STATE OF MICHIGAN

COURT OF APPEALS

TORIN CLAY,

Plaintiff-Appellant,

v

UNIVERSITY OF MICHIGAN,

Defendant-Appellee.

UNPUBLISHED
December 17, 2020

No. 352349
Court of Claims
LC No. 19-000136-MM

Before: CAVANAGH, P.J., and JANSEN and SHAPIRO, JJ.

PER CURIAM.

Plaintiff, Torin Clay, appeals as of right the December 2, 2019 order granting summary disposition in favor of defendant, the University of Michigan (the University), under MCR 2.116(C)(7) and (C)(8). We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

In the fall of 2017, plaintiff was a junior at the University of Michigan. Plaintiff lived in Detroit, with his mother, Nicole Clay, and commuted to Ann Arbor for school.

On the evening of Friday, September 1, 2017, plaintiff had attended a party with some friends. At some point, plaintiff was separated from his friends who had his car keys. Plaintiff's cell phone battery also died. Knowing he could be safe and charge his cell phone, plaintiff made his way to the Undergraduate Library sometime between 2:00 a.m. and 4:00 a.m. Plaintiff plugged in his cell phone and fell asleep at a table.

A library staff member woke plaintiff, and told him he could not sleep in the library. Plaintiff told the staff member that he was a student, and showed his MCard. Plaintiff then fell asleep for a second time, and was awoken for a second time by the same staff member. At that point, plaintiff got up, and found a different library staff member. Plaintiff told the second staff member he was being harassed, and then left the library.

Plaintiff attempted to call his friends, but no one answered. Around 5:00 a.m., plaintiff re-entered the undergraduate library and fell asleep for a third time. Around 6:00 a.m., plaintiff was

awoken by University of Michigan Campus Police telling him he needed to leave the library. Plaintiff attempted to relay that he was a student, and show his MCard. Regardless, plaintiff was forced to the ground, handcuffed, and arrested for trespass. Plaintiff was taken to the campus police station where he was processed, and then transported to U-M Hospital to be treated for injuries sustained during the arrest. Campus police reported arresting plaintiff for "resisting officer" and "trespass," and received a one-year ban from the undergraduate library.

On September 20, 2017, plaintiff and Clay, who is an attorney and works for the Wayne County Prosecutor's Office, met with Carrie Landrum of the University of Michigan Office of Student Conflict Resolution (OSCR). Plaintiff and Clay viewed a copy of the police report and the notice of library ban during this meeting. Landrum told plaintiff he could get a copy of both documents by contacting campus police. However, when plaintiff attempted to obtain a copy of both documents, he was told by campus police that those documents could not be released to him.

On October 1, 2017, Clay sent an e-mail to University of Michigan President Mark Schlissel asking to meet and discuss the aforementioned events. Schlissel never responded directly to Clay, but instead forwarded her e-mail to the University of Michigan Police Department. On October 3, 2017, University of Michigan Chief of Police Robert Neumann called Clay to discuss this matter. Chief Neumann indicated that this case had been forwarded to the Washtenaw County Prosecutor's Office for consideration of criminal charges, and that if plaintiff sought to appeal the library ban he would have to write a letter of apology to Chief Neumann. Clay indicated that in light in of possible criminal charges, plaintiff would not be writing any type of letter than may self-incriminate. Plaintiff was never criminally charged in this incident. He was, however, banned from using the undergraduate library for the entire 2017-2018 school year, meaning he was prevented from accessing materials or attending student meetings or other events.

Plaintiff felt ostracized and unwelcome as a result of this incident, and it caused him severe emotional distress necessitating treatment. Plaintiff was unable to fully function as a student, and his grades fell. Ultimately, plaintiff received an academic suspension, which plaintiff claims has disrupted his career goals and aspirations.

Plaintiff filed a three-count Verified Complaint in the Court of Claims on August 30, 2019. In Count I, plaintiff alleged defendant violated his right to be free from unreasonable searches and seizures as guaranteed by Const. 1963, Art I, § 11. In Count II, plaintiff alleged defendant violated his right to equal protection of the law as guaranteed by Const. 1963, Art I, § 2. In Count III, plaintiff alleged defendant violated his right against self-incrimination and denied him due process as guaranteed by Const. 1963, Art I, § 17. Plaintiff sought declaratory relief in the form of lifting his academic suspension, as well as compensatory damages, punitive and/or exemplary damages, attorney fees and costs, and any "other and further relief as appears just and proper."

