

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40637
Summary Calendar

BOBBY MICHAEL DENNIS,

Plaintiff-Appellant,

versus

F. FIGUEROA, Asst. Warden, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
(6:92-CV-799)

(January 12, 1995)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

EDITH H. JONES, Circuit Judge:*

Appellant Dennis, a prisoner in the TDCJ-ID, filed a civil rights complaint under 42 U.S.C. § 1983 against ten prison officials for excessive use of force.

Following a Spears hearing, the magistrate judge recommended "that the claims against Major Brock and Captain Blevins be dismissed . . . pursuant to 28 U.S.C. § 1915(d) [and]

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

that [Dennis] be allowed to proceed with his excessive use of force claims against the remaining Defendants." The magistrate judge ordered the remaining defendants to answer Dennis's complaint. This order was filed on November 19, 1993. On November 29, 1993, Dennis filed an omnibus motion containing his sworn statement related to his injuries, a motion for appointment of counsel, and a demand for jury trial. The magistrate judge concluded that this jury trial demand was defective because it was not made on a separate piece of paper as is required by Local Rule 4(c) for the Eastern District of Texas.¹

The defendants filed their original answer on December 20, 1993. On January 7, 1994, the magistrate judge set the "case for an expanded evidentiary hearing pursuant to Flowers v. Phelps, 956 F.2d 488 (5th Cir. 1992)[, modified in part on other grounds, 964 F.2d 400 (5th Cir. 1994)]." On January 11, 1994, Dennis filed a second demand for a jury trial. The magistrate judge denied the motion as untimely pursuant to Fed. R. Civ. P. 38(b).

Following the expanded evidentiary hearing, the magistrate judge issued her report and recommendation that judgment be entered for the defendants, based on the testimony of the witnesses at the hearing and the documentary evidence presented. The magistrate judge concluded that Dennis had not shown by a preponderance of the credible evidence that he was subjected to an

¹ This conclusion was stated in the magistrate judge's order denying Dennis's third request for a jury trial. R. 1, 61-62.

excessive use of force. Dennis objected to this recommendation. The district court found these objections to be without merit, adopted the findings and conclusions of the magistrate judge, and entered judgment for the defendants and dismissed Dennis's complaint with prejudice. Dennis timely filed a notice of appeal.

We must vacate and remand for one reason. Dennis contends that it was error for the magistrate judge to deny his jury demand and proceed with an expanded evidentiary hearing pursuant to Flowers. The defendants argue that Dennis did not properly demand a jury in his pleading of November 29, 1993, because it was not filed on a separate sheet of paper as required by Local Rule 4(c) for the Eastern District of Texas. Defendants concede that this document was filed within the time to file a proper jury demand.

In Clark v. Richards, No. 93-5119 (5th Cir. June 19, 1994) (unpublished) this court noted that Fed. R. Civ. P. 38(b) allows a jury demand to be "'indorsed upon a pleading of the party.'" Clark, No. 93-5119, slip op. at 12. The Court specifically noted that Local Rule 4(c), requiring a separate sheet of paper for jury demands, is in conflict with Fed. R. Civ. P. 38(b) and that such conflicts are not allowed under Fed. R. Civ. P. 83. In Clark, the Court held that "[e]ven assuming that Local Rule 4(c) mandates that a jury demand be made on a separate paper[,] . . . compliance with Federal Rule of Civil Procedure 38(b) was sufficient to make an effective jury demand." Id. at 12-13. The Seventh Circuit has held that a jury demand made in compliance with Fed. R. Civ. P.

38(b) cannot be nullified by a failure to comply with an additional requirement of a local rule. Partee v. Buch, 28 F.3d 636, 638 (7th Cir. 1994).

Consequently, the dismissal of Dennis's complaint must be vacated and the case remanded to the district court "with directions that the case be listed for a trial by jury in the district court or, if a reference is made in accordance with the provisions of 28 U.S.C. § 636 and consented to by the parties, a trial by jury before a district court."

The judgment of the district court is VACATED and REMANDED.