

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-3719

SAMUEL ROSS,
Appellant

v.

CLERK OF COURTS OF THE COURT OF COMMON PLEAS OF PHILADELPHIA,
PENNSYLVANIA; D. JUGLE, Prothonotary of the Office of Judicial Records;
C. FORTE, Prothonotary of the Office of Judicial Records Pennsylvania

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 2-17-cv-05012)
District Judge: Honorable Juan R. Sanchez

Submitted for Possible Dismissal Pursuant to 28 U.S.C. § 1915(e)(2)(B) or
Summary Action Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6

March 29, 2018

Before: CHAGARES, GREENAWAY, Jr., and GREENBERG, Circuit Judges

(Opinion filed: June 8, 2018)

OPINION*

PER CURIAM

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Samuel Ross appeals pro se from the District Court's dismissal of his complaint pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). We will summarily affirm because no substantial question is presented by this appeal. See 3d Cir. L.A.R. 27.4; 3d Cir. I.O.P. 10.6.

Ross, an inmate confined at the State Correctional Institution at Somerset, filed this pro se civil rights action pursuant to 28 U.S.C. § 1983, accompanied by an application to proceed in forma pauperis, in the United States District Court for the Eastern District of Pennsylvania. Ross alleged that defendants violated his right to access the courts under the First and Fourteenth Amendments by failing to timely mail a motion submitted by Ross pertaining to an ongoing medical malpractice suit. By order entered November 16, 2017, the District Court granted Ross leave to proceed in forma pauperis and dismissed his complaint under § 1915(e)(2)(B). The Court held that Ross had failed to state a claim under § 1983 since Ross was unable to show actual injury because he did not demonstrate that he had no other remedy available to him. The Court found that Ross had a pending petition for allowance of appeal with the Supreme Court of Pennsylvania in his medical malpractice action and therefore he had an alternative remedy to address any injury. Ross appeals.

We have jurisdiction pursuant to 28 U.S.C. § 1291. We exercise plenary review of the District Court's sua sponte dismissal under § 1915(e)(2)(B) for failure to state a claim. See Allah v. Seiverling, 229 F.3d 220, 223 (3d Cir. 2000). "[W]e accept all factual allegations as true [and] construe the complaint in the light most favorable to the

plaintiff.” Warren Gen. Hosp. v. Amgen Inc., 643 F.3d 77, 84 (3d Cir. 2011) (quoting Pinker v. Roche Holdings Ltd., 292 F.3d 361, 374 n.7 (3d Cir. 2002)). We may affirm on any basis supported by the record. Murray v. Bledsoe, 650 F.3d 246, 247 (3d Cir. 2011) (per curiam).

We agree with the District Court that Ross has failed to state a claim under § 1983. In order to state a claim of the denial of access to the courts, a prisoner such as Ross must allege that his efforts to pursue a legal claim were hindered and he suffered an actual injury. See Lewis v. Casey, 518 U.S. 343, 351 (1996). On appeal, Ross argues that the Supreme Court of Pennsylvania denied his petition for allowance of appeal on February 6, 2018, and therefore he is able to show both actual injury and that he has no other remedy other than the present suit. However, as a prisoner, Ross’ right of access to the courts does not extend to his medical malpractice action. “[P]risoners may only proceed on access-to-courts claims in two types of cases, challenges (direct or collateral) to their sentences and conditions of confinement.” Monroe v. Beard, 536 F.3d 198, 205 (3d Cir. 2008) (citing Lewis, 518 U.S. at 354–55). “In other words, a prisoner has no constitutional right of access to the courts to litigate an unrelated civil claim.” Simmons v. Sacramento Cnty. Super. Ct., 318 F.3d 1156, 1160 (9th Cir. 2003). Because Ross’ medical malpractice action is not related to his criminal sentence or conditions of confinement, he has failed to state an access to the courts claim under § 1983 and we will affirm the judgment of the District Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SAMUEL T. ROSS,
Plaintiff,

v.

CLERK OF COURTS OF THE COURT
OF COMMON PLEAS OF
PHILADELPHIA, PENNSYLVANIA,
et al.,
Defendants.