In lieu of an answer, on October 16, 2019, defendant filed a motion to dismiss under MCR 2.116(C)(7) and (C)(8). Relevant to this appeal, defendant argued that plaintiff's complaint must be dismissed for failure to comport with the strictly construed requirements of MCL 600.6431(1), which mandates that within one year after a claim accrues against a state instrumentality, such as defendant, a plaintiff must file a written claim or a written notice of intention to file a claim. Defendant argued that plaintiff's claim accrued when the alleged wrong was done–September 2, 2017–the date that plaintiff was issued a trespass warning, arrested, and banned from the library

for one year. Indeed, plaintiff's verified complaint, filed August 30, 2019, listed September 2, 2017 as the date of accrual. However, plaintiff's Notice of Intent to File a Claim was not received by defendant until September 7, 2018, which is outside of the one-year time period proscribed by law.

Plaintiff filed a response brief, and maintained that his claims were timely as he had substantially complied with MCL 600.6431(1). Plaintiff did admit that his Notice of Intent was three days late due "a misunderstanding and a clerical error," but that such an error should not prelude plaintiff from access to the courts to pursue his constitutional claims. Indeed, a legal assistant had mailed the notice to an old address via certified mail instead of physically delivering the notice, and this error was compounded by the Labor Day Weekend holiday. However, plaintiff argued, defendant had effectively received timely notice of his claim.

For the first time, plaintiff also argued that his due process claim actually accrued on October 4, 2017. Because his due process claim was one for post-deprivation of due process, it did not occur until Chief Neumann spoke to Clay and communicated that plaintiff needed to write an apology letter. Plaintiff argued that in a post-deprivation of due process claim, the taking has already occurred, but only becomes actionable when plaintiff is denied an adequate remedy for the deprivation. This occurred, according to plaintiff, on October 4, 2017. Plaintiff also requested leave to amend his complaint under MCL 2.116(I)(5) and MCR 2.118(A)(2). In this case, plaintiff argued, there are no particularized reasons for denying plaintiff leave to amend. Plaintiff also sought to add Chief Neumann as a defendant to this action, as he was a state employee acting within the scope of his authority. Plaintiff also filed a separate motion for leave to file his first amended complaint that reiterated the arguments made in his response to defendant's motion for summary disposition.

On November 27, 2019, the Court of Claims entered an opinion and order granting defendant's motion for summary disposition under MCR 2.116(C)(7) and (C)(8). The Court of Claims noted that plaintiff filed his notice of intent with the Court of Claims on September 7, 2018, and listed the date of accrual of his claims was September 2, 2017. Thus, "[b]y plaintiff's own admission in his responsive briefing, his [notice of intent] was filed outside the one-year time period described by [MCL 600.6431(1)]." The Court of Claims further found plaintiff's attempt to excuse the late filing unconvincing, and that an attempt to excuse strict compliance with the statute because of a clerical error is unsupported by any caselaw. Moreover, application of the "harsh-and-unreasonable-consequences" exception is unwarranted in this case. The Court of Claims stated:

> Indeed, this case does not involve allegations of a complex series of events that give rise to plaintiff's cause of action, nor is it a case where the alleged injuries became manifest gradually. Cf. *Mays [v Snyder]*, 323 Mich App [1, 35-36; 916 NW2d 227 (2018)]. Nor are there any allegations that defendant took efforts to conceal the existence of a possible cause of action. Cf. *id*. Rather, plaintiff's complaint alleges a discrete incident as the cause of his alleged injuries that was, according to the complaint, well known to plaintiff. As a result, "it can hardly be said that the application of the [one-year] notice provision of [§ 6431(1)] effectively divested plaintiff of the ability to vindicate the alleged constitutional violation[s] or

> otherwise functionally abrogated a constitutional right. *Rusha [v Dept of Corrections]*, 307 Mich App [300, 312; 859 NW2d 735 (2014)].

The Court of Claims also concluded that plaintiff's due process claim was untimely. The Court of Claims found that based on plaintiff's own complaint, his claim accrued on September 2, 2017, the date upon which plaintiff was banned from the library. Plaintiff sought monetary damages, and the Michigan Supreme Court has held that "a procedural-due-process claim seeking monetary relief accrues when the deprivation of life, liberty, or property has occurred." *Bauserman v Unemployment Ins Agency*, 503 Mich 169, 173; 931 NW2d 539 (2019). Thus, where the alleged due process violation occurred on September 2, 2017, and plaintiff's notice of intent was not filed until September 7, 2018, plaintiff's claim is untimely.

