

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-1543

OMAR S. FOLK,
Appellant

v.

BUREAU OF PRISONS, Employees and Medical Staff, et al.

(D.C. Civ. No. 3-18-cv-02252)

SUR PETITION FOR PANEL REHEARING

Present: RESTREPO, MATEY, and SCIRICA, Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court, it is hereby

O R D E R E D that the petition for rehearing by the panel is denied.

BY THE COURT,

s/Anthony J. Scirica
Circuit Judge

Dated: November 26, 2021

PDB/cc: Omar Sierre Folk

Navin Jani, Esq.

Kathryn A. Dux, Esq.

APPENDIX A

OMAR S. FOLK, Appellant v. BUREAU OF PRISONS, Employees and Medical Staff; PA-C Samuel GOSA; ELIZABETH SANTOS/STAHL, Clinical Director; DR. ROBERT E. PUCELL; JOHN T. BURN; BRIAN BUSCHMAN; D. PARKER; M. MAGYAR; R. PARKYN; C. SMITH; JENNIFER HOLTZ-APPLE; DAVID J. BALL; PA-C ZALNO; CO. GENTZYEL; R&D FAUSEY; M. WASHINGTON; L. HUNTER; J. POTOPE; T. GREELY; T. ANDRESS; T. CULLEN; J. MARIS; A. RODERMEL; A. DEWALT; C. CRAIG; NICK MAIZE; C. ERICKSON; E. STAHL; J. WALKER; C. CAIN; J. FREYNIK; D. NICOLLETTE; T. THOMAS

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

2021 U.S. App. LEXIS 23798

No. 21-1543

July 29, 2021, Submitted for Possible Dismissal Pursuant to 28 U.S.C. § 1915(e)(2)(B) or Summary Action Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6

August 11, 2021, Opinion Filed

Notice:

NOT PRECEDENTIAL OPINION UNDER THIRD CIRCUIT INTERNAL OPERATING PROCEDURE RULE 5.7. SUCH OPINIONS ARE NOT REGARDED AS PRECEDENTS WHICH BIND THE COURT. PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Prior History

{2021 U.S. App. LEXIS 1}On Appeal from the United States District Court for the Middle District of Pennsylvania. M.D. Pa. Civil No. 3:18-cv-02252. District Judge: Honorable Robert D. Mariani.

Counsel For **OMAR S. FOLK**, Plaintiff - Appellant: Omar Sierre Folk, Allenwood FCI Medium, White Deer, PA.

For FEDERAL BUREAU OF PRISONS, Employee's and Medical Staff, Defendant - Appellee: Navin Jani, Esq., Office of United States Attorney, Harrisburg, PA.

For DAVID J. BALL, Defendant - Appellee: Kathryn A. Dux, Esq., Jacob C. Lehman, Esq., Ari J. Sliffman, Esq., German Gallagher & Murtagh, Philadelphia, PA.

Judges: Before: RESTREPO, MATEY, and SCIRICA, Circuit Judges.

Opinion

OPINION*

PER CURIAM

Omar Sierre Folk appeals from orders of the District Court dismissing his claims and ruling on several motions. For the reasons that follow, we will summarily affirm the District Court's judgment.

I.

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In 2018, Folk initiated an action in the District Court, bringing civil rights claims relating to his medical care in prison. Folk subsequently amended his complaint, and several defendants moved to dismiss it. The District Court granted their motion without prejudice and with leave to further amend.

In doing so, the District Court directed Folk to comply with Federal Rules of Civil Procedure 8 and {2021 U.S. App. LEXIS 2} 20 when filing a second amended complaint. The District Court explained that Folk's 14-page amended complaint primarily set out summaries of isolated and unrelated events, spanning five years, and named 16 defendants. It instructed him about the requirements of Rules 8 and 20, noting that he should identify his related claims against each defendant individually, along with the facts supporting those claims. The District Court explained that if Folk wished to bring claims about separate, unrelated incidents, he should file separate complaints initiating additional actions to address those unrelated incidents. The District Court also warned that this would be Folk's final opportunity to amend his complaint to comply with Rules 8 and 20.

Rather than clarify his claims, Folk responded by filing a 247-page second amended complaint against 51 defendants. This document is a largely handwritten account of Folk's interactions with various prison staff and medical providers between 2013 and 2020. In portions of the complaint, Folk alleged that Dr. David J. Ball, a private physician, failed to adequately treat knee and thigh injuries from 2013 to 2018. Folk stated that Dr. Ball ordered several MRIs and x-rays of {2021 U.S. App. LEXIS 3} Folk's leg and ordered nerve testing and a new knee brace for him. Dr. Ball also recommended injections to treat Folk's pain, but Folk declined them. Folk claimed that Dr. Ball refused to perform surgery on his ruptured quadricep because he feared that Folk may have permanent nerve damage and recommended physical therapy and exercise as an alternative treatment.

