

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

KEVIN HOWARD,)
)
 Plaintiff,)
)
 v.) Civil Action No. 01-376-SLR
)
 ROBERT SNYDER, STAN TAYLOR,)
 FRANCINE KOBUS, ELIZABETH)
 BURRIS, JOHN DOE #1, JOHN)
 DOE #2, PAUL HOWARD, MAJOR)
 CUNNINGHAM, LESMA JONES,)
 DOREEN WILLIAMS, C/O LASKO,)
 WAYNE MASSEY, JOHN DOE and)
 JANE DOE,)
)
 Defendants.)

MEMORANDUM ORDER

Presently before the court is plaintiff's "Motion for Relief from Judgment" pursuant to Fed. R. Civ. P. 60(b). (D.I. 16) Plaintiff Kevin Howard is a pro se litigant who is presently incarcerated at the Delaware Correctional Center ("DCC") located in Smyrna, Delaware. His SBI number is 148032. He filed this action pursuant to 42 U.S.C. § 1983 and requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915.

I. BACKGROUND

Plaintiff raises two separate claims alleging the violation of his First and Fourteenth Amendment right to access

the courts.¹ Plaintiff alleges that each of the defendants have participated in the violations of his right to access the courts. Plaintiff further alleges that the defendants have engaged in a "continuous tort" beginning on August 2, 1998 and continuing "to this day". (Id.) The court dismissed plaintiff's claims as time-barred by the statute of limitations, finding that the two incidents were separate and did not constitute a continuous tort. Plaintiff filed the current motion on March 22, 2002. This is the court's decision on the motion.

II. STANDARD OF REVIEW

"As a general rule, motions for reconsideration should be granted 'sparingly.'" Stafford v. Noramco of Delaware, Inc., No. 97-376-GMS, 2001 WL 65738 at *1 (D. Del. Jan. 10, 2001) (citing Karr v. Castle, 768 F.Supp. 1087, 1090 (D. Del. 1991)). The Third Circuit has noted that the purpose of a motion for reconsideration is to "correct manifest errors of law or fact or to present newly discovered evidence." Max's Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999) (citing North River Ins. Co. v. CIGNA Reinsurance Co., 52 F.3d 1194, 1218 (3d Cir. 1995)). In order to succeed, plaintiff must show that at least one of the following criteria applies: (1) a change in the controlling law; (2) availability of new evidence

¹ Plaintiff's allegations are set out more fully at Howard v. Snyder, No. 01-376-SLR, 2002 WL 450082 (D. Del. March 11, 2002).

not available when the court made its decision; or (3) need to correct a clear error of law or fact or to prevent manifest injustice. Skretvedt v. E.I. Dupont de Nemours and Co., No. 98-61-MPT, 2000 WL 33341051 at *4 (D. Del. October 31, 2000) (citing Max's Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros, 176 F.3d at 677)). For the reasons discussed below, the court will deny in part and grant in part plaintiff's motion for reconsideration.

III. DISCUSSION

In his motion, plaintiff argues that the court erred in three ways. First, plaintiff argues that the court should have considered plaintiff's complaint along with the amended complaint. Second, plaintiff argues that the statute of limitations has not yet begun to run regarding either of his claims because the tortious conduct of the defendants is on going. Third, plaintiff argues that the exhaustion provision of the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a) tolls the time the statute of limitations begins to run.

Plaintiff's first two argument are unavailing. However, the court agrees that the PLRA requires inmates to exhaust administrative remedies when filing "prison conditions" claims. See 42 U.S.C. § 1997e(a). The Supreme Court has recently determined that all prisoner claims fall within the scope of § 1997e(a). See Porter v. Nassle, 534 U.S. 516, 122 S.Ct. 983, 986 (2002) (holding that "§ 1997e(a)'s exhaustion

requirement applies to all prisoners seeking redress for prison circumstances or occurrences"). Consequently, the time during which plaintiff pursued administrative remedies tolls the statute of limitations. As plaintiff has alleged two separate violations of his right to access the courts, the court will address each incident in turn.

