UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

NORMAN TIMBERLAKE	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CAUSE NO. 1:06-cv-1859-RLY-WTL**
	)	
ED BUSS,	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF MOTION
FOR JUDGMENT ON THE PLEADINGS

The Court is aware of the nature of this action and the status of the record. The defendant will not lengthen this brief with unnecessary material.

The standards for entry of judgment on the pleadings

After the pleadings are closed, a defendant may seek dismissal for failure to state a claim by a motion for judgment on the pleadings. Fed. R. Civ. P. 12(c), (h). Where no evidence outside the pleadings is submitted a motion for judgment on the pleadings will be reviewed under the standard of a Rule 12(b)(6) motion. *Paist v. Town and Country Corp*., 744 F. Supp. 179 (N.D. Ill. 1990).

Argument

The defendant's argument is straightforward. The plaintiff, by filing this action 14 working days before his execution, has waited so long to bring this action, and has brought it in such a way, that he has deprived the defendant of a meaningful opportunity to develop a

satisfactory defense. Because of that, the Court cannot properly consider the merits of the action without requiring entry of a stay. That fact is, alone, enough to justify dismissal of the action. *See, e.g., Nelson v. Campbell*, 541 U.S. 637, 649-50, 124 S. Ct. 2117, 2126 (2004) ("there is a strong equitable presumption against the grant of a stay where a claim could have been brought at such time as to allow consideration of the merits without requiring entry of a stay"); *cited with approval in Hill v. McDonough*, 126 S. Ct. 2096, 2104 (2006),

The defendant has developed this argument in his Response in Opposition to Plaintiff's Application for Preliminary Injunction and respectfully refers the Court to that response rather than lengthen the instant memorandum by repeating the arguments set forth there.

The argument presented there is strengthened by other considerations. Among them is the obvious fact that the plaintiff is unable to present his case in the expedited fashion required by the Court's rulings, which in turn were necessitated by the late filing of the action. Examples are that the plaintiff did not properly file his motion for preliminary injunction within the time limit set by the Court, which then afforded him two more days to do so. The plaintiff was filing supporting exhibits at 5:42 the day following the day they were due, and after the defendants had responded to his motion.

The plaintiff has not "clarified, reduced or streamlined" his claims as the Court invited on January 4, 2007 (document 9), and still does not suggest how the execution procedure might be improved before January 19, 2007, to remedy his concerns. It is now 7:30 p.m. on January 10 and no "document styled along the lines of a case management plan" has been filed, as the Court requested orally on January 3 and ordered in writing on January 4. The plaintiff has tendered no suggestion for such a document to the defendant's counsel.

The Court has now set this matter for trial to be conducted in Indianapolis less than 40 hours prior to the scheduled execution, which will occur in Michigan City. The most qualified person available to testify regarding Indiana's execution procedure, the defendant, has been occupied, and will continue to be occupied, making arrangements and otherwise dealing with the myriad final details accompanying any execution, as well as the many other matters for which the superintendent of a maximum-security prison is more routinely responsible. The timing of the hearing threatens to compromise his ability to carry out his duties at a proper level.

Much more significant is the fact that, given the short time available, it is impossible for the defendant to determine whether it is advisable to seek out one or more disinterested experts to testify at the trial. The defendant cannot reasonably prepare to depose any experts the plaintiff might call to testify and cannot seek evidence to rebut it. Without a balanced, adversarial presentation of evidence, this Court will not be able to take full advantage of the evidence-gathering potential of a trial. The Court will not be able to consider the merits properly.

The Court is struggling mightily to cope with the short time frame, but it is evident that the plaintiff is unable to do so. The plaintiff created this circumstance by delaying filing too long. Because of that delay, he is not entitled to the protection of equity.

The State of Indiana, however, maintains its recognized "strong interest in enforcing its criminal judgments without undue interference from the federal courts," *Hill* at 2104.

For these reasons, it is right, just, and proper for the Court to dismiss the action now, rather than prolong these proceedings. To do so will alert others facing the death penalty that the Court will entertain their suits only if brought seasonably. To do otherwise, however, will encourage others facing execution to engage in the same dilatory tactic the plaintiff used in the case at bar.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2007, a copy of the foregoing motion for judgment on the pleadings was filed electronically. Notice of this filing will be sent to the following person by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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I hereby certify that on January 10, 2007, a copy of the foregoing for judgment on the pleadings was mailed, by email pursuant to agreement, to the following:

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