Dr. Ball filed a motion to dismiss, as did a group of defendants employed by the Bureau of Prisons ("BOP"); the remaining defendants Folk named in his second amended complaint had not yet been served. In the meantime, Folk moved for: (1) reconsideration of an earlier order denying his request for intervention from the District Court regarding his legal mail; (2) an entry of default against certain defendants; and (3) appointment of counsel. The District Court ultimately deemed Folk's first motion to be withdrawn for failure to comply with a local rule and denied the others. The District Court subsequently granted Dr. Ball's motion to dismiss Folk's claims against him pursuant to Federal Rule of Civil Procedure 12(b)(6). It also dismissed the remainder of Folk's complaint pursuant to Rules 8 and 20. The District Court did so by granting the BOP defendants' motion and dismissing, {2021 U.S. App. LEXIS 4} sua sponte, Folk's remaining claims against several dozen unserved defendants pursuant to 28 U.S.C. § 1915(e)(2)(B).

Folk timely appealed, specifying that he sought to appeal the dismissal of his claims and the District Court's rulings on his other motions. On appeal, he has filed a motion to vacate the District Court's judgment and remand the case.

II.

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. While we exercise plenary review over a district court's dismissal of claims under Rule 12(b)(6), see Fowler v. UPMC Shadyside, 578 F.3d 203, 206 (3d Cir. 2009), we review a dismissal for failure to comply with the requirements of Rule 8 for an abuse of discretion, see In re Westinghouse Sec. Litig., 90 F.3d 696, 702 (3d Cir. 1996). Dismissal for failure to state a claim is appropriate "if, accepting all well-pleaded allegations in the complaint as true and viewing them in the light most favorable to the plaintiff, a court finds that [the] plaintiff's claims lack facial plausibility." Warren Gen. Hosp. v. Amgen Inc., 643 F.3d 77, 84 (3d Cir. 2011). We construe Folk's pro se pleadings liberally, see Haines v. Kerner, 404

U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972), and may summarily affirm a district court's decision "on any basis supported by the record" if the appeal fails to present a substantial question, see Murray v. Bledsoe, 650 F.3d 246, 247 (3d Cir. 2011) (per curiam).

III.

We agree with the District Court's dismissal of Folk's claims. For his claims against Dr. Ball, the District Court correctly concluded that Folk{2021 U.S. App. LEXIS 5} failed to state a claim under Rule 12(b)(6). Although it was not entirely clear, it appeared that Folk sought to bring claims of Eighth Amendment deliberate indifference and professional negligence under state law. "[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' . . . proscribed by the Eighth Amendment." Estelle v. Gamble, 429 U.S. 97, 104, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976) (citation omitted). Establishing a claim requires proving both an objective component - "a serious medical need" - and a subjective component - "acts or omissions by prison officials that indicate deliberate indifference to that need." See Natale v. Camden Cnty. Corr. Facility, 318 F.3d 575, 582 (3d Cir. 2003).

Folk alleged that Dr. Ball conducted testing, ordered an assistive device, and offered injections for pain that Folk declined. He also claimed that Dr. Ball would not perform surgery on an injury because he feared that Folk would have permanent nerve damage, offering alternative treatment in the form of physical therapy and exercise. These allegations show that Folk merely disagreed with the course of treatment recommended by Dr. Ball. However, mere disagreement with medical treatment does not constitute deliberate indifference under the Eighth Amendment. See Monmouth Cnty. Corr. Inst. Inmates v. Lanzaro, 834 F.2d 326, 346 (3d. Cir. 1987); see also U.S. ex rel. Walker v. Fayette County, 599 F.2d 573, 575 n.2 (3d Cir. 1979) (per curiam) ("Where a prisoner has received some medical{2021 U.S. App. LEXIS 6} attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments and to constitutionalize claims which sound in state tort law.") (citation omitted).

Further, the District Court properly dismissed Folk's claim of professional negligence against Dr. Ball. Folk did not file a certificate of merit ("COM") or claim that a COM was unnecessary, as required by Pennsylvania Rule of Civil Procedure 1042.3, despite receiving ample notice about the requirement in Dr. Ball's motion to dismiss. See Schmigel v. Uchal, 800 F.3d 113, 119-20 (3d Cir. 2015) ("Pennsylvania's notice requirement, like the COM requirement itself, is substantive state law under [Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)]."); Liggon-Redding v. Estate of Sugarman, 659 F.3d 258, 264-65 (3d Cir. 2011); see also Pa. R. Civ. P. 1042.6-7.

Accordingly, Folk's claims against Dr. Ball were properly dismissed.

We also conclude that the District Court did not abuse its discretion in dismissing the remainder of Folk's claims under Rule 8. Federal Rule of Civil Procedure 8(a) requires a pleading to contain "a short and plain statement of the grounds for the court's jurisdiction" and "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(1), (2). Each averment must be "simple, concise, and direct." Fed. R. Civ. P. 8(d)(1). "Taken together," Rules 8(a) and 8(d)(1) "underscore the emphasis placed on clarity and brevity by the federal pleading rules." {2021 U.S. App. LEXIS 7} Westinghouse, 90 F.3d at 702 (citation omitted). A statement must be plain "to give the adverse party fair notice of the claim asserted so as to enable him to answer and prepare for trial," and must be short to avoid placing "an unjustified burden on the court and the part[ies] who must respond to it because they are forced to select the relevant material from a mass of verbiage." Salahuddin v. Cuomo, 861 F.2d 40, 42 (2d Cir. 1988) (citation omitted).

