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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOHNATHAN NELSON,

Plaintiff,

**PLAINTIFF'S MOTION
TO RECONSIDER**

-VS-

J. PILLEY,

Civil Action No. 07-6064

Defendant.

MOTION BY: Plaintiff Johnathan Nelson

DATE, PLACE, AND TIME
OF HEARING:

At the United States District Court, Western District of New York, United States Courthouse, 100 State Street, Rochester, New York, before the Hon. David Larimer at a date, place and time to be determined by the Court.

RELIEF REQUESTED:

(1) Granting Plaintiff's motion, pursuant to Fed. R. Civ. P. 59(e) and 60(b): (a) for reconsideration of the Court's August 31, 2009 Decision and Order; (b) to vacate the Court's September 1, 2009 Judgment; (c) to allow Plaintiff to conduct further discovery with respect to his exhaustion of administrative remedies; and (d) to allow Plaintiff to supplement his response to Defendants' motion for summary judgment; and

(2) Granting Plaintiff such other and further relief as the Court deems just and proper.

SUPPORTING PAPERS: (1) Affidavit of Joseph Nacca, sworn to on September 10, 2009; and (2) Memorandum of Law in Support of Motion to Reconsider dated September 10, 2009.

PLEASE TAKE FURTHER NOTICE that Plaintiff requests oral argument of this motion.

DATED: September 10, 2009
Fairport, New York

BOND, SCHOENECK & KING, PLLC

/s/ Joseph Nacca

Joseph Nacca, Esq.

James Holahan, Esq.

Attorneys for Plaintiff Johnathan Nelson

345 Woodcliff Drive, Suite 208

Fairport, NY 14450

Telephone: (585) 362-4722

jnacca@bsk.com

TO: Gary M. Levine, Esq.
Assistant Attorney General of Counsel
NYS Office of the Attorney General
144 Exchange Blvd., Suite 200
Rochester, NY 14614
gary.levine@oag.state.ny.us

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOHNATHAN NELSON,

Plaintiff,

-VS-

J. PILLEY, et al.

Defendants.

**AFFIDAVIT IN SUPPORT OF
MOTION TO RECONSIDER**

Civil Action No. 07-6064

JOSEPH S. NACCA, being duly sworn deposes and says:

1. I am an attorney licensed to practice in New York and am an associate of Bond, Schoeneck & King, PLLC, attorneys for plaintiff Johnathan Nelson (“Nelson”).

2. I respectfully submit this Affidavit in support of Nelson’s Motion to Reconsider this Court’s Decision and Order dated August 31, 2009 (the “Decision and Order”) and to vacate the Judgment entered in this action on September 1, 2009 (the “Judgment”), made pursuant to Fed. R. Civ. P. 59(e) and 60(b).

Background

3. Nelson filed this action *pro se* in February 2007, seeking damages for excessive use of force and cruel and unusual punishment.

4. In May 2007, after Defendant Pilley answered the Complaint, Nelson filed a Motion to Appoint Counsel. (See Docket No. 6.)

5. In August 2007, as discovery was being conducted, Nelson filed a second Motion to Appoint Counsel. (See Docket No. 30.) In September 2008, Nelson filed a third Motion to Appoint Counsel. (See Docket No. 34.)

6. Defendants filed a motion for summary judgment in November 2008. (See Docket No. 36.) As of that date, the Court had not yet ruled on any of Nelson's three Motions to Appoint Counsel.

7. While the summary judgment motion was pending, Nelson filed a motion to stay consideration thereof until the Court ruled on Nelson's Motion to Appoint Counsel. (See Docket No. 45.) Subsequently, in July 2009, the Court entered an Order granting Nelson's Motion to Appoint Counsel. (See Docket No. 47.)

8. At the time counsel was appointed to represent Nelson, Nelson's Motion to Stay was still pending. In addition, the statute of limitations with respect to the "John Doe" defendants was, at least arguably, set to expire on August 5, 2009.

