

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

STEVEN KENT BLOOM,)
)
 Plaintiff,)
)
 v.) Case No. 01-3450-KHV
)
 K. RUHNKE, et al.,)
)
 Defendants.)

ORDER, WITH REPORT AND RECOMMENDATION

On November 17, 2005, pursuant to Fed. R. Civ. P. 16(a) and prior notice to the parties (*see* doc. 124), the undersigned U.S. Magistrate Judge, James P. O’Hara, conducted a telephone status conference in this prisoner civil rights case. The plaintiff, Steven Kent Bloom, appeared pro se. Defendants appeared through Kansas Assistant Attorneys General Robert G. Allison-Gallimore and Ralph J. DeZago.¹

By way of background, the record reflects that, on August 26, 2005, the presiding U.S. District Judge in this case, Hon. Kathryn H. Vratil, filed an order which dismissed certain of plaintiff’s claims but which also granted him leave to file an amended complaint (doc. 65). Judge Vratil’s order was limited to specifically defined changes to plaintiff’s prior pleadings

¹ On October 25, 2005, Mr. Allison-Gallimore assumed the defense of the case and Mr. DeZago withdrew as counsel of record (*see* doc. 99). It is the court’s understanding that Mr. DeZago participated in the November 17, 2005 conference merely to help facilitate the case transition.

and to certain claims plaintiff wished to assert against K. Ruhnke, Kansas Attorney General Phill Kline, and Kansas Secretary of Corrections Roger Werholtz (doc. 65, p. 3).²

On September 9, 2005, plaintiff filed a very lengthy amended complaint (docs. 74-79). Despite the limiting terms of Judge Vratil's order, plaintiff purported to add entirely new official capacity claims against ten employees of the Kansas Department of Corrections who work at the Lansing Correctional Facility. These individuals include David R. McKune, Duane Muckenthaller, D. Ferris, f/n/u Wagner, f/n/u Tillman, f/n/u Ogletree, f/n/u Thomas, and three other individuals with unknown names.

On September 23, 2005, Kline and Werholtz timely filed a motion to dismiss plaintiff's amended complaint (doc. 86), arguing that plaintiff had failed to state any claim upon which relief can be granted. On September 30, 2005, plaintiff filed his response to the motion to dismiss (doc. 90), and Kline and Werholtz filed their reply brief on October 24, 2005 (doc. 100). Given the dispositive nature of this motion, it was to be decided by Judge Vratil instead of the undersigned magistrate judge.

It does not appear that Ruhnke timely filed any motion to dismiss or, for that matter, filed any pleading in response to plaintiff's amended complaint.³ Presumably because the

² Judge Vratil only granted plaintiff leave to amend limited to: (1) any claims against Kline and Werholtz in their official capacities, (2) any claims against Ruhnke, and (3) a statement of the facts constituting plaintiff's case.

³ On October 9, 2002, though counsel with the Kansas Attorney General's office, Ruhnke filed a response to a motion for summary judgment by plaintiff, evidently electing to voluntarily enter an appearance and thereby waive process and service of process (*see* doc. (continued...))

time for doing so has not yet expired, no responsive pleadings have been filed by any of the ten “new” defendants.

During the status conference on November 17, 2005, it was agreed that, in the interests of judicial economy and moving this case forward to conclusion in a reasonably timely manner, plaintiff’s amended complaint should be deemed stricken. Further, there was an oral stipulation pursuant to Fed. R. Civ. P. 41(a)(1)(ii) that plaintiff would voluntarily dismiss all ten of the above-referenced “new” parties. Under the parties’ stipulation, this dismissal is without prejudice to plaintiff’s right to file a separate suit against one or more of those ten individuals, with the understanding that any applicable statutes of limitation shall be deemed tolled from September 9, 2005 (the date plaintiff improperly filed his amended complaint) until December 5, 2005 (the date by which plaintiff has stated that he intends to file a separate suit with regard to those claims, probably in state court).

As the undersigned discussed with the plaintiff and defense counsel during the status conference, magistrate judges have limited power to make dispositive rulings in a civil case, even by stipulation of the parties. Accordingly, and in an abundance of caution, the undersigned respectfully recommends to Judge Vratil, pursuant to 28 U.S.C. § 636 and Fed.

³(...continued)

18). Three years later, on October 24, 2005 (i.e., after the court entered its order granting plaintiff leave to amend and after plaintiff had proceeded to file the amended complaint), Mr. Allison-Gallimore entered his appearance for “defendants” (doc. 99). Therefore, the court infers that Mr. Allison-Gallimore represents Ruhnke and there still is no issue in this case with regard to process or service of process. If Mr. Allison-Gallimore believes that the court’s inference is incorrect, then an appropriate motion addressing this issue shall be filed on Ruhnke’s behalf by **December 5, 2005**.

