UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Chay Calloway

Plaintiff.

v.

Rudy Richter et al.

Defendants.

Hon. Hugh B. Scott

97CV0671

Decision & Order

Before the Court are defendants' respective motions for summary judgement (Docket Nos. 21 and 33).

Background

This is a civil rights action under § 1983 of Title 42 of the United States Code. The plaintiff, Chay Calloway, is a former inmate of the Wende Correctional Facility. He claims that a corrections officer sexually assaulted him at Wende in 1994. He seeks money damages, and declaratory and injunctive relief. Calloway claims that the defendants' conduct violated his right to privacy (First Amendment), right of equal protection (Fifth Amendment) and right to be free of cruel and unusual punishment (Eighth Amendment). He also claims violations of state law.

The plaintiff alleges that Correction Officer Rudy Richter sexually assaulted him. He also names as defendants Philip Coombe, Sylvia Laguna and Frank Irvin, three former administrative employees of the Department of Correctional Services who were not present or involved in the alleged assaults, on the grounds that they failed to protect him from Richter.

Defendants Coombe, Laguna and Irvin move for summary judgment dismissing all claims

made against them. They contend that they did not have the personal involvement or awareness required for liability with respect to the plaintiff's claims. They move also to strike or dismiss the complaint with an award of attorney's fees, alleging that the plaintiff submitted two counterfeit documents to support his claim, and thus, committed fraud on the Court. Defendant Richter joins in the motion for summary judgment to the extent it seeks dismissal based on the alleged fraud on the Court.

Discussion

Standard of Review

Summary judgment is appropriate where there are no issues of material fact in dispute, and the moving party is entitled to judgment as a matter of law. See Trans Sport, Inc. v. Starter Sportswear, Inc., 964 F. 2d 186, 188 (2nd Cir. 1992) citing Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir. 1991). The non-moving party must, "demonstrate to the court the existence of a genuine issue of material fact." Lendino v. Trans Union Credit Information, Co., 970 F.2d 1110, 1112 (2nd Cir. 1992), citing Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). A fact is material:

> when its resolution would "affect the outcome of the suit under the governing law" and a dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party."

General Electric Company v. New York State Department of Labor, 936 F.2d 1448, 1452 (2nd Cir. 1991), quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In fact, "the non-moving party must come forward with enough evidence to support a jury verdict ... and the

... motion will not be defeated merely ... on the basis of conjecture or surmise. " Trans Sport, supra. 964 F.2d at 188. quoting Bryant v. Maffucci, supra. If undisputed material facts are properly placed before the court by the moving party, those facts will be deemed admitted. unless they are properly controverted by the nonmoving party." Glazer v. Formica Corp., 964 F.2d 149. 154 (2nd Cir. 1992). citing Dusanenko v. Maloney. 726 F.2d 82 (2nd Cir. 1984). The court's responsibility in addressing a summary judgment motion is identifying factual issues. not resolving them. See Burger King Corp. v. Horn & Hardart Co., 893 F.2d 525. 528 (2nd Cir. 1990).

The Plaintiff's Claims in this Lawsuit

The plaintiff claims in this lawsuit that officer Richter assaulted him sexually at the Wende Correctional Facility in the shower area of A-block. 1-company. on September 2. 9. 16. and 23. 1994; and at his cell on the same company on October 1, 1994 (See transcript of deposition of Chay Calloway on April 17. 1998 ["Calloway Deposition"] at pages182-183, 188. 189-195 attached as Exhibit 3 to the Affidavit of Andrew Lipkind dated October 27. 1998 ["Lipkind Affidavit"]. The plaintiff claims that the incident of October 1, 1994 was officer Richter's last act of misconduct toward him (Calloway Deposition at pages 79. 86-87. 136-137).[1]

Officer Richter denies that he assaulted the plaintiff.

[1] The reference to a later date in para. 19 of the complaint was an error. The plaintiff clarified this during discovery. The date of the last incident should read Oct. 1, 1994 (Calloway Deposition at pages 87. 234-235).

