UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-30102

(Summary Calendar)

LOUIS TAYLOR,

Plaintiff-Appellant,

versus

RICHARD STALDER, Warden, Wade Correctional Center, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Eastern District of Louisiana
(CA-93-1089 N)

(September 8, 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:[*]

Louis Taylor, an inmate in the Louisiana prison system, filed a pro se complaint pursuant to 42 U.S.C. § 1983 (1988) alleging that the defendants violated his constitutional right to due process by failing to notify him of a disciplinary appeal decision within the 120 days mandated by prison procedures. The district court, adopting the report and recommendations of a magistrate

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

judge, dismissed the complaint as frivolous. *See* 28 U.S.C. § 1915(d). Taylor now appeals that decision, and we affirm.

I

Before addressing the merits of the decision below, we must first examine whether we have jurisdiction over this matter. *See Mosley v. Cozby*, 813 F.2d 659, 660 (5th Cir. 1987). On February 4, 1994, the district court issued an order adopting the magistrate judge's report and recommendation. Three days later, final judgment was entered. Taylor, however, timely filed objections to the magistrate judge's R & R on February 8. By minute entry on February 16, the district court vacated the earlier judgment, although this was not filed until February 23. Also on February 16, Taylor filed a notice of appeal. The district court subsequently issued a second order dismissing Taylor's complaint.[1]

"In general, filing of a notice of appeal confers jurisdiction on the court of appeals and divests the district court of control over those aspects of the case involved in the appeal." *Marrese v. American Academy of Orthopedic Surgeons*, 105 S. Ct. 1327, 1331 (1985); *see also Griggs v. Provident Consumer Discount Co.*, 103 S. Ct. 400, 402 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance))it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."); *United States v. Dunbar*, 611 F.2d 985, 987 (5th Cir.) (noting that "the filing of

[1] The district court dismissed the complaint on February 21, and final judgment was entered on February 22.

a notice of appeal has generally given the appellate court sole jurisdiction and divested the trial court of jurisdiction to proceed with the case"), *cert. denied,* 100 S. Ct. 3022 (1980). However, Fed. R. App. P. 4(a)(4) provides that "[a] notice of appeal filed after . . . entry of the judgment but before disposition of [motions made pursuant to Fed. R. Civ. P. 52(b), 59, or 60] is ineffective to appeal from the judgment . . . until the date of the entry of the order disposing of the last such motion outstanding."

Here, for reasons of judicial economy,[2] we choose to construe Taylor's objections to the magistrate' report either as a Rule 59(e) motion to alter or amend the judgment or as a Rule 60(b)(6) motion seeking relief from the judgment. Accordingly, the district court had jurisdiction to vacate its first judgment and consider Taylor's objections. Taylor's notice of appeal therefore became effective on February 22, when the district court entered judgment dismissing the complaint as frivolous. Consequently, we must determine whether the district court's decision to dismiss the complaint was correct.

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[2] If we found that Taylor's motion containing his objections to the magistrate's report was not a Rule 59 or 60 motion, the district court would not have had jurisdiction to vacate the February 7 judgment, consider Taylor's objections, and then render the February 22 judgment dismissing Taylor's complaint. Thus, we would be required to remand the case to the district court so that it could consider Taylor's objections. As the district court already has considered and rejected those objections, a remand would simply waste limited judicial resources.

II

"An *in forma pauperis* complaint may be dismissed if it lacks an arguable basis in law or fact." *Eason v. Thaler*, 14 F.3d 8, 9 (5th Cir. 1994). We review the district court's § 1915(d) dismissal of such a complaint using the abuse of discretion standard. *Id.*

Taylor's complaint alleged that the defendants deprived him of a protected liberty interest by failing to rule on his appeal from a disciplinary board decision within the 120 days mandated by prison procedures. In *Bay v. Lynn,* No. 92-3409 (5th Cir. April 5, 1993), we affirmed the dismissal on summary judgment of another Louisiana inmate's § 1983 action on a similar claim. The defendant there filed his action based upon his contention that he did not receive notice of a disciplinary board decision within the 120 days mandated by the same prison rules in the instant case. We held in *Bay* that the prison rules "do not contain a `substantive predicate' mandating the grant of an appeal or any other outcome should the appeal decision not be rendered within 120 days." *Bay,* No. 92-3409, slip op. at 6; *see also Olim v. Wakinekona,* 103 S. Ct. 1741, 1748 (1983) ("Process in not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has legitimate claim of entitlement."). We further noted the defendant did not complain that he did not receive proper notice or a hearing, and that, therefore, "the `constitutional minima' were satisfied in this case when Bay received some kind of notice and [a disciplinary board] hearing." *Bay,* No. 92-3409, slip

op. at 6. Based on our decision in *Bay,* and given the fact that Taylor does not complain that he failed to receive adequate notice or a hearing, we conclude that the "constitutional minima" were satisfied. Consequently, Taylor does not state a claim for the deprivation of a protected liberty interest.[3] Accordingly, we hold that the allegations in Taylor's complaint lack an arguable basis in law, and that his complaint was properly dismissed as frivolous under § 1915(d). We further note, however, that because the allegations in the complaint cannot be cured by an amendment, the dismissal should be modified to be with prejudice. *See Graves v. Hampton,* 1 F.3d 315, 318-19 (5th Cir. 1993).

III

Accordingly, we AFFIRM the judgment of the district court, as MODIFIED.

[3] We also uphold the dismissal of Taylor's conspiracy claims, as those claims are all dependent on his alleged substantive liberty interest in receiving notice of the appeal board's decision within 120 days.