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UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

Court of Chancery of Delaware.

Joseph BIROWSKI, Brian J. Winward, et al.
Plaintiffs,

v.

Walter REDMAN, et al. Defendants.

No. Civ.A. 12402. | Submitted May 8, 2000. | Draft
Report June 16, 2000. | Final Report July 18, 2001.

Attorneys and Law Firms

Brian J. Winward, Plaintiff, pro se.

Gregg Wilson, of the Department of Justice, Wilmington,
Delaware, for Defendants.

Opinion

MASTER'S REPORT

GLASSCOCK, J.

*1 After receiving Mr. Winward's letter of May 8, 2000 suggesting that his motion to set aside the Master's report of February 21, 1997 is ripe for decision, I have reviewed the extensive file in this case. Mr. Winward is correct. There are a number of outstanding motions which must be addressed in this matter, including Winward's motion referred to above, the defendants' motion to lift the stay of proceedings (entered by Master Kiger in 1997) and for a protective order, and Winward's motion to proceed *in forma pauperis* in a related action, *Winward v. Wilson*. Because the latter case seeks to address issues which overlap with matters at issue in the instant matter, and since under the doctrines of law of the case and *res judicata*, the validity of Master Kiger's report will necessarily bear on issues in the *Winward v. Wilson* and *Birowski* matters, it is appropriate to defer any action on the *in forma pauperis* motion, together with the other outstanding motions in this case, until the motion to set aside the Master's report is resolved.

This case has involved lengthy and contentious litigation. It was filed in the 1980s as an attempt by the plaintiffs, all of whom were inmates serving sentences under the control of the Department of Corrections, to enforce a

number of claimed rights. Plaintiff Brian Winward is serving a sentence of 107 years, including 39 years of mandatory incarceration. The plaintiffs were represented by counsel. In 1992, they entered a settlement agreement with the defendants, all of whom were state officials, which provided, in part pertinent here, that Winward would be evaluated and offered a drug addiction rehabilitation program. The settlement agreement is enforceable as a contract between the parties, but was not entered as an order of the court.

The current incarnation of the case arose as Winward's attempt to obtain specific performance of what he considered to be the terms of the 1992 agreement, together with a finding that the defendants were in contempt of court for failure to comply. Master Kiger issued a lengthy, extensively researched and thoughtful decision on September 4, 1996. Winward took exception to this draft report, and the Master issued a final report on February 21, 1997, which reiterated the draft report and in addition addressed (and rejected) the exceptions. By rule, Winward had 20 days to take exception to the final report and seek a *de novo* review by the presiding Vice Chancellor. Court of Chancery Rules, Rule 144. Winward did not take exception to the Master's report and specifically waived his right to do so, by letter to the Master.

The Master's final report disposed of all issues in this case other than whether the treatment program currently being offered by the Department of Corrections is in compliance with the 1992 settlement agreement. A hearing on that issue was held on August 6, 1997, at which testimony was taken. Following the hearing, Mr. Winward requested that a stay be entered pending his application for a pardon which, if granted, would have had an affect on his ability to attend the drug addiction treatment program which he preferred. The defendants did not object to the stay, which was entered by Master Kiger and remains in effect. Winward's current motion to "set aside" the Master's February 21, 1997 report was filed on March 12, 1999.

*2 The sole issue before this Court at the time of the Master's report concerned Mr. Winward's request that the *Birowski* case be reopened and 1) the defendants be found in contempt for violating the settlement agreement, or 2) the settlement agreement be specifically enforced in accordance with Mr. Winward's understanding of its essential term: that he be treated for drug addiction in the Key/Crest Rehabilitation Program. In addressing Winward's various arguments, the Master reached the following findings of fact and conclusions of law:

1) The settlement agreement was never embodied in an order of the Court, and therefore Winward was not

Birowski v. Redman, Not Reported in A.2d (2001)

entitled to a finding that the defendants were in contempt of court for any failure to comply with the agreement (Master's report, at 13).

2) That the defendants were not obligated to provide Winward with a particular mode of treatment, but were simply obligated to provide Winward with a suitable program of treatment (Master's report, at 3-9).

3) That Winward had been offered a treatment program which the State indicated was in compliance with its obligations under the settlement agreement, and that Winward had refused to participate in the program, instead insisting on a different program (Master's report, at 3-9).

4) That Winward had no protected liberty interest, under 11 *Del. C.* § 6531 or otherwise, in attending the Key/Crest Program rather than the program of rehabilitation offered by the State (Master's report, at 10-12).

