97CV07404-RR-MO

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

United States of America ex rel. THOMAS TOCCO,

97 CV 7404 (RR)

Plaintiff,

Memorandum and
ORDER

-against-

CALVIN D. MORTON, Warden; DAVID SCHAAF, Deputy Warden; R. PALMQUIST, Deputy Warden; REX SPROUL, Deputy Warden; M. TRAXLER, SIA; UNITED STATES BUREAU OF PRISONS; UNITED STATES JUSTICE DEPARTMENT; et alia,

Defendant.

----------X

APPEARANCES

THOMAS TOCCO,
Inmate No. 45301-053
FCI Schuylkill
P.O. Box 700
Minersville, PA 17954
Petitioner Pro Se

GM

HON. ZACHARY W. CARTER
UNITED STATES ATTORNEY FOR THE
EASTERN DISTRICT OF NEW YORK
One Pierrepont Plaza
Brooklyn, NY 11202
By: Richard M. Molot, Esq.
Assistant United States Attorney
Attorney for Defendants

RAGGI, District Judge:

Petitioner Thomas Tocco, proceeding pro se, petitions this court for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 (1994), and for injunctive and/or declaratory relief to reduce the inmate population at the Brooklyn Metropolitan Detention Center ("MDC"). Tocco was convicted in December 1995 after entering a guilty plea before Judge Jack B. Weinstein to one count of conspiracy to commit arson in violation of 18 U.S.C. § 371. See United States v. Tocco, 95 CR 119. Sentenced to five-years' imprisonment, Tocco is presently incarcerated at the Federal Correctional Institution in Schuylkill, Pennsylvania. From October 1997 through January 1998, however, Tocco was housed at the MDC in Brooklyn. Petitioner submits that the MDC is plagued by various unsafe and unsanitary conditions caused by prisoner overcrowding. He seeks a writ of habeas corpus and such injunctive and declaratory relief as will remedy the complained of overcrowding. The United States Attorney, on behalf of all defendants, moves to dismiss Tocco's petition without prejudice on a number of grounds, including a failure to exhaust administrative remedies and mootness. Having carefully considered the

submissions of the parties, this court finds that the government's motion to dismiss without prejudice is properly granted.[1]

Discussion

I. Habeas Corpus

To the extent that Tocco sues for habeas corpus relief, his petition must be dismissed for failure to state a claim. Habeas corpus is available to prisoners who contend that they are in custody in violation of the Constitution or laws of the United States. See 28 U.S.C. § 2241. Tocco, however, does not challenge the legality of his conviction or the fact or duration of his confinement. He challenges only the conditions under which he has -- in the past -- been confined. He must look to legal theories other than habeas corpus to pursue this claim. See Mack v. Varelas, 835 F.2d 995, 998 (2d Cir. 1987). The court hereby dismisses his habeas corpus petition without prejudice.

---

[1]This is Tocco's second lawsuit arising out of his confinement at the MDC. In 1996, he filed a Bivens action against the institution and certain of its officers for injuries sustained in a fight with a fellow inmate. See Tocco v. Brooklyn Metropolitan Detention Center, et al., 96 CV 0726. Judge Weinstein dismissed that case on October 22, 1997 for failure to prosecute.

II. Other Avenues of Relief -- Failure to Exhaust Administrative Remedies

However liberally this court reads Tocco's pleadings to state some other claim for relief than habeas corpus, his action would have to be dismissed for failure to exhaust administrative remedies. Moreover, to the extent he seeks equitable relief, his transfer from the MDC renders his claim moot.

The Prison Litigation Reform Act of 1995 ("PLRA"), codified at 42 U.S.C. § 1997e(a) (1994 & Supp. 1998) specifically provides that no prisoner may bring any federal lawsuit challenging the conditions of his confinement "until such administrative remedies as are available are exhausted." The Bureau of Prisons Administrative Remedy Program, set forth at 28 C.F.R. § 542.10 et seq. (1997), describes the process through which inmates housed in federal institutions may seek review of issues relating to "any aspect of their confinement," 28 C.F.R. § 542.10. This process provides for institutional review of an inmate's complaint at various levels from the warden of a particular

institution to the Bureau's Regional Director to its General Counsel. See 28 C.F.R. § 542.15.

