IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1405
(Summary Calendar)

JOHN S. SEYMOUR,

Plaintiff-Appellant,

versus

MR. HAAS, individually and in
his official capacity as Director
of Hospital Administration
Fort Worth, FCI, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(4:92-CV-630-Y)

(February 11, 1994)

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Plaintiff-Appellant John S. Seymour, a prisoner in the Federal Correctional Institution (FCI), Fort Worth, Texas, appeals the

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*Local Rule 47.5 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

dismissal of his § 1983 civil rights suit grounded in deliberate indifference to serious medical needs. On appeal he insists that the district court's dismissal of his claim was tantamount to the grant of a summary judgment for the defendants because the court considered matters other than those contained within the four corners of Seymour's complaint. Yet the court failed to give Seymour the 10 days notice required under Federal Rule of Civil Procedure 56(c). Agreeing with Seymour that the dismissal was the equivalent of summary judgment, that the 10 days notice under Fed. R. Civ. P. 56(c) was required but not given, and that the error committed in failing to give such notice was not harmless, we vacate the district court's order of dismissal and remand for further proceedings consistent with this opinion.

I

FACTS AND PROCEEDINGS

Seymour brought this Bivens[1] action against 17 FCI employees (the defendants), alleging that they were deliberately indifferent to his serious medical needs. On December 30, 1992, the district court entered an erroneous order, dismissing Seymour's claims for the defendants' failure timely to answer the complaint. On February 26, 1993, this erroneous order was vacated, and the district court ordered Seymour and the defendants to arrange a status conference and to file a joint status report. They were given 30 days from the date of the order to accomplish these tasks.

[1] Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

Earlier, though, on January 4, 1993, the defendants had filed a motion to dismiss under Fed. R. Civ. P. 12(b)(1), 12(b)(2), 12(b)(5), and 12(b)(6), to which motion were attached a memorandum in support of the motion and declarations under penalty of perjury from the defendants and others.

On March 25, 1993, following issuance of the order that vacated the erroneous dismissal and required a status conference, the defendants filed a supplement to the January 4, 1993, motion to dismiss, seeking a stay of the status conference. In this motion, the defendants re-urged the court to grant their motion to dismiss.

On March 31, 1993, the district court granted the defendants' motion to dismiss because Seymour had failed to respond to the motion. The court specifically stated that "[a] review of Seymour's medical history and affidavits of Seymour's physicians at FCI clearly demonstrate that his claims do not rise to the level of a constitutional issue. On the contrary, the evidence reflects that Seymour has been accorded an abundance of medical care while at FCI." Final judgment was entered on March 31, 1993, and Seymour filed a notice of appeal on April 23, 1993.[2] On appeal, Seymour contends that the district court converted the defendants' motion to dismiss into a motion for summary judgment, and granted that motion without giving him 10 days notice as required by Fed. R.

[2] On April 12, 1993, Seymour filed a motion for reconsideration with the district court; however, the motion was ordered "unfiled" by the district court on April 14, 1993, for noncompliance with the rules. As Seymour filed a timely notice of appeal anyway, this returned document does not deprive us of appellate jurisdiction.

Civ. P. 56(c).

II

ANALYSIS

Dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim is appropriate when, accepting all well-pleaded facts as true and viewing them in the light most favorable to the plaintiff, the plaintiff can prove no set of facts that would entitle him to relief. McCartney v. First City Bank, 970 F.2d 45, 47 (5th Cir. 1992). The district court may not look beyond the pleadings to rule on a motion to dismiss. Id. If the district court considers matters beyond the scope of the pleadings, the motion is treated as a motion for summary judgment and appropriate notice must be given under Fed. R. Civ. P. 56(c). See Fernandez-Montes v. Allied Pilots Ass'n, 987 F.2d 278, 283 n.7 (5th Cir. 1993).

The language used by the district court in the order of dismissal undeniably referred to evidence and affidavits outside the pleadings. Therefore, the notice requirements of Fed. R. Civ. P. 56(c) apply. Although the defendants do not expressly concede the point, they do by implication, arguing that the error in failing to prove the 10 days notice to Seymour was harmless. In Powell v. United States, 849 F.2d 1576, 1582 (5th Cir. 1988), we held that "error in notice is harmless if the nonmoving party admits that he has no additional evidence anyway or if . . . the appellate court evaluates all of the nonmoving party's additional evidence and finds no genuine issue of material fact." Seymour has not admitted that he has nothing else to present. On the contrary,

attached to Seymour's reply brief is the report of Dr. Francisco B. Sauceda and a 12-page supplement containing specific factual allegations related to his medical care. As part of this supplement, Seymour states that he also intends to "present a factual day-by-day account of his care."

The additional evidence that Seymour intends to present shows that there are genuine issues of material fact whether prison officials were or were not deliberately indifferent to his serious medical needs. Allegations of wanton acts or omissions sufficiently harmful to evidence deliberate indifference to a prisoner's serious medical needs are necessary to state a constitutional claim. Wilson v. Seiter, ____ U.S. ____, 111 S.Ct. 2321, 2323-27, 115 L.Ed.2d 271 (1991); Estelle v. Gamble, 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). Acts of negligence, neglect, or medical malpractice are not sufficient. Fielder v. Bosshard, 590 F.2d 105, 107 (5th Cir. 1979); see Gamble, 429 U.S. at 105-06.

In his supplement, Seymour alleges that prison officials ignored his complaints that he was being denied an orthopedic foot brace and was forced to work beyond his physical abilities. Seymour specified the dates on which he was denied medical care and job reassignment despite complaints of acute pain. Seymour averred that on December 3, 1992, "Dr. Barry threatened to take [him] off all medication and watch to see if there were side effects, if [he] did not stop complaining about the side effects." If this evidence were to be presented in summary judgment form, there would be a

genuine issue of material fact regarding deliberate indifference to his medical needs. Consequently, the error committed in granting of summary judgment without the 10 days notice as required by Rule 56(c) was not harmless. The order of dismissal is therefore vacated and the case remanded for further consistent proceedings.[3] VACATED and REMANDED.

[3] Given this result, it is not necessary to address Seymour's contention on appeal that the clerk of court wrongly refused to file some of his pleadings.