

UNPUBLISHED

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

No. 19-7381

ASHLEY T. PRIOR,

Plaintiff - Appellant,

v.

STATE OF SC; BRYAN P. STIRLING; JOHN B. MCCREE; SHERIFF OF
COLUMBIA; JOHN AND JANE 1-10 DOES, SCDC Kirkland Staff; JAMES AND
JOAN 1-10 DOE, DHEC and SCDC Investigators of Health Services, etc,

Defendants - Appellees.

Appeal from the United States District Court for the District of South Carolina, at
Greenville. Timothy M. Cain, District Judge. (6:19-cv-01619-TMC)

Submitted: December 17, 2019

Decided: December 20, 2019

Before KING, FLOYD, and HARRIS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Ashley T. Prior, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Ashley T. Prior appeals the district court's order denying relief on Prior's 42 U.S.C. § 1983 (2012) complaint. The district court referred this case to a magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(B) (2012). The magistrate judge recommended that relief be denied and advised Prior that failure to file timely specific objections to this recommendation could waive appellate review of a district court order based upon the recommendation.

The timely filing of specific objections to a magistrate judge's recommendation is necessary to preserve appellate review of the substance of that recommendation when the parties have been warned of the consequences of noncompliance. *United States v. Midgette*, 478 F.3d 616, 621-22 (4th Cir. 2007); *see also Thomas v. Arn*, 474 U.S. 140, 154-55 (1985). Prior has waived appellate review by failing to file objections to the magistrate judge's recommendation after receiving proper notice. Accordingly, we affirm the judgment of the district court.

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

FILED: January 22, 2020

UNITED STATES COURT OF APPEALS
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No. 19-7381
(6:19-cv-01619-TMC)

ASHLEY T. PRIOR

Plaintiff - Appellant

v.

STATE OF SC; BRYAN P. STIRLING; JOHN B. MCCREE; SHERIFF OF
COLUMBIA; JOHN AND JANE 1-10 DOES, SCDC Kirkland Staff; JAMES
AND JOAN 1-10 DOE, DHEC and SCDC Investigators of Health Services, etc

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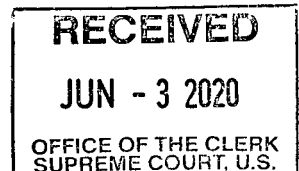
ORDER

The court denies the petition for rehearing.

Entered at the direction of the panel: Judge King, Judge Floyd, and
Judge Harris.

For the Court

/s/ Patricia S. Connor, Clerk



IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Ashley T. Prior,

Plaintiff,

vs.

State of South Carolina, Bryan P.
Stirling, John B. McCree, Sheriff of
Columbia, John & Jane Doe 1-10,
James & Joan Doe 1-10,

Defendants.

C/A No. 6:19-1619-TMC-KFM

REPORT OF MAGISTRATE JUDGE

This is a § 1983 action filed by a state prisoner. Pursuant to the provisions of 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2)(d), (D.S.C.), this magistrate judge is authorized to review all pretrial matters in this case and submit findings and recommendations to the district court.

The plaintiff's complaint was entered on the docket on June 5, 2019 (doc. 1). By order dated June 7, 2019, the plaintiff was given an opportunity to provide the necessary information to bring the case into proper form for evaluation and possible service of process, including paperwork required to effect service of process (doc. 5). The plaintiff was warned that failure to provide the necessary information and paperwork within the timetable set in the order may subject the case to dismissal (*id.* at 1). The plaintiff did not respond to the order, so a second proper form order was issued on July 3, 2019 (doc. 7). The plaintiff was warned for the second time that failure to provide the necessary information and paperwork within the timetable set in the order may subject the case to dismissal (*id.* at 1). The plaintiff returned only some of the required documents to the court on July 17, 2019, so a third proper form order was issued on July 29, 2019 (doc. 11). The order warned the plaintiff that he was being provided with one final opportunity to bring his

case into proper form and that failure to do so may subject the case to dismissal (*id.* at 1). On August 12, 2019, the plaintiff provided some documents, but did not provide all of the documents required. Instead, with his incomplete documents, the plaintiff filed a letter asserting that he did not have to provide completed service documents because he was seeking relief against unidentified parties (docs. 14-3; 15-2). Nevertheless, the plaintiff has failed to provide service documents for the named parties—with only one Form USM 285 appropriately filled out for defendant John B. McCree (doc. 15-1 at 4). Despite the opportunities outlined above, the plaintiff has not brought his case into proper form for judicial screening.

