

MANDATE

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of September, two thousand and nineteen.

Misbah Abdul-Kareem,

Petitioner - Appellant,

v.

Vermont Department of Health,

Respondent - Appellee.

ORDER

Docket No. 19-1303

Appellant filed a notice of appeal in the above-referenced matter. On July 12, 2019 the Court ordered that Appellant's principal brief must be filed on or before August 21, 2019. Appellant failed to submit a brief. Upon consideration thereof,

IT IS HEREBY ORDERED that Appellant's brief must be filed on or before September 23, 2019. The appeal will be dismissed effective September 23, 2019 if the brief is not filed by that date. A motion to extend the time to file the brief or to seek other relief will not toll the filing date. See Local Rule 27.1(f)(1); cf. RLI Insurance Co. v. JDJ Marine, Inc., 716 F.3d 41, 43-45 (2d Cir. 2013).

For the Court:

Catherine O'Hagan Wolfe,
Clerk of Court




A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit




MANDATE ISSUED ON 10/09/2019

**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 18th day of December, two thousand and nineteen.

Before: Jon O. Newman,
 Ralph K. Winter,
 José A. Cabranes,
 Circuit Judges.

Misbah Abdul-Kareem,

ORDER

Petitioner - Appellant,

Docket No. 19-1303

v.

Vermont Department of Health,

Respondent - Appellee.

Appellant, pro se, moves to recall the mandate and reinstate this appeal which was dismissed on a briefing default.

IT IS HEREBY ORDERED that the motions to recall the mandate and reinstate the appeal are DENIED.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court


Catherine O'Hagan Wolfe

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Misbah Abdul-Kareem,

Petitioner,

v.

Civil Action No. 5:18-cv-164-gwc-jmc

Vermont Department of Mental Health

Respondent.

ORDER AND REPORT AND RECOMMENDATION

(Docs. 1, 1-1)

Misbah Abdul-Kareem, proceeding *pro se*, has filed a form Application for Leave to Proceed *in Forma Pauperis*, seeking to proceed in district court without prepaying fees or costs. (Doc. 1.) Because the financial Affidavit filed in support of the Application (*id.* at 2–4) meets the requirements of 28 U.S.C. § 1915(a), the Application is GRANTED. For the reasons set forth below, however, I recommend that Abdul-Kareem’s proposed civil action (Doc. 1-1) be DISMISSED.

Discussion

Under 28 U.S.C. § 1915(e)(2)(B), the court must conduct an initial screening of complaints filed by civil litigants proceeding *in forma pauperis*, to ensure that the case goes forward only if it meets certain requirements. In conducting this screening, the court is required to read a *pro se* plaintiff’s complaint liberally and to construe it to raise the strongest arguments it suggests. *Harris v. Miller*, 818 F.3d 49, 56–57 (2d Cir. 2016) (per curiam). Nevertheless, the court must dismiss a complaint filed *in forma pauperis* if it determines that the action “(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)(B).

In evaluating whether a complaint fails to state a claim, the court tests the pleading for “facial plausibility.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A court should not dismiss a complaint if the plaintiff has stated “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). Allegations that “are so vague as to fail to give the defendants adequate notice of the claims against them,” are subject to dismissal. *Sheehy v. Brown*, 335 F. App’x 102, 104 (2d Cir. 2009).

A court’s initial review of a complaint under § 1915(e)(2)(B) must also encompass the applicable standards of the Federal Rules of Civil Procedure. Under Rule 8, a complaint must contain a short and plain statement of the grounds for the court’s jurisdiction, and a short and plain statement of the claim showing an entitlement to relief; also, each allegation must be simple, concise, and direct. Fed. R. Civ. P. 8. A complaint that fails to comply with Rule 8 should be dismissed, as it “presents far too heavy a burden in terms of defendants’ duty to shape a comprehensive defense and provides no meaningful basis for the Court to assess the sufficiency of the[] claims.” *Gonzales v. Wing*, 167 F.R.D. 352, 355 (N.D.N.Y. 1996).

