

United States Court of Appeals For the First Circuit

No. 18-1582

GEORGE E. KERSEY

Plaintiff – Appellant

v.

HERB CHAMBERS 1186, INC.; AMERICAN HONDA FINANCE CORPORATION

Defendants – Appellees

Before
Howard, Chief Judge,
Lynch and Barron, Circuit Judges.

JUDGMENT

Entered: February 20, 2019

Pro se appellant George E. Kersey seeks to proceed in forma pauperis ("IFP") in this appeal. The district court certified that the appeal was not taken in good faith. See 28 U.S.C. § 1915(a)(3). We agree that good faith is lacking, and appellant has not identified any non-frivolous issues on appeal. See *Coppedge v. United States*, 369 U.S. 438, 445 (1962). Thus, the request to proceed IFP on appeal is denied.

Moreover, after careful review of the record, we conclude, substantially for the reasons stated by the district court in its May 31, 2018 memorandum and order, that dismissal of the complaint was proper. Therefore, no substantial question is presented in this appeal, and the judgment of the district court is summarily affirmed. See 1st Cir. R. 27.0(c).

By the Court:

Maria R. Hamilton, Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GEORGE E. KERSEY,)
Plaintiff,)
v.) Civil Action No.
HERB CHAMBERS 1186, INC., et al.,) 18-11110-FDS
Defendants.)

)

ORDER OF DISMISSAL

SAYLOR, J.

For the reasons stated in the Memorandum and Order dated May 31, 2018, this action is dismissed.

ROBERT M. FARRELL
CLERK OF COURT

Dated: 5/31/18

By /s/ Lisa Pezzarossi
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GEORGE E. KERSEY,)
Plaintiff,)
v.) Civil Action No.
) 18-11110-FDS
HERB CHAMBERS 1186, INC., et al.,)
Defendants.)

MEMORANDUM AND ORDER

SAYLOR, J.

For the reasons set forth below, plaintiff's application to proceed without prepayment of the filing fee will be granted and the complaint will be dismissed *sua sponte* pursuant to 28 U.S.C. § 1915(e)(2)(B) (ii). Plaintiff is warned that if he files any further frivolous actions against the named defendants, the court will enter an order prohibiting the filing of any future complaints without first obtaining leave of court.

I. Background

On May 25, 2018, plaintiff George Kersey, a citizen of Rhode Island with a mailing address in Framingham, Massachusetts, filed a *pro se* complaint against Herb Chambers 1186, Inc., and American Honda Finance Corporation concerning the attempted repossession of a vehicle. With his complaint, Kersey filed an application to proceed in district court without prepaying fees or costs.

This is the latest of many cases which the plaintiff has brought in this district. The present complaint is nearly identical to the complaint filed in *Kersey v. Am. Honda Fin. Corp., et*

al., No. 16-12631-FDS, 2018 WL 1904178 (D. Mass. Apr. 20, 2018) (granting defendants' motion for summary judgment).

II. Motion to Proceed *In Forma Pauperis*

A party filing a civil action must either pay a \$350 filing fee and \$50 administrative fee or file an application to proceed *in forma pauperis*. *See* 28 U.S.C. § 1914(a) (\$350 filing fee for civil actions); 28 U.S.C. § 1915 (proceedings *in forma pauperis*). Upon review of plaintiff's application, the Court concludes that he is without sufficient assets to pay the filing fee.

Accordingly, he will be permitted to proceed *in forma pauperis*.

III. Screening of the Complaint

Because the plaintiff is proceeding *in forma pauperis*, his complaint is subject to screening under 28 U.S.C. § 1915(e)(2)(B). That statute authorizes federal courts to dismiss an *in forma pauperis* complaint *sua sponte* if the claims therein are frivolous, malicious, fail to state a claim on which relief can be granted, or seek monetary relief against a defendant who is immune from such relief. *See* 28 U.S.C. § 1915(e)(2)(B).

A. Claim Preclusion

Federal law governs the preclusive effect of a prior judgment in a federal court. *See, e.g.*, *Massachusetts Sch. of Law at Andover v. Am. Bar Assoc.*, 142 F.3d 26, 37 (1st Cir. 1998) (“Where, as here, both the potentially precluding suit and the potentially precluded suit were litigated in federal courts, federal law governs the *res judicata* effect of the prior judgment.”). “Under the federal law of *res judicata*, a final judgment on the merits of an action precludes the parties from relitigating claims that were raised or could have been raised in that action.”

Mather v. GSI Lumonics, Inc., 443 F.3d 123, 126 (1st Cir. 2005) (quoting *Porn v. Nat'l Grange Mut. Ins. Co.*, 93 F.3d 31, 34 (1st Cir. 1996)). Under federal law, claim preclusion (also known

as *res judicata*) applies if three factors are present: "(1) a final judgment on the merits in the earlier action; (2) an identity of the cause of action in both the earlier and later suits; and (3) an identity of parties . . . in the two suits." *Kale v. Combined Ins. Co. of Am.*, 924 F.2d 1161, 1165 (1st Cir. 1991).

