UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-11162
Summary Calendar

LUCIAN LEE SPANN, JR.,

Plaintiff-Appellant,

versus

L.W. WOODS, Warden of McConnel Unit (formerly Warden of Price Daniel Unit), in his individual capacity, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas
(5:94 CV 141 C)

(August 16, 1995)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.

GARWOOD, Circuit Judge:[*]

Plaintiff-appellant Lucian Lee Spann, Jr., (Spann) appeals the district court's dismissal of his 42 U.S.C. § 1983 suit for failure

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

to state a claim under Fed.R.Civ.P. 12(b)(6). We affirm in part and vacate and remand in part.

Facts and Proceedings Below

On May 25, 1994, Spann, an inmate confined in the Price Daniel Unit of the Texas Department of Criminal Justice (TDCJ) in Snyder, Texas, filed this section 1983 suit against various prison officials, alleging that they failed to protect him from another inmate whom they knew to be dangerous. The district court granted Spann leave to proceed *in forma pauperis*. In his *pro se* complaint, Spann alleges that, on May 30, 1992, Eager Brown (Brown), another TDCJ inmate, stabbed him in the left eye with a pencil.[1] As a result of the stabbing, Spann alleges that he has lost sight in his left eye, may require additional surgery to remove the damaged eye, and may lose sight in his other eye. Spann alleges that Defendants knew that Brown had a prior history of violence and mental problems and that they were deliberately indifferent to Spann's safety by failing to supervise and control Brown and to take necessary precautions that would have prevented the attack. Spann also alleges that his eyesight in his left eye might have been saved if prison officials had acted more expeditiously in having him transferred from the prison infirmary to the hospital.

The district court ordered Defendants to answer Spann's complaint and referred the case to a magistrate judge. On July 29,

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[1] In his complaint, Spann states that Brown was indicted for aggravated assault with a deadly weapon for the stabbing, eventually pleaded guilty, and was sentenced to twenty-five years of imprisonment, to be served consecutively with the fifty-year term he was then serving.

1994, the magistrate judge ordered Defendants to produce Spann's prison and medical records and Brown's prison records. The order stated that Defendants should provide Spann with a copy of these documents. Defendants produced Spann's prison records and furnished him with copies. Defendants submitted the remaining files to the court under seal and did not disclose them to Spann; these documents included the Emergency Action Center files for Spann and Brown and the Unit Classification file for Brown. In a September 16, 1994, order, the magistrate judge stated that Defendants had not disclosed Brown's records to Spann and afforded Defendants the opportunity to file a motion seeking to hold Brown's prison records in camera and under court seal. On November 14, 1994, Defendants filed a motion attaching a redacted copy of the Emergency Action Center files, deleting irrelevant, confidential, or sensitive information. Defendants requested permission to provide Spann with a copy of the redacted files in lieu of submitting it to the court for in camera inspection. In the same motion, Defendants submitted Brown's Unit Classification file for in camera inspection.[2]

On November 18, 1994, the magistrate judge filed his report and recommendation. Based on his in camera inspection of Brown's prison records, the magistrate judge determined that nothing in the records indicated that Brown "was ever involved in any sort of violent or assaultive activity up to the time he stabbed [Spann] in

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On November 18, 1994, the magistrate judge issued an order stating that the documents submitted to the court for in camera inspection should be kept under seal.

the eye with the pencil." Thus, the magistrate judge found that Defendants had no actual or constructive notice of Brown's violent propensities. The magistrate judge therefore concluded that Spann's failure-to-protect claim should be rejected. The magistrate judge also determined that, based on his review of the produced records, there was no evidence that prison officials provided Spann with medical treatment in an untimely manner and moreover, that nothing in the records supported Spann's allegation that the eyesight in his left eye could have been saved even if he had been transported to the hospital sooner. Accordingly, the magistrate judge reasoned that Spann had failed to state a deliberate indifference claim. The magistrate judge recommended that Spann's suit be dismissed without prejudice pursuant to Rule 12(b)(6).

Spann filed objections to the magistrate judge's recommendation, which the magistrate judge overruled. On December 9, 1994, the district court adopted the magistrate's report and recommendations and dismissed Spann's suit without prejudice under Rule 12(b)(6) for failure to state a claim for relief. Spann filed a timely notice of appeal.