R. Civ. P. 72, that she proceed to enter an order that: (1) strikes plaintiff's amended complaint of September 9, 2005 (docs. 74-79); (2) dismisses, without prejudice, and subject to the parties' statute of limitations tolling agreement, all of plaintiff's claims in this case as against David R. McKune, Duane Muckenthaller, D. Ferris, f/n/u Wagner, f/n/u Tillman, f/n/u Ogletree, f/n/u Thomas, and the three other defendants whose names are yet unknown by plaintiff; and (3) denies, as moot, the motion to dismiss filed by Kline and Werholtz (doc. 86).⁴

The parties are hereby notified that, in the unlikely event that any of them believe that the undersigned magistrate judge has ordered the involuntary disposition of any claim or defense, then within ten days after they are served with a copy of this report and recommendation, they may, pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72, file written objections to the report and recommendation. The parties must file any objections within the ten-day period if they want to have appellate review of the proposed findings of fact, conclusions of law, or the recommended disposition. If no objections are timely filed, presumably Judge Vratil will enter an order as described above and no appellate review will be allowed by any court.

By **December 5, 2005**, plaintiff shall file a pleading in this case, titled simply "Amended Complaint," which strictly complies with Judge Vratil's August 26, 2005

⁴ Of course, any motions to dismiss may be re-filed by said defendants (and by Ruhnke) within the time allotted by Fed. R. Civ. P. 12 after plaintiff's new amended complaint is filed.

order. That is, the amended complaint shall be limited to: (1) any claims against Kline and Werholtz in their official capacities, (2) any claims against Ruhnke, and (3) a statement of the facts constituting plaintiff's case.

As the undersigned instructed plaintiff during the status conference, plaintiff shall not file any further purported "supplements" to his complaint (*see, e.g.*, doc. 83). Such supplements will be disregarded by the court. That is, if plaintiff wishes to amend his pleadings, he must first seek and obtain the court's permission to do so. This is to be done by timely filing a formal motion that fully complies with Fed. R. Civ. P. 15(a) and D. Kan. Rule 15.1.

As earlier indicated, the court infers from the state of the record that, although Ruhnke was terminated as a party defendant on November 21, 2002 by order of the Hon. G. Thomas VanBebber, U.S. District Judge (now deceased) (doc. 22), service of the amended complaint that is due to be filed by plaintiff by December 5, 2005 may be made simply by filing that pleading with the court, and with the court's Electronic Case Filing System automatically serving Mr. Allison-Gallimore as counsel of record. If, however, Ruhnke or counsel perceive this situation differently, then the court shall be notified by **December 5, 2005** so that, if necessary, a formal summons can be timely served on Ruhnke.

Because the parties have agreed that plaintiff's amended complaint of September 9, 2005 should be stricken, it was acknowledged during the conference that two non-dispositive (i.e., largely procedural) motions directly related to said amended complaint

have been rendered moot. Accordingly, the court hereby denies, on that basis, the motion that plaintiff filed on October 27, 2005 for a bill from the U.S. Marshal to serve summonses and copies of said amended complaint on the above-described individuals (doc. 105). Likewise, the court denies as moot the motion that plaintiff filed on the same date for the Clerk's Office to issue blank, discovery-related subpoenas duces tecum for service on those individuals (doc. 107).

The only other pending motion was filed by plaintiff on November 7, 2005 (doc. 122), asking the court for relief from an order entered on October 25, 2005 (doc. 104). Plaintiff withdrew this motion during the status conference, and accordingly the motion is hereby denied as moot.

The court infers from matters discussed above that the parties properly of record have not yet had the opportunity to complete discovery and otherwise fully comply with the deadlines in the scheduling order filed by the undersigned on August 29, 2005 (doc. 66). Further, in the order of November 8, 2005 that converted the scheduled final pretrial conference into a status conference (doc. 124), the undersigned vacated various settings, most notably the December 16, 2005 dispositive motion and the June 6, 2006 trial setting. On the court's motion, and with the input and approval of Judge Vratil, the undersigned now makes following modifications to the case management deadlines and settings in the scheduling order:

- a. All discovery shall be commenced or served in time to be completed by **March 3, 2006.**

b. Pursuant to Fed. R. Civ. P. 16(d), a final pretrial conference is scheduled for **March 24, 2006, at 10:30 a.m.** Unless otherwise notified, the undersigned (i.e., Judge O'Hara) will initiate and conduct this pretrial conference by long distance telephone conference call. No later than **March 10, 2006**, defense counsel shall submit the parties' proposed pretrial order (formatted in WordPerfect 9.0, or earlier version) as an attachment to an Internet e-mail sent to *ksd_ohara_chambers@ksd.uscourts.gov*. The proposed pretrial order shall not be filed with the Clerk's Office. It shall be in the form available on the court's website (*www.ksd.uscourts.gov*), and the parties shall affix their signatures according to the procedures governing multiple signatures set forth in paragraphs II(C)(2)(a) & (b) of the *Administrative Procedures for Filing, Signing, and Verifying Pleadings and Papers by Electronic Means in Civil Cases*.

c. All motions for summary judgment (and any other potentially dispositive motions) shall be filed by **May 1, 2006**.

d. Judge Vratil will conduct a telephone status conference with the pro se plaintiff and defense counsel on **August 21, 2006, at 1:30 p.m.** The court will initiate the call.

e. Mindful that the parties earlier informed the court that they expect the trial of this case to take approximately 2 days, this case is now set for trial on Judge Vratil's docket beginning on **September 12, 2006, at 9:30 a.m.**

IT IS SO ORDERED.

Dated this 21st day of November, 2005, at Kansas City, Kansas.

s/ James P. O'Hara
James P. O'Hara
U.S. Magistrate Judge