It is undisputed that Tocco pursued no administrative remedies before filing for relief in this court. Courts have excused a failure to exhaust administrative remedies in certain narrow circumstances: (1) where pursuit of administrative remedies can unduly prejudice a subsequent court action; (2) where the administrative agency cannot grant the relief sought; or (3) where administrative bias and predisposition is demonstrated. See McCarthy v. Madigan, 503 U.S. 140, 144 (1992). Assuming that these exceptions apply to the statutory mandate of the PLRA, Tocco has failed to show that any pertain to his case.

Instead, he cites this court to Lewis v. Meyer, 815 F.2d 43 (7th Cir. 1987), a case that reiterates the general proposition that exhaustion is not a prerequisite to filing a § 1983 suit. Id. at 44. Lewis, however, predates the statutory requirements of the PLRA. Similarly, Tocco errs in suggesting that

MDC administrative procedures are deficient because they were not certified by the Attorney General pursuant to 18 C.F.R. § 40.1 et seq. These regulatory provisions expressly apply only to state facilities. Finally, Tocco's unsubstantiated observation that other inmates who had complained about MDC conditions were transferred, presumably before they were able to pursue their grievances, does not excuse his own failure to file any administrative complaint. Given the nature of Tocco's complaint -- confinement in an allegedly overcrowded, unsafe, and unsanitary facility -- a transfer was plainly in his own interest.

To the extent Tocco asserts that unsatisfactory conditions persisted at the MDC after his transfer, he simply has no standing to sue for equitable relief, the only remedy he seeks in his pleadings. See Prins v. Coughlin, 76 F.3d 504, 506 (2d Cir. 1996) (inmate's transfer from a prison facility moots an action for injunctive relief against the transferring facility).[2]

---

[2] A litigant's transfer from a prison facility does not moot an action for money damages. Since Tocco has not requested such relief in his pleadings, the court makes no assumptions in this regard since various legal principles beyond the exhaustion requirements of the PLRA limit suits against the federal

Accordingly, the court dismisses Tocco's action without prejudice on the grounds that he failed to exhaust administrative remedies and that his own claim for equitable relief is now moot.

Conclusion

To the extent Thomas Tocco petitions for a writ of habeas corpus to correct allegedly unsatisfactory conditions at the Metropolitan Detention Center, a facility where he is no longer confined, his suit is dismissed without

---

government, its agencies, and employees for money damages. Indeed, in its reply papers, the government correctly points out that sovereign immunity would bar Tocco from suing the Bureau of Prisons, the Department of Justice, or any of the individual defendants in their official capacities for money damages. See Armstrong v. Sears, 33 F.3d 182, 185 (2d Cir. 1994) (Bivens action properly brought, not against United States or its governmental agencies, but rather against agents in their individual capacities); Liffiton v. Kauker, 850 F.2d 73, 77-78 (2d Cir. 1988) (United States' sovereign immunity precludes damages suit in absence of explicit congressional waiver of immunity); Keene Corp. v. United States, 700 F.2d 836, 845 n.13 (2d Cir.) (government has not waived sovereign immunity for damage actions arising out of alleged constitutional violations), cert. denied, 464 U.S. 864 (1983). If Tocco nevertheless thinks he can pursue a viable claim for money damages against any of the defendants, he is directed to file an amended complaint within thirty days of this order detailing (1) the specific parties sued for damages, (2) the wrongs attributed to each party and the injuries resulting therefrom, and (3) the legal theory on which he seeks to recover damages.

prejudice for failure to state a claim. Insofar as a liberal reading of Tocco's pleadings suggests that he is relying on other theories to obtain the equitable relief sought, the court dismisses the action without prejudice for failure to exhaust administrative remedies and mootness. If Tocco wishes to amend his complaint to plead a cause of action for money damages he must do so within thirty days of this order.

SO ORDERED.

Dated: Brooklyn, New York
November 6, 1998

REENA RAGGI
UNITED STATES DISTRICT JUDGE