CIVIL ACTION

FILED

NOV 15 2017

NO. 17-5012

ORDER

AND NOW, this ^{15~~th~~} day of November, 2017, upon consideration of Ross's motion to proceed *in forma pauperis* and his *pro se* Complaint, it is ORDERED that:

1. Leave to proceed *in forma pauperis* is GRANTED.
2. Plaintiff, Samuel T. Ross, #DG-5341, shall pay the full filing fee of \$350.00 in installments, pursuant to 28 U.S.C. § 1915(b). Based on the financial information provided by Ross, an initial partial filing fee of \$34.57 is assessed. The Superintendent or other appropriate official at SCI Somerset or at any other prison at which Ross may be incarcerated is directed to deduct \$34.57 from Ross's inmate trust fund account, when such funds become available, and forward that amount to the Clerk of the United States District Court for the Eastern District of Pennsylvania, 601 Market Street, Room 2609, Philadelphia, PA 19106, to be credited to Civil Action No. 17-5012. In each succeeding month when the amount in Ross's inmate trust fund account exceeds \$10.00, the Superintendent or other appropriate official shall forward payments to the Clerk of Court equaling 20% of the preceding month's income credited to Ross's inmate

"APPENDIX B"

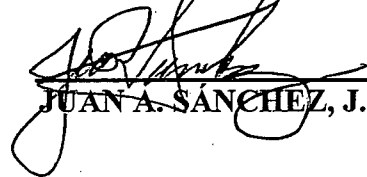
trust fund account until the fees are paid. Each payment shall reference the docket number for this case, Civil Action No. 17-5012.

3. The Clerk of Court is directed to send a copy of this Order to the Superintendent at SCI Somerset.

4. The Complaint is DISMISSED for failure to state a claim, pursuant to 28 U.S.C. §1915(e)(2)(B)(ii), in accordance with the Court's memorandum. Ross may not file an amended complaint in this matter.

5. The Clerk of Court shall CLOSE this case.

BY THE COURT:



JUAN A. SANCHEZ, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SAMUEL T. ROSS,
Plaintiff,

CIVIL ACTION

v.

CLERK OF COURTS OF THE COURT :
OF COMMON PLEAS OF :
PHILADELPHIA, PENNSYLVANIA, :
et al., :
Defendants. :

NO. 17-5012

MEMORANDUM

SÁNCHEZ, J.

NOVEMBER 15, 2017

Samuel T. Ross, a state prisoner currently incarcerated at SCI Somerset, brings this civil action pursuant to 42 U.S.C. § 1983 against the Clerk of Courts of the Court of Common Pleas of Philadelphia and Prothonotaries D. Jugle and C. Forte. In his Complaint, Ross contends that the defendants violated his right to access the courts under the First and Fourteenth Amendments by failing to timely file a motion that Ross submitted in a medical malpractice suit that he filed on behalf of his deceased father. For the following reasons, the Court will grant Ross leave to proceed *in forma pauperis* but will dismiss his Complaint.

I. FACTS

Ross's father, Samuel E. Jones, passed away "from [a]dvanced lung cancer on June 12, 2013." (Compl. ¶ 8.) On May 13, 2015, Ross filed a medical malpractice complaint, seeking damages under Pennsylvania's Wrongful Death Act and Survival Act, in the Court of Common Pleas for Philadelphia. (*Id.*); see *Ross v. Univ. of Pa. Health System*, No. 150501225 (Phila. Ct. Common Pleas). Ross alleged that the University of Pennsylvania Health System, Dr. Katherine

ENTERED

NOV 16 2017

CLERK OF COURT

Fleming-Cohen, and Dr. Kashyap Panganamamula “neglected to diagnose his father for lung cancer over a course of two years, to which upon seeking a second opinion, Temple University Hospital immediately diagnosed his father for advanced lung cancer.” (Compl. ¶ 9.)