Discussion

We review *de novo* a district court's dismissal under Rule 12(b)(6) for failure to state a claim. *Blackburn v. City of Marshall*, 42 F.3d 925, 929 (5th Cir. 1995). We must accept the plaintiff's factual allegations as true. *Cinel v. Connick*, 15 F.3d 1338, 1341 (5th Cir.), *cert. denied*, 115 S.Ct. 189 (1994). A Rule

12(b)(6) dismissal will not be affirmed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 78 S.Ct. 99, 102 (1957) (footnote omitted).

Defendants in this case never filed a motion to dismiss or a motion for summary judgment, nor did they plead failure to state a claim in their answer. Nevertheless, the district court *sua sponte* dismissed Spann's complaint for failure to state a claim under Rule 12(b)(6), based on its review of the produced documents. Because the district court considered evidence beyond the pleadings in dismissing Spann's suit, we must construe the dismissal as a *sua sponte* grant of summary judgment in favor of Defendants. *Balogun v. I.N.S.*, 9 F.3d 347, 352 (5th Cir. 1993) ("[A] decision which disposes of a party's claim by reference to evidence from outside of the pleadings is construed as a grant of summary judgment.").[3]

Fed.R.Civ.P. 56© permits a district court to grant summary judgment *sua sponte*, but only upon proper notice to the adverse party. *NL Industries, Inc. v. GHR Energy Corp.*, 940 F.2d 957, 965 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 873 (1992); *Arkwright-Boston Mfrs. Mut. Ins. Co. v. Aries Marine Corp.*, 932 F.2d 442, 445 (5th Cir. 1991); *see Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2554 (1986) ("[D]istrict courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her

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We note that, on the face of his complaint, Spann alleges a failure-to-protect claim sufficient to withstand dismissal under Rule 12(b)(6).

evidence."). When granted *sua sponte*, summary judgment is governed by Rule 56(c)'s requirement of ten days notice and an opportunity to respond. *NL Industries, Inc.*, 940 F.2d at 965. Any reasonable doubt about whether Spann received notice that his entire case was at risk of being dismissed must be resolved in his favor. *Id.* Here, the magistrate judge failed to give Spann any notice that he was going to recommend what was, in effect, summary judgment in favor of Defendants. Likewise, the district court also failed to give Spann any notice before adopting the magistrate judge's report and recommendation and dismissing Spann's complaint.[4] Accordingly, we hold that the district court erred in granting summary judgment *sua sponte* in favor of Defendants.

We do, however, affirm one aspect of the district court's dismissal. The magistrate judge construed Spann's complaint to include a claim for deliberate indifference to serious medical needs. In the only reference to medical treatment contained in his complaint, Spann alleges "[t]here existed a possibility that had the TDCJ-ID prison infirmary personnel or the named defendants herein acted more expeditiously or rapidly, in having me transferred from the prison unit to the Cogdell Hospital, then my eye sight could possibly have been saved." At most, Spann's

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As the magistrate judge's recommendation did not purport to be other than for a routine Rule 12(b)(6)dismissal, and contained nothing which might alert the *pro se* Spann that he was being afforded an opportunity to respond with "evidence" (and was at risk if he did not) to what was being treated as a summary judgment motion (rather than as an unconditional, formal recommendation for dismissal), we conclude that the magistrate judge's report does not provide the requisite summary judgment notice under all the circumstances here.

allegations state a negligence claim, and negligence is not actionable under section 1983. *Daniels v. Williams*, 106 S.Ct. 662 (1986); *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991) (holding that neither negligence, neglect, nor medical malpractice give rise to a section 1983 cause of action). We see no reason to remand Spann's deliberate indifference claim and therefore affirm this aspect of the district court's dismissal.[5]

Conclusion

For the foregoing reasons, we affirm the judgment of the district court on Spann's deliberate indifference claim but vacate the district court's judgment on Spann's failure-to-protect claim and remand for further proceedings not inconsistent herewith.

AFFIRMED in part and VACATED and REMANDED in part.

Because we vacate the district court's dismissal of Spann's failure-to-protect claim, we need not consider his argument that Defendants deleted portions of Brown's file that would have demonstrated his violent nature. Spann also argues that Defendants deleted portions of the Emergency Action Center file that would have supported his deliberate indifference to medical needs claim. We do not consider this argument because, as discussed above, his deliberate indifference claim, as alleged in his complaint, sounds only in negligence.