

ALD-012

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-2349

ASIA JOHNSON,
Appellant

v.

ROTHSCHILD

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil Action No. 2-18-cv-00606)
District Judge: Honorable Mark R. Hornak

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

October 18, 2018

Before: MCKEE, SHWARTZ, and BIBAS, Circuit Judges

(Opinion filed: November 6, 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.

Asia Johnson appeals the District Court's dismissal of her civil action and denying her application to proceed in forma pauperis as moot. For the reasons below, we will summarily affirm the District Court's order with a modification.

Johnson initiated the lawsuit by filing a motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915, together with a complaint naming "Rothschild" as the lone defendant. As a resident of Pennsylvania, Johnson asserted federal court diversity of citizenship jurisdiction under 28 U.S.C. § 1332, identifying Rothschild as a resident of the United Kingdom. In the complaint, Johnson alleged that "Pittsburgh air is the most polluted in the nation our climate is based on our behavior and how the Rothschild control our weather and what released in our air" [sic]. (Complaint, ¶III Statement of Claim.) As relief, Johnson requested "clean air better control on our climate." (Id., ¶IV Relief.)¹

The assigned Magistrate Judge issued a report and recommendation to dismiss the action under § 1915(e)(2)(B) of the in forma pauperis statute. The Magistrate Judge determined that Johnson's claims and the relief embraced an inarguable legal conclusion, presented fanciful factual allegations, and was based on a "fantastic or delusional" factual scenario. (See May 14, 2018 Report and Recommendation at 3, citing Neitzke v. Williams, 490 U.S. 319, 327-28 (1989).) Thus, the Magistrate Judge concluded that the

¹ As an exhibit to the complaint, Johnson attached a letter and a certificate dated April 25, 2018, written on behalf of President Donald J. Trump, concerning Johnson's inclusion in the Republican Presidential Honor Roll.

complaint was frivolous within the meaning of § 1915(e)(2)(B), and that granting leave to amend the complaint would be futile. The Magistrate Judge further recommended denying Johnson's in forma pauperis application as moot. Johnson filed objections. The District Court considered Johnson's objections but adopted the report and recommendation, dismissed the action, and denied the in forma pauperis motion as moot.

Johnson appeals. We have appellate jurisdiction pursuant to 28 U.S.C. § 1291. We may affirm for any reason supported by the record. See Brightwell v. Lehman, 637 F.3d 187, 191 (3d Cir. 2011).

We first address the District Court's disposition of Johnson's in forma pauperis motion. A district court's determination of whether to grant a motion to proceed in forma pauperis should focus on the applicant's financial eligibility. See Sinwell v. Shapp, 536 F.2d 15, 19 (3d Cir. 1976). An analysis of the complaint under 28 U.S.C. § 1915(e)(2)(B) is appropriate only after a litigant is granted leave to proceed pursuant to the in forma pauperis statute. See Deutsch v. United States, 67 F.3d 1080, 1084 n.5 (3d Cir. 1995) (discussing procedure of determining in forma pauperis status, followed by consideration of whether a complaint is "frivolous or malicious" under former § 1915(d)). Here, the District Court erred in denying Johnson's in forma pauperis motion as moot. Instead, the District Court should have addressed the motion before subjecting the complaint to the screening provisions of the in forma pauperis statute. Johnson indicated in her motion filed in the District Court that she had income of \$653 per month

and \$200 in cash or savings, while her expenses totaled approximately \$536 per month. A litigant need not be “absolutely destitute” or contribute his or her “last dollar” in order to qualify for in forma pauperis status. See Adkins v. E.I. DuPont de Nemours & Co., 335 U.S. 331, 339 (1948). On this record, we conclude that Johnson was financially eligible to proceed in forma pauperis when she filed her complaint.

We now turn to the District Court’s analysis of Johnson’s complaint. We exercise plenary review over the District Court’s dismissal of the case as frivolous or legally without basis. See Roman v. Jeffes, 904 F.2d 192, 194 (3d Cir. 1990). We agree with the District Court’s assessment of the allegations contained in Johnson’s complaint. See Neitzke, 490 U.S. at 325 (a complaint is frivolous if it “lacks an arguable basis either in law or in fact”). Moreover, while generally a plaintiff should be given leave to amend a complaint subject to dismissal, we discern no error in the District Court’s determination here that allowing Johnson leave to amend would have been futile. See Grayson v. Mayview State Hosp., 293 F.3d 103, 108 (3d Cir. 2002).