Finally, the Court of Claims concluded:

> [E]ven assuming plaintiff alleged a post-deprivation procedural due process violation that occurred at a later date . . . Count II of plaintiff's complaint would be subject to dismissal under MCR 2.116(C)(8). To that end, plaintiff's responsive briefing argues that he was deprived of due process by way of Chief Neumann's demand that plaintiff write an apology letter. According to plaintiff, this apology demand deprived him of the process to which he would ordinarily be due with respect to challenging his library ban. The problem with this assertion is that ¶ 89 of plaintiff's complaint admits that plaintiff otherwise "had a right to appeal his ban from the Undergraduate Library by way of a formal appeals process as opposed to writing a letter of apology[.]"
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> * * *
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> Here, plaintiff's complaint expressly admits that a process was available, but he did not avail himself of the same. He never alleged that he attempted to invoke the available process or that he was deprived of the same. Furthermore, he does not allege that any deprivation of constitutional rights was the result of an official policy or custom. As a result, his complaint fails to state a claim upon which relief can be granted and, to the extent such a claim could be timely, it would be subject to dismissal under MCR 2.116(C)(8).

On December 5, 2019, the Court of Claims entered a second order denying plaintiff's motion for leave to file an amended complaint on the basis that any amendment would be futile. The "amended claim, like the original claim, suffers from the same lack of compliance with MCL 600.6431(1) as was outlined in [the Court of Claims'] original opinion." Moreover, adding Officer Neumann as a defendant would also be futile. Although this Court in *Pike v Northern Mich Univ*, 327 Mich App 683; 935 NW2d 86 (2019) concluded that generally, notice requirements do not apply to claims against state employees, the allegations of gross negligence that formed the basis for the plaintiff's complaint in *Pike* are distinguishable from plaintiff's allegations against Chief Neumann. Plaintiff's proposed amended is a claim against Chief Neumann in his official capacity, and does not allege gross negligence. Thus, the proposed amendment is actually against the state, because Chief Neumann, although an individual, would not be liable for any damages. Rather,

defendant would be solely responsible for any damage reward. Accordingly, any claim against Chief Neumann also lacks strict compliance with the notice requirements of MCL 600.6431(1)

Plaintiff filed a motion for reconsideration of the Court of Claim's order granting summary disposition in favor of defendant, which was denied. This appeal followed.

II. STANDARDS OF REVIEW

Defendant moved for summary disposition, under MCR 2.116(C)(7) and (C)(8), arguing that plaintiff failed to comply with the notice requirement found in MCL 600.6431.

> MCL 600.6431 "establishes conditions precedent for avoiding" governmental immunity. *Fairley v Dep't of Corrections*, 497 Mich 290, 297; 871 NW2d 129 (2015). In other words, if a plaintiff fails to comply with MCL 600.6431, his or her claims against a governmental agency are barred by governmental immunity. *Id*. This court reviews de novo a lower court's decision to grant summary disposition under MCR 2.116(C)(7) on the basis of governmental immunity. *Yono v Dep't of Transp*, 499 Mich 636, 645; 885 NW2d 445 (2016). "When a motion is filed under this subrule, the court must consider not only the pleadings, but also any affidavits, depositions, admissions or documentary evidence that is filed or submitted by the parties." *Kerbersky v Northern Mich Univ*, 458 Mich 525, 529; 582 NW2d 828 (1998), citing MCR 2.116(G)(5). "Further, whether MCL 600.6431 requires dismissal of a plaintiff's claim for failure to provide the designated notice raises questions of statutory interpretation, which we . . . review de novo." *McCahan v Brennan*, 492 Mich 730, 735-736; 822 NW2d 747 (2012) (citation omitted). [*Bauserman v Unemployment Ins Agency*, 503 Mich 169, 179; 931 NW2d 539 (2019).]

Likewise, "[t]his Court reviews a motion for summary disposition under MCR 2.116(C)(8) for the legal sufficiency of a claim." *Mays v Governor of Michigan*, ___ Mich ___, ___; ___ NW2d ___ (2020), citing *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). This court accepts "all factual allegations in the complaint as true, deciding the motion on the pleadings alone." *Id*., quoting *El-Khalil*, 504 Mich at 160. "A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery." *El-Khalil*, 504 Mich at 160.

