

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Michael Thomson,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 09AP-782
v.	:	(C.P.C. No. 08CVH-07-10196)
	:	
Ohio Department of Rehabilitation and	:	(ACCELERATED CALENDAR)
Correction et al.,	:	
	:	
Defendants-Appellees.	:	
	:	

D E C I S I O N

Rendered on February 9, 2010

Michael Thomson, pro se.

Richard Cordray, Attorney General, and Ashley D. Rutherford,
for appellees.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Plaintiff-appellant, Michael Thomson, appeals from a judgment of the Franklin County Court of Common Pleas granting the motion of defendants-appellees, the Ohio Department of Rehabilitation and Correction ("ODRC"), Terry Collins, the Director of ODRC, and Carl Anderson, Warden of Toledo Correctional Institution (together, "defendants"), to dismiss plaintiff's complaint for failure to state a claim upon which relief can be granted. Because the trial court did not err (1) in dismissing plaintiff's complaint in

its entirety for failure to state a claim upon which relief can be granted, (2) in not affording plaintiff a hearing on his requests for a temporary restraining order and for a preliminary injunction, and (3) in denying plaintiff's motions to compel and for an award of sanctions, we affirm.

I. Procedural History

{¶2} On July 16, 2008, plaintiff filed a complaint for declaratory judgment and preliminary injunction against defendants. Plaintiff, an inmate incarcerated at Toledo Correctional Institution at the time he filed his complaint, sought a judgment declaring defendants violated his constitutional and statutory rights by recommending he be removed from protective control. Plaintiff further challenged as unconstitutional ODRC's procedures for placement in and removal from protective control, including the review process afforded inmates following notice of defendants' intention to remove an inmate from protective control. Lastly, plaintiff's complaint sought a preliminary injunction ordering ODRC to maintain his protective control classification for the duration of the lawsuit. On August 19, 2008, plaintiff filed a motion for a temporary restraining order ("TRO") to prevent defendants from discharging him from protective control.

{¶3} On August 20, 2008, defendants filed a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted. Plaintiff responded on September 2, 2008 with a memorandum opposing defendants' motion, and defendants filed a reply on September 15, 2008. The Franklin County Court of Common Pleas issued a decision and entry on July 31, 2009 granting defendants' motion. In its decision, the trial court concluded that because plaintiff had not been released from protective control at the time he filed his complaint, he failed to demonstrate a real controversy existed that would

entitle him to declaratory relief. The trial court further determined plaintiff has no constitutional right to remain in protective control. Finally, because plaintiff failed to allege he was in imminent danger of being removed from protective control, the trial court concluded injunctive relief was inappropriate.

II. Assignments of Error

{¶4} Plaintiff appeals, assigning four errors:

I. The Court Erred in Determining Appellant was not in Imminent Danger of Being Removed from Protective Custody.

II. The Court Erred by not Affording Appellant with a Hearing on the Preliminary Injunction and Motion(s) for a Temporary Restraining Order.

III. The Court Erred by Failing to Address Appellant's Issues as Raised in His Complaint for Adjudication.

IV. The Court Erred in Neglecting to Grant Appellant's Motions to Compel and Award of Sanctions.

III. First and Third Assignments of Error – Motion to Dismiss

{¶5} In his first and third assignments of error, plaintiff asserts the trial court erred in granting defendants' motion to dismiss for failure to state a claim upon which relief may be granted. Plaintiff argues a review of the merits of his complaint demonstrates the trial court erroneously determined plaintiff was not in imminent danger of being removed from protective control.

{¶6} "When reviewing a judgment granting a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim, an appellate court must independently review the complaint to determine if dismissal is appropriate." *Wooden v. Kentner*, 153 Ohio App.3d 24, 2003-Ohio-2695, ¶6, quoting *Gleason v. Ohio Army Natl. Guard* (2001), 142 Ohio App.3d 697,

700 (internal quotation marks omitted). "The appellate court need not defer to the trial court's decision in Civ.R. 12(B)(6) cases." *Id.*, quoting *Gleason*.