9. On July 27, 2009, I sent a letter to the Court advising that Magistrate Feldman was in the process of appointing counsel and requesting that the Court refrain from considering the pending Motion for Summary Judgment until Nelson had an opportunity to seek leave to amend the Complaint. A copy of my July 27, 2009 letter is attached hereto as Exhibit 1.

10. Ultimately, rather than amending the existing Complaint, Nelson filed a new Complaint -- naming individual defendants in a separate action in order to preserve his claims against the individuals who had only been identified as "John Doe" defendants in this action. (See Civil Action No. 09-cv-06393, Docket No. 1.) This new action was filed on August 5, 2009.

11. On August 31, 2009, the Court entered its Decision and Order, and, on September 1, 2009, the Court entered the Judgment.

The Motion to Reconsider

12. The instant Motion presents relatively unique circumstances under which reconsideration is necessary to prevent manifest injustice. Absent reconsideration, the Decision and Order would preclude Nelson -- after having counsel appointed over two years after he first moved for such relief --from receiving any benefit therefrom.

12. With respect to the issue of Nelson's failure to exhaust his administrative remedies, there are numerous bases recognized in the Second Circuit upon which a failure to exhaust may be excused.

13. In this case, Nelson did not have the benefit of counsel to assist him with either: (1) conducting discovery in connection with any of the recognized exceptions; or (2) responding to Defendants' motion for summary judgment.

14. Given the Court's recognition that it was appropriate to appoint counsel in this action, Nelson should have the benefit of counsel's representation in some meaningful respect. Specifically, Nelson should be able to take discovery regarding his alleged failure to exhaust administrative remedies and for purposes of establishing one or more of the recognized excuses for such failure, and Nelson should also be permitted to file a supplemental response to Defendants' motion for summary judgment with the assistance of counsel.

15. Further, it would constitute manifest injustice for the Court to grant Nelson's Motion to Appoint Counsel in July 2009 -- after Defendants had completed their discovery and after Nelson had already responded to the motion for summary judgment *pro se* -- only to award summary judgment against Nelson just one month later.

WHEREFORE, in light of the unique circumstances and procedural history of this case, for the reasons set forth herein and in the accompanying Memorandum of Law, Nelson

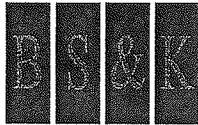
respectfully requests that this Court enter an order: (a) granting Nelson's Motion; (b) vacating the Judgment; (c) granting Nelson the opportunity to conduct discovery related to his alleged failure to exhaust administrative remedies and to file a supplemental brief in response to Defendants' motion for summary judgment; and (d) granting Nelson such other and further relief as is appropriate.

/s/ Joseph S. Nacca
Joseph S. Nacca, Esq.

Sworn to before me this
10th day of September, 2009.

/s/ Judith C. Gray
Notary Public

JUDITH C. GRAY
Notary Public, State of New York
Monroe County
Commission Expires April 30, 2010



BOND, SCHOENECK & KING, PLLC

ATTORNEYS AT LAW ■ NEW YORK FLORIDA KANSAS

JOSEPH S. NACCA
Direct: 585-362-4713
jnacca@bsk.com

July 27, 2009

VIA UPS OVERNIGHT

Hon. David G. Larimer
United States District Judge
U. S. District Court, Western District of New York
100 State Street, Room 2500
Rochester NY 14614

Re: *Nelson v. Pilley, et al.*
Civil Action No.: 07-CV-06064

Dear Judge Larimer:

I write to inform you that Magistrate Feldman is in the process of appointing my colleague, James Holahan, and I to represent Plaintiff in the above-referenced §1983 action. As appointed counsel, we intend to, among other things, seek leave to amend the Complaint.

We understand that defendants' Motion for Summary Judgment is pending before you. We respectfully request that you refrain from considering the pending Motion for Summary Judgment until our planned motion for leave to amend is decided. We also respectfully request an opportunity to respond to the pending summary judgment motion at an appropriate time, after we have had an opportunity to familiarize ourselves with the prior proceedings in this action.

