UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 02-3811

LANDREE E. WAUFORD,

Appellant

v.

KATHLEEN HAWK, Director of Bureau of Prisons at HOLC; J.D. LAMER, Warden, Warden of U.S.P. Lewisburg; MR. McGINNIS, Captain at U.S.P. Lewisburg; MR. BAGGOT, is no longer employed at U.S.P. Lewisburg; MR. HEVERLY, Lieutenant at U.S.P. Lewisburg; MR. MORALES, Lieutenant at U.S.P. Lewisburg; TWO UNKNOWN OFFICERS, Correctional Officers

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On Appeal From the United States District Court
For the Middle District of Pennsylvania
(D.C. Civ. No. 96-cv-01231)
District Judge: Honorable James M. Munley

Submitted Under Third Circuit LAR 34.1(a)
June 18, 2003

Before: ALITO, BARRY AND ALDISERT, CIRCUIT JUDGES

(Filed: June 30, 2003)

OPINION

PER CURIAM

Landree E. Wauford, a federal prisoner formerly confined in Lewisburg, Pennsylvania, appeals the district court's dismissal of his civil rights complaint for failure

to exhaust administrative remedies. Because the defendants did not assert Wauford's nonexhaustion as an affirmative defense at the earliest practicable moment, we will vacate the district court's judgment and remand for further proceedings.

I.

Wauford filed a civil rights action in the district court in 1996, alleging that prison officers used excessive force against him during a riot at U.S.P. Lewisburg. The defendants filed an answer, offering four separate affirmative defenses. They did not offer as a defense Wauford's failure to administratively exhaust his claims pursuant to 42 U.S.C. § 1997e(a), however.[1] The district court dismissed the complaint pursuant to 28 U.S.C. § 1915(e)(2)(B), concluding that the complaint was conclusory and did not suggest that any defendant had personally participated in a violation of Wauford's civil rights. We vacated in principal part and remanded, holding that the district court's dismissal was correct as to only one defendant. As to the others, we held that Wauford's complaint satisfactorily alleged Eighth Amendment violations.

In 1998, on remand, the defendants sought summary judgment, arguing only that the undisputed facts did not establish a constitutional violation. The district court denied

[1] The answer "admitted" Wauford's statement in the complaint that he had not fully exhausted his administrative remedies, see Answer ¶ III, but the defendants did not argue the nonexhaustion as a reason for dismissal. The Prison Litigation Reform Act (PLRA), which amended § 1997e to require administrative exhaustion before the filing of any lawsuit challenging prison conditions, was enacted on April 26, 1996, about 19 months *before* the defendants filed their answer. See Smith v. BOP, 300 F.3d 721, 723 (3d Cir. 2002). (Wauford's complaint was also filed after the PLRA's enactment.)

the motion. It held that there existed genuine issues of material fact, and it allowed further discovery by Wauford. Thereafter, the court scheduled a pre-trial conference, which was later rescheduled at the defendants' request. Prior to the rescheduled pre-trial conference, however, Wauford filed a document styled "motion for non-exhaustion," in which he again[2] called attention to his failure to fully exhaust his administrative remedies. In response, the defendants filed a "brief in opposition," which asked--for the first time--that Wauford's complaint be dismissed pursuant to § 1997e(a).[3] The district court canceled the pre-trial conference, and it subsequently dismissed Wauford's complaint for failure to state a claim. The basis for the dismissal was Wauford's failure to exhaust his administrative remedies. See District Court Order, *passim*. Wauford timely appealed. On appeal, he argues, among other things, that he was not required to exhaust his administrative remedies. See Informal Brief ¶ 5. We liberally construe his brief to include an argument that the defendants waived any reliance on nonexhaustion. See Haines v. Kerner, 404 U.S. 519, 520 (1972).

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[2] Wauford candidly admitted in his complaint that he had not exhausted his administrative remedies. See Complaint ¶ III(A). As noted above, see supra n.1, the defendants acknowledged the nonexhaustion in their answer but did not press it as a defense.

[3] We note that the defendants' "brief in opposition" was filed in May 2002 (Wauford's "motion for non-exhaustion" was filed in April 2002), over two years after we held in Nyhuis v. Reno, 204 F.3d 65, 67 (3d Cir. 2000), that prisoners seeking money damages were required to exhaust their administrative remedies even when they could not receive such damages by way of the prison administrative process. Accordingly, the defendants cannot even persuasively argue that they pressed the § 1997e(a) issue at the earliest practicable moment after this circuit's law on the issue became clear.