Folk's second amended complaint was anything but "simple, concise, and direct." See Fed. R. Civ. P. 8(d)(1). Rather than clarifying his 14-page amended complaint, Folk's 247-page second amended

complaint, which spans seven years of encounters with dozens of people, is dense, very difficult to follow, and lacking any consistent structure. It is so voluminous and unfocused that it is largely impossible to identify what about Folk's encounters with most prison and medical staff could support any claim for relief or what those claims were for each of the 51 defendants.

As was the case here, "a district court acts within its discretion when it dismisses an excessively prolix and overlong complaint," especially after the litigant has been given an opportunity "to better tailor [his] pleading." See Garrett v. Wexford Health, 938 F.3d 69, 93 (3d Cir. 2019), cert. denied, 140 S. Ct. 1611, 206 L. Ed. 2d 955 (2020).¹ The District Court "expressly{2021 U.S. App. LEXIS 8} warned [Folk] that failure to replead [his] claims in compliance with Rule 8 would result in the dismissal of those claims" and explained how to comply with that rule. See Westinghouse, 90 F.3d at 704. Where Folk responded by filing an extremely lengthy document that was significantly harder to understand, dismissal of his complaint under Rule 8 was appropriate.² See id. at 703 (affirming the dismissal of an "unnecessarily complicated and verbose" 240-page counseled complaint that plaintiffs had failed to sufficiently narrow through "two rounds of difficult motions"); see also Mann v. Boatright, 477 F.3d 1140, 1148 (10th Cir. 2007) (explaining that it is not a "district court's job to stitch together cognizable claims for relief from [a] wholly deficient pleading"). Under these circumstances, the District Court also did not err in denying Folk further leave to amend. See Grayson v. Mayview State Hosp., 293 F.3d 103, 108 (3d Cir. 2002).

We further conclude that the District Court did not err in denying Folk's other motions. We discern no error in the District Court's decision to deem Folk's motion for reconsideration of an earlier order regarding his legal mail to be withdrawn under M.D. Pa. Local Rule 7.5 after he did not timely file a brief in support of the motion. See United States v. Eleven Vehicles, 200 F.3d 203, 214 (3d Cir. 2000). The District Court also did not abuse its discretion in denying, without prejudice, Folk's{2021 U.S. App. LEXIS 9} request for an entry of default against defendants who had not yet been served. See Fed. R. Civ. P. 55(a); Chamberlain v. Giampapa, 210 F.3d 154, 164 (3d Cir. 2000). Finally, although it is unfortunate that Folk appears unable to articulate the claims he may believe he has, we have no basis to conclude that any such claims might be potentially valid and thus cannot say that the District Court abused its discretion by denying Folk's request for appointment of counsel. See Tabron v. Grace, 6 F.3d 147, 155-56 (3d Cir. 1993).

Accordingly, we will affirm the District Court's judgment.³

Footnotes

*
This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

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In light of this conclusion, we need not consider the District Court's additional conclusion that Folk's second amended complaint violated Fed. R. Civ. P. 20, which is not an independent basis to dismiss a complaint. See Fed. R. Civ. P. 21. We note, however, that the District Court's Rule 20 analysis further underscores the deficiencies of Folk's second amended complaint under Rule 8. The manner in which Folk included so many claims against so many defendants makes it exceedingly difficult to determine where one claim ends and another begins and which specific claims relate to which specific defendants. In that regard, we note that the fact that Dr. Ball was able to identify and respond to claims against him does not mean that the same was true for the other defendants. Cf.

Garrett, 938 F.3d at 96 n.29 (addressing the application of Rule 8 to "specific defendants").

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For the same reasons, the District Court did not err in dismissing Folk's claims against the unserved defendants *sua sponte* under 28 U.S.C. § 1915(e)(2)(B) for failure to comply with Rule 8. See Simmons v. Abruzzo, 49 F.3d 83, 86 (2d Cir. 1995) (explaining that a district court may dismiss claims *sua sponte* for failure to comply with Rule 8 where a "complaint is so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised") (citation omitted).

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Folk's motion to vacate and remand is denied.

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04/25/2022

**OMAR S. FOLK, Plaintiff v. BUREAU OF PRISONS, et al., Defendants
UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**
2021 U.S. Dist. LEXIS 44638
Civil No. 3:18-cv-2252
March 10, 2021, Decided
March 10, 2021, Filed

Editorial Information: Subsequent History

Affirmed by, Motion denied by Folk v. Bureau of Prisons, 2021 U.S. App. LEXIS 23798 (3d Cir. Pa., Aug. 11, 2021)

Editorial Information: Prior History

Folk v. Bureau of Prisons, 2019 U.S. Dist. LEXIS 165940, 2019 WL 4724799 (M.D. Pa., Sept. 26, 2019)

Counsel {2021 U.S. Dist. LEXIS 1}Omar S. Folk, Plaintiff, Pro se, White Deer, PA.

