UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-6907

SHAN EDWARD CARTER,

Plaintiff - Appellant,

v.

JOHN W. SHERRILL; BENJAMIN R. DAVID; JAY D. HOCKENBURY; KRISTIN D. PARKS; MARGARET T. CLOUTIER; WILLIAM H. DURHAM; ROY A. COOPER, III; PHYLLIS M. GORHAM; D. JACK HOOKS, JR.; SHERRI HORNER-LAWRENCE; GEORGE P. CORVIN; N.C. STATE BAR; N.C. DEPARTMENT OF JUSTICE,

Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. James C. Dever III, Chief District Judge. (5:16-ct-03272-D)

Submitted: September 28, 2017 Decided: October 3, 2017

Before WILKINSON, MOTZ, and KING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Shan Edward Carter, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

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PER CURIAM:

Shan Edward Carter appeals the district court's orders dismissing his complaint under 28 U.S.C. § 1915(e)(2)(B) (2012) and denying reconsideration. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Carter v. Sherill*, No. 5:16-ct-03272-D (E.D.N.C. June 13 & July 17, 2017). We also deny Carter's motion to assign counsel. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:16-CT-3272-D

SHAN EDWARD CARTER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**ORDER**
	)	
JOHN W. SHERRILL, et al.,	)	
	)	
Defendants.	)	

On October 18, 2016, Shan Edward Carter ("plaintiff" or "Carter"), a death-sentenced state inmate proceeding pro se, filed a 42-page complaint alleging violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO") [D.E. 1]. Carter proceeds in forma pauperis. [D.E. 2, 8]. Carter moves for court-appointed counsel [D.E. 9] and summary judgment [D.E. 10]. Carter has filed several supplements to his complaint [D.E. 11–13]. As explained below, the court denies Carter's motions, reviews the complaint pursuant to 28 U.S.C. § 1915, and dismisses the action for failure to state a claim upon which relief can be granted.

When a prisoner seeks relief in a civil action from a governmental entity or officer, a court must review and dismiss the complaint if it is "frivolous, malicious, or fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915A(a), (b)(1). A frivolous case "lacks an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989). Legally frivolous claims are "based on an indisputably meritless legal theory and include claims of infringement of a legal interest which clearly does not exist." Adams v. Rice, 40 F.3d 72, 75 (4th Cir. 1994) (quotations omitted). Factually frivolous claims lack an "arguable basis" in fact. Neitzke, 490 U.S. at 325.

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The standard used to evaluate the sufficiency of a pleading is flexible, and a pro se complaint, "however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam) (quotation omitted). The Supreme Court's holding in Erickson, however, does not undermine the "requirement that a pleading contain 'more than labels and conclusions.'" Giarratano v. Johnson, 521 F.3d 298, 304 n.5 (4th Cir. 2008) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)); see Ashcroft v. Iqbal, 556 U.S. 662, 677–83 (2009); Coleman v. Md. Court of Appeals, 626 F.3d 187, 190 (4th Cir. 2010), aff'd, 566 U.S. 30 (2012); Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 255–56 (4th Cir. 2009); Francis v. Giacomelli, 588 F.3d 186, 193 (4th Cir. 2009).

On February 16, 1997, on a public street in Wilmington, North Carolina, with "[a] number of residents . . . out on the neighborhood streets that day," Carter chased down and shot to death a man with whom he had an ongoing dispute over money Carter had stolen from the man. State v. Carter, 357 N.C. 345, 348–49, 584 S.E.2d 792, 796 (2003), cert. denied sub nom. Carter v. North Carolina, 541 U.S. 943 (2004). One of the bullets also struck and killed an eight-year-old boy who was sitting in his mother's car. Id. Carter was indicted on two counts of first-degree murder, discharging a firearm into occupied property, and possession of a firearm by a convicted felon, tried capitally and found guilty on all counts, and received two death sentences for the murders and consecutive sentences of 46 to 65 months for discharge of a firearm into an occupied vehicle and 20 to 24 months for possession of a firearm by a convicted felon. Id. at 347, 584 S.E.2d at 795. Carter is also serving sentences of imprisonment, including a sentence of life imprisonment without parole, for the December 6, 1996, first-degree murder, robbery with a dangerous weapon, first-degree burglary, and second-degree kidnapping of another man. See State v. Carter, 156 N.C. App. 446, 448, 577 S.E.2d 640, 641 (2003), cert. denied sub nom. Carter v. North Carolina, 543 U.S. 1058

(2005).

