

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 93-1960
Summary Calendar
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SHERMAN BAILEY,

Plaintiff-Appellant,

versus

DALLAS COUNTY JAIL SYSTEMS
SHERIFF'S DEPT. AND ITS
ADMINISTRATION,

Defendant-Appellee.

S)))))))))Q

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

(3:92-CV-407-P)

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(March 31, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.*

PER CURIAM:

Proceeding *pro se* and *in forma pauperis*, plaintiff-appellant Sherman Bailey (Bailey), a Texas state prisoner, filed this civil rights action against the "Dallas County Jail Systems Sheriff's Department and its Administration" (Dallas County Jail). Although

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Dallas County Jail was the only defendant listed in the caption of the complaint, Jim Bowles, Dallas County Sheriff, was named as a defendant in the body of the complaint. Bailey alleged that while he was a pretrial detainee, and as a result of the acts or omissions of the defendant(s), he was sexually assaulted by another inmate resulting in his contraction of human immunodeficiency virus (HIV).

The magistrate judge propounded interrogatories to Bailey. Those interrogatories referred to Bowles as a defendant. The record is silent as to whether Bailey responded to the interrogatories. Dallas County Jail filed a motion to dismiss the complaint, arguing only that Bailey failed to state a claim *because* Dallas County Jail was not an entity separately amenable to suit (no other reason was given); in the alternative, it argued that service of process was insufficient.

Bailey filed a Motion for Leave to File an Amended Complaint. He requested leave to amend "to clearly define defendant(s) . . ." because he did not "list the appropriate defendants for the caption . . ." He did not, however, submit an amended complaint.

In her report and recommendation, the magistrate judge concluded that Dallas County Jail was not an entity amenable to suit apart from Dallas County. No other defect in the complaint was noted. She recommended denying Bailey's motion for leave to amend because "what appears to be his amendment does not cure the defects noted . . ." No explanation of this conclusion was given. She recommended that the case be dismissed without prejudice.

Bailey filed objections.

The district court adopted the magistrate judge's recommendation, granted Dallas County Jail's motion to dismiss, and denied Bailey's motion for leave to amend. The dismissal does not reflect that it is without prejudice. *Cf.* Fed. R. Civ. P. 41(b) (dismissal on merits unless order "otherwise specifies").

Bailey argues that the district court erred in denying his motion for leave to amend his complaint and dismissing the suit.

"*Pro se* prisoner complaints must be read in a liberal fashion and should not be dismissed unless it appears beyond all doubt that the prisoner could prove no set of facts under which he would be entitled to relief." *Jackson v. Cain*, 864 F.2d 1235, 1241 (5th Cir. 1989) (quotation and citations omitted). This Court reviews a dismissal for failure to state a claim under Fed. R. Civ. P. 12(b)(6) *de novo*. *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993).

The denial of leave to amend a complaint is reviewed for abuse of discretion. *Ashe v. Corley*, 992 F.2d 540, 542 (5th Cir. 1993). Under the Federal Rules of Civil Procedure:

"A party may amend the party's pleading once as a matter of course at any time before a response pleading is served . . . Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a).

A responsive pleading is "a complaint, an answer, a reply to a counter-claim, an answer to a cross-claim, a third-party complaint, a third-party answer, and, pursuant to court order, a reply to an answer or third-party answer." *Albany Ins. Co. v. Almacenadora*

Somex, S.A., 5 F.3d 907, 910 (5th Cir. 1993) (internal quotations omitted). Dallas County Jail did not file a responsive pleading. A motion to dismiss is not considered a responsive pleading. *Id.* at 910-11. Thus, Bailey's motion to amend was "as a matter of course" rather than "by leave of the court."

The magistrate judge recommended denying Bailey's motion for leave to amend his complaint because his proposed amendment would not cure the defects. A district court may deny leave to amend if the amendment would be futile. *Avatar Exploration, Inc. v. Chevron, U.S.A., Inc.*, 933 F.2d 314, 321 (5th Cir. 1991). An amendment to Bailey's complaint to add the proper defendant(s), however, would not be futile as no other defect in the complaint was noted or asserted. Bailey's complaint appears to state a cognizable claim under 42 U.S.C. § 1983: that the state-actor defendant(s) failed to protect him from an assault by another inmate. See *Johnston v. Lucas*, 786 F.2d 1254, 1259 (5th Cir. 1986). Even had Bailey not moved to amend, "[a] *pro se* plaintiff . . . should be permitted to amend his pleadings [and name the proper party] when it is clear from his complaint that there is a potential ground for relief." *Gallegos v. La. Code of Criminal Procedures art. 658*, 858 F.2d 1091, 1092 (5th Cir. 1988).

The district court correctly held that Dallas County Jail is not a legal entity amenable to suit. See *Wright v. El Paso County Jail*, 642 F.2d 134, 136 n.3 (5th Cir. 1981). In *Wright*, this Court noted that "it may be appropriate on remand . . . to allow the plaintiff to amend his complaint to change the defendant El Paso

County Jail to El Paso County and to name the 'responsible parties.'" *Id.* Bailey's brief indicates his intent to sue Dallas County.

The district court, though it correctly held that Dallas County Jail is not a legal entity amenable to suit, erred in failing to allow Bailey to amend his complaint to name a legally responsible party, either an individual or legal entity, amenable to suit. Accordingly, the district court's judgment is vacated and the cause is remanded for further proceedings consistent herewith.

VACATED and REMANDED.