

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1735

JOSEPH FACELLA

vs.

COMMONWEALTH OF MASSACHUSETTS & another.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, an inmate at North Central Correctional Institution (NCCI), brought this action for "Intentional Tort" under 42 U.S.C. § 1983 and G. L. c. 258, alleging that NCCI and Adam Brackett, a correction officer at NCCI, unlawfully disposed of approximately 200 of his comic books valued at hundreds of dollars. On the defendants' motion, the judge dismissed all counts in the complaint except for one alleging that Brackett, in his individual capacity, violated 42 U.S.C. § 1983 by intentionally disposing of the plaintiff's comic books. That claim was later dismissed on summary judgment.

On appeal, the plaintiff argues that the existence of disputed material facts should have precluded summary judgment

¹ Adam Brackett, individually and as a correction officer at North Central Correctional Institution.

on his remaining 42 U.S.C. § 1983 claim, and that the earlier dismissal of the State intentional tort claim against Brackett in his individual capacity was error.² We affirm the dismissal of the plaintiff's 42 U.S.C. § 1983 claim, but agree with the plaintiff that his State law claim against Brackett in his individual capacity should have survived the motion to dismiss. We therefore vacate in part and remand for further proceedings.

Summary judgment. We review the allowance of summary judgment de novo. See Carey v. Commissioner of Correction, 479 Mass. 367, 369 (2018); LaChance v. Commissioner of Correction, 88 Mass. App. Ct. 507, 508 (2015). Summary judgment is appropriate if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002).

The plaintiff's 42 U.S.C. § 1983 claim is predicated on his being deprived of his comic books without due process. The United States Supreme Court, however, has held that procedural due process claims for deprivation of property are barred if there is an adequate postdeprivation remedy available under State law. See Hudson v. Palmer, 468 U.S. 517, 533 (1984);

² The plaintiff does not argue that the dismissal of claims against the Commonwealth or against Brackett in his official capacity were improper.

Baker v. Gray, 57 Mass. App. Ct. 618, 625 (2003). Here, the plaintiff not only had access to the institutional grievance process -- which he took advantage of -- but also to the remedy that he is pursuing in this lawsuit: a State law tort claim. Under Hudson, the availability of such a claim is dispositive on the issue, entitling Brackett to judgment as a matter of law.³ We therefore discern no error in the judge's conclusion that the plaintiff's 42 U.S.C. § 1983 claim failed as a matter of law.⁴

Motion to dismiss. We review the grant of a motion to dismiss de novo. See Curtis v. Herb Chambers I-95, Inc., 458 Mass. 674, 676 (2011).

"In considering whether a count in a complaint survives a motion to dismiss under Mass. R. Civ. P. 12 (b) (6), we accept as true the factual allegations in the complaint and the attached exhibits, draw all reasonable inferences in the plaintiff's favor, and determine whether the allegations plausibly suggest that the plaintiff is entitled to relief on that legal claim" (quotation and citation omitted).

³ We note that Hudson only bars such claims if the deprivation of property was "random and unauthorized," Zinermon v. Burch, 494 U.S. 113, 137 (1990); the plaintiff does not allege that Brackett's actions were authorized by established State procedure.

⁴ The motion judge did not appear to consider this issue in making his summary judgment ruling, but we may affirm the dismissal on "any ground apparent on the record that supports the result reached in the lower court," and do so here. Gabbidon v. King, 414 Mass. 685, 686 (1993).

Buffalo-Water 1, LLC v. Fidelity Real Estate Co., LLC, 481 Mass. 13, 17 (2018). See Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008).

Although the pro se plaintiff cited G. L. c. 258 as the basis for his State claim of "Intentional Tort" against Brackett in his individual capacity, we interpret the claim as one for conversion.⁵ See Mass. R. Civ. P. 8 (f), 365 Mass. 749 (1974) (pleadings need not adhere to any technical form, and "shall be so construed as to do substantial justice"). "To state a plausible claim of conversion, a plaintiff must allege that the defendant wrongfully exercised dominion or control over the personal property of the plaintiff." Hornibrook v. Richard, 488 Mass. 74, 83 (2021).

Reading the complaint and its attachments liberally, we think that the plaintiff has made out a plausible claim that Brackett converted his property. The plaintiff alleges that, at the time Brackett removed him from his cell, he had in excess of 200 comic books stored there. He further alleges that Brackett was subsequently observed removing stacks of comic books from

⁵ The intentional tort claim against Brackett in his individual capacity did not lie in G. L. c. 258. See Parker v. Chief Justice for Admin. & Mgt. of the Trial Court, 67 Mass. App. Ct. 174, 180 (2006) ("With respect to intentional torts, . . . claims against the public employer are barred, see G. L. c. 258, § 10 (c), but may be asserted against the public employee in his individual capacity").

the cell, enough to fill two large trash bags. The plaintiff, on his return from the segregation unit three days later, went to reclaim his property and discovered that only forty-eight of the comic books were accounted for on the contraband inventory form he was given. And, when the plaintiff raised this discrepancy with Brackett, the plaintiff claims that Brackett acted evasively and refused to discuss the missing comic books. These allegations, viewed in the light most favorable to the plaintiff, permit the inference that Brackett intentionally and wrongfully disposed of the comic books, thereby committing conversion. See Hornibrook, 488 Mass. at 83. Whether these facts permit alternative inferences, as Brackett argues, is irrelevant at this stage. See Iannacchino, 451 Mass. at 636.

Brackett's other arguments for affirming the dismissal are also without merit. He first argues that because Department of Correction regulations allowed the plaintiff to possess a maximum of only ten comic books, any excess was contraband, and therefore the plaintiff had no right to them. The regulations themselves belie this assertion. Title 103 Code Mass. Regs. § 403.14 (2014) affords prisoners the right to elect how they would like to manage the disposition of seized property. In doing so, it recognizes that possession and ownership are not interchangeable; declaring an item contraband may permit

deprivation of possession, but the prisoner still owns the item.⁶ Accordingly, the plaintiff retained an ownership interest in the seized comic books, and on that basis may pursue a conversion claim for their improper disposal.

Brackett also claims common law immunity, which shields public officials from liability when "they act[] in good faith, engaging in activity that [is] within their discretion." Nelson v. Salem State College, 446 Mass. 525, 538 (2006). The applicable regulation, however, allowed no such discretion: if, as the plaintiff alleges, Brackett seized his comic books as contraband, then it was mandatory that the plaintiff receive notice and have the opportunity to elect how the items would be disposed of.⁷ See 103 Code Mass. Regs. § 403.14 (2014).

⁶ Authorities considering this issue in the context of prison contraband have consistently recognized this distinction. See, e.g., Hatten v. White, 275 F.3d 1208, 1210 (10th Cir. 2002) ("there is a difference between the right to own property and the right to possess property while in prison"); Williams v. Meese, 926 F.2d 994, 998 (10th Cir. 1991) ("Although plaintiff no longer has possession of the property, he still retains control over it and, therefore, has not been 'deprived' of the property"); Pryor-El v. Kelly, 892 F. Supp. 261, 271 (D.D.C. 1995); Stansbury v. Hannigan, 265 Kan. 404, 420, cert. denied, 525 U.S. 1060 (1998); Small v. Horn, 554 Pa. 600, 614 (1998).

⁷ The plaintiff does not dispute that he received such notice and opportunity for a subset of his comic books, but he alleges that the number was far short of the total taken from him. We note that in March of 2015 the plaintiff entered into an agreement with NCCI establishing default procedures for handling his comic books going forward; we see no indication, and the parties do not argue, that it should have retroactive application to the comic books alleged to be taken here.

Brackett had no discretion to dispose of the comic books before the regulation's requirements were satisfied, and therefore he cannot claim immunity.

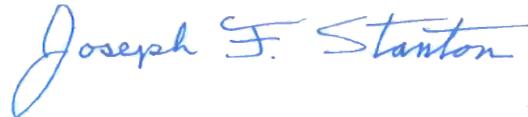
Finally, Brackett also urges us to affirm the dismissal on jurisdictional grounds, noting that the plaintiff's request for \$1,000 is below the damages threshold for Superior Court cases. See G. L. c. 212, § 3. Dismissal in such instances is not reflexive and automatic, however. Rather, a judge "may dismiss [a] case" on such grounds "after receiving written responses from the parties and after a hearing, if requested by any party." G. L. c. 212, § 3A. The issue does not appear to have been raised below. Furthermore, in a case like this, where the plaintiff has also requested injunctive relief and the Superior Court has already overseen the case for years -- and through a summary judgment motion -- we think it prudent to allow the Superior Court judge to consider the matter in the first instance on remand. See Ari Weitzner, M.D., P.C. v. Cynosure, Inc., 85 Mass. App. Ct. 77, 82-84 (2014).

Conclusion. So much of the judgment as dismissed the plaintiff's State law intentional tort claim against Adam Brackett in his individual capacity is vacated, and the case is remanded to the trial court for further proceedings consistent

with this memorandum and order. The remainder of the judgment is affirmed.

So ordered.

By the Court (Milkey,
Lemire & Singh, JJ.⁸),



Clerk

Entered: September 7, 2021.

⁸ The panelists are listed in order of seniority.