UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1399
Summary Calendar

JOSEPH C. SUN,

Plaintiff-Appellant,

VERSUS

UNITED STATES OF AMERICA, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CV-1914-T)

(April 5, 1994)

Before KING, DUHÉ and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Joseph C. Sun, a federal prisoner, appeals, *pro se*, the dismissal with prejudice of his civil rights action, filed pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2674, and ***Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics***, 403 U.S. 388 (1971). We **AFFIRM in part** and **VACATE and REMAND in part**.

I.

Sun filed this action in September 1992, asserting some 62 claims based on alleged civil rights violations, and seeking

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[1] 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 Pursuant to that rule, the court has determined that this opinion should not be published.

monetary and injunctive relief. Sun had previously raised these claims in a habeas petition under 28 U.S.C. § 2241, dismissed in August 1992. His appeal from that judgment was dismissed on Sun's motion in October 1992. The instant case was filed in September 1992, less than one month after the dismissal of Sun's petition, and before this court dismissed his appeal.

Named as defendants were the United States, the Federal Bureau of Prisons (BOP), the U.S. Parole Commission, and 30 BOP and Parole Commission employees. They moved to dismiss, or in the alternative for summary judgment, based on failure to exhaust administrative remedies, collateral estoppel, and failure to state a claim. They also contended that the individual defendants were entitled to qualified immunity.

The district court, after considering matters outside the pleadings, including the attachments to the motion and to Sun's response, dismissed Sun's complaint with prejudice, based on collateral estoppel.[2]

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[2] In dismissing Sun's complaint, the district court noted that Sun has "consistently, and apparently incessantly, fil[ed] both grievances with the Bureau of Prisons[,] and federal lawsuits". It also noted that Sun

> has instituted over thirty lawsuits in Georgia, one in Wisconsin, one in Indiana, and two in Texas, including the present lawsuit. The Superior Court of Gwinnett County, Georgia, enjoined Sun from filing further lawsuits in that court because it determined that [Sun] was consistently filing "repetitive, frivolous, useless, groundless, harassing and character assassination lawsuits."

As an attachment to his response to defendants' motion, Sun submitted a footnote to the language quoted above, in which the Gwinnett County Superior Court stated that Sun

II.

Sun contends that the district court erred in granting defendants' motion to dismiss, because it considered matters outside the pleadings, and erroneously applied collateral estoppel.

A.

Sun asserts that the district court's consideration of documents outside the pleadings resulted in a summary judgment, rather than Rule 12(b)(6) dismissal; and that he did not have an opportunity to respond to the documents attached to defendants' motion.

1.

Of course, if the district court considers matters outside the pleadings when ruling on a Rule 12(b)(6) motion, it must treat the motion as one for summary judgment, and dispose of it under Rule 56. Fed. R. Civ. P. 12(b), 56; *e.g.*, ***Washington v. Allstate Ins. Co.***, 901 F.2d 1281, 1284 (5th Cir. 1990). As Sun points out, the district court did consider such documents (including the judgment dismissing Sun's habeas action) to conclude that his claims were barred by collateral estoppel. Accordingly, we review the decision as a summary judgment. ***Washington***, 901 F.2d at 1284.

> has been and seemingly continues to be to the federal and state courts of Georgia what small-pox were to the American Indians; what the boll weevil was to King Cotton in the South; and in general what war has done to all mankind - destructive and of no discernible benefit.
>
> The attached paperwork doesn't even begin to describe the voracious appetite of the litigant to litigate, re-litigate, re-re-litigate, ad infinitum.

2.

Reviewing the decision as a summary judgment is proper, because Sun had adequate notice that the court might treat the motion as one for summary judgment. *See* ***id.***; Fed. R. Civ. P. 56(c). Rule 56 requires the district court to give parties ten days notice in advance of such a decision, so that they may submit additional summary judgment evidence. Sun had the requisite notice no later than March 23, 1993, when he filed his response (with attachments) to defendants' motion to dismiss *or for summary judgment*. *See* ***Washington***, 901 F.2d at 1284 (party has notice at least from date it submits matters outside pleadings). The district court granted summary judgment on April 9, 1993, more than ten days after Sun responded.

B.

We review a summary judgment *de novo*, examining the evidence in the light most favorable to the non-movant. *E.g.*, ***Abbott v. Equity Group, Inc.***, 2 F.3d 613, 618 (5th Cir. 1993), *cert. denied*, 62 U.S.L.W. 3503 (U.S. Mar. 7, 1994) (No. 93-1136). It is proper if the movant establishes that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. ***Id.***; Fed. R. Civ. P. 56(c). To defeat summary judgment, the non-movant must go beyond the pleadings and point to specific facts demonstrating that there is a material fact issue for trial. Fed. R. Civ. P. 56(e).

The district court based judgment on collateral estoppel, because it found the claims in this case identical to those in Sun's earlier habeas petition.

Collateral estoppel bars a claim if it is identical to a claim in a prior suit, its determination was a critical, necessary part of the prior judgment, and application of the doctrine is neither unfair nor inappropriate due to special circumstances. ***Texas Pig Stands v. Hard Rock Cafe Int'l, Inc.***, 951 F.2d 684, 691 (5th Cir. 1992). Complete identity of parties to the two suits is not required. ***Id.*** Collateral estoppel will not apply, however, if the party did not have a "full and fair" opportunity to litigate the issue in the prior suit. ***Allen v. McCurry***, 449 U.S. 90, 95 (1980).

