

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-4692

(Summary Calendar)

HEARNE EDWARD SMITH, ET AL.,

Plaintiffs,

GARY ALLEN TESTIN,

Plaintiff-Appellant,

versus

O.J. STEWART, ETC.,
ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(1:91 CV 791)

(October 18, 1993)

Before DAVIS, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Gary Allen Testin, proceeding pro se and in forma pauperis, appeals summary judgment of his civil rights suit against certain Liberty County jail officials. Finding no error, we affirm.

Testin, formerly an inmate at the Liberty County Jail, filed suit pursuant to 42 U.S.C. § 1983 (1988), alleging that the

* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

defendants denied him his constitutional right of access to the courts by (1) intentionally inspecting his legal mail outside of his presence; and (2) failing to provide him loose postage stamps. After the magistrate judge conducted a *Spears* evidentiary hearing,¹ the defendants moved to dismiss Testin's complaint for failure to state a claim upon which relief may be granted. See Fed. R. Civ. P. 12(b)(6). Treating the motion to dismiss as a motion for summary judgment,² the magistrate judge recommended that summary judgment be granted on Testin's claims. The district court, adopting the magistrate judge's report and recommendation, subsequently dismissed Testin's claims with prejudice. Testin filed a timely notice of appeal.

We review the district court's grant of a summary judgment motion de novo. *Davis v. Illinois Cent. R.R.*, 921 F.2d 616, 617-18 (5th Cir. 1991). Summary judgment is appropriate if the record discloses "that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). While we must "review the facts drawing all inferences most favorable to the party opposing the motion," *Reid v. State Farm Mut. Auto. Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986), that party may not rest upon mere allegations or denials in its pleadings, but must set forth specific facts showing the

¹ See *Spears v. McCotter*, 766 F.2d 179, 181-82 (5th Cir. 1985).

² See Fed. R. Civ. P. 12(b) ("If, on a motion . . . to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56"); see also *Jackson v. Procunier*, 789 F.2d 307, 310 (5th Cir. 1986).

existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57, 106 S. Ct. 2505, 2514, 91 L. Ed. 2d 202 (1986).

Testin first contends that the district court erred in granting summary judgment on his claim that the defendants routinely inspected his legal mail outside of his presence. Section 1983 provides a cause of action for the deprivation of a constitutional right by any person acting under color of state law. *Gomez v. Toledo*, 446 U.S. 635, 638-39, 100 S. Ct. 1920, 1922-23, 64 L. Ed. 2d 572 (1980). Prisoners have a constitutional right of adequate, effective, and meaningful access to the courts. *Bounds v. Smith*, 430 U.S. 817, 821-22, 97 S. Ct. 1491, 1494-95, 52 L. Ed. 2d 72 (1977). A prisoner may establish a violation of this right by showing that he was not provided with the means "to file a legally sufficient claim." *Mann v. Smith*, 796 F.2d 79, 84 (5th Cir. 1986) (quoting *Morrow v. Harwell*, 768 F.2d 619, 623 (5th Cir. 1985)). To state a constitutional violation, a prisoner must show that his access to the courts has been, in fact, prejudiced. See *Henthorn v. Swinson*, 955 F.2d 351, 354 (5th Cir.) ("A denial-of-access-to-the-courts claim is not valid if a litigant's position is not prejudiced by the alleged violation."), *cert. denied*, ___ U.S. ___, 112 S. Ct. 2974, 119 L. Ed. 2d 593 (1992); *Richardson v. McDonnell*, 841 F.2d 120, 122 (5th Cir. 1988) (holding that prisoner is not denied his right of meaningful access to the courts where delay in processing mail does not impede or prejudice access). Testin has neither asserted nor shown that his ability to prepare

or transmit a necessary legal document has been affected by the inspections of his legal mail. We therefore hold that the district court properly granted summary judgment on this claim. *See Brewer v. Wilkinson*, 1993 WL 368236, at *9 (5th Cir. (Tex.)) (holding that the opening of legal mail outside a prisoner's presence does not itself amount to a violation of a constitutional right).

Testin also contends that the district court erred in granting summary judgment on his claim that the defendants denied him access to the courts by failing to provide loose postage stamps. Although the defendants did not provide Testin with loose postage stamps, they did provide Testin with pre-stamped envelopes. Testin himself concedes that he could have mailed his petition for habeas corpus relief by using two separate, pre-stamped envelopes. Thus, Testin cannot show how he has been denied his right to meaningful access to the courts by the defendants' failure to provide loose postage stamps. *See Henthorn*, 955 F.2d at 354.

For the foregoing reasons, the district court's judgment is AFFIRMED.