This action is barred by claim preclusion because plaintiff already filed a lawsuit in this court concerning the same set of facts alleged in the complaint. Plaintiff's claims against the defendants arise out of the same nucleus of facts as those he alleged in the earlier complaint, and those claims were dismissed with prejudice on the merits. He cannot file a second complaint simply because he is displeased with the outcome of the earlier action.

Although "dismissal on the court's own initiative, without affording the plaintiff either notice or an opportunity to be heard . . . is disfavored in federal practice," where "it is crystal clear that the plaintiff cannot prevail and that amending the complaint would be futile," a dismissal *sua sponte* is appropriate. *Gonzalez-Gonzalez v. United States*, 257 F.3d 31, 36-37 (1st Cir. 2001).

B. The Court's Power to Enjoin Vexatious Litigants

This appears to be the eleventh *pro se* action filed by plaintiff in this court.¹ Plaintiff has already been judicially barred from suing Becton Dickinson and Company without seeking leave of court. See *Kersey v. Becton Dickinson and Co.*, No. 16-10495-LTS (D. Mass.), *appeal filed*,

¹ Since 1989, plaintiff has filed at least the following eleven actions in this court: *Kersey v. Trump*, No. 17-11635-ADB (closed Dec. 18, 2017); *Kersey v. Staples, et al.*, No. 17-11267-NMG (closed May 3, 2018); *Kersey v. Am. Honda Fin. Corp., et al.*, No. 16-12631-FDS, 2018 WL 1904178 (granting defendants' motion for summary judgment); *Kersey, et al. v. Prudential Ins. Agency*, No. 15-14186-GAO (closed Feb. 6, 2017); *Kersey v. Sears Roebuck & Co.*, No. 08-10800-RWZ (closed Mar. 15, 2011); *Kersey v. Peoples' United Bank, NA of Connecticut*, No. 16-12414-PBS (closed Nov. 29, 2017); *Kersey v. Becton Dickinson and Co.*, No. 16-10495-LTS (closed Oct. 17, 2016); *Kersey v. Widnall, et al.* No. 97-11478-GAO (closed Mar. 12, 1998); *Kersey v. United States Air, et al.*, No. 97-11401-GAO (closed Mar. 12, 1998); and *Kersey v. Dennison Mfg., et al.*, No. 89-02650-ADM (closed Feb. 25, 1993).

No. 18-1103 (1st Cir. Jan. 31, 2018).

Plaintiff filed the present action on May 25, 2018, shortly after the Court granted defendants' motion for summary judgment on April 20, 2018, and awarded defendants \$46,144.48 in damages, attorneys' fees and costs. *See Kersey v. Am. Honda Fin. Corp., et al.*, No. 16-12631-FDS. Given plaintiff's litigious history, the fact that he is (or was) a lawyer, and the lack of merit of his prior cases, the Court finds that his conduct in filing the present action to be malicious, vexatious, and an abuse of the processes of this court for the administration of justice. *See Chambers v. Nasco, Inc.*, 501 U.S. 32, 46-50 (1991); *accord United States v. Kouri-Perez*, 187 F.3d 1, 6-8 (1st Cir. 1999) (same).

Plaintiff is warned that should he file any further frivolous actions against Herb Chambers 1186, Inc., and American Honda Finance Corporation, the Court will enter an order barring the filing of any future complaints against these defendants without first obtaining leave of court.

C. Certification That Any Appeal Would Not Be Taken in Good Faith

Under 28 U.S.C. § 1915(a)(3) “[a]n appeal may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good faith.” *Id.* Similarly, under Fed. R. App. P. 24(a)(3), a party who has been permitted to proceed *in forma pauperis* in the district court action may proceed on appeal *in forma pauperis* without further authorization unless the district court certifies that the appeal is not taken in good faith. *Id.* Such a certification prohibits *in forma pauperis* status on appeal even though plaintiff has been found to be indigent. This Court finds that any appeal filed in this action would be one that plainly does not deserve additional judicial attention. *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

III. Conclusion

For the foregoing reasons,

1. The Application to Proceed in District Court without Prepaying Fees or Costs is GRANTED.
2. This action is hereby DISMISSED.
3. Plaintiff is warned that should he file any further frivolous actions against Herb Chambers 1186, Inc., and American Honda Finance Corporation, the Court will enter an order barring the filing of any future complaints against these defendants without first obtaining leave of court.
4. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) and Fed. R. App. P. 24(a)(3) that any appeal of this memorandum and order would not be taken in good faith.
5. The clerk shall enter a separate order of dismissal.

So Ordered.

Dated: May 31, 2018

/s/ F. Dennis Saylor IV

F. Dennis Saylor IV
United States District Judge