In this case, Plaintiff's proposed Complaint does not satisfy the basic pleading standard of Rule 8, as it consists largely of correspondence and filings relating to other court cases, and lacks specific factual allegations of wrongdoing against identifiable defendants. (See Doc. 1-1.) Additionally, both the nature of Plaintiff's claims and the causes of action he seeks to allege are not sufficiently clear for the Court to conduct a plausibility analysis. Accordingly, I recommend that Plaintiff's Complaint be DISMISSED under 28 U.S.C. § 1915(e)(2)(B) for failure to state a claim.

Plaintiff should, however, be granted leave to amend as the Second Circuit has cautioned that a district court "should not dismiss a pro se complaint 'without granting leave to amend at least once,' unless amendment would be futile." *Garcia v. Superintendent of Great Meadow Corr. Facility*, 841 F.3d 581, 583 (2d Cir. 2016) (per curiam) (quoting *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000)).

In the event Plaintiff chooses to file an amended complaint, he must comply with the Federal Rules of Civil Procedure, including Rule 8's requirement that the complaint state the grounds for the court's jurisdiction and a cause of action. See Fed. R. Civ. P. 8(a)(1). Any amended complaint must also comply with Rule 10's requirements that the complaint include a caption with the court name, the case number, and the names of the parties; and that each paragraph be numbered and allege a single set of facts. See Fed. R. Civ. P. 10(a), (b). Finally, the amended complaint must comply with Rule 11's requirements: it must be signed by Plaintiff, if he has no attorney; it must state Plaintiff's mailing address, e-mail address, and

telephone number; and its factual allegations must either have evidentiary support or will likely have evidentiary support after a reasonable opportunity for further investigation or discovery. *See* Fed. R. Civ. P. 11 (a), (b)(3). For further reference, Plaintiff may consult the Court's Representing Yourself as a *Pro Se* Litigant Guide, available at <http://www.vtd.uscourts.gov/sites/vtd/files/ProSeGuide113015.pdf>.

Conclusion

For these reasons, Abdul-Kareem's Application for Leave to Proceed *in Forma Pauperis* (Doc. 1) is GRANTED, but I recommend his proposed complaint (Doc. 1-1) be DISMISSED with leave to amend within 30 days of the Court's order on this Report and Recommendation. In the event an Amended Complaint is not filed within 30 days of the Court's order on this Report and Recommendation, this matter should be closed.

SO ORDERED.

Dated at Burlington, in the District of Vermont, this 15th day of
October 2018.

/s/ John M. Conroy
John M. Conroy
United States Magistrate Judge

Any party may object to this Report and Recommendation within 14 days after service thereof, by filing with the Clerk of the Court and serving on the Magistrate Judge and all parties, written objections which shall specifically identify those portions of the Report and Recommendation to which objection is made and the basis for such objections. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d), 72(b)(2); L.R. 72(c). Failure to timely file such objections "operates as a waiver of any further judicial review of the magistrate's decision." *Small v. Sec'y of Health & Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989).

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED

2019 APR -1 PM 12:40

CLERK

BY

DEPUTY CLERK

Misbah Abdul-Kareem,

Petitioner,

v.

Vermont Department of Mental Health,

Respondent.

Case No. 5:18-cv-164

ORDER
(Doc. 3, 4)

Petitioner Misbah Abdul-Kareem has filed an application for leave to proceed in forma pauperis (without paying a filing fee). The case was referred to U.S. Magistrate Judge Conroy who conducted an initial screening to determine whether the Petition had sufficient merit to proceed in court. Judge Conroy has issued a Report and Recommendation (Doc. 3) recommending dismissal without prejudice. "Without prejudice" means that petitioner has the right to refile the petition if he can provide additional facts or in some other way demonstrate a legal basis for the claim which was absent the first time.