On July 7, 2015, counsel for the defendants in Ross’s medical malpractice suit filed a Notice of Intent to Enter Judgment of Non Pros for Failure to File Certificate of Merit. (*Id.* ¶ 10); *see Ross v. Univ. of Pa. Health System*, No. 150501225 (Phila. Ct. Common Pleas). Ross contends that under Rule 1042.3(d) of the Pennsylvania Rules of Civil Procedure, he had until August 6, 2015 to file a motion to extend the time for filing a certificate of merit. (Compl. ¶ 11.) On July 11, 2015, Ross placed in the prison mailbox for mailing to the Court of Common Pleas a Motion to Extend the Time to File a Certificate of Merit. (*Id.* ¶ 12.) He contends that this motion was timely filed pursuant to the prison mailbox rule. (*Id.* ¶¶ 13-14.)

According to Ross, upon receipt of his motion, the Clerk of Court “mailed the motion back to [him] with an attached sticky note informing him that he had to submit the motion to the Civil Division.” (*Id.* ¶ 15.) Ross contends that this action was contrary to 42 Pa. Cons. Stat. Ann. § 5103(c), which provides that matters filed in the wrong division should be transferred to the proper division and treated as if originally filed in the transferee division. (*Id.* ¶¶ 16-17.) On July 20, 2015, Ross “re-deposited the Motion to Extend in the prison mailbox” for mailing to the Office of Judicial Records. (*Id.* ¶ 18.)

On July 23, 2015, D. Jugle received the Motion to Extend, “but mailed the motion back to . . . Ross for a cover sheet to be completed and returned.” (*Id.* ¶ 19.) According to Ross, Philadelphia Civil Rule 205.2(b) provides that if a civil cover sheet is not attached to a document as required, the Office of Judicial Records must accept the document for filing, provided, however, that the file-stamped copy is returned to the party for service and that a civil cover

sheet is submitted within twenty (20) days. (*Id.* ¶ 20.) Ross contends that, contrary to that rule, D. Jugle “did not accept [the] Motion to Extend for filing and did not file-stamp the motion on the day it was stamped-received on July 23, 2015.” (*Id.* ¶ 21.)

Ross “re-deposited the Motion to Extend along with a completed cover sheet in the prison mailbox on August 03, 2015,” for mailing to the Office of Judicial Records.” (*Id.* ¶ 22.) C. Forte received the motion on August 6, 2015, but did not file it when received “and held it until August 11, 2015.” (*Id.* ¶ 23.) On August 7, 2015, the Court of Common Pleas entered a judgment of non pros in favor of the defendants. (*Id.* ¶ 25); *see Ross v. Univ. of Pa. Health System*, No. 150501225 (Phila. Ct. Common Pleas).

On November 20, 2015, Ross “learned via a copy of his docket sheet that the Prothonotary C. Forte did actually enter Judgment of Non Pros against him.” (Compl. ¶ 26.) Ross unsuccessfully moved to reopen the judgment. (*Id.*); *see Ross v. Univ. of Pa. Health System*, No. 150501225 (Phila. Ct. Common Pleas). On August 25, 2017, the Superior Court of Pennsylvania affirmed the Court of Common Pleas’ judgment. *See Ross v. Univ. of Pa. Health System*, No. 1238 EDA 2016 (Pa. Super. Ct.). Ross filed a petition for allowance of appeal to the Supreme Court of Pennsylvania on September 25, 2017. *See Ross v. Univ. of Pa. Health System*, No. 438 EAL 2017 (Pa.). His petition is still pending before the Supreme Court of Pennsylvania. *See id.*

II. STANDARD OF REVIEW

The Court will grant Ross leave to proceed *in forma pauperis* because it appears that he is not capable of prepaying the fees required to commence this action.¹ Accordingly, 28 U.S.C. § 1915(e)(2)(B)(ii) applies, which requires the Court to dismiss the complaint if it fails to state a

¹ However, as Ross is a prisoner subject to the Prison Litigation Reform Act, he will be obligated to pay the filing fee in installments pursuant to 28 U.S.C. § 1915(b).

claim. Whether a complaint fails to state a claim under § 1915(e)(2)(B)(ii) is governed by the same standard applicable to motions to dismiss under Federal Rule of Civil Procedure 12(b)(6), *see Tourscher v. McCullough*, 184 F.3d 236, 240 (3d Cir. 1999), which requires the Court to determine whether the complaint contains “sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotations omitted). Conclusory statements and naked assertions will not suffice. *Id.* The Court may also consider matters of public record. *Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006). As Ross is proceeding *pro se*, the Court construes his allegations liberally. *Higgs v. Att’y Gen.*, 655 F.3d 333, 339 (3d Cir. 2011).

