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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001265-MR

JAMES NICK HARRISON — APPELLANT

v.

APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE GEORGE DAVIS, JUDGE
ACTION NO. 08-CI-00195

SONYA WRIGHT; PHILLIP BRAMBLETT;
JOSIE WILLIAMS; and JOHN MOTLEY — APPELLEES

AND NO. 2011-CA-001266-MR

JAMES NICK HARRISON — APPELLANT

v.

APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE GEORGE DAVIS, JUDGE
ACTION NO. 08-CI-00188

BARB FREDERICK; JOSIE WILLIAMS;
PHILLIP BRAMBLETT; AND JOHN MOTLEY — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; MOORE AND THOMPSON, JUDGES.

MOORE, JUDGE: James Nick Harrison appeals the orders of the Morgan Circuit Court dismissing his 42 U.S.C. §1983 and state constitutional claims and granting summary judgment regarding his Open Records Act (KRS[1] 61.870 *et seq*.) claim. After a thorough review of the record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case involves two appeals arising from two separate actions. However, because the allegations are based upon the same or substantially similar facts, we find it appropriate to address both simultaneously.

At all times relevant to this appeal, James has been incarcerated in the Eastern Kentucky Correctional Complex (EKCC). James received notice from EKCC that an item of correspondence from his son could not be delivered to him because it contained a social security number, which, for purposes of prison security, was classified as contraband.[2] James was instructed in the notice of rejection that, in order to receive the letter, he could return the letter to his son for removal of the social security number after which his son could re-mail the letter.

[1] Kentucky Revised Statute.

[2] We are unable to ascertain from the record before us whether these two actions arose from the rejection of the same or multiple unauthorized letters. This is inconsequential, as the basis for each action is the rejection of a letter due to a social security number being classified as "contraband."

James made no assertion at any time during these proceedings that he attempted to comply with this procedure.

After submitting multiple records requests to the EKCC records custodian in which James requested a copy of the letter and of the policy prohibiting inmates from possessing social security numbers, James filed an appeal with the Kentucky Attorney General's Office. The Attorney General's response letter cited several bases for denying James' request. Namely, James had filed an untimely request; the policies and procedures were readily available to James in the EKCC library; James was not entitled to inspection of the records pursuant to KRS 197.025(2) because the policies do not contain any specific reference to James; James failed to describe the records he requested with any specificity as required by KRS 61.872(3)(b); and James did not send his request to the coordinator through institutional mail as required by Kentucky Corrections Policy and Procedure (CPP) 6.1. The Attorney General's Office also issued an opinion conceding that EKCC's responses to James' request had mistakenly advised him to refer to CPP 17.1 but noting that James was nevertheless not entitled to inspection of records not containing any specific reference to James, pursuant to KRS 197.025(2).

James filed a timely appeal with the Morgan Circuit Court. The circuit court granted summary judgment, finding that KRS 197.025(2) precluded applicability of the Open Records Act to inmates, unless the document(s) requested specifically referenced the inmate making the request.

James also filed a separate action in the Morgan Circuit Court pursuant to 42 U.S.C. §1983 alleging that rejection of his mail on the basis that he was not permitted to have any social security number(s) in his possession violated his first amendment right to communicate with his son. He also claimed that his rights under the first, second, third, twenty-seventh, and twenty-eighth sections of the Kentucky Constitution were violated as "set forth above under KRS Chapter 418 and CR 57 [or CR 56]." The circuit court granted the appellees motion to dismiss for failure to state a claim for which relief could be granted and subsequently denied James' motion to alter, amend, or vacate its dismissal.[3] James now appeals.

II. STANDARD OF REVIEW

Summary judgment serves to terminate litigation where "the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. It is well established that a party responding to a properly supported summary judgment motion cannot merely rest on the allegations in his pleadings. *Continental Casualty Co. v. Belknap Hardware & Mfg. Co*., 281 S.W.2d 914, 916 (Ky. 1955). "[S]peculation and supposition are insufficient to

[3] In its order, the trial court did not include any rationale for dismissing the action for failure to state a claim. This has no bearing on our analysis however because we may affirm the trial court on any basis that is supported by the record. *Kentucky Farm Bureau v. Gray*, 814 S.W.2d 928, 930 (Ky. App. 1991) (citing *Richmond v. Louisville & Jefferson County MSD*, 572 S.W.2d 601 (Ky. App. 1978)).

justify a submission of a case to the jury, and . . . the question should be taken from the jury when the evidence is so unsatisfactory as to resort to surmise and speculation." *O'Bryan v. Cave*, 202 S.W.3d 585, 588 (Ky. 2006) (quoting *Chesapeake & Ohio Ry. Co. v. Yates*, 239 S.W.2d 953, 955 (Ky. 1951)). "'Belief' is not evidence and does not create an issue of material fact." *Humana of Kentucky, Inc. v. Seitz*, 796 S.W.2d 1, 3 (Ky. 1990); *see also Haugh v. City of Louisville*, 242 S.W.3d 683, 686 (Ky. App. 2007) ("A party's subjective beliefs about the nature of the evidence is not the sort of affirmative proof required to avoid summary judgment."). Furthermore, the party opposing summary judgment "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment." *Steelvest, Inc. v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 481 (Ky. 1991) (internal citations and quotations omitted).

On appeal, we must consider the evidence of record in the light most favorable to the non-movant and must further consider whether the circuit court correctly determined that there were no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue

de novo." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001) (footnote omitted).