{¶7} "In order to sustain dismissal of a complaint under Civ.R. 12(B)(6) for failure to state a claim upon which relief may be granted, it must appear beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *LeRoy v. Allen, Yurasek & Merklin*, 114 Ohio St.3d 323, 2007-Ohio-3608, ¶14, citing *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, ¶11. "The allegations of the complaint must be construed as true." *Id.*, citing *Maitland v. Ford Motor Co.*, 103 Ohio St.3d 463, 2004-Ohio-5717, ¶11. "Furthermore, the complaint's material allegations and any reasonable inferences drawn therefrom must be construed in the nonmoving party's favor." *Id.*, citing *Kenty v. Transamerica Premium Ins. Co.* (1995), 72 Ohio St.3d 415, 418.

A. Declaratory Relief Claim

{¶8} ODRC originally assigned plaintiff to the protective control unit in 1994. Plaintiff's complaint states that during his time in protective control, he learned he suffers from Asperger's Syndrome, a "distinct form of autism." (Complaint, 3.) Plaintiff's complaint asserts his Asperger's Syndrome, coupled with his physical stature and appearance, subject him to an "increased risk" of sexual victimization and exploitation. (Complaint, 4, 8.) His complaint, in part, sought a declaration that he could not be removed from protective control.

{¶9} A declaratory judgment action is a civil action that provides a remedy in addition to other legal and equitable remedies available. *Aust v. Ohio State Dental Bd.* (2000), 136 Ohio App.3d 677, 681. "The essential elements for declaratory relief are (1) a

real controversy exists between the parties, (2) the controversy is justiciable in character, and (3) speedy relief is necessary to preserve the rights of the parties." *Walker v. Ghee*, 10th Dist. No. 01AP-960, 2002-Ohio-297, quoting *Aust*. The only reasons for dismissing a declaratory judgment action "before addressing the merits of the case are: (1) no justiciable issue or actual controversy exists between the parties; or (2) the declaratory judgment will not terminate the uncertainty or controversy." *Festi v. Ohio Adult Parole Auth.*, 10th Dist. No. 04AP-1372, 2005-Ohio-3622, ¶11, citing *Wilburn v. Ohio Dept. of Rehab. & Corr.* (Nov. 27, 2001), 10th Dist. No. 01AP-198. For purposes of a declaratory judgment action, "[a] 'justiciable issue' requires the existence of a legal interest or right, and a 'controversy' exists where there is a genuine dispute between parties with adverse legal interests." *Ritchie v. Ohio Adult Parole Auth.*, 10th Dist. No. 05AP-1019, 2006-Ohio-1210, ¶17, citing *Wilburn*, and *Festi* at ¶11.

{¶10} Inherent in determining whether a complaint sets forth a justiciable issue is the question of ripeness. Ripeness is "a question of timing." *State ex rel. Elyria Foundry Co. v. Indus. Comm.*, 82 Ohio St.3d 88, 89, 1998-Ohio-366, quoting *Regional Rail Reorganization Act Cases* (1974), 419 U.S. 102, 140, 95 S.Ct. 335. "The ripeness doctrine seeks to prevent courts from engaging in premature adjudication." *Johnson v. Ferguson-Ramos*, 10th Dist. No. 04AP-1180, 2005-Ohio-3280, ¶22, citing *Elyria Foundry Co.* at 89. Premature claims are not justiciable, so trial courts lack jurisdiction to review them. *Id.*, citing *Stewart v. Stewart* (1999), 134 Ohio App.3d 556, 558, quoting Section 4(B), Article IV, Ohio Constitution.

{¶11} Defendants contend plaintiff's complaint was not yet ripe for review, as plaintiff's complaint neither alleged plaintiff had been removed from protective control nor

asserted he was in imminent danger of being so removed. With that premise, defendants assert no justiciable controversy exists between the parties and the trial court thus properly dismissed plaintiff's complaint. Plaintiff responds that the trial court erred in determining he was not in imminent danger of removal from protective control, since defendants effectuated his actual removal shortly after he filed his complaint by transferring him to a different institution and placing him with mentally challenged inmates.