Summary action is appropriate if there is no substantial question presented in the appeal. See Third Circuit LAR 27.4. For the above reasons, we will summarily affirm the District Court’s judgment but direct that it modify its order to grant Johnson’s application to proceed in forma pauperis. See 3d Cir. LAR 27.4; I.O.P. 10.6.

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October 18, 2018

Before: MCKEE, SHWARTZ, and BIBAS, Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Western District of Pennsylvania and was submitted for possible dismissal pursuant to 28 U.S.C. § 1915(e)(2)(B) and for possible summary action pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6 on October 18, 2018. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered May 30, 2018 be and the same hereby is affirmed with a modification. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

DATED: November 6, 2018

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

ASIA JOHNSON,)
Plaintiff,) Civil Action No. 18-606
v.) Judge Mark R. Hornak
ROTHSCHILD,) Chief Magistrate Judge Maureen P. Kelly
Defendant.) Re: ECF No. 1

REPORT AND RECOMMENDATION

I. RECOMMENDATION

Presently before the Court is a Motion for Leave to Proceed *in forma pauperis* filed by Plaintiff Asia Johnson. ECF No. 1. For the reasons that follow, it is respectfully recommended that this case be dismissed with prejudice and that the Motion be denied as moot.

II. REPORT

The *in forma pauperis* statute, 28 U.S.C. § 1915, "is designed to ensure that indigent litigants have meaningful access to the federal courts." Douris v. Middletown Twp., 293 F. App'x 130, 131 (3d Cir. 2008) (quoting Neitzke v. Williams, 490 U.S. 319, 324 (1989)).

Congress recognized, however, that a litigant whose filing fees and court costs are assumed by the public, unlike a paying litigant, lacks an economic incentive to refrain from filing frivolous, malicious, or repetitive lawsuits. Neitzke, 490 U.S. at 324; Deutsch v. United States, 67 F.3d 1080, 1084 (3d Cir.1995).

Accordingly, the Court must take two determinations when reviewing an *in forma pauperis* application: (1) whether Plaintiff is eligible for pauper status under 28 U.S.C. § 1915(e)(2)(A); and

(2) the Court must review the complaint and determine whether it is frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant immune from such relief pursuant to 28 U.S.C. § 1915(e)(2)(B).

Plaintiff has filed 13 cases in this Court in the last two months in which she has requested *in forma pauperis* status, one of which appears to have been against the same Defendant as in the instant case.¹ In at least three of these cases, Civil Action Nos. 18-495, 18-610 and 18-611, the Court, having screened Plaintiff's *pro se* Complaints pursuant to 28 U.S.C. § 1915(e)(2)(B), dismissed her requests for *in forma pauperis* status because of her frivolous Complaints which could not be amended. It is recommended that the Court do the same with regard to the instant matter.

Section 1915 provides:

Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that—

- (A) the allegation of poverty is untrue; or
- (B) the action or appeal—
 - (i) is frivolous or malicious;
 - (ii) fails to state a claim on which relief may be granted; or
 - (iii) seeks monetary relief against a defendant who is immune from such relief.

28 U.S.C. § 1915 (e)(2).

The United States Supreme Court in Neitzke held that dismissal based on 28 U.S.C. § 1915(e)(2) is appropriate when the action is “based on an indisputably meritless legal theory” and when it posits “factual contentions [that] are clearly baseless.” 490 U.S. at 327. The Supreme Court specifically stated that 28 U.S.C. § 1915(e)(2)(B)’s term “frivolous,” when applied to a

¹ Johnson v. Rothschild, Civil Action No. 18-606

Complaint, “embraces not only the inarguable legal conclusion, but also the fanciful factual allegation,” such that a claim is frivolous within the meaning of Section 1915(e)(2)(B) if it “lacks an arguable basis either in law or in fact[.]” Id. at 325. Plaintiff’s Complaint, herein, fails to present any sort of cognizable legal claim nor any relief which this Court could grant.