BACKGROUND

The plaintiff seeks damages, it appears, based upon both medical indifference and a slip and fall at Kirkland Correctional Institution (“Kirkland”) (docs. 1; 1-2). The plaintiff alleges that “medical doctors and staff” at Kirkland deprived him of medical care because they ran out of his eye drops and stomach medicine (doc. 1 at 1–4). The plaintiff contends that the lack of his stomach medicine has caused him to spit up blood and the lack of his eye drops has prevented him from reading or watching television for fifteen months (*id.*). The plaintiff further alleged, on the court’s standard complaint form, that he slipped and fell in the kitchen at Kirkland on June 14, 2019 (doc. 1-2). The plaintiff contends that he injured his knee and was injured “inside out” as a result of the fall (*id.* at 5–6). He alleges that the defendants were aware of the slippery condition and that failing to prevent his fall constituted cruel and unusual punishment (*id.* at 4–5). For relief, the plaintiff seeks money damages and medical treatment outside of Kirkland (docs. 1 at 1, 8; 1-2 at 6).

STANDARD OF REVIEW

The plaintiff filed this action pursuant to 28 U.S.C. § 1915, the *in forma pauperis* statute. This statute authorizes the District Court to dismiss a case if it is satisfied that the action “fails to state a claim on which relief may be granted,” is “frivolous or malicious,” or “seeks monetary relief against a defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2)(B). Further, the plaintiff is a prisoner under the definition of 28 U.S.C. § 1915A(c), and “seeks redress from a governmental entity or officer or employee of a governmental entity.” 28 U.S.C. § 1915A(a). Thus, even if the plaintiff had prepaid the full filing fee, this Court is charged with screening the plaintiff’s lawsuit to identify cognizable claims or to dismiss the complaint if (1) it is frivolous, malicious, or fails to state a claim upon which relief may be granted, or (2) seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A.

As a *pro se* litigant, the plaintiff’s pleadings are accorded liberal construction and held to a less stringent standard than formal pleadings drafted by attorneys. See *Erickson v. Pardus*, 551 U.S. 89 (2007) (*per curiam*). The requirement of liberal construction does not mean that the Court can ignore a clear failure in the pleading to allege facts which set forth a claim cognizable in a federal district court. See *Weller v. Dep’t of Soc. Servs.*, 901 F.2d 387, 391 (4th Cir. 1990).

This complaint is filed pursuant to 42 U.S.C. § 1983, which “‘is not itself a source of substantive rights,’ but merely provides ‘a method for vindicating federal rights elsewhere conferred.’” *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n. 3 (1979)). A civil action under § 1983 “creates a private right of action to vindicate violations of ‘rights, privileges, or immunities secured by the Constitution and laws’ of the United States.” *Rehberg v. Paulk*, 566 U.S. 356, 361 (2012). To state a claim under § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the

alleged violation was committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

DISCUSSION

As noted above, the plaintiff filed the instant action pursuant to § 1983, seeking damages from the defendants. For the reasons that follow, the undersigned recommends dismissal of the instant action.

It is well established that a court has the authority to dismiss a case pursuant to Federal Rule of Civil Procedure 41(b) for failure to prosecute and/or failure to comply with orders of the court. *Ballard v. Carlson*, 882 F.2d 93, 95 (4th Cir.1989). "The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." See *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630–31 (1962) (emphasis added). In addition to its inherent authority, this court may also *sua sponte* dismiss a case for lack of prosecution under Fed. R. Civ. P. 41(b). *Id.* at 630. In considering whether to dismiss an action pursuant to Rule 41(b), the court is required to consider four factors:

- (1) the degree of personal responsibility on the part of the plaintiff;
- (2) the amount of prejudice to the defendant caused by the delay;
- (3) the history of the plaintiff in proceeding in a dilatory manner; and,
- (4) the existence of less drastic sanctions other than dismissal.

Davis v. Williams, 588 F.2d 69, 70 (4th Cir.1978).

