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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STEVEN BRODER,

Plaintiff,

vs.

CORRECTIONAL MEDICAL SERVICES, et al.,

Defendants.
_____/

No. 03-CV-75106-DT

Hon. Gerald E. Rosen

ORDER ADOPTING, IN PART AND WITH MODIFICATION, MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION OF AUGUST 9, 2004, AND DISMISSING PLAINTIFF'S COMPLAINT AS TO DEFENDANT CMS, IN ITS ENTIRETY, WITH PREJUDICE

At a session of said Court, held in the U.S. Courthouse, Detroit, Michigan on SEP 22 2004

PRESENT: Honorable Gerald E. Rosen
United States District Judge

This matter is presently before the Court on the August 9, 2004 Report and Recommendation of Magistrate Judge Paul J. Komives recommending that the Court grant, in part, and deny, in part, the Motion to Dismiss filed by Defendant Correctional Medical Service ("CMS"),[1] and recommending that the Court grant Plaintiff's Motion to

[1] CMS provides health care services to inmates incarcerated by the Michigan Department of Corrections (MDOC), pursuant to a contract between CMS and the State of Michigan.

Compel to the extent that it seeks discovery from Defendant CMS. Plaintiff timely filed objections to the Report and Recommendation to which objections, three defendants -- Defendants Caruso, Epp and Pramstaller -- have replied.

The Magistrate Judge's recommendation concerning Defendant's Motion to Dismiss is based upon his conclusion that Plaintiff failed to exhaust his administrative remedies with regard to his some of claims against Defendant CMS[2] by virtue of his failure to name CMS or allege any complaints against that entity in his November 3, 2001, March 7, 2003, and April 22, 2003 grievances. Therefore, pursuant to 42 U.S.C. § 1997c(a), the Magistrate Judge recommends that with regard to the complaints alleged in these three grievances, Plaintiff's claims against Defendant CMS be dismissed. However, with regard to complaints asserted in his July 12, 2002 grievance, Magistrate Judge Komives determined that Plaintiff had exhausted his administrative remedies against CMS, and for this reason, the Magistrate Judge recommends that Defendant's Motion to Dismiss be denied as to this one grievance.

The Court disagrees with the Magistrate Judge's exhaustion determination regarding the July 12, 2002 grievance. Plaintiff alleged in his July 12, 2002 grievance:

> I am filing this grievance to complain about the delay in diagnosis and treatment of my cancer, which caused months of unnecessary pain and medical complications. I want to make sure this never happens again and want compensation for the harm I have suffered. This grievance is against the following doctors and staff (see attached list), and any other treating

[2] Defendant CMS is but one of eleven defendants named in Plaintiff's Complaint.

> personnel, supervising personnel, and any and all other individuals or organizations involved in the diagnosis. . . .

[See Defendant's Motion to Dismiss Ex. 2-3.]

To this grievance, Plaintiff attached a list of names of 36 doctors and nurses and one prison official, the warden of the prison, Henry Grayson. [*See* Plaintiff's Opposition Brief, Ex. A.] At the end of this two-column list of names, Plaintiff added the following phrases:

> "Any and all relevant CMS personnel" [and]
>
> Any and all relevant MDOC personnel"

Id.

The Magistrate Judge determined that naming "any and all relevant CMS personnel" in his appended list is sufficient to constitute a complaint against CMS, the entity. The Court disagrees. This case is essentially no different than *Alder v. Correctional Medical Services*, No. 02-CV-70997-DT (E.D. Mich.), *aff'd* 73 Fed. Appx. 839, 2003 WL 22025373 (6th Cir. 2003), *cert. denied*, 124 S.Ct. 1718 (2004). In *Alder*, as in this case, the Magistrate Judge recommended that the court find that the prisoner's grievance naming an employee of CMS in his grievance was sufficient to serve to exhaust the prisoner's administrative remedies with respect to CMS itself. The District Court rejected the Magistrate Judge's recommendation. The court concluded that Alder's grievance naming an employee of CMS could not serve to exhaust Alder's claims against CMS, and, having failed to demonstrate by any other evidence that he

exhausted his administrative remedies with respect to CMS, the District Court overruled the Magistrate Judge's recommendation. The Sixth Circuit affirmed the District Court's failure-to-exhaust conclusion. *See also, VanDiver v. Martin* 304 F. Supp. 2d 934 (E.D. Mich. 2004) (merely mentioning CMS in grievance held insufficient to constitute a complaint against the entity).

Here, Plaintiff only includes in his attachment to his July 12 grievance a list of 37 specifically identified defendants, with the appended catch-all the phrase "any and all relevant CMS ***personnel***" at the end of this list. Even accepting this broad statement as being sufficient to put CMS personnel that Plaintiff might ultimately seek to sue them, nowhere in his grievance does Plaintiff state that he is seeking compensation from CMS, ***the entity***. It is well-settled that a Section 1983 claim cannot be sustained on a theory of respondeat superior, *see Rizzo v. Goode*, 423 U.S. 362, 376-77 (1976), yet this appears to be the basis for the Magistrate Judge's recommendation.

However, even beyond Plaintiff's failure to exhaust problem, the Court finds Plaintiff's claims against CMS to be barred for another reason: Eleventh Amendment immunity. The Eleventh Amendment prohibits federal courts from entertaining suits by private parties against States or their agencies unless the state expressly consents to being sued and therefore waives its sovereign immunity. *Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057 (1978); *Quern v. Jordan*, 440 U.S. 332, 350, 99 S.Ct. 1139 (1979) (holding that § 1983 does not override a State's Eleventh Amendment immunity). The State of

Michigan has not consented to being sued in civil rights actions in the federal courts. *See Abick v. Michigan*, 803 F.2d 874, 877 (6th Cir.1986). *See also*, *Hafford v. Seidner*, 183 F.3d 506, 512 (6th Cir.1999) (recognizing that claims against a State under § 1981 are barred by the Eleventh Amendment).

As indicated, the protections of the Eleventh Amendment extend not only to the State but also to state agencies. *See Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89, 100-01, 104 S.Ct. 900, 908 (1984); *Johnson v. University of Cincinnati*, 215 F.3d 561, 571 (6th Cir.) (the university, as an arm of the State, is immune from suit under the Eleventh Amendment); *Presler v. Michigan Dept. of Corrections,* 129 F.3d 1265, 1997 WL 693057 (6th Cir. 1997) (the Eleventh Amendment bars suit against MDOC); *Lee v. Michigan Parole Board*, 104 Fed. Appx. 490, 2004 WL 1532563 (6th Cir. 2004) (holding that prisoner's Section 1983 civil rights claims against the Michigan Parole Board, the Michigan Department of Corrections, and the Michigan Bureau of Forensic Mental Health Services were barred by the Eleventh Amendment); *Taggart v. Oklahoma*, 74 Fed.Appx. 880, 881, 2003 WL 22052864 (10th Cir.2003) (affirming district court's dismissal of prisoner's § 1983 action filed against the State of Oklahoma, the Oklahoma Department of Corrections, and DOC Medical Services on Eleventh Amendment immunity grounds).

Although this case admittedly has a slightly different twist, i.e., the entity sued is a private entity with whom the state has contracted to provide required medical services to

inmates incarcerated in the state prison, the Sixth Circuit has held that private entities performing prison duties are to be treated no differently than the Department of Corrections. *See Boyd v. Corrections Corporation of America*, ___ F3d. ___, 2004 WL 1982517 (6th Cir., Sept. 8, 2004). In *Boyd*, the prisoner-plaintiff argued that CCA was a private entity, not an arm of the State, and that he, therefore, was not required to pursue his grievances through the prison grievance procedure as mandated by the PLRA. Although the holding in *Boyd* addressed only the complete exhaustion issue with respect to complaints against CCA employees, the Sixth Circuit could not have reached the conclusion it did -- i.e., finding that although CCA was a private entity that operated pursuant to a contract with the State, in order to pursue their civil rights complaints against CCA employees, the prisoners had to have first pursued their complaints through the prison's grievance procedure and have fully exhausted those administrative remedies -- the Court *ipso facto* had to find that CCA, although a private contractor, was, for purposes of processing prisoner grievances, operating as an arm of the State with which it had contracted.[3]

[3] To the extent that Plaintiff has attempted to craft his complaints against CMS as a "policy or custom" complaint against a corporation acting under color of state law so as to bring his action against CMS within the purview of *Monell v. Dep't of Social Services*, 436 U.S. 658, 98 S.Ct. 2018 (1978), the Court notes that *Monell* doctrine is applicable only to *local* governments and municipalities which are not considered part of the State for Eleventh Amendment purposes. *See Monell*, 436 U.S. at 689 n. 54, 98 S.Ct. at 2035 n. 54.