{¶12} Initially, plaintiff's argument misapprehends the nature of a Civ.R. 12(B)(6) motion to dismiss. When construing a motion to dismiss for failure to state a claim, the trial court "may not rely on allegations or evidence outside the complaint," but instead must review only the complaint itself. *Morrow v. Reminger & Reminger Co., L.P.A.*, 183 Ohio App.3d 40, 2009-Ohio-2665, ¶7, citing *State ex rel. Fuqua v. Alexander* (1997), 79 Ohio St.3d 206, 207, and *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, syllabus. Plaintiff's complaint avers that although the Protective Control Review Committee and the managing officer of the Toledo Correctional Institution recommended his release from protective control, the Bureau of Classification "has not officiated a disposition concerning the Plaintiff's appeal of the decision." (Complaint, 6.) The trial court properly relied on the face of plaintiff's complaint in determining defendants' motion to dismiss. If circumstances changed after plaintiff filed his complaint, his remedy was a motion to amend his complaint pursuant to Civ.R. 15.

{¶13} Secondly, as plaintiff's complaint suggests, the Ohio Administrative Code provides a procedure for dealing with the substance of plaintiff's complaint. Ohio Adm.Code 5120-9-14 governs inmate control and discipline, including the procedure for

placement in and removal from protective control. According to the rule, "[e]very six months the warden or designee shall interview the inmate" in protective control to determine the necessity of continuing such placement. Ohio Adm.Code 5120-9-14(J). The rule further provides that "[t]he status of every inmate placed in protective control shall be reviewed by the reclassification committee every ninety days," and the reclassification committee then may recommend continued placement in protective control, release to the general inmate population, or other appropriate action. *Id.*

{¶14} Under the provisions of the rule, the warden may recommend an inmate be removed from protective control based on his own interview or based on the findings of the reclassification committee. *Id.* After the warden forwards a recommendation to discontinue placement in protective control, the Bureau of Classification, a component of ODRC, must "make the final determination and effectuate any necessary institutional transfer." *Id.* In making its decisions regarding inmate placement, the members of the Bureau of Classification "shall consider the recommendations, documentation, and inmate's objections, if any, along with any additional information available to them." Ohio Adm.Code 5120-9-14(H).

{¶15} On November 30, 2007, the acting warden of Toledo Correctional Institution recommended plaintiff's discharge from protective control and his placement in the general population. Plaintiff appealed the recommendation to the Bureau of Classification on December 4, 2007. At the time plaintiff filed his complaint in the common pleas court, the Bureau of Classification had not made a final determination regarding plaintiff's continued placement in protective control, making plaintiff's challenge of his possible removal premature. *Leslie v. Ohio Dept. of Dev.*, 171 Ohio App.3d 55, 2007-Ohio-1170,

¶62 (stating declaratory judgment "is improper when there are sufficient administrative remedies to resolve an issue that does not involve the validity or constitutionality of a statute"); *Arbor Health Care Co. v. Jackson* (1987), 39 Ohio App.3d 183, 186 (noting that "[m]erely because the administrative appeals process takes more time than plaintiff desires is not a sufficient ground for bypassing the specialized procedure").

{¶16} Moreover, 42 U.S.C. 1997e(a) similarly provides that "a prisoner confined in any jail, prison, or other correctional facility" shall bring "[n]o action * * * with respect to prison conditions" under 42 U.S.C. 1983 or any other federal law "until such administrative remedies as are available are exhausted." "Section 1997e(a) requires prison inmates to utilize [administrative procedures] and exhaust all administrative remedies before filing suit in federal or state courts." *Evans v. Collins* (Feb. 27, 2007), S.D. Ohio No. 1:06-CV-00342; accord *Martin v. Ohio Dept. of Rehab. & Corr.*, 140 Ohio App.3d 831, 2001-Ohio-2678 (construing Section 1997e(a), and its requirement that administrative remedies be exhausted, to be a condition precedent to a Section 1983 claim, "whether the claim is brought in federal court or state court"); *Hamilton v. Wilkinson*, 10th Dist. No. 04AP-502, 2004-Ohio-6982, ¶10 (noting "[e]xhaustion of administrative remedies is a requirement under the Federal Prison Litigation Reform Act ['PLRA'], which must be met before a prisoner's 1983 cause of action against prison officials can accrue"); see also *Baker v. Rolnick* (2005), 210 Ariz. 321, 110 P.3d 1284 (concluding "the broad yet plain language of §1997e(a) encompasses §1983 prisoner lawsuits filed in both state and federal court" and noting Ohio, Connecticut, Illinois, Indiana, and Nebraska have applied Section 1997e(a)'s administrative exhaustion requirement to Section 1983 suits filed in state court).