1. The August 21, 1998 Confiscation is Time-barred

Plaintiff's legal material was first confiscated on August 21, 1998. (D.I. 14 at 3) Plaintiff alleges that he filed a grievance requesting that the documents be returned. (Id.) Plaintiff further alleges that on April 5, 1999, defendant Burris refused to return the property confiscated on August 21, 1998. The court received plaintiff's complaint on May 14, 2001. Plaintiff argues that he placed the complaint in the prison mail system on April 24, 2001. Nonetheless, plaintiff's first claim is time-barred and applying the "mailbox rule" will not save this claim. See Houston v. Lack, 487 U.S. 266 (1998) (holding that a pro se prisoner's notice of appeal in a habeas corpus case was considered filed at the moment of delivery to prison authorities). As noted above, plaintiff's administrative remedies regarding this claim were exhausted on April 5, 1999, more than two years before he filed his complaint. Therefore, the court shall deny plaintiff's motion for reconsideration regarding the confiscation of his legal material on August 21,

1998.

2. The April 28, 1999 Confiscation is not Time-barred

Plaintiff's legal materials were again confiscated on April 28, 1999. (D.I. 14 at 5) Plaintiff alleges that he filed a grievance regarding this confiscation and that the grievance was finally denied on August 17, 2000. (D.I. 16 at 4) Thus, plaintiff exhausted administrative remedies regarding the second confiscation of his legal material on August 17, 2000. Consequently this claim is not time-barred. Therefore, the court shall grant plaintiff's motion for reconsideration regarding the second confiscation of his legal material on April 28, 1999.

In order to succeed on a First Amendment claim for denial of access to the courts, plaintiff must allege an actual injury. See Lewis v. Casey, 518 U.S. 343, 350-355 (1996). In his amended complaint, plaintiff alleges that the confiscation of his legal material on April 28, 1999 adversely effected three of his pending cases. Therefore, plaintiff's claim regarding the confiscation of his legal material on April 28, 1999 is not frivolous within the meaning of 28 U.S.C. §§ 1915(e)(2)(B)-1915A(a). An appropriate order shall be entered regarding this claim.

NOW THEREFORE, IT IS HEREBY ORDERED this 14th day of May, 2002, that:

1. Plaintiff's "Motion for Relief from Judgment" (D.I. 16)

is DENIED in part and GRANTED in part. Plaintiff's claim regarding the confiscation of his legal material on August 21, 1998 is time-barred. Plaintiff's claim regarding the confiscation of his legal material on April 28, 1999 is not time-barred.

IT IS FURTHER ORDERED that:

1. The clerk of the court shall cause a copy of this order to be mailed to plaintiff.

2. Pursuant to Fed. R. Civ. P. 4(c)(2) and (d)(2), plaintiff shall complete and return to the clerk of the court an **original** "U.S. Marshal-285" form for the defendant, as well as for the Attorney General of the State of Delaware, pursuant to 10 Del. C. § 3103(c). Failure to submit this form may provide grounds for dismissal of the lawsuit pursuant to Fed. R. Civ. P. 4(m).

3. Upon receipt of the form(s) required by paragraph 2 above, the United States Marshal shall forthwith serve a copy of the amended complaint (D.I. 14), the court's memorandum order dated March 12, 2002 (D.I. 15), the motion for reconsideration (D.I. 16), this order, a "Notice of Lawsuit" form, the filing fee order(s), and a "Return of Waiver" form upon each of the defendants so identified in each 285 form.

4. Within **thirty (30) days** from the date that the "Notice of Lawsuit" and "Return of Waiver" forms are sent, if an executed

"Waiver of Service of Summons" form has not been received from a defendant, the United States Marshal shall personally serve said defendant(s) pursuant to Fed. R. Civ. P. 4(c)(2) and said defendant(s) shall be required to bear the cost related to such service, unless good cause is shown for failure to sign and return the waiver.

5. Pursuant to Fed. R. Civ. P. 4(d)(3), a defendant, who before being served with process timely returns a waiver as requested, is required to answer or otherwise respond to the complaint within **sixty (60) days** from the date on which the complaint, this order, the "Notice of Lawsuit" form, and the "Return of Waiver" form is sent. If a defendant responds by way of a motion, said motion shall be accompanied by a brief or a memorandum of points and authorities and any supporting affidavits.

6. No communication, including pleadings, briefs, statement of position, etc., will be considered by the court in this civil action unless the documents reflect proof of service upon the parties or their counsel. The clerk of the court is instructed not to accept any such document unless accompanied by proof of service.

Sue L. Robinson
UNITED STATES DISTRICT JUDGE