For Bureau of Prisons, Employee's and Medical Staff, PA-C
Samuel Gosa, Elizabeth Santos/Stahl, Clinical Director, Brian Buschman, D. Parker, M.
Magyar, R. Parkyn, C. Smith, Jennifer Holtz-Apple, PA-C Zalno, Co. Gentzyel, R&D Fausey,
M. Washington, Defendants: Samuel Dalke, US Attorney's Office, Middle District of PA -
Prisoner, Harrisburg, PA.

For David J. Ball, Defendant: Ari J. Sliffman, German, Gallagher
& Murtagh, PC, Philadelphia, PA; Jacob C. Lehman, German Gallagher & Murtagh, P.C.,
Philadelphia, PA.

Judges: Robert D. Mariani, United States District Judge.

Opinion

Opinion by: Robert D. Mariani

Opinion

MEMORANDUM

I. Factual Background & Procedural History

Plaintiff Omar Folk ("Folk"), an inmate confined at the Federal Correctional Institution, Allenwood Medium, in White Deer, Pennsylvania ("FCI-Allenwood"), initiated this action pursuant to *Bivens*, 128 U.S.C. § 1331. (Doc. 1). On March 9, 2020, the Court dismissed Folk's first amended complaint for failure to comply with Rules 8 and 20 of the Federal Rules of Civil Procedure. (Docs. 82, 83). The Court directed Folk to file a proposed second amended complaint that strictly complied with Federal Rules of Civil Procedure 8 and 20. (*Id.*). After being granted extensions of time, Folk filed his proposed second amended complaint{2021 U.S. Dist. LEXIS 2} on or about May 11, 2020. (Doc. 101). In the second amended complaint, Folk names approximately fifty-one Defendants. (See *id.*). The following Defendants have been served and have representation in this action: Samuel Gosa, Brian Buschman, Elizabeth Stahl, Beth Zalno, Geona Fausey, Milton Washington, Darlene Parker,

Ryan Parkyn, Michael Magyar, Jennifer Holtzapple, Charles S. Smith, and M. Gentzyel (collectively, "BOP Defendants"), and Dr. David J. Ball, a private physician. The remaining newly named Defendants have not yet been served.

Presently pending before the Court is the BOP Defendants' motion (Doc. 104) to dismiss based on Folk's failure to comply with Rules 8 and 20 of the Federal Rules of Civil Procedure. For the reasons set forth below, the Court will grant the motion to dismiss. The Court will also dismiss the unserved Defendants from this action.

II. Discussion

A. Federal Rules of Civil Procedure 8 and 20

Folk's 247-page proposed second amended complaint contains allegations of distinct acts committed by disparate parties spanning his entire seven-year term of incarceration. (Doc. 101). He names approximately fifty-one different Defendants and raises approximately ten different claims. (*Id.*).

Federal Rule of Civil Procedure 8 establishes the general rules of pleading. See Fed. R. Civ. P. 8. Rule 8(a) requires a pleading{2021 U.S. Dist. LEXIS 3} to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Rule 8(d)(1) speaks to factual allegations, requiring that "[e]ach allegation . . . be simple, concise, and direct." Fed. R. Civ. P. 8(d)(1). These rules task the Plaintiff to provide "the defendant notice of what the . . . claim is and the grounds upon which it rests." *Phillips v. County of Allegheny*, 515 F.3d 224, 232 (3d Cir. 2008) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). This standard requires more than legal labels and conclusory assertions: a complaint must include enough facts to "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

Folk's second amended complaint fails to meet these basic pleading requirements. The factual narrative spans seven years and involves fifty-one different individuals. Folk appears to list *all* of his alleged medical ailments, issues, and interactions beginning in 2013 through the present. (See Doc. 101). It is evident that Folk's second amended complaint "[e]aves the defendants having to guess what of the many things discussed" constitute causes of action, the legal theory on which those causes may rest, and the Defendants against whom each cause is lodged. See *Binsack v. Lackawanna Cty. Prison*, 438 F. App'x 158, 160 (3d Cir. 2011) (nonprecedential). Folk's second amended complaint thus fails to comply with Rule 8.

The lack of clarity in Folk's second{2021 U.S. Dist. LEXIS 4} amended complaint causes an additional problem. Rules 18 and 20 of the Federal Rules of Civil Procedure explain the circumstances in which multiple claims and multiple defendants may be joined. Rule 18 states that a party "may join . . . as many claims as it has against an opposing party." Fed. R. Civ. P. 18(a). Thus, when an action involves only one defendant, a plaintiff may assert every claim he has against that defendant, regardless of whether the claims are factually or legally related to one another, subject only to the limits of federal subject-matter jurisdiction. See 7 Charles Alan Wright & Arthur Miller, et al., *Federal Practice & Procedure* § 1582 (3d ed. 2019); see also Fed. R. Civ. P. 18(a).