Personal Involvement

It is well settled that personal involvement in the alleged constitutional deprivation is a prerequisite to liability under 42 U.S.C. § 1983. Wright v. Smith, 21 F. 3d 496, 501 (2d Cir. 1994). McKinnon V. Patterson, 568 F. 2d 930, 934 (2d Cir. 1977). Such involvement may be shown by: (1) direct participation in the infraction, (2) failure to remedy the wrong, if possible, after learning of it through a report or appeal, (3) creation or allowance of a policy or custom under which the unconstitutional practice occurred, or (4) grossly negligent management of subordinates who caused the unlawful conduct. Williams v. Smith, 781 F. 2d 319, 323-24 (2d Cir. 1986).

It is undisputed that defendants Coombe, Laguna and Irvin were not personally present at the scene of any of the alleged incidents of assault or harassment by Richter of which the plaintiff complains in this lawsuit. They did not participate personally in any interaction between officer Richter and the plaintiff. They have no personal knowledge that any such assaults occurred (Coombe Affidavit dated October 21, 1998 at ¶ 5; Irvin Affidavit dated October 16, 1998 at ¶ 4; Laguna Affidavit dated October 23, 1998 at ¶ 4). Nor were they present in August 1994, when the plaintiff claims that Richter made sexual comments to him (Calloway Deposition at pages 94-95).

The plaintiff does not assert that Coombe, Irvin or Laguna gave any order or direction to Richter to assault or harass the plaintiff. The plaintiff's complaint does not assert that the defendants followed a policy to allow assaults. Indeed, the defendants assert that the Department of Corrections maintains rules of officer conduct which bar excessive force, sexual abuse, or sexual contact by an officer toward an inmate, and that the Department enforces these

rules through its employee disciplinary process (Coombe Affidavit at ¶ 7; Irvin Affidavit at ¶ 6). In addition, defendant Laguna asserts that she had no authority or control over the daily actions of Richter in her capacity as Director of the Department's Inmate Grievance Program. She did not manage correction officers (Laguna Affidavit at ¶ 4). Security policies were not within her authority or duties (Laguna Affidavit at ¶ 6). The plaintiff does not dispute these allegations. The plaintiff does not claim in this lawsuit that the processing or determination of a grievance violated his rights. He concedes that the officer's alleged misconduct stopped before he filed a grievance (Calloway Deposition at page 79).

The plaintiff acknowledges that he made no oral complaints about Richter to defendants Coombe, Irvin or Laguna before the alleged misconduct ended on October 1, 1994. (Calloway Deposition at pages 31, 69, 74 [Irvin], 61 [Coombe], 74-75 [Laguna]).[2] However, the plaintiff alleges that on September 3, 1994 he sent a letter to Coombe, Irvin and Laguna advising them of Richter's sexual harassment and asking that they intercede to stop it. The alleged September 3, 1994 letter states, in part:

> I am in dire need of your assistance in the enclose matter. I've been sexually harass by, Officer R. Richter for over one month, and I see no end too come.

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[2] The plaintiff did write two complaints *after* the alleged misconduct ended. The first was an inmate grievance against Richter, claiming sexual assault. The plaintiff wrote this grievance on October 3, 1994 and then submitted it (Calloway Deposition at page 79). The grievance was investigated and ultimately denied for lack of substantiating evidence (Affidavit of Thomas Eagen dated October 21, 1998 at ¶ 4, and exhibits; Irvin Affidavit at ¶ 9). The second was a written letter and petition to Irvin dated October 3,1994, making the same complaint against Richter. This letter and petition were received in the Superintendent's office on October 4, 1994. According to Irvin, this was the first complaint that he received against Richter (Irvin Affidavit at ¶ 8). Irvin referred the letter and petition to his Deputy Superintendent for Security, for investigation and follow-up (Irvin Affidavit at ¶ 8).

I would greatly appreciate if your offices can look into this matter.
to get the officer to cease this threaten behavior.

I am extremely frighten of what this officer may do to me.
please please look into this matter as soon as possible.
I would greatly appreciate if you don't tell officer Richter
I wrote too everyone. or I'll be in trouble.

(See September 3. 1994 Letter attached as Exhibit B to the Affidavit of Erich J. Speckin dated October 22. 1998.)