Additionally, a trial court's decision on a motion for leave to amend a pleading is reviewed for an abuse of discretion. *PT Today, Inc v Comm'r of Office of Fin and Ins Servs*, 270 Mich App 110, 142; 715 NW2d 398 (2006). A trial court "abuses its discretion only when the court's decision is outside the range of reasonable and principled outcomes." *Coloma Charter Twp v Berrien Co*, 317 Mich App 127, 163; 894 NW2d 623 (2016).

III. ANALYSIS

First, plaintiff argues on appeal that the Court of Claims erred by dismissing his complaint for failure to strictly comply with the requirements of MCL 600.6431(1). We disagree.

MCL 600.6431(1) provides:

> (1) No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.

This notice requirement "is an unambiguous condition precedent to sue the state," and "a claimant's failure to strictly comply" with the statute "warrants dismissal of the claim." *Mays v Governor*, 323 Mich App 1, 26-27; 916 NW2d 227 (2018).

Neither party disputes the applicability of MCL 600.6431(1) to this case; plaintiff was required to provide defendant with notice of his claim within one year. Thus, the issue is whether plaintiff's notice was timely. Plaintiff's notice of intent was filed in the Court of Claims on September 7, 2018, and indicated that plaintiff's claim arose on September 2, 2017, the date he was arrested and banned from the undergraduate library. Specifically, the notice provided, "3. When the Claim Arose: September 2, 2017." Plaintiff's verified complaint also indicated that plaintiff's claim arose on September 2, 2017. Thus, it is clear that plaintiff's notice of intent was untimely, as it was filed three days after the one-year deadline outlined in MCL 600.6431(1). Indeed, plaintiff conceded in his response brief to defendant's motion for summary disposition that his notice of intent was untimely. Thus, where plaintiff failed to strictly comply with the notice requirement found in MCL 600.6431(1), plaintiff could not maintain this suit against defendant and dismissal of his claim was required. *Mays*, 323 Mich App at 26-27.

Briefly, plaintiff argued in his responsive briefing and in this Court that his post-deprivation due process claim actually accrued on October 4, 2017, the date Chief Neumann told Clay that the only way to appeal the library ban was to write a letter of apology. Admittedly, this information was inconsistent with the clearly stated appeal process found on the trespass warning issued to plaintiff on September 2, 2017, which provided:

> **RIGHT TO APPEAL**
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> You have the right to appeal this warning, or any extension of it, by appointment with the Director of the Department of Public Safety (DPS) at the University of Michigan at (734) 763-3434. DPS must schedule your appointment within 30 days of your request. An attorney or other support person may accompany you to the appointment. You may appeal the reason for the warning, the property covered by the warning, and the length of time the warning will be in effect. You will not be in violation of this Trespass Warning when you appear at DPS for your appeal appointment.

However, even if plaintiff's argument were to have merit, his failure to comply with the strict requirements of MCL 600.6431(1) preclude his claim. The October 4, 2017 date does not appear

anywhere in plaintiff's notice of intent filed on September 7, 2018. Nor does plaintiff cite that date as a date of accrual anywhere in his verified complaint. With respect to the October 4, 2017 date, plaintiff failed to provide defendant, within one year of that date, specific information regarding the "time when and the place where" his claim arose. Accordingly, plaintiff's claim was properly dismissed as untimely.

Plaintiff also argues on appeal that the Court of Claims abused its discretion by denying his motion for leave to file an amended complaint. Again, we disagree.

When a trial court grants a motion for summary disposition under MCR 2.116(C)(8), as the Court of Claims did here, MCR 2.116(I)(5) provides that "the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." Leave to amend should be denied only for particularized reasons, including undue delay, bead faith, repeated failure to cure deficiencies, undue prejudice, or futility. *Jawad A. Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 208; 920 NW2d 148 (2018). An amendment is futile if it restates existing allegations, or if it would add allegations that still would not state a claim. *Yudashkin v Holden*, 247 Mich App 642, 651; 637 NW2d 257 (2001).

As discussed, any amendment to plaintiff's complaint to include the October 4, 2017 date as the date of accrual would have been futile, as plaintiff would have still failed to comply with the notice requirements under MCL 600.6431(1). Plaintiff also sought to add Chief Neumann as an individual defendant. However, plaintiff does not specifically challenge the Court of Claim's determination that adding Chief Neumann would be futile, therefore we need not address that issue. In sum, we conclude that the Court of Claims did not abuse its discretion by denying plaintiff's motion to file an amended complaint.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Douglas B. Shapiro