When a plaintiff seeks to assert claims against *multiple* defendants, Rule 20 also comes into play. See *Wright & Miller, supra*, § 1655. Rule 20 governs permissive joinder of parties and explains that a plaintiff may only join multiple defendants in a single case if (1) "any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences," and (2) "any question of law or fact common to all defendants will arise in the action." Fed. R. Civ. P. 20(a)(2). In other words, notwithstanding the broad joinder-of-claims language of Rule 18(a), a{2021 U.S. Dist. LEXIS 5} plaintiff may join

multiple defendants in a single complaint only if he asserts at least one claim linking *all* defendants that (1) arises out of the same transaction or occurrence and (2) involves a common question of law or fact. *Id.*; Wright & Miller, *supra*, § 1655. That is, there must be at least one common claim against all named defendants. Once a plaintiff satisfies this requirement, he may invoke Rule 18 to assert "as many claims as [he] has" against one or more defendants, even if those additional claims are unrelated to the common claim linking all defendants. See Fed. R. Civ. P. 18(a); Wright & Miller, *supra*, § 1655.

The Court finds that Folk's second amended complaint is in violation of Rule 20, as was his first amended complaint. On March 9, 2020, the Court issued a detailed Memorandum and Order directing **Folk** to file a second amended complaint that contained only the claims and Defendants that were related and involved the same transactions or occurrences and had a common legal and factual basis as required by Rule 20(a). (Docs. 82, 83). The Court also directed that all claims that were unrelated must be filed as separate actions. (Doc. 82). Instead of complying with the terms of the March 9, 2020 Memorandum and Order, **Folk** filed his second amended complaint which contains{2021 U.S. Dist. LEXIS 6} numerous allegations and are related only insofar as they all occurred at FCI-Allenwood. In the second amended complaint, **Folk** sets forth various, disjointed claims related to his dental treatment, delay in receiving teeth cleaning and tooth extraction, inadequate treatment for his gallbladder, inadequate treatment for his mental health condition, delayed physical therapy, permanent discoloration in his leg and foot, denial of his special diet, permanent nerve damage in his quadriceps, inadequate treatment for his quadriceps and knee injuries, and harassment claims. (See Doc. 101). The fifty-one named Defendants and their alleged conduct are essentially unrelated, and they do not meet the requirements of joinder. It is quite clear that **Folk** failed to comply with the March 9, 2020 Order with respect to joining unrelated claims and parties in one pleading.

Given that the alleged acts have been committed by disparate parties at different times over the course of seven years, and do not arise out of the same transaction, occurrence, or series of transactions or occurrences, the Court will dismiss the second amended complaint against the BOP Defendants.

B. The Unserved Defendants

Although{2021 U.S. Dist. LEXIS 7} in some instances it is appropriate for a Court to dismiss claims, *sua sponte*, against parties for whom dismissal is appropriate, but for whatever reason have failed to join in the motion, the Court declines to do so here because the remaining Defendants have not been served. See *Bryson v. Brand Insulations*, 621 F.2d 556, 559 (3d Cir. 1980) ("[F]or a court to grant judgment on the pleadings, *sua sponte*, is not error. The district court may on its own initiative enter an order dismissing the action provided the complaint affords a sufficient basis for the court's action."); *Ryle v. Fuh*, 820 F. App'x 121, 123-24 (3d Cir. 2020) (affirming District Court's granting of defendant's motion to dismiss, and dismissal against some defendants *sua sponte*, where the Court dismissed the complaint with prejudice). Under § 1915(e)(2)(B) of the Prisoner Litigation Reform Act, however, the Court has an obligation to dismiss a complaint "at any time the court determines" the complaint is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from suit. 28 U.S.C. § 1915(e)(2)(B) (emphasis added). See, e.g., *Brown v. Sage*, 941 F.3d 655, 659 (3d Cir. 2019) (en banc) (noting that under the PLRA the district court shall at any time dismiss any case which, *inter alia*, fails to state a claim upon which relief may be granted);{2021 U.S. Dist. LEXIS 8} *Lopez v. Smith*, 203 F.3d 1122, 1126 n.6 (9th Cir. 2000); *Bower v. Rey*, 2016 U.S. Dist. LEXIS 174356, 2016 WL 7324526 (M.D. Pa. Dec. 16, 2016); *Bracey v. Pa. Dep't of Corrs.*, 2012 U.S. Dist. LEXIS 69792, 2012 WL 1825828 (W.D. Pa. May 18, 2012) ("The Court's obligation to dismiss a complaint under the PLRA screening provisions

is not excused even after defendants have filed a motion to dismiss."). That section applies to this action because Folk is a prisoner proceeding *in forma pauperis*. See 28 U.S.C. § 1915(e)(2).

In determining whether a prisoner's complaint states a claim under § 1915(e)(2)(B), the Court is guided by the Rule 12(b)(6) motion to dismiss standard. Under Rule 12(b)(6), the Court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) (quoting *Phillips v. County of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008)). While a complaint need only contain "a short and plain statement of the claim," Fed. R. Civ. P. 8(a)(2), and detailed factual allegations are not required, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 555, 570. "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (internal quotations omitted).

Folk's claims against the remaining unserved Defendants-approximately thirty-five individuals-suffer from the same defects{2021 U.S. Dist. LEXIS 9} articulated above. As such, the unserved Defendants are entitled to dismissal from this action.