5) That Winward's claim that the State was in violation of a Superior Court sentencing order of February 23, 1993 is not germane to this lawsuit, and that the remedy for any such violation is in the Superior Court (Master's report, at 12).

6) That Winward's allegation that he was the victim of racial discrimination in connection with the State's choice of a rehabilitation program is unrelated to the specific performance sought here, and if, if true, could be remedied at law, depriving this Court of jurisdiction (Master's report, at 12-13, 19-20).

7) That Winward has no constitutional right to counsel in this civil matter (Master's report, 16-17).

8) That Winward had no right to a specific program of drug rehabilitation under the Eighth Amendment to the United States Constitution (Master's report, at 18-19).

9) That Winward was not entitled to further discovery on the issues pertinent to the conclusions of fact and law in the report (Master's report, at 21).

Having waived his right to take exception to the Master's final report, Winward argues that he is entitled to relief from the strictures of the report under Court of Chancery Rule 60(b), on the ground that the opposing party has participated in fraud. Rule 60(b), however, refers to relief from a final judgment. The findings of fact and conclusions of law in the Master's report, while disposing of most of the issues in this case, do not represent a final judgment. I am bound by the previous Master's report under the doctrine of law of the case; what Winward really seeks is a finding that that doctrine does not apply to the Master's report. While relief from the doctrine of law of the case is available somewhat more broadly than

relief from a judgment under Rule 60(b), Winward has failed to establish that such relief is warranted here.

*3 The "law of the case" is established when a legal principal is applied to an issue presented by facts which remain constant during the litigation. *Kenton v. Kenton*, Del.Supr., 571 A.2d 778, 784 (1990). Under the doctrine, I must not disturb the prior decision of this Court unless that decision "is clearly wrong, produces an injustice or should be revisited because of changed circumstances." *Gannett Co., Inc. v. Kanaga*, Del.Supr., No. 352, 1998, Walsh, J. (May 3, 2000); accord *Brittingham v. State*, Del.Supr., 705 A.2d 577, 579 (1998). Winward argues that the Master's final report should be set aside because the report is a result of a fraud perpetrated by the defendants. If the report were a result of a fraud upon the Court, Winward would certainly be correct that the report should be set aside notwithstanding the doctrine of law of the case. In evaluating Winward's claim, I have carefully looked at all the documents submitted by the parties in this matter, including Winward's motion, his response to the State's opening memorandum, and his response to the State's reply memorandum, together with the several letters he has written me with regard to the issue. Winward has failed to demonstrate that the Master's report was induced by fraud, and therefore the report is the law of this case.

Winward's only claim of a "fraudulent" representation made by the defendants prior to the final report involves a statement alleged to have been made by a State official on January 16, 1992 indicating that Winward was ineligible for the Key/Crest Drug Addition Treatment Program, at a time when similarly situated black inmates were enrolled in the program (Winward is white). Assuming that the representation made by the State official was incorrect (and even fraudulent), however, Winward has failed to demonstrate that the Master's report in any way relied on the representation. The Master made no finding that Winward has not been subject to racial discrimination; rather, he correctly indicated that such discrimination, if it existed, was not material to the specific enforcement of the agreement which Winward had entered. The Master also noted that, despite the odious nature of racial discrimination, a remedy for such discrimination is available at law, and thus this Court is without jurisdiction.

In his "Response to Reply Memorandum" Winward seems to be using this allegedly fraudulent statement to make a different argument. Winward argues that the official's "misrepresentation," that the length of the plaintiff's sentence precluded his enrollment in the Key/Crest Program, was expressly contrary to certain Department of Correction regulations (regulations under which Key/Crest treatment was provided to black inmates at the same time it was being denied to Winward). Winward claims that this representation induced not the

Birowski v. Redman, Not Reported in A.2d (2001)

Master's report but the settlement agreement itself: that is, Winward argues that he would not have entered the settlement agreement had the Department of Correction's regulations not been fraudulently misrepresented.

*4 Setting aside the fact that Winward was represented by counsel at the time he entered the settlement agreement, and that his counsel were presumably aware of Winward's rights under the Department of Correction's regulations which were the very matter at issue, Winward's argument has no bearing on the validity of the Master's report. The Master's report is a response to Winward's request that this Court *enforce* the 1992 settlement agreement. In asking that the agreement be enforced, Winward necessarily concedes the agreement's validity. The issue of the validity of the settlement agreement, which Winward now appears to argue was procured by fraud, was not before the Master at the time of the final report.

