

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

IN RE:

PETITION OF LESLIE WILLIS
TO PERPETUATE EVIDENCE
PERTAINING TO "THE TRUST FOR
ANNIE PEARL (WHITE) WILLIS"
) 2:20-cv-1833
) Electronic Filing

MEMORANDUM ORDER

September 2, 2021

Petitioner, Leslie Willis ("Willis" or "Petitioner"), has filed Objections (ECF No. 136) to the Order of Magistrate Judge Lisa Pupo Lenihan (ECF No. 134) dated August 31, 2021, denying Willis' Motion for Leave to File a Second Amended Petition (ECF No. 126). This Court will consider Petitioner's objections as an appeal from the Magistrate Judge's Orders pursuant to the Magistrate Judges Act (the "Act"), 28 U. S. C. § 636(b)(1).

A United States Magistrate Judge may hear and determine any [non-dispositive] pretrial matter pending before the Court pursuant to 28 U.S.C. § 636(b)(1)(A). The district court will only reverse a magistrate judge's decision on these matters if it is "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A) ("A judge of the court may reconsider any [non-dispositive] pretrial matter . . . where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law."); Fed. R. Civ. P. 72 (a). Therefore, "this Court will review a magistrate judge's findings of fact for clear error." *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 91-92 (3d Cir. 1992); see also *Lithuanian Commerce Corp., Ltd. v. Sara Lee Hosiery*, 177 F.R.D. 205, 213 (D.N.J.1997). A finding is clearly erroneous if "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); see also *Kounelis v. Sherer*, 529 F. Supp. 2d 503, 518 (D.N.J. 2008); *Lo Bosco v. Kure Engineering Ltd.*, 891 F. Supp. 1035, 1037 (D.N.J. 1995). The district court will not reverse the magistrate judge's determination, even in circumstances where

the court might have decided the matter differently. *Cooley v. Merski*, 2008 U.S. Dist. LEXIS 50271, *3 (W.D. Pa. June 26, 2008) (citing *Cardona v. General Motors Corp.*, 942 F. Supp. 968, 971 (D.N.J. 1996)).

In matters where the magistrate judge is authorized to exercise his or her discretion, the decision will be reversed only for an abuse of discretion. See, e.g., *Kresejky v. Panasonic Commc'ns & Sys. Co.*, 169 F.R.D. 54, 64 (D.N.J. 1996) ("Where, as here, the magistrate has ruled on a non-dispositive matter . . . , his or her ruling is entitled to great deference and is reversible only for abuse of discretion"). "This deferential standard is 'especially appropriate where the Magistrate Judge has managed this case from the outset and developed a thorough knowledge of the proceedings.'" *Lithuanian Commerce Corp., Ltd. v. Sara Lee Hosiery*, 177 F.R.D. at 214 (quoting *Pub. Interest Research Group v. Hercules, Inc.*, 830 F. Supp. 1525, 1547 (D.N.J. 1993), aff'd on other grounds and rev'd on other grounds, 50 F.3d 1239 (3d Cir.1995)).

After a review of Willis' Motion and the Order of Magistrate Judge Lisa Pupo Lenihan denying such motion, this Court is unable to find either an abuse of discretion by the Magistrate Judge, or that the Magistrate Judge's ruling was clearly erroneous or contrary to law. Accordingly,

IT IS HEREBY ORDERED that after consideration of Willis' Objections to/Appeal of Magistrate Judge Lenihan's Order dated August 31, 2021, the Objections/Appeal are/is DENIED. The Order of Magistrate Judge Lenihan is AFFIRMED.

s/DAVID STEWART CERCONE

David Stewart Cercone
United States District Judge

cc: Leslie Willis

Bridget J. Daley, Esquire
Magistrate Judge Lisa Pupo Lenihan
(Via CM/ECF Electronic Mail)

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

IN RE: PETITION OF LESLIE WILLIS
TO PERPETUATE EVIDENCE
PERTAINING TO THE TRUST FOR
ANNIE PEARL (WHITE) WILLIS,
ECF No. 126