II.[4]

Section 1997e(a)'s exhaustion requirement is not jurisdictional. Nyhuis v. Reno, 204 F.3d 65, 69 n.4 (3d Cir. 2000). In a case decided several months before the district court dismissed Wauford's complaint, we held that § 1997e(a) provides "an affirmative defense to be pleaded by the defendant[s]." Ray v. Kertes, 285 F.3d 287, 295 (3d Cir. 2002). Accordingly, the onus was on the defendants to plead nonexhaustion as a basis for dismissal. Id. at 296. They did not do so until after the case was remanded--and, even then, they did so only after they had been denied summary judgment and the case was on the verge of trial.

Nonjurisdictional bars to suit are typically subject to equitable modifications such as waiver. Cf. Miller v. N.J. State Dep't of Corr., 145 F.3d 616, 617-18 (3d Cir. 1998). The § 1997e(a) requirement is no exception. Ray, 285 F.3d at 295. To preserve it, so as to avoid prejudice to the plaintiff and to conserve judicial resources, a defendant must raise a nonjurisdictional defense early in the litigation. Robinson v. Johnson, 313 F.3d 128, 134 (3d Cir. 2002); Bradford-White Corp. v. Ernst & Whinney, 872 F.2d 1153, 1160-61 (3d Cir. 1989). Although there is no absolute requirement that the defendant press an affirmative defense in an answer, "if [it is] not pleaded in the answer, [it] must be raised at the earliest practicable moment thereafter." Robinson, 313 F.3d at 137. If it

[4] We exercise plenary review over the question whether the district court erred in dismissing the complaint pursuant to § 1997e(a). See Allah v. Seiverling, 229 F.3d 220, 223 (3d Cir. 2000); see also Ray v. Kertes, 285 F.3d 287, 291 (3d Cir. 2002).

is not pressed at that point, it is waived. See id.; Bradford-White Corp., 872 F.2d at 1160-61.

III.

We conclude that the defendants waived any reliance on Wauford's failure to exhaust his administrative remedies. The defendants did not press the § 1997e(a) defense in their answer, instead offering four other defenses. Accordingly, they needed to raise it "at the earliest practicable moment thereafter." Robinson, 313 F.3d at 137. They did not do so. Before they did finally press the issue, on the eve of trial and nearly six years into the litigation (and then only after Wauford broached the subject), this court had already expended considerable resources adjudicating Wauford's first appeal and the district court had already expended considerable resources adjudicating the defendants' motion for summary judgment. On these facts, we do not hesitate to conclude that the defendants waived the § 1997e(a) defense.

In their brief, the prison officials suggest that the district court's dismissal was appropriate because Wauford explicitly conceded his failure to exhaust.[5] See Appellees' brief, 13. In Ray, as the prison officials note, we did not rule out the possibility that a district court could, *on its own motion*, raise nonexhaustion that was apparent on the face of the complaint itself. 285 F.3d at 297. Here, however, the district court did not raise nonexhaustion on its own. Instead, it responded to an express request of the defendants,

[5] Of course, as we have noted, Wauford's failure to exhaust should have been apparent from the outset. See supra n.1.

in their "brief in opposition" to Wauford's "motion for non-exhaustion," for a dismissal pursuant to § 1997e(a). Furthermore, whatever inherent power that a district court retains to raise nonexhaustion on its own surely does not include the power to cure an already-effected waiver of the issue by defendants. See, e.g., Scott v. Collins, 286 F.3d 923, 930 (6th Cir. 2002).[6]

The prison officials also bring to our attention precedent suggesting that a failure to exhaust may properly be raised in a motion to dismiss. See Appellees' brief, 13. We do not dispute this proposition. See, e.g., Robinson, 313 F.3d at 135 & n.3. However, as we indicated above, when a defendant fails to raise an affirmative defense in an answer, it must press the issue "at the earliest practicable moment thereafter." Id. at 137. Even if it could be said here that the prison officials filed the equivalent of a motion to dismiss, its filing on the eve of trial was not "at the earliest practicable moment."

IV.

For the foregoing reasons, we conclude that the district court erred in dismissing Wauford's complaint pursuant to § 1997e(a).[7] We will vacate the district court's judgment and remand for proceedings consistent with this opinion.

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[6] In any event, we perceive no actual intent by the district court to "cure" any waiver. The district court simply does not appear to have considered the possibility of waiver.

[7] Our resolution of the appeal makes it unnecessary for us to address Wauford's contentions that (i) the application of § 1997e(a) to him is unconstitutional and (ii) the district court erred in cancelling the pre-trial conference. The latter issue is, of course, not likely to occur again on remand.

TO THE CLERK:

Please file the foregoing opinion.

_____
Circuit Judge