Carter alleges that he "is innocent and a wrongly convicted prisoner" and that

> between February 18, 1999 to this present date . . . all the defendants at various times between the said dates joined in conspiracies against the plaintiff consisting of a conspiracy to murder the plaintiff by poisonous lethal injection under the color of law in the State of North Carolina's death chamber at Central Prison in Raleigh, N.C., malicious communicating threats to murder the plaintiff, kidnapping the plaintiff, tampering with (a civil rights) victim - witness, mail and or wire fraud, aiding and abetting, and circumventing the state criminal procedure that federally funded, in order to subvert the Heck rule injuring the plaintiff in his indisputable contingent monetary int[e]rest and or vested monetary int[e]rest under the color of law.

Compl. [D.E. 1] 2, 8.

Carter names as defendants three defense attorneys, two prosecutors, the former North Carolina Attorney General, an assistant attorney general, three state superior court judges, and a psychiatrist. Id. at 2. All of these defendants bear some connection to his criminal cases. See id. at 13–25. Carter further names the North Carolina State Bar and the North Carolina Department of Justice. Id. at 2. Carter alleges that all defendants have committed "multiple racketeering acts" related to his criminal cases in violation of RICO, and "seeks treble damages from the defendants . . . of upward of $95,000,000.00 (million dollars)," along with declaratory and injunctive relief, including Carter's "release . . . from his illegal restraints and confinement for the wrongful conviction[s]." Id. at 1, 26–32 (describing the alleged predicate acts), 41.

A plaintiff cannot recover monetary damages or obtain injunctive relief for alleged constitutional violations when such recovery would imply the invalidity of an underlying conviction unless he can "prove that the conviction . . . has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." Heck v. Humphrey, 512 U.S. 477, 486–87 (1994); see Mobley v. Tompkins, 473 F. App'x 337, 337 (4th Cir. 2012) (per curiam)

(unpublished) (applying Heck bar to claims for injunctive relief); Omar v. Chasanow, 318 F. App'x 188, 189 & n.* (4th Cir. 2009) (per curiam) (unpublished) (collecting cases); Michau v. Charleston Cty. S.C., 434 F.3d 725, 728 (4th Cir. 2006). "A district court must undertake a case specific analysis to determine whether success on the claims would necessarily imply the invalidity of a conviction or sentence." Thigpen v. McDonnell, 273 F. App'x 271, 272 (4th Cir. 2008) (per curiam) (unpublished).

Carter recognizes that Heck poses a hurdle for the relief he seeks, and has attempted to use RICO to plead around Heck. See Compl. at 2–5. Unfortunately for Carter, " there is . . . case law establishing that civil RICO cases are Heck-barred by their very nature." Adamski v. McGinnis, No. 13-CV-962-JPS, 2015 WL 1467818, at *4 (E.D. Wis. Mar. 30, 2015) (unpublished) (collecting cases); see Oberg v. Asotin Cty., 310 F. App'x 144, 145 (9th Cir. 2009) (per curiam) (unpublished); Swan v. Barbadoro, 520 F.3d 24, 26 (1st Cir. 2008) ("Heck's bar cannot be circumvented by substituting a supposed RICO action . . . ."). Because Carter's conviction has not been overturned or otherwise invalidated, his claim fails.

As for Carter's motion for appointment of counsel, no right to counsel exists in civil cases absent "exceptional circumstances." Whisenant v. Yuam, 739 F.2d 160, 163 (4th Cir. 1984), abrogated in part on other grounds by Mallard v. U.S. Dist. Court, 490 U.S. 296 (1989); see Cook v. Bounds, 518 F.2d 779, 780 (4th Cir. 1975). The existence of exceptional circumstances "hinges on [the] characteristics of the claim and the litigant." Whisenant, 739 F.2d at 163. The facts of this case and Carter's abilities do not present exceptional circumstances. Accordingly, the court denies Carter's motion for appointed counsel [D.E. 9].

As for Carter's motion for summary judgment, the motion is premature. An entry of default shall be made when "a party against whom a judgment for affirmative relief is sought has failed to

plead or otherwise defend." Fed. R. Civ. P. 55(a). A defendant is not required to answer until after the defendant has been served with the summons and complaint. See Fed. R. Civ. P. 12(a). Because defendants have not been served with the summons and complaint, no answer is due. Therefore, the court denies the motion.

In sum, the court DENIES plaintiff's motions for appointed counsel and summary judgment [D.E. 9–10], and DISMISSES the action under 28 U.S.C. § 1915(e)(2)(B) for failure to state a claim. The clerk shall close the case.

SO ORDERED. This 13 day of June 2017.