Civil Action No. 2:20-cv-01833
Magistrate Judge Lisa Pupo Lemhan
ECF No. 126

ORDER

IT IS FURTHER ORDERED that, in accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1)(A), Federal Rule of Civil Procedure 72(a), and Local Civil Rule 72.C.2., the parties are allowed fourteen (14) days after the date of service of this Order to file objections to the determinations made herein, which shall specifically designate the parts of the order objected to and the basis for the objection. Any party opposing the objections shall have fourteen (14) days from the date of service of the objections to respond thereto. Failure to file a timely objection shall constitute a waiver of any appellate rights.

*/s/ Lisa Pupo Lemhan
Lisa Pupo Lemhan
United States Magistrate Judge*

Pending is a Motion by Petitioner for Leave to File a Second Amended Petition to Perpetuate Evidence, ECF No. 126. Respondent PNC filed a brief in Opposition, ECF No. 133. A review of the proposed Second Amended Petition reveals that it still does not satisfy the requirements of Fed. R. Civ. P. 27 and only further complicates the matter before the Court. Petitioner has already filed one amended Petition and there is a pending Motion to Dismiss the First Amended Petition, ECF No. 74. The proposed Second Amended Petition does not cure the deficiencies set forth in PNC's Motion to Dismiss. Allowing a second amendment would only prolong this litigation.

Following Fed. R. Civ. P. 15(a) the Court finds that the amendment would be futile, and it would also prejudice PNC by further delaying this matter. The fact that Petitioner has filed a Petition for Writ of Certiorari to the U.S. Supreme Court on Case No. 2:18-cv-290-DSC-LPL (W.D. Pa. April 12, 2019), *aff'd*, Case No. 19-2094 (3d Cir. Mar. 2, 2020) does not affect this decision as this case is a separate matter from this one and the issues do not overlap. Therefore, IT IS HEREBY ORDERED that the Motion for Leave to File a Second Amended Petition is DENIED.

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

In Re

PETITION OF LESLIE WILLIS TO
PERPETUATE EVIDENCE
PERTAINING TO "THE TRUST FOR
ANNIE PEARL (WHITE) WILLIS"

vs.

Civil Action No. 2:
Judge David Cercone
Magistrate Judge Lenihan

PNC FINANCIAL SERVICES GROUP,
INC. and

ECF Nos. 66, 67

PNC BANK, N.A.,
Defendants.

Willis the Trust Instrument for the trust in question.

PNC FINANCIAL SERVICES GROUP,
INC. and

ECF Nos. 66, 67

A number of exhibits have been filed. ECF Nos. 11, 14, 15, 16. Willis filed a Motion for leave to file an amended petition on December 17, 2020. ECF No. 13. The Motion was granted on January 12, 2021. ECF No. 18. A second Motion for Extension was filed on January 15, 2021. ECF No. 20. This was also granted. ECF No. 21.

Pending before the Court are a third Motion for Service by U.S. Marshal and a Motion to Extend Time for Service by U.S. Marshal. ECF Nos. 66 and 67. For the reasons set forth below, both motions are denied.

It is necessary to set the background for this case prior to ruling on these motions. Willis' initial filing, on November 25, 2020, was a Motion to proceed in forma pauperis, accompanied by a document titled "Petition to Perpetuate Evidence Pertaining To 'The Trust for Annie Pearl (White) Willis' (Pursuant to Fed. R. Civ. P. Rule 27(a))". ECF No. 1-1. Rule 27(a) allows a party to file a petition which "must ask for an order authorizing the petitioner to depose the named persons in order to perpetuate their testimony." The filed petition is partially compliant but, rather than asking for depositions, requests that persons preserve evidence.

An Amended Petition was filed on January 27, 2021. ECF No. 27. The Amended Petition is similar but also asks that safe deposit records and evidence of real estate be "perpetuated" and adds additional adverse parties, primarily lawyers and law firms.