The plaintiff claims he sent carbon copies of this letter to Coombe. Irvin and Laguna. and kept the original. which he produced at his deposition (Calloway Deposition at pages 165-166). This letter is the sole purported evidence asserted by the plaintiff as the basis of his claim that Coombe. Irvin and Laguna had prior notice of Richter's alleged harassment and that notwithstanding this notice. they failed to protect Calloway from Richter.

The defendants alleged that the purported September 3. 1994 letter is fraudulent.[3] Despite containing significant details regarding the plaintiff's claims. the 51-paragraph complaint drafted by the plaintiff's attorney makes no mention of the purported letter. Defendants Coombe. Irvin and Laguna each testified that they never received this letter. Each of their offices had specific procedures for filing correspondence from inmates in 1994. It is undisputed that the incoming correspondence log kept by the Commissioner's office contains no entry for this alleged letter. Similarly. the Central Office file for inmate Calloway also contains no such letter (See

[3] The defendants also allege that the plaintiff submitted a second fraudulent document during discovery. an alleged affidavit by inmate Terrence Adams confirming aspects of the October 1. 1994 allegations (See Lipkind Affidavit at Exhibit 5). The plaintiff stated under oath that he received it from Adams. and that Adams had written it (Calloway Deposition at pages 218. 220). However. Adams testified that he did not create. write or sign the statement. According to Adams. he never saw it before it was shown to him at his August 1998 deposition (Adams Deposition at pages 31-35).

affidavit of Rhonda M. Gottlieb dated October 21, 1998 at ¶¶ 3-5). Further, the Inmate Grievance Program office correspondence log from 1994, which lists every letter received from inmates that year, contains no entry for this letter. (Eagen Affidavit at ¶¶ 6-7). Finally, the Wende Superintendent's inmate correspondence file from 1994, and the Deputy Superintendent's files, contain no such letter from inmate Calloway (Affidavit of Cynthia Sherlock dated October 19, 1998 at ¶¶ 3-5; Affidavit of Wendy Jensen dated October 21, 1998 at ¶ 4).

Perhaps even more significantly, forensic chemistry testing of the ink from this letter performed by the defendants' expert allegedly reveals that the letter was not written on September 3, 1994. The ink dating test shows that it was written more than two years later (Speckin Affidavit at ¶ 6; Lipkind Affidavit ¶¶ 9-10). The plaintiff has failed to meet this evidence with its own expert report. Indeed, the plaintiff has failed to make any specific challenge to the methodology used by the defendants' expert. The plaintiff makes only a general argument questioning the reliability of such ink testing. The dating of documents by the use of experts analyzing the ink is competent evidence. (See United States v. Colasurdo, 453 F.2d. 585 (2d. Cir. 1971); Janopoulos v. Harvey L. Walner & Associates, 866 F.Supp. 1086 (N.D. Ill. 1994).

In any event, to survive summary judgment and maintain his claims against Coombe, Irvin and Laguna, the plaintiff must establish a triable issue of fact that these defendants *received* the September 3, 1994 letter (the sole item asserted by the plaintiff as advising the defendants of Richter's allegedly offending conduct). The plaintiff contends only that he placed the letters on the bars of his cell to be picked up by the mail officer. The parties have provided the Court with no authority which establishes a presumption of receipt by an addressee merely upon the

assertion by an inmate that a letter was placed on his bars for pick-up.[4] It is clear, however, that should any such presumption exist, it is rebuttable. Meckel v. Continental Resources Co., 758 F.2d. 811 (2d. Cir. 1985); Bellecourt v. U.S., 994 F.2d 427, 430 (8th Cir. 1992)(the presumption of receipt can be rebutted by evidence of non-receipt).

In Bellecourt, an inmate in a federal penitentiary attempted to assert causes of action based upon negligence, medical malpractice and various civil rights violations. To maintain his negligence and malpractice claims, the plaintiff was required to establish that he had presented such claims to the appropriate federal agency under the Federal Tort Claims Act. In support of his argument that he had made such presentment, the plaintiff in Bellecourt submitted an affidavit asserting that he mailed the claim to the federal agency by using the inmate mail system. In granting a motion to dismiss, the Court rejected the argument that such testimony established receipt by the federal agency noting that the addressee denied receiving the claim and that the claim was not listed in any of the logs kept regarding inmate mail. Bellecourt v. U.S., 784 F.Supp. 625, 630 (D. Minn. 1992).

