

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

KHEMALL JOKHOO,
Plaintiff,
v.

Judgment in a Civil Case

LOLA VELAQUEZ-AGUILU,
Defendant.

Case Number: 5:19-CT-3125-FL

Decision by Court.

This action came before the Honorable Louise W. Flanagan, United States District Judge, for frivolity review pursuant to 28 U.S.C. § 1915.

IT IS ORDERED AND ADJUDGED, in accordance with the court's order entered this date, that this action is hereby dismissed with prejudice pursuant to 28 U.S.C. § 1915(e)(2)(B)(i).

This Judgment Filed and Entered on February 25, 2020, with service on

Khemall Jokhoo 16804-041 (via U.S. Mail)
Rivers Correctional Institution
P.O. Box 630
Winton, NC 27986

February 25, 2020

PETER A. MOORE, JR., CLERK

/s/ M. Castania

By M. Castania, Deputy Clerk

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:19-CT-3125-FL

KHEMALL JOKHOO,)
Plaintiff,)
v.)
LOLA VELAQUEZ-AGUILU,)
Defendant.)

Plaintiff, a federal inmate proceeding pro se, filed this civil rights action pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), alleging defendant lacked authority to file criminal charges against him. The matter is before the court for frivolity review of plaintiff's complaint pursuant to 28 U.S.C. § 1915, and on plaintiff's motion for default judgment, (DE 14).

Section 1915 provides that courts shall review complaints filed by prisoners seeking leave to proceed in forma pauperis and dismiss such complaints when they are frivolous, malicious, or fail to state a claim on which relief may be granted. 28 U.S.C. § 1915(e)(2)(B)(i)-(ii). A complaint may be found frivolous because of either legal or factual deficiencies. First, a complaint is frivolous where “it lacks an arguable basis . . . in law.” Neitzke v. Williams, 490 U.S. 319, 325 (1989). Legally frivolous claims are based on an “indisputably meritless legal theory” and include “claims of infringement of a legal interest which clearly does not exist.” Adams v. Rice, 40 F.3d 72, 75 (4th Cir. 1994) (quoting Neitzke, 490 U.S. at 327). Under this standard, complaints may be dismissed for failure to state a claim cognizable in law, although

frivolity is a more lenient standard than that for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Neitzke, 490 U.S. at 328. Second, a complaint may be frivolous where it “lacks an arguable basis . . . in fact.” Id. at 325. Section 1915 permits federal courts “to pierce the veil of the complaint’s factual allegations and dismiss those claims whose factual contentions are clearly baseless.” See Denton v. Hernandez, 504 U.S. 25, 32 (1992) (citing Neitzke, 490 U.S. at 327).

Plaintiff is a federal inmate serving 175 months’ imprisonment following convictions for bank fraud, mail fraud, wire fraud, aggravated identity theft, and impersonation of a federal officer or employee. United States v. Jokhoo, 806 F.3d 1137, 1139 (8th Cir. 2015). Plaintiff alleges defendant, the principal federal prosecutor in plaintiff’s criminal case, “ha[d] no constitutional or statutory (acts of Congress) authority to prosecute” plaintiff because she is not a judicial branch officer. (DE 1 ¶ 7). As relief, plaintiff seeks an order vacating his criminal convictions and damages.

Prosecutorial immunity bars civil suits against prosecutors where the claim is based on “prosecutorial activities that are ‘intimately associated with the judicial phase of the criminal process.’” Safar v. Tingle, 859 F.3d 241, 248-49 (4th Cir. 2017) (quoting Imbler v. Pachtman, 424 U.S. 409, 430 (1976)). Defendant’s initiation of plaintiff’s criminal prosecution is intimately associated with the judicial phase of the criminal process. See Nivens v. Gilchrist, 444 F.3d 237, 250 (4th Cir. 2006). Accordingly, the court dismisses plaintiff’s individual capacity claim as barred by prosecutorial immunity. See id. (affirming dismissal with prejudice of action barred by prosecutorial immunity).

To the extent plaintiff is alleging an official capacity claim against defendant, the claim is

barred by sovereign immunity. See United States v. Testan, 424 U.S. 392, 399 (1976); McLean v. United States, 566 F.3d 391, 401 (4th Cir. 2009). Finally, the court lacks authority to vacate plaintiff's conviction or sentence in this civil rights action. See Heck v. Humphrey, 512 U.S. 477 (1994).

Plaintiff also has filed motion for default judgment, alleging defendant has not responded to his complaint within the time period required by the Federal Rules of Civil Procedure. Defendant, however, has not been served with the complaint and therefore the time period within which to file an answer has not expired. See Fed. R. Civ. P. 12(a). Furthermore, because the court is dismissing this action on initial review, the motion is moot.

Based on the foregoing, the court DISMISSES WITH PREJUDICE this action pursuant to 28 U.S.C. § 1915(e)(2)(B)(i), and DENIES plaintiff's motion for default judgment, (DE 14). This dismissal counts as a "strike" for purposes of 28 U.S.C. § 1915(g). The clerk is DIRECTED to close this case.

SO ORDERED, this the 24th day of February, 2020.


LOUISE W. FLANAGAN
United States District Judge

APPENDIX B

FILED: October 6, 2020

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 20-6385
(5:19-ct-03125-FL)

KHEMALL JOKHOO

Plaintiff - Appellant

v.

LOLA VELAQUEZ-AGUILU, Assistant U.S. Attorney

Defendant - Appellee

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

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

No. 20-6385

KHEMALL JOKHOO,

Plaintiff - Appellant,

v.

LOLA VELAQUEZ-AGUILU, Assistant U.S. Attorney,

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Louise W. Flanagan, District Judge. (5:19-cv-03125-FL)

Submitted: September 29, 2020

Decided: October 6, 2020

Before GREGORY, Chief Judge, AGEE, and KEENAN, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Khemall Jokhoo, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Khemall Jokhoo appeals the district court's order construing his complaint as an action pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and dismissing it under 18 U.S.C. § 1915(e)(2)(B). We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Jokhoo v. Velaquez-Aguilu*, No. 5:19-cv-03125-FL (E.D.N.C. Feb. 15, 2020). 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

APPENDIX C

FILED: December 15, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6385
(5:19-cv-03125-FL)

KHEMALL JOKHOO

Plaintiff - Appellant

v.

LOLA VELAQUEZ-AGUILU, Assistant U.S. Attorney

Defendant - Appellee

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

**Additional material
from this filing is
available in the
Clerk's Office.**