{¶17} Indeed, plaintiff acknowledged such a result in his memorandum opposing defendants' motion to dismiss, stating that "if a potential Plaintiff files an action concerning a [Protective Control] Review Committee decision before the appeal is answered, it is barred by 42 U.S.C. 1997e(a) under the Prison Litigation Reform Act (PLRA) of 1996 for failure to exhaust the administrative remedies available." (Memorandum contra, 7.) See *Reasoner v. Randle*, 4th Dist. No. 00CA2557, 2001-Ohio-2661 (noting available administrative remedy, coupled with Section 1997e(a), "requires inmates complaining of the conditions of their incarceration to exhaust the available administrative remedies prior to seeking equitable relief in the courts"). Because plaintiff filed his complaint before the Bureau of Classification rendered its final decision on plaintiff's request for administrative review, his complaint was not ripe for judicial review.

{¶18} Plaintiff's complaint also sought a declaration that Ohio Adm.Code 5120-9-14 is unconstitutional because it fails to include a time frame in which the administrative review process must be decided, a claim apparently brought pursuant to 42 U.S.C. 1983 for an alleged violation of plaintiff's due process rights. See *Wilkinson v. Dotson* (2005), 544 U.S. 74, 77, 125 S.Ct. 1242 (characterizing as a 42 U.S.C. 1983 claim a prisoner's complaint alleging violation of prisoner's due process rights as a result of allegedly unconstitutional procedures in parole board proceedings).

{¶19} The common law rule in Ohio requiring that administrative remedies be exhausted before declaratory relief is sought arguably does not apply to plaintiff's complaint where the constitutionality of a statute or rule is involved. *Leslie*, supra; *Fairview Gen. Hosp. v. Fletcher* (1992), 63 Ohio St.3d 146, 149-50 (concluding that because no constitutional claims were involved, declaratory relief was unnecessary until

administrative remedies were exhausted). Moreover, a controversy arguably was present regarding plaintiff's constitutional claim because, at the time plaintiff filed his complaint, he was in the midst of having his protective control status determined under a rule whose time frame plaintiff asserts is unconstitutional. Plaintiff's claim nonetheless fails under 42 U.S.C. 1997e(a) for failure to exhaust administrative remedies.

{¶20} Contrary to the language of the statute, plaintiff did not allow the administrative review procedure to be completed before bringing his constitutional challenge. See *Baksi v. Mitchell* (C.A.6., 2000), 211 F.3d 1268 (concluding 42 U.S.C. 1997e(a) applied to a prisoner who claimed defendants violated his due process rights by placing him in administrative isolation without notice and hearing). Because plaintiff failed to exhaust his administrative remedies, his claim for declaratory relief regarding his constitutional claim is not ripe for review, and the trial court properly dismissed it.

{¶21} Accordingly, the declaratory relief aspects of plaintiff's first and third assignments of error are unpersuasive.

B. Injunctive Relief Claim

{¶22} Plaintiff's complaint also seeks injunctive relief. According to the complaint, plaintiff sought a preliminary injunction pending the outcome of his request for declaratory relief. Plaintiff's complaint does not assert he was about to be released from protective control during the pendency of the administrative review.