III. Leave to Amend

When a complaint fails to present a *prima facie* case of liability, district courts must generally grant leave to amend before dismissing the complaint. See *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 108 (3d Cir. 2002); *Shane v. Fauver*, 213 F.3d 113, 116-17 (3d Cir. 2000). Specifically, the Third Circuit Court of Appeals has admonished that when a complaint is subject to dismissal for failure to state a claim, courts should liberally grant leave to amend "unless such an amendment would be inequitable or futile." *Phillips*, 515 F.3d at 245 (citing *Alston v. Parker*, 363 F.3d 229, 235 (3d Cir. 2004)). For the reasons set forth above, the Court concludes that any further amendment would be futile, and Folk will not be permitted leave to file a third amended complaint. See *Jones v. Unknown D. O. C. Bus Driver & Transp. Crew*, 944 F.3d 478, 483 (3d Cir. 2019) (where inmate plaintiff "has already had two chances to tell his story . . . giving him further leave to amend would be futile.").

IV. Conclusion

The Court will grant the BOP Defendants' motion (Doc. 104) to dismiss the second amended complaint based on Folk's failure to comply with Rules 8 and 20 of the Federal Rules of Civil Procedure. The Court will also dismiss the unserved Defendants from this action.

A separate Order shall issue.

/s/ Robert D. Mariani

Robert D. Mariani

United States District Judge

Dated: March 10, 2021{2021 U.S. Dist. LEXIS 10}

ORDER

AND NOW, this 10th day of March, 2021, upon consideration of the BOP Defendants' motion (Doc. 104) to dismiss, and for the reasons set forth in the accompanying Memorandum, **IT IS HEREBY ORDERED THAT:**

1. The motion (Doc. 104) is **GRANTED**.
2. The unserved Defendants are **DISMISSED** pursuant to 28 U.S.C. § 1915(e).
3. The remaining pending motions (Docs. 133, 134, 135, 138, 142, 145, 151) are **DISMISSED** as moot.
4. The Clerk of Court is directed to **CLOSE** this case.
5. Any appeal from this Order is **DEEMED** frivolous and not taken in good faith. See 28 U.S.C. § 1915(a)(3).

/s/ Robert D. Mariani
Robert D. Mariani
United States District Judge

Footnotes

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Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) (holding that there exists an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights).

OMAR S. FOLK, Plaintiff v. BUREAU OF PRISONS, et al., Defendants
UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
2021 U.S. Dist. LEXIS 5843
Civil No. 3:18-cv-2252
January 12, 2021, Decided
January 12, 2021, Filed

Editorial Information: Prior History

Folk v. Bureau of Prisons, 2019 U.S. Dist. LEXIS 165940, 2019 WL 4724799 (M.D. Pa., Sept. 26, 2019)

Counsel {2021 U.S. Dist. LEXIS 1}Omar S. Folk, Plaintiff, Pro se, White Deer, PA.

For Bureau of Prisons, Employee's and Medical Staff, PA-C
Samuel Gosa, Elizabeth Santos/Stahl, Clinical Director, Brian Buschman, D. Parker, M. Magyar, R. Parkyn, C. Smith, Jennifer Holtz-Apple, PA-C Zalno, Co. Gentzyel, R&D Fausey, M. Washington, Defendants: Samuel Dalke, US Attorney's Office, Middle District of PA - Prisoner, Harrisburg, PA.

For David J. Ball, Defendant: Ari J. Sliffman, German, Gallagher & Murtagh, PC, Philadelphia, PA; Jacob C. Lehman, German Gallagher & Murtagh, P.C., The Bellevue, Philadelphia, PA.

Judges: Robert D. Mariani, United States District Judge.

Opinion

Opinion by: Robert D. Mariani

Opinion

MEMORANDUM

I. Background

Plaintiff **Omar Folk** ("Plaintiff"), an inmate confined at the Federal Correctional Institution, Allenwood, in White-Deer, Pennsylvania, initiated this action pursuant to *Bivens*, 128 U.S.C. § 1331. (Doc. 1). The matter is proceeding via a second amended complaint. (Doc. 101). Presently pending before the Court is Plaintiffs motion for appointment of counsel. (Doc. 86). For the reasons set forth below, the Court will deny the motion without prejudice.

II. Discussion

Although prisoners have no constitutional or statutory right to appointment of counsel in a{2021 U.S. Dist. LEXIS 2} civil case, the Court has discretion "to request an attorney to represent any person unable to afford counsel." 28 U.S.C. § 1915(e)(1); *Parham v. Johnson*, 126 F.3d 454, 456-57 (3d Cir. 1997); *Montgomery v. Pinchak*, 294 F.3d 492, 499 (3d Cir. 2002); *Tabron v. Grace*, 6 F.3d 147, 153 (3d Cir. 1993). The United States Court of Appeals for the Third Circuit has stated that the appointment of counsel for an indigent litigant should be made when circumstances indicate "the likelihood of substantial prejudice to him resulting, for example, from his probable inability without

such assistance to present the facts and legal issues to the court in a complex but arguably meritorious case." *Smith-Bey v. Petsock*, 741 F.2d 22, 26 (3d Cir. 1984).