III. DISCUSSION

“Under the First and Fourteenth Amendments, prisoners retain a right of access to the courts.” *Monroe v. Beard*, 536 F.3d 198, 205 (3d Cir. 2008). As noted above, Ross contends that the defendants violated his right to access the courts by not docketing his motion for an extension of time to file a certificate of merit in a timely manner. He alleges that because of their actions, he lost the ability to pursue his medical malpractice suit on behalf of his deceased father. In order to state an access to the courts claim, Ross

must show (1) that [he] suffered an “actual injury”—that [he] lost a chance to pursue a “nonfrivolous” or “arguable” underlying claim; and (2) that [he] has no other “remedy that may be awarded as recompense” for the lost claim other than in the present denial of access suit.” *See Christopher v. Harbury*, 536 U.S. 403, 415 (2002). To that end, prisoners must satisfy certain pleading requirements: The complaint must describe the underlying arguable claim well enough to show that it is “more than mere hope,” and it must describe the “lost remedy.”

Monroe, 536 F.3d at 205-06 (second internal citation omitted). With respect to the lost remedy, a prisoner must show how his claims “may no longer be pursued as a result of defendant’s actions.” *Id.* at 206 n.9.

Here, Ross has not shown that he has suffered an actual injury to his medical malpractice suit because he cannot demonstrate that he has no other remedy other than this present suit. *See id.* at 205-06. As noted above, Ross's petition for allowance of appeal is still pending before the Supreme Court of Pennsylvania. *See Ross v. Univ. of Pa. Health System*, No. 438 EAL 2017 (Pa.). Thus, Ross has the opportunity to present his arguments for why his medical malpractice suit should be reopened to that court. *See Fraihat v. Cohen*, No. 06cv1452JM(BLM), 2008 WL 26900430, at *3 (S.D. Cal. July 2, 2008) (denying claim for denial of access to the courts because plaintiff had no shown actual injury because he was continuing to pursue a remedy by prosecuting an appeal of a denial of a motion to reopen); *see also Wells v. Miller*, 652 F. App'x 874, 875 (11th Cir. 2016) (affirming dismissal of access to the courts claim because plaintiff did not show the absence of an adequate remedy at law because plaintiff admitted he could have sought appellate review); *Frazier v. City of Phila.*, No. 17-3741, 2017 WL 3749777, at *2 (E.D. Pa. Aug. 29, 2017) (dismissing complaint raising access to the courts claim because plaintiff could have filed a motion to reopen the time to appeal pursuant to Rule 4(a)(6) of the Federal Rules of Civil Procedure). Accordingly, Ross's access to the courts claim must be dismissed.

IV. CONCLUSION

For the foregoing reasons, the Court will dismiss Ross's Complaint for failure to state a claim, pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). Ross will not be provided leave to file an amended complaint because amendment would be futile. *See Grayson v. Mayview State Hosp.*, 293 F.3d 103, 112-13 (3d Cir. 2002). An appropriate order follows, which shall be docketed separately.

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FORTE, Prothonotary of the Office of Judicial Records Pennsylvania

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 2-17-cv-05012)
District Judge: Honorable Juan R. Sanchez

SUR PETITION FOR REHEARING

BEFORE: SMITH, Chief Judge, and AMBRO, CHAGARES, JORDAN, HARDIMAN,
GREENAWAY, Jr., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, BIBAS, and
GREENBERG, Circuit Judges

The petition for rehearing filed by appellant, Samuel Ross, in the above captioned matter having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the Court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service who are not disqualified not having

"APPENDIX C"

voted for rehearing by the court en banc, the petition for rehearing is denied. Judge Greenberg's vote is limited to denying rehearing before the original panel.

BY THE COURT:

s/ Morton I. Greenberg
Circuit Judge

DATED: August 1, 2018
JK/cc: Samuel Ross