{¶23} "In deciding whether to grant a preliminary injunction, a court must look at: (1) whether there is a substantial likelihood that plaintiff will prevail on the merits, (2) whether plaintiff will suffer irreparable injury if the injunction is not granted, (3) whether third parties will be unjustifiably harmed if the injunction is granted, and (4) whether the

public interest will be served by the injunction." *Hydrofarm, Inc. v. Orendorff*, 10th Dist. No. 08AP-287, 2008-Ohio-6819, ¶18, quoting *Vanguard Transp. Sys., Inc. v. Edwards Transfer & Storage Co., Gen. Commodities Div.* (1996), 109 Ohio App.3d 786, 790, citing *Valco Cincinnati, Inc. v. N&D Machining Serv., Inc.* (1986), 24 Ohio St.3d 41.

{¶24} The primary goal of preliminary injunctive relief "is to preserve the status quo pending final determination of the matter." *Ohio Urology, Inc. v. Poll* (1991), 72 Ohio App.3d 446, 454; *Dunkelman v. Cincinnati Bengals, Inc.*, 158 Ohio App.3d 604, 2004-Ohio-6425, ¶45 (noting the "purpose of a preliminary injunction is to preserve the status quo of the parties pending a decision on the merits"). Here, nothing in plaintiff's complaint asserts he will lose protective control status pending the outcome of the administrative review. Based on the allegations of plaintiff's complaint, no injunctive relief is needed to preserve the status quo while the administrative review process resolves plaintiff's protective control status.

{¶25} Moreover, 42 U.S.C. 1997e(a) combines with Ohio common law to render his request for injunctive relief inappropriate. Not only has plaintiff failed to exhaust his administrative remedies, as 42 U.S.C. 1997e(a) requires, before filing his complaint, but "[i]njunctive relief * * * is granted only where the act sought to be enjoined will cause immediate and irreparable injury to the complaining party, and there is no adequate remedy at law." *Steele v. Collins*, 10th Dist. No. 09AP-9, 2009-Ohio-4836, ¶15, quoting *Franklin Cty. Dist. Bd. of Health v. Paxson*, 152 Ohio App.3d 193, 2003-Ohio-1331, ¶25, citing *Lemley v. Stevenson* (1995), 104 Ohio App.3d 126, 136, and *Strah v. Lake Cty. Humane Soc.* (1993), 90 Ohio App.3d 822, 831. Plaintiff's complaint, in effect, fails to allege irreparable harm is imminent and acknowledges an adequate remedy at law in the

administrative remedies provided to review the warden's recommendation. Plaintiff's first and third assignments of error are unpersuasive insofar as they address the aspects of plaintiff's complaint seeking injunctive relief.

C. ADA Claim

{¶26} Plaintiff also contends the trial court erred in not addressing his assertion that defendants' refusal to allow him to present evidence of his Asperger's Syndrome during his Protective Control Review Committee hearing violated his rights under the Americans with Disabilities Act ("ADA"). In order to state a claim under Title II of the ADA, a prisoner must allege: "(1) that he is a qualified individual with a disability; (2) that defendants are subject to the ADA; and (3) that plaintiff was denied the opportunity to participate or benefit from defendants' services, programs, or activities or was otherwise discriminated against by defendants, by reason of plaintiff's disability." *Hoepf v. Parks* (S.D. Ohio, 2006), No. 1:05CV314, quoting *Toney v. Goord* (N.D.N.Y. Aug. 28, 2006), No. 04-CV-1174. Apart from any other deficiencies plaintiff's ADA allegations may suffer, plaintiff's complaint fails to assert he was denied protective control, the requested accommodation: the administrative review had yet to determine whether plaintiff would be removed from protective control. The trial court thus did not err in dismissing his claim under the ADA for failure to state a claim upon which relief may be granted.

{¶27} For the stated reasons, we overrule plaintiff's first and third assignments of error.

IV. Second Assignment of Error – Hearings for Preliminary Injunction and TRO

{¶28} Plaintiff next asserts the trial court erred in not affording him a hearing on either his requests for a TRO or a preliminary injunction. Plaintiff argues that because

Civ.R. 65 requires an evidentiary hearing on a TRO or preliminary injunction, the trial court's failure to grant him such hearings is reversible error.