In January 2017 Petitioner was the subject of an involuntary hospitalization proceeding in state court. He accepted an order of non-hospitalization and subsequently filed an appeal to the Vermont Supreme Court. He claimed that he was assaulted while hospitalized and that his placement there was unsafe. The Vermont Supreme Court affirmed the order of non-hospitalization. *In re M.K.*, 2018 WL 1749882 (Vt. April 6, 2018).

In October 2018, petitioner commenced this action. He filed forms intended for use before the Court of Appeals and copies of materials filed in the Vermont Supreme Court appeal. He seeks to renew his claim that his hospital placement in January 2017 subjected him to assaults

by other patients. He names no particular defendant and describes no legal claim. His filing appears to be a continuation of the non-hospitalization case.

CONCLUSION

The court accepts Judge Conroy's Report and Recommendation (Doc. 3), granting the Motion for Leave to Proceed in Forma Pauperis, but DISMISSES the action without prejudice and without leave to amend because it describes no claim or cause of action on which the court could grant relief or assistance to the petitioner. The pending Petition for Writ of Habeas Corpus (Doc. 4) is DENIED as moot.

Dated at Rutland, in the District of Vermont, this 1 day of April, 2019.



Geoffrey W. Crawford, Chief Judge
United States District Court

UNITED STATES DISTRICT COURT

for the
District of Vermont

Misbah Abdul-Kareem

Appellant(s)

V.

Vermont Department of Mental Health

Appellee(s)

Civil Action No. 5:18-cv-164

JUDGMENT IN A CIVIL ACTION

☐ **Jury Verdict.**

☒ **Decision by Court.**

IT IS ORDERED AND ADJUDGED that pursuant to the court's Order (Document No. 6) filed April 1, 2019, the Magistrate Judge's Report and Recommendation (Document No. 3) is **ACCEPTED** as petitioner's Motion for Leave to Proceed in Forma Pauperis (Document No. 1) is **GRANTED**. Petitioner's Petition for Writ of Habeas Corpus (Document No. 4) is **DENIED AS MOOT**. The action is **DISMISSED** without prejudice and without leave to amend because it describes no claim or cause of action on which the court could grant relief or assistance to the petition.

Date: April 1, 2019

JEFFREY S. EATON
CLERK OF COURT

JUDGMENT ENTERED ON DOCKET

DATE ENTERED: 4/1/2019

/s/ Elizabeth S. Britt
Signature of Clerk or Deputy Clerk

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
DISTRICT OF VERMONT
FEDERAL BUILDING
BURLINGTON, VERMONT 05402-0945

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Civil Action: 5:18-cv-164

Date: April 1, 2019

Misbah Abdul-Kareem v. Vermont Department of Mental Health

NOTICE TO LITIGANTS

If you wish to appeal the enclosed judgment or order, you must file a Notice of Appeal within 30 days after entry of the judgment or order appealed from (or 60 days if the United States or an officer or agency of the United States is a party). Fed. R. App. P. 4(a)(1). The fee for filing an appeal is \$505.00.

If you wish to appeal but are unable to file your Notice of Appeal within 30 days [or 60 days if applicable] after the date of entry shown on line 2 below, then you have an additional 30 days to file a Motion for Extension of Time. The Motion for Extension of Time **must** be filed within 30 days after the date on line 3 below. Every Motion for Extension of Time must contain an explanation which demonstrates "good cause" or "excusable neglect" for failure to file the Notice of Appeal within the time limit required. Fed. R. App. P. 4(a)(5).

PLEASE TAKE NOTICE

- | | |
|-------------------------------------------------------------|----------------------|
| 1. Judgment filed | <u>April 1, 2019</u> |
| 2. Date of Entry of Judgment on
the docket of this court | <u>April 1, 2019</u> |
| 3. Notice of Appeal MUST be
filed on or before | <u>May 1, 2019</u> |

/s/ Elizabeth S. Britt
Signature of Clerk or Deputy Clerk