The initial determination to be made by the Court in evaluating the expenditure of the "precious commodity" of volunteer counsel is whether the case has some arguable merit in fact or law. *Montgomery*, 294 F.3d at 499. If a plaintiff overcomes this threshold hurdle, other factors to be examined are:

- (1) the plaintiff's ability to present his or her own case;
- (2) the difficulty of the particular legal issues;
- (3) the degree to which factual investigation will be necessary and the ability of the plaintiff to pursue investigation;
- (4) the plaintiff's capacity to retain counsel on his or her own behalf;
- (5) the extent to which the case is likely to turn on credibility determinations; and
- (6) whether the case will require{2021 U.S. Dist. LEXIS 3} testimony from expert witnesses.*Id.* (citing *Tabron*, 6 F.3d at 155-57). The Third Circuit Court of Appeals added two other factors to be taken into consideration: (1) the court's willingness to aid the indigent party in presenting his or her own case; and (2) the available supply of lawyers willing to accept section 1915(e) requests within the relevant geographic area. See *Gordon v. Gonzalez*, 232 F. App'x 153 (3d Cir. 2007).

Here, Plaintiff bases the motion on his inability to afford counsel, the alleged complexity of the case, and his limited access to a computer. (Docs. 86, 87). However, thus far, Plaintiff has demonstrated that he is capable of properly and forcefully prosecuting his claims. Despite Plaintiff's incarceration, investigation of the facts is not beyond his capabilities and he is intimately familiar with the facts of his case. Moreover, the Court notes that it does not have a large group of attorneys who would represent this action in a pro bono capacity.

Based on the foregoing, it does not appear that Plaintiff will suffer prejudice if forced to prosecute this case on his own. The Court's duty to construe *pro se* pleadings liberally, *Haines v. Kerner*, 404 U.S. 519, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972), *Riley v. Jeffes*, 777 F.2d 143, 147-48 (3d Cir. 1985), coupled with Plaintiffs apparent ability to litigate this action, militate against the appointment of counsel. Accordingly, {2021 U.S. Dist. LEXIS 4} the motion for appointment of counsel will be denied, however the denial will be without prejudice. As the Court in *Tabron* stated:

[A]ppointment of counsel under § 1915(d) may be made at any point in the litigation and may be made by the district court *sua sponte* . . . even if it does not appear until trial (or immediately before trial) that an indigent litigant is not capable of trying his or her case, the district court should consider appointment of counsel at that point. *Tabron*, 6 F.3d at 157. Therefore, in the event that future proceedings demonstrate the need for counsel, the matter may be reconsidered either *sua sponte* or upon motion of Plaintiff.

A separate Order shall issue.

/s/ Robert D. Mariani

Robert D. Mariani

United States District Judge

Dated: January 12, 2021

ORDER

AND NOW, this 12th day of January, 2021, upon consideration of Plaintiff's motion (Doc. 86) for appointment of counsel, and in accordance with the Memorandum issued this date, **IT IS HEREBY ORDERED THAT** the motion (Doc. 86) is **DENIED** without prejudice.

/s/ Robert D. Mariani
Robert D. Mariani
United States District Judge

Footnotes

1

Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) (holding that there exists an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights).

OMAR S. FOLK, Plaintiff v. BUREAU OF PRISONS, et al., Defendants
UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
2020 U.S. Dist. LEXIS 40571
Civil No. 3:18-cv-2252
March 9, 2020, Decided
March 9, 2020, Filed

Editorial Information: Prior History

Folk v. Bureau of Prisons, 2019 U.S. Dist. LEXIS 165940 (M.D. Pa., Sept. 26, 2019)

Counsel {2020 U.S. Dist. LEXIS 1}Omar S. **Folk**, Plaintiff, Pro se, White Deer, PA.

For Bureau of Prisons, Employee's and Medical Staff, PA-C
Samuel Gosa, Elizabeth Santos/Stahl, Clinical Director, Brian Buschman, D. Parker, M. Magyar, R. Parkyn, C. Smith, Jennifer Holtz-Apple, PA-C Zalno, Co. Gentzyel, R&D Fausey, M. Washington, Defendants: Samuel Dalke, US Attorney's Office, Middle District of PA - Prisoner, Harrisburg, PA.

For David J. Ball, Defendant: Ari J. Sliffman, German, Gallagher & Murtagh, PC, Philadelphia, PA; Jacob C. Lehman, German Gallagher & Murtagh, P.C., Philadelphia, PA.

Judges: Robert D. Mariani, United States District Judge.

