

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 34929

TRAVERS A. GREENE,

Appellant,

vs.

DONOVAN NICKEL AND CALVIN C. PECK,

Respondents.

FILED

JUN 14 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. P. [Signature]*
CHIEF DEPUTY CLERK

ORDER OF REMAND

This is a proper person appeal from a district court order dismissing appellant's action brought under 42 U.S.C. § 1983 and a subsequent order denying appellant's motion for relief from judgment under NRCP 60(b). Having reviewed the record and other documents before this court, we reverse the district court's order denying relief under NRCP 60(b) and remand this matter to the district court for further proceedings.

Appellant Travers A. Greene is an inmate at the Ely State Prison. He alleges that in September 1997, respondent correctional officer, Donavon Nickel, and two other officers conducted a search of his cell while he was absent. During the search, Nickel allegedly destroyed legal documents kept by Greene. As a result, Greene filed a complaint through the prison's internal grievance procedure seeking reimbursement of \$25 and other relief. Greene also filed an inmate personal property claim form for \$25, pursuant to NRS 209.243 and department of prison administrative rules. His grievance was ultimately denied. Thereafter, he filed a civil complaint in the district court under 42 U.S.C. § 1983, alleging that

respondents violated his due process rights and his right to access the courts. In his complaint, Greene only alleged that he had been "advised . . . to file a grievance"; an affidavit which appears to have been attached to his complaint added, however, that he had "attempted to resolve this [matter] via administrative agencies."

Without filing an answer, respondents moved for dismissal, arguing that Greene's complaint failed to allege that he had exhausted all administrative remedies as required under 42 U.S.C. § 1997e(a).¹ The motion specifically cited NRS 209.243 as one of the administrative remedies available to Greene.² Greene opposed the motion, alleging that he had exhausted all available remedies and attaching documents from the prison grievance procedure that demonstrated that he had pursued this remedy to its end. Greene, however, omitted attaching his inmate personal property claim form authorized under NRS 209.243. The district court subsequently granted the motion to dismiss, concluding that Greene had failed to sufficiently demonstrate exhaustion.

¹Section 1997e(a) provides:

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

²NRS 209.243 provides that a prisoner may file an administrative claim with the department of prisons to recover compensation for the loss of his personal property, property damage, personal injuries, or any other claim arising out of a tort alleged to have occurred during his incarceration as a result of an act of the department or its agents.

Greene filed a timely motion for relief from judgment,³ attaching a copy of the inmate personal property form and asserting that he had assumed that the district court knew that his grievance procedure had included filing this form. The district court concluded that relief under NRCP 60(b) was not warranted, because the motion to dismiss and the reply thereto put Greene on notice that NRS 209.243 was one of the administrative remedies he must show he exhausted, and that his failure to bring the claim form to the court's attention until after dismissal was not excusable. This appeal followed.⁴

Pursuant to 42 U.S.C. § 1997e(a), a prison inmate may not bring an action under § 1983 regarding prison conditions until he has exhausted "such administrative remedies as are available." See also *Brown v. Toombs*, 139 F.3d 1102 (6th Cir.), cert. denied, 525 U.S. 833 (1998). The prisoner has the burden of establishing that he has exhausted all administrative remedies. Id. at 1104. To this end, a prisoner should attach to his § 1983 complaint any decision demonstrating the administrative disposition of his claims. See id.

Because Greene initially failed to present to the district court all evidence pertinent to demonstrating the

³This motion was entitled a motion to alter the judgment; however, in substance, it was a motion for relief from judgment under NRCP 60(b), and the district court gave consideration to it as such.

⁴We deny appellant's motions received on October 14, 1999, and May 22, 2000, to file proper person documents, see NRAP 46(b); however, we have considered the proper person documents received from appellant. We have also considered the response filed by respondents on May 15, 2000.

exhaustion of his administrative remedies, we conclude that the district court did not err in dismissing his complaint in the first instance.⁵

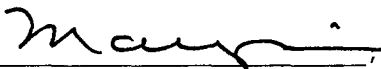
However, the fact remains that Greene actually did exhaust his administrative remedies prior to bringing his § 1983 claim. NRCP 60(b) affords relief from a judgment for mistake, inadvertence, or excusable neglect. Granting or denying a motion under NRCP 60(b) is largely within the discretion of the court. *Culinary Workers v. Haugen*, 76 Nev. 424, 357 P.2d 113 (1960). Nevertheless, Rule 60(b) is a remedial provision which is to be construed liberally and is intended to operate to relieve the harshness of rigid form and to serve this state's public policy of adjudicating an action on its merits. See *La-Tex Partnership v. Deters*, 111 Nev. 471, 893 P.2d 361 (1995). Persuasive factors for granting relief include the moving party's prompt application to remove the judgment, absence of intent to delay proceedings, lack of knowledge of procedural requirements, and good faith. Id. at 476, 893 P.2d at 365.

Applying the relevant factors to this case, we conclude from the record that (1) Greene promptly moved for

⁵We note that the district court, which rendered its decision prior to *Rumbles v. Hill*, 182 F.3d 1064 (9th Cir. 1999), cert. denied, 120 S. Ct. 787 (2000), erroneously determined in its order that the exhaustion requirement was jurisdictional. See id. at 1067-68 (holding that § 1997e(a) is not jurisdictional); *Perez v. Wisconsin Dept. of Corrections*, 182 F.3d 532, 535 (7th Cir. 1999) (same). However, the requirement, although not jurisdictional, is mandatory for initiating a suit under § 1983, and Greene's initial failure to demonstrate exhaustion was a sufficient ground for dismissal. See *Rosenstein v. Steele*, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987) ("[T]his court will affirm the order of the district court if it reached the correct result, albeit for different reasons.").

relief from judgment following the dismissal of his action; (2) there is no evidence that he wanted to delay the proceedings; (3) there is evidence that Greene did not know he had to submit his inmate personal property claim form; (4) and the record does not indicate that his actions were in bad faith. Accordingly, the district court erred in denying Greene relief under NRCP 60(b), especially in light of the fact that he showed compliance with the exhaustion requirement. We therefore reverse the order denying the motion for relief from judgment and remand this matter to the district court for entry of an order granting the motion and for further proceedings.

It is so ORDERED.



Maupin J.



Shearing J.



Becker J.

cc: Hon. Merlyn H. Hoyt, District Judge
Attorney General
Travers A. Greene
White Pine County Clerk