{¶29} Civ.R. 65 explicitly addresses both TROs and preliminary injunctions. Civ.R. 65(A) and (B). Contrary to plaintiff's contentions, "Civ.R. 65 does not require a court to hold a hearing on a TRO." *Ridenour v. Wilkinson*, 10th Dist. No. 07AP-200, 2007-Ohio-5965, ¶49, citing Civ.R. 65(A), and *Hohmann, Boukis & Curtis Co., L.P.A. v. Brunn Law Firm Co., L.P.A.* (2000), 138 Ohio App.3d 693, 698-99. Moreover, Civ.R. 65(A) and (B) require a trial court to hold a hearing on a motion for preliminary injunction only if a TRO has been granted. *Id.* Because the trial court properly did not grant plaintiff's TRO, the trial court was not required to conduct a hearing under Civ.R. 65 on plaintiff's motion for preliminary injunction. *Id.* Further, because plaintiff's complaint does not allege a basis for concluding declaratory or injunctive relief is appropriate, any error in failing to conduct an evidentiary hearing on plaintiff's requests for a TRO and a preliminary injunction is harmless. See *id.* at ¶50, citing *Johnson v. Morris* (1995), 108 Ohio App.3d 343, 352-53.

{¶30} Plaintiff's second assignment of error is overruled.

V. Fourth Assignment of Error – Motion to Compel and Sanctions

{¶31} In his fourth and final assignment of error, plaintiff asserts the trial court erred in failing to grant his motions to compel discovery and for an award of sanctions for defendants' failure to comply with an order compelling discovery.

{¶32} We review the trial court's resolution of discovery matters under an abuse-of-discretion standard. *State ex rel. Keller v. Columbus*, 164 Ohio App.3d 648, 2005-Ohio-6500, ¶39, citing *State ex rel. The V Cos. v. Marshall* (1998), 81 Ohio St.3d 467, 469 (noting that, absent an abuse of discretion, an appellate court must affirm a trial

court's disposition of discovery issues). A trial court acts within its discretion when it grants a stay of discovery pending the resolution of a dispositive motion. See *Watley v. Wilkinson*, 10th Dist. No. 03AP-1039, 2004-Ohio-5062, ¶18, citing *Harlow v. Fitzgerald* (1982), 457 U.S. 800, 818, 102 S.Ct. 2727. See also *Grover v. Bartsch*, 2d Dist. No. 21413, 2006-Ohio-6115, ¶10 (finding a motion to dismiss based on the allegations in the complaint might dispose of the litigation, so the trial court was within its discretion when it granted the stay of discovery pending the motion to dismiss).

{¶33} Here, plaintiff filed his motion for an order compelling discovery on September 12, 2008, after defendants filed an August 21, 2008 motion to stay discovery pending the resolution of their August 20, 2008 motion to dismiss. On November 24, 2008, the trial court granted defendants' motion to stay discovery. Pursuant to *Watley*, the trial court did not abuse its discretion in granting defendants' motion to stay discovery and in denying plaintiff's motion to compel discovery.

{¶34} Additionally, an appellate court will not disturb on appeal the trial court's decision whether or not to grant an award of sanctions absent an abuse of discretion. *Toney v. Berkemer* (1983), 6 Ohio St.3d 455, 458 (noting "Civ.R. 37(A) and (B) provide broad discretion to the trial court to impose sanctions for failure to comply with the trial court's discovery orders"). Here, because the trial court issued no order compelling discovery, the trial court did not abuse its discretion in failing to grant plaintiff's motion for award of sanctions for failure to comply with a discovery order. Accordingly, we overrule plaintiff's fourth assignment of error.

VI. Disposition

{¶35} In the final analysis, the trial court did not err in granting defendants' motion to dismiss for failure to state a claim upon which relief can be granted, as plaintiff's complaint did not assert a justiciable claim for declaratory relief or the factual predicate for injunctive relief. Because the allegations of his claim for injunctive relief were insufficient, the trial court did not err in not affording plaintiff a hearing on either his request for a TRO or a preliminary injunction. Finally, the trial court did not abuse its discretion in staying discovery pending disposition of defendants' motion to dismiss and, in light of that ruling, denying plaintiff's motions to compel discovery and for award of sanctions. Having overruled plaintiff's four assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

SADLER and McGRATH, JJ., concur.