More exhibits were then filed. ECF Nos. 28, 31, 32, 33, 34, 35, 36, 37, 39. Petitioner continued to ask for the U.S. Marshal to serve her documents (ECF No. 38); however, since she was continuing to file documents, and there were no actual adverse parties named on the face of the Petition it was very difficult for the Court to determine when, what and whom to serve. On February 22, 2021, the Court did order service on the PNC entities now named on the docket. ECF No. 40.¹

¹Additional exhibits were filed subsequent to service at ECF Nos. 43 and 50.

Willis continues to ask that all of her documents be served by the Marshal and is now asking that all of the adverse parties listed in the Amended Petition be served. ECF Nos. 51, 55, 66, 67.

Although the Petition was not entirely in compliance with Rule 27(a), as Willis was proceeding pro se, and in an attempt to give her every benefit provided by *Haines v. Kerner*, 404 U.S. 519, 520 (1972), the Court identified the 2 primary entities who would have the evidence referenced in the Amended Petition and ordered service by the U.S. Marshal.

Pertinent to the case at bar is the authority granted to federal courts for the *sua sponte* dismissal of claims in IFP proceedings. Specifically, 28 U.S.C. § 1915(e), as amended, requires the federal courts to review complaints filed by persons who are proceeding in *forma pauperis* and to dismiss, at any time, any action that fails to state a claim on which relief may be granted 28 U.S.C. § 1915(e)(2)(B).

A complaint must be dismissed pursuant to Fed. R. Civ. P. 12 (b)(6)² if it does not allege

"enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 556 (2007) (rejecting the traditional 12(b)(6) standard set forth in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). The court must accept as true all allegations of the complaint and all reasonable factual inferences must be viewed in the light most favorable to the plaintiff.

Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 944 (3d Cir. 1985). "To the extent that

a complaint filed *in forma pauperis* which fails to state a claim lacks even an arguable basis in law, Rule 12(b)(6) and § 1915(d) both counsel dismissal." *Neitzke*, 490 U.S. at 328 (footnote omitted).

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This Petition was filed *in forma pauperis* and it is questionable whether Willis' Petition satisfies the requirements set forth above. The Rule requires the underlying action expected to be filed is cognizable in this court, that the testimony asked to be perpetuated is necessary to that action and perpetuating the testimony prior to the filing of the action is necessary to prevent a failure or delay of justice. None of these requirements has been satisfied thus far, unless it is set forth in the volumes of exhibits filed by Petitioner, which the Court is not inclined to comb through. Therefore, the Court is not inclined to order the U.S. Marshal to make further expenditures of time, effort and cost to serve 20 additional parties, including law firms, attorneys representing the Commonwealth of Pennsylvania and the assistant solicitor of Allegheny County until it is assured that all of the requirements of Rule 27 are met.

For all these reasons,

IT IS HEREBY ORDERED, this 16th day of April, 2021, that the Motions at ECF Nos. 66 and 67 are DENIED.

BY THE COURT:



Lisa Pupo Lenihan
U.S. Magistrate Judge

²In reviewing complaints under 28 U.S.C. § 1915(e), a federal court applies the same standard applied to motions to dismiss under Federal Rule of Civil Procedure 12(b)(6). *D'Agostino v. CECOM RDEC*, 436 F. App'x 70, 72 (3d Cir. 2011) (citing *Tourquier v. McCullough*, 184 F.3d 236, 240 (3d Cir. 1999)). In addition to the complaint, courts may consider matters of public record and other matters of which a court may take judicial notice, court orders, and exhibits attached to the complaint when adjudicating a motion to dismiss under Rule 12(b)(6). *Oshiver v. Levin, Fishbein, Sedran & Bernstein*, 38 F.3d 1380, 1384 n.2 (3d Cir. 1994) (citing 5A Wright and Miller, *Federal Practice and Procedure: Civil* 2d, § 1357; *Chester County Intermediate Unit v. Pennsylvania Blue Shield*, 896 F.2d 808, 812 (3d Cir. 1990)).

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