Plaintiff indicates that the basis for jurisdiction is a diversity of citizenship, as she is a resident of Pennsylvania and Defendant Rothschild is a resident of the United Kingdom and the amount in controversy exceeds \$75,000. ECF No. 1-1. At first blush these statements would seem to support this Court’s jurisdiction; however, a review of Plaintiff’s “Statement of Claim” section, quickly illustrates how this Court lacks jurisdiction.

Plaintiff’s Statement of Claim reads as follows:

Pittsburgh air is the most polluted in the nation our climate is based on our behavior and how the Rothschild control our weather and what released in our air

ECF No. 1-1 at 4.

With respect to the relief sought, Plaintiff writes:

Clean air better control on our climate.

Id.

Based on the above, the Court finds that this claim and the relief sought by Plaintiff in the instant matter “embrace not only [an] inarguable legal conclusion, but also [present] fanciful factual allegation[s],” such that her claim is frivolous within the meaning of Section 1915(e)(2)(B). As noted in Neitzke, this Court is also dismissing this claim because it is based on a “fantastic or delusional” factual scenario. Id. at 327-28; see also Wilson v. Rackmill, 878 F.2d 772, 774 (3d Cir. 1989).

Generally, before dismissing a claim for failing the screening, the Court must grant a plaintiff leave to amend the complaint, unless it would be inequitable, futile or prejudiced. Hughes v. Allegheny County Airport Authority, Civ. A. No. 11-1006 (W.D. Pa. Jan. 13, 2012), 2012 WL 464700 at * 2 (citing Grayson v. Mayview State Hosp., 293 F.3d 103, 114 (3d Cir. 2002)).

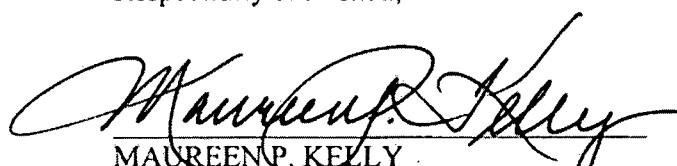
If a *pro se* plaintiff can cure the factual allegations in order to state a claim, this Court must give her an opportunity to do so. However, if an amendment cannot cure the deficiencies, the Court may dismiss the Complaint without leave to amend. Id.

Based on the foregoing legal authority and given the statements set forth in Plaintiff's Complaint, it is recommended that this Court dismiss this action and deny the *in forma pauperis* request as moot. It is further recommended that Plaintiff not be granted leave to amend this Complaint as such would be futile.

In accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1), and Local Rule 72.D.2, the parties are permitted to file written objections in accordance with the schedule established in the docket entry reflecting the filing of this Report and Recommendation. Failure to timely file objections will waive the right to appeal. Brightwell v. Lehman, 637 F.3d 187, 193 n. 7 (3d Cir. 2011). Any party opposing objections may file their response to the objections within fourteen (14) days thereafter in accordance with Local Civil Rule 72.D.2.

Dated: May 14, 2018

Respectfully submitted,


MAUREEN P. KELLY
CHIEF UNITED STATES MAGISTRATE JUDGE

cc: The Honorable Mark R. Hornak
United States District Judge

Asia Johnson
1807 West Street
Munhall, PA 15120

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

ASIA JOHNSON,)
Plaintiff,) Civil Action No. 18-606
v.) Judge Mark R. Hornak
ROTHSCHILD,) Chief Magistrate Judge Maureen P. Kelly
Defendant.)

ORDER

AND NOW, this 30th day of May, 2018, after Plaintiff Asia Johnson filed a Motion for Leave to Proceed *in forma pauperis* in the above-captioned case, ECF No. 1, after a Report and Recommendation was filed by the Chief United States Magistrate Judge, ECF No. 2, and Objections thereto having been filed by the Plaintiff and considered by the Court, and upon independent review of the record, and upon consideration of the Magistrate Judge's Report and Recommendation, which is adopted as the opinion of this Court,

IT IS HEREBY ORDERED that this action is DISMISSED with prejudice and the Motion for Leave to Proceed *in forma pauperis* is DENIED as moot.



Mark R. Hornak
United States District Judge

cc: The Honorable Maureen P. Kelly
Chief United States Magistrate Judge

Asia Johnson
1807 West Street
Munhall, PA 15120

All counsel of record via CM-ECF