Sun contends that collateral estoppel does not bar his claims, because they are not identical to those raised in his habeas petition, and because most of the claims in that petition were dismissed without prejudice for failure to exhaust administrative remedies. In Sun's habeas action, the district court identified seven issues: five were dismissed without prejudice for failure to exhaust administrative remedies; two were dismissed on the merits with prejudice.

1.

The two claims dismissed on the merits, with prejudice, in the habeas proceeding involved challenges to ten disciplinary proceedings, and the resulting delay in Sun's parole date. In the instant case, Sun claims a variety of civil rights violations,

including the same claims with regard to his parole date and the disciplinary proceedings.

As stated, these claims were decided on the merits in the habeas proceeding, and dismissed with prejudice. In the instant case, the district court did not err in granting summary judgment, based on collateral estoppel, as to these claims. ***Texas Pig Stands***, 951 F.2d at 691.

2.

Sun's other constitutional claims -- also previously raised in his habeas petition -- involve denial of access to the courts, deprivation of needed medical treatment, retaliation for filing administrative and judicial complaints, defendants' failure to protect him from other inmates, and cruel and unusual punishment. As stated, in the habeas proceeding, these claims were dismissed, without prejudice, for failure to exhaust administrative remedies. Accordingly, they were not fully and fairly litigated in the habeas proceeding, *see* ***Allen***, 449 U.S. at 95; therefore, application of collateral estoppel was improper.

Of course, with regard to these claims, we may affirm the judgment on alternative grounds. ***Hanchey v. Energas Co.***, 925 F.2d 96, 97 (5th Cir. 1990). One such ground is failure to exhaust administrative remedies. Failure to exhaust is a jurisdictional bar to FTCA claims. *E.g.,* ***Shah v. Quinlin***, 901 F.2d 1241, 1244 (5th Cir. 1990). And, exhaustion is required in ***Bivens*** actions seeking only injunctive relief. ***Rourke v. Thompson***, 11 F.3d 47, 50 (5th Cir. 1993).

As noted, Sun also seeks monetary relief. The Supreme Court has held that, as to ***Bivens*** actions seeking only monetary relief, dismissal for failure to exhaust is inappropriate. ***McCarthy v. Madigan***, __ U.S. __, __, 112 S. Ct. 1081, 1084, 1086-91 (1992). We have not decided whether exhaustion is required when a prisoner seeks both injunctive and monetary relief in a ***Bivens*** action, *see* ***Rourke***, 11 F.3d at 50 & n.9; however, we need not reach that issue.

Because the district court dismissed Sun's claims based on collateral estoppel, the record has not been fully developed with regard to them, including whether they are more properly characterized as ***Bivens*** claims or as FTCA claims. *See* ***McCarthy***, __ U.S. at __, 112 S. Ct. at 1091-92 (discussing characterization of claims as ***Bivens*** or FTCA claims). Moreover, Sun's requests for injunctive and monetary relief are inextricably intertwined.

Under these circumstances, considerations of judicial economy counsel against our addressing his claims for monetary relief, if they fall under ***Bivens***, but dismissing those for injunctive relief because he has not exhausted his administrative remedies. *See* ***Rourke***, 11 F.3d at 50 (noting concerns of judicial efficiency and administrative authority that "tip the scales in favor of requiring exhaustion" in claims for injunctive relief). They should be decided in a single proceeding, after the record has been adequately developed.

Accordingly, we vacate the judgment as to Sun's claims concerning denial of access to the courts, deprivation of medical treatment, retaliation, failure to protect, and cruel and unusual

punishment. We remand those claims to the district court, with it to stay its hand pending Sun's either withdrawing his request for injunctive relief, or exhausting his administrative remedies as to his requests for such relief.[3] We note that Sun may also be required to exhaust his administrative remedies, regardless of what form of relief he requests, with respect to those claims properly characterized as FTCA claims.

III.

For the foregoing reasons, we **AFFIRM** the judgment as to Sun's claims involving disciplinary proceedings and his parole date; as to the remainder of his claims, we **VACATE** the judgment and **REMAND** for further proceedings consistent with this opinion.

AFFIRMED in part and VACATED and REMANDED in part

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[3] Because we vacate and remand the remainder of Sun's claims, we need not reach whether defendants would be entitled to qualified immunity with regard to them. Defendants contend that we could affirm the judgment on that ground. They base this primarily on their claim that Sun has not satisfied the heightened pleading standard required by ***Elliott v. Perez***, 751 F.2d 1472, 1482 (5th Cir. 1985). That standard was abrogated, with regard to claims against municipalities, by the recent decision in ***Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit***, __ U.S. __, 113 S. Ct. 1160 (1993). This court has not addressed squarely whether ***Leatherman*** applies also to claims against individuals; we see no reason to decide the issue here. *See* ***Richardson v. Oldham***, 12 F.3d 1373, 1380 (5th Cir. 1994) (declining to decide whether ***Leatherman*** applies to claims against individuals). Because the district court did not develop the issue of qualified immunity, we decline to reach it.