Likewise, "[s]ince a motion for failure to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court's determination; instead, an appellate court reviews the issue *de novo*." *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010) (footnote omitted). "It is well settled in this jurisdiction when considering a motion to dismiss under [Kentucky Rules of Civil Procedure (CR) 12.02], that the pleadings should be liberally construed in a light most favorable to the plaintiff and all allegations taken in the complaint taken to be true." *Mims v. Western-Southern Agency, Inc*., 226 S.W.3d 833, 835 (Ky. App. 2007) (citing *Gall v. Scroggy*, 725 S.W.2 867, 869 (Ky. App. 1987)).

III. ANALYSIS

a. Open Records Act

On appeal, James argues that the denial of his request pursuant to KRS 197.025(2) contravenes the Open Records Act and that the circuit court erred by failing to conduct an *in camera* review of the applicable policies in order to confirm that the records did not specifically make any reference to James.

KRS 197.025(2) provides:

> KRS 61.870 to 61.884 to the contrary notwithstanding, the department shall not be required to comply with a request for any record from any inmate confined in jail or any facility or any individual on active supervision under the jurisdiction of the department, unless the request is for a record which contains a specific reference to the individual.

Thus, it was not improper to deny James' request because of his status as an inmate. Moreover, James' assertion that the circuit court should have conducted an *in camera* review presupposes that there is an additional policy specifically stating that inmates may not possess social security numbers. There is no evidence contained in the record that an additional specific policy exists. We find this improbable because both the Attorney General and circuit court noted that James had access to the applicable policies.

Furthermore, the policy and procedures available to James cite ample bases for classifying the correspondence to James as unauthorized. The procedures concerning inmate mail are outlined by CPP 16.2 and permit the rejection of incoming mail that is determined to contain contraband. Contraband is in relevant

part defined as "[a]nything not authorized for retention or receipt by the inmate and not issued to him through regular institutional channels." *See* CPP 16.2 (adopting the definition of contraband contained in CPP 9.6). This definition is therefore sufficient to encompass a social security number. And, classifying a social security number as contraband is not improper where, as the appellees indicate, inmates previously allowed to possess social security numbers - even their own - have been known to file fraudulent tax returns or to use them to perpetrate other crimes.

Even assuming an additional policy exists that specifically states that inmates are not permitted to possess social security numbers, the circuit court did not err by declining to conduct an *in camera* review of the policy because any such policy would be of general applicability and would make no specific reference to James. Therefore, summary judgment was proper.

b. 42 U.S.C. §1983 and State Claims

With respect to James' 42 U.S.C. §1983 claim, James asserts that dismissal was improper because there was no policy stating that inmates were not allowed to possess social security numbers. Thus, withholding his mail from him was a violation of his rights by the prison officials.

We have already established that the CPP definition of contraband sufficiently encompasses social security numbers. James makes no argument that the possession of a social security number is related to his rights of expression. Rather, he asserts that rejection of the letter with content classified as contraband

prevented communication with his son. The Sixth Circuit has previously evaluated the propriety of censorship of inmate mail for the purpose of withholding contraband from inmate correspondence.

> The reality of penological systems is that incarceration brings about the withdrawal or limitation of many privileges and rights. The retraction of protected freedoms is justified by the legitimate objectives underlying our penal system. . . . [C]ensorship of inmate correspondence [is] justified if certain criteria are met. First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. Second, the limitation of first amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved.

Meadows v. Hopkins, 713 F.2d 206, 210 (6th Cir. 1983).

Without question, the protection of inmates and the public from fraud or crime that may be perpetrated as a result of possessing social security numbers constitutes a substantial government interest. Likewise, the limitation upon first amendment freedoms in order to achieve this objective is no greater than necessary or essential for the protection of the governmental interest involved. The restriction is limited only to the items or information classified as contraband. And, as is evident from the record, where the contraband is evident on the face of other non-restricted material, inmates are given the opportunity to return the correspondence to the sender for redaction of the social security number so that the correspondence may be received in a form that is in conformance with prison policy.

Again, and perhaps most importantly, James makes no allegation that he attempted to comply with this redaction procedure in order to receive the non-restricted content of the correspondence. Nothing in the record reflects that James made any effort to do so. Thus, we find James' argument that his first amendment rights were violated to be without merit because it was his failure to comply, as opposed to the action of any government official, that ultimately deprived him of communication with his son.

James' complaint also alleges violation of his first amendment rights under the Kentucky Constitution, which we interpret to be an allegation that his right to freedom of speech was violated pursuant to Section One of the Kentucky Constitution. That provision provides that Kentucky citizens possess the right to "freely communicat[e] their thoughts and opinions." We likewise find no merit to James' argument that forbidding possession of a social security number prohibited his ability to communicate with his son. We again reiterate that James failed to comply with the procedure by which he was permitted to obtain the substance of the correspondence from his son.

As to the remainder of James' claims pertaining to violation of the Kentucky Constitution, James simply fails to allege any facts that would permit relief under the sections cited. As mentioned, James requests relief for violation of sections two, three, twenty-seven, and twenty-eight of the Kentucky Constitution, as set forth in CR 56, CR 57, and KRS 418. We can find no allegation of record

even remotely relevant to these provisions. Thus, the trial court dismissal for failure to state a claim was proper.

Accordingly, we affirm.

ALL CONCUR.

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