JAMES C. DEVER III
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:16-CT-3272-D

SHAN EDWARD CARTER, Plaintiff,	)	
v.	)	**ORDER**
JOHN W. SHERRILL, et al., Defendants.	)	

On October 18, 2016, Shan Edward Carter ("Carter" or "plaintiff"), a death-sentenced state inmate proceeding pro se, filed a 42-page complaint alleging violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO") [D.E. 1]. On June 13, 2017, the court reviewed the complaint pursuant to 28 U.S.C. § 1915, denied Carter's motions for appointed counsel and summary judgment, and dismissed the action for failure to state a claim upon which relief can be granted [D.E. 14]. On that same date, the clerk entered judgment [D.E. 15]. Carter moves for reconsideration [D.E. 16, 19] and has filed a notice of appeal [D.E. 17].

Ordinarily, "a district court loses jurisdiction to amend or vacate its order after the notice of appeal has been filed." Lewis v. Tobacco Workers' Int'l Union, 577 F.2d 1135, 1139 (4th Cir. 1978); see Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982) (per curiam); Haefner v. Cty. of Lancaster, 116 F.3d 1473, at *1 (4th Cir. 1997) (per curiam) (unpublished table decision). However, a notice of appeal filed after judgment is entered but before the court rules on a motion for reconsideration "becomes effective . . . when the order disposing of the last such remaining motion is entered." Fed. R. App. P. 4(a)(4)(B)(i); see Wheeler v. Accrediting Council for

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Continuing Educ. & Training, 70 F.3d 114, at *1 (4th Cir. 1995) (per curiam) (unpublished table decision). Thus, the court considers Carter's motions.

Federal Rule of Civil Procedure 59(e) permits a court to alter or amend a judgment. See Fed. R. Civ. P. 59(e). Whether to alter or amend a judgment under Rule 59(e) is within the sound discretion of the district court. See, e.g., Dennis v. Columbia Colleton Med. Ctr., Inc., 290 F.3d 639, 653 (4th Cir. 2002); Hughes v. Bedsole, 48 F.3d 1376, 1382 (4th Cir. 1995). The Fourth Circuit has recognized three reasons for granting a motion to alter or amend a judgment under Rule 59(e): "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not [previously] available . . . ; or (3) to correct a clear error of law or prevent manifest injustice." Zinkand v. Brown, 478 F.3d 634, 637 (4th Cir. 2007) (quotation omitted); see Bogart v. Chapell, 396 F.3d 548, 555 (4th Cir. 2005); Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co., 148 F.3d 396, 403 (4th Cir. 1998).

In dismissing Carter's complaint, the court found that Carter's complaint, while ostensibly pled as a RICO action, was essentially an attempt to collaterally attack his criminal convictions in violation of the Supreme Court's ruling in Heck v. Humphrey, 512 U.S. 477, 486–87 (1994). Order [D.E. 14] 3–4. Carter contends that the "court apparently overlooked the facts that the plaintiff pleaded three different reasons showing good cause for a[n] exception to the Heck rule." [D.E. 16] 2 (emphasis in original); see [D.E. 19] 2–4. Carter has not cited any recent change in controlling law or any newly discovered evidence. Moreover, he has not identified any clear error in this court's order.

To the extent Carter requests relief under Federal Rule of Civil Procedure 60(b), his motion also fails. "Federal Rule of Civil Procedure 60(b) authorizes a district court to grant relief from a final judgment for five enumerated reasons or for 'any other reason that justifies relief.'" Aikens v.

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Ingram, 652 F.3d 496, 500 (4th Cir. 2011) (en banc) (quoting Fed. R. Civ. P. 60(b)(6)). Under Rule 60(b), a movant first must demonstrate that his motion is timely, that he has a meritorious claim or defense, that the opposing party will not suffer unfair prejudice from setting aside the judgment, and that exceptional circumstances warrant the relief. See Robinson v. Wix Filtration Corp. LLC, 599 F.3d 403, 412 n.12 (4th Cir. 2010); Nat'l Credit Union Admin. Bd. v. Gray, 1 F.3d 262, 264 (4th Cir. 1993). If a movant satisfies these threshold conditions, he must then "satisfy one of the six enumerated grounds for relief under Rule 60(b)." Gray, 1 F.3d at 266. Carter has failed to establish a meritorious claim or defense. Thus, Carter fails to meet Rule 60(b)'s threshold requirements.

In sum, the court DENIES Carter's motions [D.E. 16, 19].

SO ORDERED. This 17 day of July 2017.

JAMES C. DEVER III
Chief United States District Judge

Additional material from this filing is available in the Clerk's Office.