to § 636(c), but only made "findings of fact" and "recommendations" pursuant to § 636(b)(1)(B) and did not exceed his statutory authority.

II

Carbe argues that the district court erred in dismissing his complaint for failure to exhaust before a responsive pleading was

² McCarthy v. Bronson, 500 U.S. 136, 139 (1991)(emphasis in original).

filed. This court reviews a district court's dismissal of a prisoner's complaint for failure to exhaust de novo.³

The proper characterization under the Federal Rules of Civil Procedure of the Prison Litigation Reform Act's exhaustion requirement has been uncertain.⁴ The Supreme Court recently provided an answer in Jones v. Bock, holding that "failure to exhaust is an affirmative defense under the PLRA, and that inmates are not required to specially plead or demonstrate exhaustion in their complaints."⁵ We had held that a district court may dismiss a complaint, sua sponte, for failure to exhaust.⁶

In PLRA cases, district courts in this circuit often hold "Spears hearings" to determine whether a case should be dismissed for various reasons before defendants are served.⁷ While Jones, in insisting upon a return to the regular pleading order in the handling of the affirmative defense of failure to exhaust, does not otherwise cast doubt upon Spears hearings, a practice extensively used in this circuit for over twenty years, it does make clear that a court cannot in a Spears hearing before a responsive pleading is filed resolve the question of exhaustion. Any failure to exhaust

³ Powe v. Ennis, 177 F.3d 393, 394 (5th Cir. 1999).

⁴ See Johnson v. Johnson, 385 F.3d 503, 516 n.7 (5th Cir. 2004) (noting the debate but not deciding the question).

⁵ 127 S. Ct. 910, 921 (2007).

⁶ See Wendell v. Asher, 162 F.3d 887, 889-90 (5th Cir. 1998) (indicating that the district court dismissed for failure to exhaust without a motion from the defendants); Underwood v. Wilson, 151 F.3d 292, 292-93 (5th Cir. 1998) (same).

⁷ See Spears v. McCotter, 766 F.2d 179 (5th Cir. 1985).

must be asserted by the defendant.⁸ Under Jones, however, a court can dismiss a case prior to service on defendants for failure to state a claim, predicated on failure to exhaust, if the complaint itself makes clear that the prisoner failed to exhaust.⁹ Here, however, Carbe's complaint is silent as to exhaustion.

It bears emphasis that a district court cannot by local rule sidestep Jones by requiring prisoners to affirmatively plead exhaustion. It is, at least now it is, an affirmative defense under the Federal Rules, a defense belonging to the state that is waived if not asserted. To the extent decisions of this court have suggested otherwise, they did not survive Jones.

We must then VACATE the judgment and REMAND.

⁸ See Aquilar-Avellaveda v. Terrell, 478 F.3d 1223, 1225 (10th Cir. Mar. 5, 2007) ("Because [the prisoner's] complaint was silent as to whether he had exhausted his administrative remedies - which is acceptable under Jones - the district court erred in requesting [the prisoner] to supplement the record on that issue.").

⁹ See Jones, 127 S. Ct. at 92-21 (holding that courts can dismiss for failure to state a claim when the existence of an affirmative defense, like a statute of limitations bar, is apparent from the face of the complaint).