Similarly, in the instant case, each of the alleged addressees has denied receiving the September 3, 1994 letter. Further, the letter is not listed in any of the regularly kept logs which would have tracked such correspondence; nor is it found in Calloway's inmate correspondence file. The plaintiff has presented no evidence to counter the defendant's testimony that they did not receive the letter, the fact that the letter was not entered on any of the regularly kept logs, and

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[4] The defendants cite state court cases which hold that placing a letter in an office out-box does not establish mailing (2647 Realty Co. v. Abrams, 138 Misc. 2d 308, 311 (N.Y.Cty 1988)) and that no presumption arises upon an assertion of mailing absent personal knowledge of deposit with the United States Postal Service (Washington v. St. Paul Surplus Lines Ins. Co., 200 A.D.2d 617, 618 (2d Dept. 1944)).

was not contained in his inmate file.[5] Even aside from the cloud of uncertainty surrounding the very existence of this letter in 1994, the plaintiff has come forward with no evidence from which a reasonable jury could conclude that defendants Coombe, Irvin or Laguna received this letter prior to the cessation of the alleged offensive conduct by Richter. Inasmuch as the September 3, 1994 letter is the only alleged evidence which would have provided defendants Coombe, Irvin and Laguna with prior notice of the alleged harassing conduct by Richter, the plaintiff cannot establish that these defendants were aware of any such conduct but failed to protect him. Finally, the plaintiff has failed to set forth a prima facie case of deliberate indifference or gross negligence on the part of Coombe, Irvin or Laguna, or that these defendants had created or maintained a policy or custom under which the alleged unconstitutional practice occurred.

Based on the above, the motion for summary judgment on behalf of defendants Coombe, Irvin and Laguna is granted.[6]

Fraud on the Court

Inasmuch as the Court is granting summary judgment in favor of Coombe, Irvin, and Laguna based on the plaintiff's failure to raise a triable issue of fact as to whether they were

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[5] Although not necessarily dispositive of the issue, the plaintiff has failed to present any evidence, other than his self-serving, conclusory statements, to rebut the defendant's expert's conclusion that the September 3, 1994 letter could not have been written in 1994.

[6] In addition to the federal civil rights claims, the plaintiff's complaint asserts various state law claims. Defendants Coombe, Irvin and Laguna seek dismissal of these claims based upon Eleventh Amendment immunity. The papers and arguments submitted by the plaintiff do not contest the defendants' assertion of this immunity. Thus, summary judgment is appropriate with respect to any state claims asserted against these defendants as well as the federal civil rights claims.

personally involved in the alleged constitutional deprivations, the Court need not address their motion to the extent that it is based upon the alleged fraud by the plaintiff.

However, defendant Richter also seeks dismissal based upon the alleged fraud. The Court finds that issues of fact still exist as to whether such fraud was committed in connection with either the September 3, 1994 letter or the subsequent affidavit allegedly signed by Terrence Adams.[7] Thus, Richter's motion is denied without prejudice and may be reasserted as appropriate during or post trial.

Conclusion

Based on the above, the motion for summary judgment filed on behalf of Coombe, Irvin and Laguna (Docket No. 21) is **GRANTED** in its entirety. The motion for summary judgment filed on behalf of Richter (Docket No. 33) is **DENIED WITHOUT PREJUDICE.**

So Ordered.

/s/

Hon. Hugh B. Scott
United States Magistrate Judge

Dated: Buffalo, New York
December 30, 1998

[7] The Court notes that on December 15, 1998 it received a letter directly from the plaintiff (not from his counsel) dated December 14, 1994 attaching an affidavit purportedly signed by Bruce Johnson (an inmate at the Attica Correctional Facility) dated December 8, 1998. This letter does not appear to have been filed or copied to counsel. In any event, this letter and the attached affidavit are not relevant to the instant motion.