

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

ANTHONY CIOFFI, JR.
Inmate #332-078
Trumbull Correctional Institution
5701 Burnett Road
Leavittsburg, Ohio 44430-0901

Petitioner

vs.

DAVID BOBBY, Warden
Trumbull Correctional Institution
5701 Burnett Road
Leavittsburg, Ohio 44430-0901

Respondent

CASE NO: 4:04CV1837

JUDGE: JAMES GWIN
Magistrate Judge George J. Limbert

**SUPPLEMENTAL
MEMORANDUM IN
SUPPORT OF PETITIONER'S
OBJECTIONS TO
MAGISTRATE'S PROPOSED
FINDINGS AND
RECOMENDATION**

Now comes petitioner, Anthony Cioffi, Jr., who submits the following supplemental memorandum in support of his *Objections to the Report and Recommendations of the Magistrate Judge* and in response to Respondent Bobby's *Response in Opposition to Petitioner's Objections to The Magistrate Judge's Report and Recommendation* ("Response").

Respondent's Response to petitioner's objections demonstrates a profound misunderstanding of the difference between a motion for summary judgment and a motion to dismiss. This fact is underscored by the fact that the arguments contained in the Response are based upon legal theories applicable to a summary judgment motion.

Perhaps if respondent had filed a motion for summary judgment he could prevail on those arguments. However, applying the legal standards for a motion to dismiss, respondent's position must fail.

It is important to keep in mind that respondent chose to file a motion to dismiss. He could have just as easily filed a motion for summary judgment, but didn't. Federal law sets forth a clear standard to be applied by courts faced with a F.R.12(B)(6) motion to dismiss: "the Court must construe the complaint in the light most favorable to the plaintiff[s], accept all factual allegations as true, and determine whether the plaintiff[s] undoubtedly can prove no set of facts in support of [their] claims that would entitle [them] to relief." LRL Properties, et al., Plaintiffs-Appellants, v. Portage Metro Housing Authority, et al., Defendants-Appellees. (On Appeal from the United States District Court for the Northern District of Ohio); citing In re DeLorean Motor Co., 991 F.2d 1236, 1240 (6th Cir. 1993); Mayer v. Mylod, 988 F.2d 635, 638 (6th Cir. 1993). "A complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Michaels Bldg. Co. v. Ameritrust Co., N.A., 848 F.2d 674, 679 (6th Cir. 1988) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

In the second footnote of his Response, respondent notes: "*Taking Petitioner's counsel's logic of applying the presumption of truth to facts under Rule 12(B) to jurisdiction defenses to its conclusion, an untimely petition would never be subject to a statute of limitations dismissal if only the petitioner affirmatively asserts in the petition*

that the petition was timely filed or that equitable tolling is present.” Respondent’s comment, as set forth above, is a poignant example of a lack of understanding of basic civil procedure. In point of fact, statute of limitations issues and equitable tolling issues such as those referenced by respondent are easily and routinely decided upon motions for summary judgment, where factual inquires and the submission of evidence are not only appropriate but required.

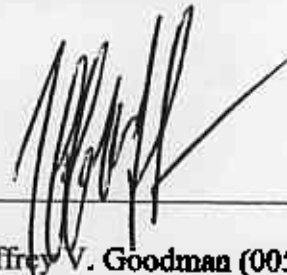
In the instant case, respondent’s counsel is now unhappy with his chosen litigation strategy – a fact which does not alter this court’s legal obligations under well-established law. “When a federal court reviews the sufficiency of a complaint, before the reception of any evidence . . . its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the plaintiff is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Scheuer, 416 U.S. 232, 236 (1974). It is not the function of the court to weigh evidence or evaluate the credibility of witnesses, Cameron v. Seitz, 1994 WL 575446, *5 (6th Cir. 1994); instead, the court should deny the motion unless it is clear that the plaintiff can prove no set of facts in support of her claim that would entitle her to relief.” Cameron, 1994 WL 575446, *5 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

CONCLUSION

Viewing the facts set forth in the pleadings in this matter in a light most favorable to petitioner, giving petitioner the benefit of all reasonable inferences, it is abundantly

clear that petitioner Cioffi can prove a set of facts entitling him to the equitable tolling provisions provided under law. On that basis, this Court should sustain petitioner's objections to the Magistrate Judge's Report and Recommendation, enter an order denying respondent's motion to dismiss and proceed with this matter upon its merits.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Objections has been forwarded to all counsel of record and to all unrepresented parties via regular U.S. Mail this 11 day of February, 2005.



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