Here, the State of Michigan has delegated its duty to provide health care to state prisoners to Corrections Medical Services. CMS, thus, is acting as arm of the State, and accordingly, like the Michigan Department of Corrections, is immune from suit by virtue of the Eleventh Amendment. Therefore, Plaintiff's action against CMS is barred. Accordingly, the Court will dismiss Plaintiff's claims against CMS with prejudice.[4]

The Magistrate Judge also recommends that the Court deny Plaintiff's motion to compel discovery from Defendants Antonini, Axelson, Trimble, Bey, Mathai, and Clark because they have not been served with process, and recommends that the Court enter an order directing Plaintiff to show cause why the complaint against these defendants should not be dismissed for failure to comply with Fed. R. Civ. P. 4(m).[5] The Court finds it unnecessary to enter a show cause order because the Court finds that Plaintiff has sufficiently explained the breakdown in the "service by the U.S. Marshal" procedure utilized in *in forma pauperis* actions (*see* Response Brief, pp. 9-14). As Plaintiff indicates, the Court ordered the Marshal's office to serve Defendants. The Court is advised that the Marshal's service does not file returns of service, nor does it provide

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[4] This ruling moots the Magistrate Judge's recommendation with regard to Plaintiff's motion to compel discovery from CMS.

[5] Although the Magistrate Judge also noted that Defendant Grayson was not served, an Answer to Plaintiff's Complaint was filed on behalf of Defendant Grayson. Although the Michigan Attorney General indicates (through the reply brief of Defendants Caruso, Epp and Prastaller) that Warden Grayson's name was included as an answering defendant by mistake, no good cause has been shown for requiring that Grayson be served anew.

proofs of service to prisoner-plaintiffs. Plaintiff indicates that upon receiving the Michigan Attorney General's Appearance together with an Answer and jury demand from four of the MDOC defendants, and the Appearance of separate counsel for CMS, Plaintiff mistakenly assumed that all of the defendants had been served. Plaintiff served discovery requests upon CMS and all of the individual CMS defendants in April 2004. No responses were ever filed to those discovery requests. However, because the first responsive pleading was from CMS itself, Plaintiff's counsel assumed that that motion would be decided before any action would be taken on the discovery requests. Although Plaintiff's counsel had sent correspondence to CMS's counsel inquiring about the interrogatories it had directed to the individual CMS defendants, CMS never advised Plaintiff's counsel that the individual defendants had not been served, nor did counsel object to any of the discovery requests on that basis.

Because service of process on the individual defendants was out of Plaintiff's hands, the Court finds that Plaintiff has shown sufficient good cause to extend the life of the summons in this case. Therefore, the Court will order that the summons be extended for a period of 30 days from the date of this Order to enable Plaintiff to effectuate service of process on the six unserved individual CMS Defendants. After these defendants are served, Plaintiff may re-serve them with his discovery requests.

CONCLUSION

For all of the foregoing reasons,

IT IS HEREBY ORDERED that the Magistrate Judge's August 9, 2004 Report and Recommendation is accepted, in part, and rejected, in part. The R&R is accepted with regard to Defendant CMS's Motion to Dismiss as to claims contained in his November 3, 2001, March 7, 2003, and April 22, 2003 grievances but rejected with regard to the July 12, 2002 grievance.

IT IS FURTHER ORDERED that for the reasons stated in the Magistrate Judge's R&R and for the further reasons set forth above, Defendant CMS's Motion to Dismiss is GRANTED and Plaintiff's claims against this defendant are dismissed, with prejudice.

IT IS FURTHER ORDERED that the summonses issued in this case are hereby extended for a period of 30 days to allow Plaintiff to effectuate service upon Defendants Antonini, Axelson, Trimble, Bey, Mathai, and Clark. (There is no need to serve Defendant Grayson inasmuch as an answer has been filed on his behalf.)

IT IS FURTHER ORDERED that Plaintiff's Motion to Compel is DENIED without prejudice as to the individual CMS defendants. Plaintiff may re-serve his discovery requests after these defendants have been properly served with process. (The Motion to Compel is denied as moot as to Defendant CMS.)

SO ORDERED.

Gerald E. Rosen
United States District Judge

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