We appreciate your consideration of this matter.

Respectfully,

BOND, SCHOENECK & KING, PLLC

Joseph S. Nacca

cc: Hon. Jonathan W. Feldman (via facsimile)
Mr. Gary M. Levine (via electronic mail)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOHNATHAN C. NELSON,

Plaintiff,

vs.

CORRECTIONS OFFICER J. PILLEY,
et al.,

Defendants.

**MEMORANDUM OF LAW IN
SUPPORT OF MOTION TO
RECONSIDER**

Civil Action No. 07-cv-6064L

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO RECONSIDER

Plaintiff Johnathan C. Nelson (“Nelson”), by and through his attorneys, Bond, Schoeneck & King, PLLC, respectfully submits this Memorandum of Law in Support of his Motion (the “Motion”) to Reconsider this Court’s Decision and Order dated August 31, 2009 (the “Decision and Order”) and to vacate the Judgment entered in this action on September 1, 2009 (the “Judgment”).

PRELIMINARY STATEMENT

After filing this action *pro se* in February 2007, Nelson diligently sought an order granting his request to appoint counsel. Nelson’s request, however, was not granted until July 2009, more than two years after it was initially made. Nelson brings this Motion respectfully requesting that the Court reconsider its Decision and Order granting Defendants summary judgment on the grounds that Nelson did not have the benefit of counsel to aid him in discovery or to adequately respond to Defendants’ summary judgment motion. Specifically, Nelson requests that, pursuant to Fed. R. Civ. P. 59(e) and 60(b), the Court: (a) reconsider its Decision and Order; (b) vacate the Judgment; (c) allow Nelson -- with the benefit of counsel -- the

opportunity to conduct further, limited discovery in connection with the issue of Nelson's exhaustion of administrative remedies; and (d) allow Nelson -- again, with the benefit of counsel -- to supplement his response to Defendants' motion for summary judgment. As will now be shown, such relief is warranted in order to prevent manifest injustice.

ARGUMENT

A. Nelson's Motions to Appoint Counsel

As stated above, Nelson filed the instant action *pro se* in February 2007, seeking damages for excessive use of force and cruel and unusual punishment. In May 2007, after Defendant Pilley answered the Complaint, Nelson filed a Motion to Appoint Counsel. (See Docket No. 6.) In August 2007, as discovery was being conducted, Nelson filed a second Motion to Appoint Counsel. (See Docket No. 30.) Over a year later, in September 2008, Nelson filed a third Motion to Appoint Counsel. (See Docket No. 34.)

Defendants' motion for summary judgment was filed in November 2008. (See Docket No. 36.) As of that date, the Court had not yet ruled on any of Nelson's three Motions to Appoint Counsel. While the summary judgment motion was pending, Nelson filed a motion to stay consideration thereof until the Court ruled on Nelson's Motion to Appoint Counsel. (See Docket No. 45.) Subsequently, in July 2009, the Court entered an Order granting Nelson's Motion to Appoint Counsel. (See Docket No. 47.)

At the time counsel was appointed to represent Nelson, Nelson's Motion to Stay was still pending. In addition, the statute of limitations with respect to the "John Doe" defendants was, at least arguably, set to expire on August 5, 2009. Accordingly, on July 27, 2009, counsel sent a letter to the Court advising that Magistrate Feldman was in the process of appointing counsel and requesting that the Court refrain from considering the pending Motion for Summary Judgment

until Nelson had an opportunity to seek leave to amend the Complaint. (See Nacca Aff. Ex. 1.) Ultimately, rather than amending the existing Complaint, Nelson filed a new Complaint -- naming individual defendants in a separate action in order to preserve his claims against the individuals who had only been identified as “John Doe” defendants in this action. (See Civil Action No. 09-cv-06393, Docket No. 1.) This new action was filed on August 5, 2009. The Decision and Order at issue here was entered less than one month later.

B. Reconsideration is Necessary to Prevent Manifest Injustice

A motion for reconsideration is appropriate where there has been an intervening change in the law, new evidence becomes available, or there is a need to correct a clear error or prevent manifest injustice. See Patterson-Stevens, Inc. v. Int'l Union of Operating Eng'rs, 164 F.R.D. 4, 6 (W.D.N.Y. 1995). Nelson respectfully submits that the instant Motion presents relatively unique circumstances under which reconsideration is necessary to prevent manifest injustice. Absent reconsideration, the Decision and Order would preclude Nelson -- after having counsel appointed over two years after he first moved for such relief -- from receiving any benefit therefrom.

With respect to the issue of Nelson’s failure to exhaust his administrative remedies, there are numerous bases recognized in the Second Circuit upon which a failure to exhaust may be excused. Among other things, a prisoner’s failure to exhaust may be excused where: (1) administrative remedies are not available to the prisoner; (2) defendants have either waived the defense of failure to exhaust or acted in such a way as to estop them from raising the defense; or (3) special circumstances, such as a reasonable misunderstanding of the grievance procedures, justify the prisoner’s failure to comply with the exhaustion requirement. See Hemphill v. New York, 380 F.3d 680, 686 (2d Cir. 2004).

In this case, Nelson did not have the benefit of counsel to assist him with either: (1) conducting discovery in connection with any of the above-described exceptions; or (2) responding to Defendants' motion for summary judgment. Given that the Court appointed counsel to represent Nelson in this matter, Nelson should have the opportunity to litigate the action with the assistance of such counsel. In particular, Nelson should be able to take discovery regarding his alleged failure to exhaust administrative remedies and for purposes of establishing one or more of the above-described excuses for such failure, and Nelson should also be permitted to file a supplemental response to Defendants' motion for summary judgment with the assistance of counsel.

Further, because Nelson moved for the appointment of counsel as early as May 2007, Nelson respectfully submits that it would constitute manifest injustice for the Court to grant his Motion to Appoint Counsel in July 2009 -- after Defendants had completed their discovery and after Nelson had already responded to the motion for summary judgment *pro se* -- only to award summary judgment against Nelson just one month later.

In short, the procedural circumstances of this action are such that the Court's Decision and Order would effectively nullify the Court's appointment of counsel to represent Nelson. While Nelson recognizes that the Court might ultimately grant the motion for summary judgment even after Nelson has the opportunity to conduct additional limited discovery and file a supplemental response, Nelson nevertheless should be afforded those opportunities in the interest of justice.

CONCLUSION

WHEREFORE, for the reasons set forth herein, Nelson respectfully requests that this Court enter an order: (a) granting Nelson's Motion; (b) vacating the Judgment; (c) granting

Nelson the opportunity to conduct discovery related to his alleged failure to exhaust administrative remedies and to file a supplemental brief in response to Defendants' motion for summary judgment; and (d) granting Nelson such other and further relief as is appropriate.

DATED: September 10, 2009

BOND, SCHOENECK & KING, PLLC

By: /s/ Joseph S. Nacca

Joseph S. Nacca, Esq.

James Holahan, Esq.

Attorneys for Plaintiff Johnathan Nelson

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOHNATHAN NELSON,

Plaintiff,

vs.

Civil Action No. 07-6064

J. PILLEY,

Defendant.

Certificate of Service

I hereby certify that on September 10, 2009, I electronically filed **Plaintiff's Motion to Reconsider, Affidavit of Joseph Nacca with the papers in support of the Motion to Reconsider attached, and Memorandum of Law in Support of Motion to Reconsider**, with the Clerk of the District Court using the CM/ECF system, which sent notification of such filing to the following: Gary Levine, Esq. – gary.levine@oag.state.ny.us

BOND, SCHOENECK & KING, PLLC

s/ Joseph S. Nacca

Joseph S. Nacca, Esq.

Attorneys for Plaintiff Johnathan Nelson

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