Here, the factors weigh in favor of dismissal. With respect to factors (1) and (3), as noted, despite multiple opportunities, the plaintiff has failed to bring his case into proper form. In doing so, he has failed to comply with the court's orders of June 7, 2019,

July 3, 2019, and July 29, 2019, which instructed the plaintiff to provide specific documentation to the court so that the case may be screened as required by 28 U.S.C. §§ 1915; 1915A, and so the United States Marshal Service could attempt service of process (docs. 5; 7; 11). Each order warned the plaintiff of the consequences of failing to comply with the orders' instructions, including the dismissal of his case pursuant to Fed. R. Civ. P. 41(b) (docs. 5; 7; 11). Despite these warnings, the plaintiff has not provided the court with all of the required documentation.

Accordingly, as the plaintiff has failed to comply with the court's orders and has been previously warned that such failures could result in dismissal, the undersigned recommends that the instant action be dismissed without prejudice pursuant to Fed. R. Civ. P. 41(b) for failure to comply with orders of the court.¹

RECOMMENDATION

In light of the plaintiff's failure to bring his case into proper form, the undersigned recommends that the court decline to automatically give his leave to amend his complaint. Accordingly, based upon the foregoing, the Court recommends that the District Court dismiss this action without prejudice and without issuance and service of process. **The plaintiff's attention is directed to the important notice on the next page.**

IT IS SO RECOMMENDED.

s/Kevin F. McDonald
United States Magistrate Judge

August 15, 2019
Greenville, South Carolina

¹ The undersigned also notes that the plaintiff's complaint appears to concede a failure to exhaust at least his slip and fall claim (doc. 1-2 at 9). Nevertheless, even on the merits, it appears the plaintiff's claims would be subject to summary dismissal. For example, the plaintiff has not named a party amenable to suit with respect to his medical indifference claims—beyond conclusorily asserting various Kirkland Staff Members were responsible (docs. 1; 1-2). Additionally, the plaintiff's slip and fall claim appears to rely on negligence by the defendants, which does not rise to the level of a constitutional violation. See *Estelle v. Gamble*, 429 U.S. 97 (1976). As such, the plaintiff's claims appear to fail on the merits, even if he had complied with the court's orders to bring his case into proper form.

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a *de novo* review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); see Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
300 East Washington Street, Room 239
Greenville, South Carolina 29601

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Ashley T. Prior,

Plaintiff,

v.

State of South Carolina, Bryan P.
Stirling, John B. McCree, Sheriff of
Columbia, John & Jane Doe 1-10,
and James & Joan Doe 1-10,

Defendants.

C/A No. 6:19-cv-1619-TMC

ORDER

Plaintiff Ashley T. Prior, a prisoner proceeding pro se, filed this action pursuant to 42 U.S.C. § 1983. (ECF No. 1). On August 15, 2019, Magistrate Judge Kevin F. McDonald issued a Report and Recommendation (“Report”) recommending that the instant action be dismissed without prejudice pursuant to Fed. R. Civ. P. 41(b) for failure to comply with orders of the court. (ECF No. 19).¹ Plaintiff was advised of his right to file objections to the Report. *Id.* at 6. Plaintiff, however, has not filed any objections, and the time to do has now run.

The Report has no presumptive weight and the responsibility to make a final determination in this matter remains with this court. *See Mathews v. Weber*, 423 U.S. 261, 270-71 (1976). In the absence of objections, this court is not required to provide an explanation for adopting the Report. *See Camby v. Davis*, 718 F.2d 198, 199 (4th Cir. 1983). Rather, “in the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must only satisfy itself that there is no clear error on the face of the record in order to

¹In accordance with 28 U.S.C. § 636(b) and Local Rule 73.02(B)(2), D.S.C., all pre-trial proceedings were referred to a magistrate judge.

accept the recommendation.” *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee’s note). Furthermore, failure to file specific written objections to the Report results in a party’s waiver of the right to appeal the district court’s judgment based upon that recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

After a thorough review of the Report and the record in this case, the court adopts the Magistrate Judge’s Report (ECF No. 19) and incorporates it herein. Accordingly, this action is **DISMISSED** without prejudice pursuant to Rule 41(b) for failure to prosecute and without issuance and service of process.

IT IS SO ORDERED.

s/Timothy M. Cain
United States District Judge

September 5, 2019
Anderson, South Carolina

NOTICE OF RIGHT TO APPEAL

The parties are hereby notified of the right to appeal this order pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure.