

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

June 20, 2016

Elisabeth A. Shumaker
Clerk of Court

In re: MICHAEL GILYARD,

Petitioner.

No. 16-7041
(D.C. Nos. 6:14-CV-00558-JHP-SPS &
6:15-CV-00125-JHP-SPS)
(E.D. Okla.)

ORDER

Before **TYMKOVICH**, Chief Judge, **BRISCOE** and **O'BRIEN**, Circuit Judges.

Michael Gilyard petitions this court for a writ of mandamus directing the United States District Court for the Eastern District of Oklahoma to grant the summary judgment motion he filed in November 2015 in Case No. 6:15-CV-00125-JHP-SPS, for which he filed a motion for adjudication in February 2016. We deny his petition.

Because it is a “drastic” remedy, “we will grant a writ only when the district court has acted wholly without jurisdiction or so clearly abused its discretion as to constitute usurpation of power.” *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1186 (10th Cir. 2009) (internal quotation marks omitted). To be entitled to the extraordinary remedy of a writ of mandamus, Mr. Gilyard “must have no other adequate means to attain the relief he desires”; his right to the writ must be “clear and indisputable”; and we must be satisfied that the writ is an appropriate exercise of our discretion under the circumstances. *Id.* at 1187 (internal quotation marks omitted).

Mr. Gilyard's petition does not meet this high standard for mandamus relief. As an initial matter, the motion in question is no longer pending, and we cannot order the district court to rule on a motion that is not pending. Mr. Gilyard filed duplicate complaints against the same defendants in Case Nos. 6:14-CV-00558-JHP-SPS (the "2014 case") and 6:15-CV-00125-JHP-SPS (the "2015 case") in the same district court. The district court resolved this duplication in a March 28, 2016, opinion and order filed in both cases, which directed the parties to make future filings in the 2014 case and dismissed the 2015 case, without transferring the pending summary judgment motion. Furthermore, Mr. Gilyard has another adequate means to obtain the relief he seeks—specifically, he can refile the summary judgment motion in the 2014 case.

Accordingly, we deny the petition for a writ of mandamus. Mr. Gilyard's motion to proceed without prepayment of costs or fees is granted. Only prepayment of fees is waived, not the fees themselves. 28 U.S.C. § 1915(a)(1). Mr. Gilyard is still required to pay all filing and docketing fees in full.

Entered for the Court



ELISABETH A. SHUMAKER, Clerk