Winward points to two other allegedly fraudulent communications with the Court. Both of these representations were made at the August hearing which Master Kiger held concerning the issue remaining after the final report: whether the defendants' current treatment program for Winward complied with the 1992 agreement. Since this allegedly fraudulent behavior took place after the Master's report became final, that report cannot have been induced by the fraud.

Winward refers to the testimony of a correctional officer that Winward was ineligible for the Key/Crest Program because of Winward's numerous "disciplinary referrals," a representation Winward claims was untrue and fraudulent. Winward also points to a statement by the Director of the Key Program that Winward would be a disruptive presence in the program although (according to Winward) similarly situated and presumably equally disruptive black inmates were permitted into the program. Assuming that these representations were made to the Court, and assuming that they were untrue and intended to mislead the Court, they still have no bearing on the Master's report which became final before they were uttered. While the accuracy of these statements may have a bearing on the outcome of the remaining issue of compliance with the settlement agreement, Master Kiger never reached that issue, because a stay in the proceeding was entered at Winward's request pending the outcome of his petition before the Board of Pardons.

To repeat, in the interest of clarity: assuming for the purpose of this report that both the January, 1992 and August, 1997 statements were, as Winward alleges, both untrue and intended to mislead the Court, they were not relied upon by the Master in the final report and therefore form no basis for setting aside that report.¹

¹ Winward has by no means demonstrated that the defendants have made statements which are either false or fraudulent.

Winward also argues that the Master's report should be set aside because his failure to take exception was caused by "mental incapacity" resulting from "duress" caused by the stress of his presentation of matters to the Board of Pardons and "Commutation Board", together with his "personal affinity with the Master and [his] family" and "influences of correctional personnel." This allegation fails for at least two reasons. First, it is simply not credible. Winward's claim of "mental incapacity" is belied by the fact that he is obviously intelligent and a prolific litigator who has never been shy about pursuing what he perceives as his rights before judges either of this State or the Federal Courts. His "mental incapacity" was no barrier to his presentation of extensive exceptions to the Master's draft report, to which the Master responded in detail in the final report. Second, Winward has failed to state any basis upon which he would have taken exception (but for his "mental incapacity") which could have been successful. He alleges that the Master "ignored" his claims of fraud, presumably the claims of fraud arising from the January 1992 statement described above. Again, however, the Master's report was not based upon this statement.

*5 Finally, Winward argues that the report should be set aside because subsequent Superior Court sentencing orders have expanded his rights beyond those expressed in the settlement agreement or the Master's report. Winward claims that the State is not complying with these sentencing orders. If Winward is correct, however, that has no bearing on the validity of the Master's report. Winward's remedy is to request that the Superior Court enforce its sentencing orders.

For the reasons stated above, it is my recommendation:

- 1) that Mr. Winward's motion to set aside the Master's Final report of February 21, 1997 be denied;
- 2) that no party having made timely exception to the Final report, the findings of fact and conclusions of law therein be adopted by an order of this Court.

All parties agree that the stay ordered by Master Kiger in August, 1997 serves no further purpose. Therefore, once this report becomes final, I will lift the stay and decide the issues remaining in this matter, together with Mr. Winward's *in forma pauperis* motion in the related *Winward v. Wilson* matter.

Birowski v. Redman, Not Reported in A.2d (2001)

Gentlemen:

I have received a copy of the Master's Final Report, exceptions to which were to be filed by July 26, 2001, as well as Mr. Winward's motion for an enlargement of time for objections to the Master's Final Report.

Mr. Winward's motion, dated July 23, 2001, requests until September 7, 2001 -almost 6 weeks - to file exceptions to the Final Report. The ground for the motion is that Mr. Winward needs time to respond to motions and to file pleadings in other courts. No attempt was made to show why those motions and pleadings should have priority over Mr. Winward's obligation to file timely exceptions to the Master's Final Report. Because those exceptions are limited to those that Mr. Winward presented in connection with the Draft Report, their

preparation should have been a relatively simple matter that could have been accomplished in a short period of time. One month has now passed since the July 26, 2001 deadline, yet no exceptions have been filed. In my view, Mr. Winward has had sufficient time to respond, and his failure to do so amounts to a waiver of any further objections.

Having reviewed the Master's Final Report dated July 18, 2001, the Court is satisfied that it is correct, legally and factually, in all respects. Accordingly, the Master's Final Report, and the recommendations continued therein, are approved. IT IS SO ORDERED.