Opinion

Opinion by: Robert D. Mariani

Opinion

MEMORANDUM

I. Background and Procedural History

Plaintiff **Omar Folk** ("Folk"), an inmate currently confined at the Federal Correctional Institution, Allenwood Medium ("FCI-Allenwood"), in White Deer, Pennsylvania, initiated this action pursuant to *Bivens*1, 28 U.S.C. § 1331. (Doc. 1). The matter is proceeding via an amended complaint. (Doc. 7). Named as Defendants are the Bureau of Prisons ("BOP"), Samuel Gosa, Brian Buschman, Elizabeth Stahl, Beth Zalno, Geona Fausey, Milton Washington, Darlene Parker, Ryan Parkyn, Michael Magyar, Jennifer Holtzapple, and Charles S. Smith, and M. Gentzyel (collectively, {2020 U.S. Dist. LEXIS 2} "BOP Defendants"), Dr. David J. Ball, Dr. John T. Burn, and Dr. Robert E. Pucell, private physicians.

Presently pending before the Court is a motion (Doc. 32) to dismiss based on Folk's failure to comply with Rule 20 of the Federal Rules of Civil Procedure filed on behalf of the BOP Defendants, and a motion (Doc. 71) to dismiss for failure to state a claim by Defendant Dr. Ball. For the reasons set forth below, the DOC Defendants' motion to dismiss based on Folk's failure to comply with Rule 20 of the Federal Rules of Civil Procedure will be granted, and **Folk** will be afforded a final opportunity to file an amended complaint. Defendant Dr. Ball's motion to dismiss will be dismissed as moot in light

of Folk's opportunity to file a second amended complaint.

II. Discussion

Federal Rule of Civil Procedure 8 establishes the general rules of pleading. See Fed. R. Civ. P. 8. Rule 8(a) requires a pleading to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Rule 8(d)(1) speaks to factual allegations, requiring that "[e]ach allegation . . . be simple, concise, and direct." Fed. R. Civ. P. 8(d)(1). These rules task the Plaintiff to provide "the defendant notice of what the . . . claim is and the grounds upon which it rests." *Phillips v. County of Allegheny*, 515 F.3d 224, 232 (3d Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). This standard requires more than legal labels and conclusory assertions: a complaint must include{2020 U.S. Dist. LEXIS 3} enough facts to "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

Folk's amended complaint fails to meet these basic pleading requirements. The complaint is relatively concise. The problem is that the factual narrative spans five (5) years and involves the BOP, twelve (12) individual BOP employees, and three (3) private physicians. While some of the claims arguably provide sufficient factual detail to satisfy Rule 8, most of the enumerated paragraphs offer nothing more than a disconnected summary of isolated events. As to four (4) Defendants—the BOP, Elizabeth Stahl, Dr. John Burn, and Dr. Robert Pucell—the amended complaint contains no allegations whatsoever. Additionally, certain claims do not identify the legal theory supporting the individual claims. In sum, Folk's complaint "l[eaves] the defendants having to guess what of the many things discussed" constitute causes of action, the legal theory on which those causes may rest, and the Defendants against whom each cause is lodged. See *Binsack v. Lackawanna Cty. Prison*, 438 F. App'x 158, 160 (3d Cir. 2011) (nonprecedential). Folk's complaint thus fails to comply with Rule 8.

The lack of clarity in Folk's amended complaint causes an additional problem. Rules 18 and 20 of the Federal Rules of Civil Procedure explain the circumstances in which multiple claims{2020 U.S. Dist. LEXIS 4} and multiple Defendants may be joined. Rule 18 states that a party "may join . . . as many claims as it has against an opposing party." Fed. R. Civ. P. 18(a). Thus, when an action involves only one Defendant, a Plaintiff may assert every claim he has against that Defendant, regardless of whether the claims are factually or legally related to one another, subject only to the limits of federal subject-matter jurisdiction. See 7 Charles Alan Wright & Arthur Miller, Et Al., *Federal Practice & Procedure* § 1582 (3d ed. 2019); see also Fed. R. Civ. P. 18(a).

When a Plaintiff seeks to assert claims against *multiple* Defendants, however, Rule 20 also comes into play. See Wright & Miller, *supra*, § 1655. Rule 20 governs permissive joinder of parties and explains that a Plaintiff may only join multiple Defendants in a single case if: (1) "any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences," and (2) "any question of law or fact common to all defendants will arise in the action." Fed. R. Civ. P. 20(a)(2). In other words, notwithstanding the broad joinder-of-claims language of Rule 18(a), a Plaintiff may join multiple Defendants in a single complaint only if he asserts at least one claim{2020 U.S. Dist. LEXIS 5} linking *all* Defendants that (1) arises out of the same transaction or occurrence and (2) involves a common question of law or fact. *Id.*; Wright & Miller, *supra*, § 1655. That is, there must be at least one common claim against all named Defendants. Once a Plaintiff satisfies this requirement, he may invoke Rule 18 to assert "as many claims as [he] has" against one or more Defendants, even if those additional claims are unrelated to the common claim linking all Defendants. See Fed. R. Civ. P. 18(a); Wright & Miller, *supra*, § 1655.

Folk's amended complaint violates Rule 20. The allegations of the amended complaint do not properly link all Defendants. First, Folk alleges that Defendants Gosa and Parker failed to approve Folk for a special medical diet. (Doc. 7, pp. 3-5). Second, Folk alleges that several Defendants denied him a hinged knee brace or cane for his leg. (*Id.* at pp. 3-6). Folk also alleges that these Defendants retaliated against him by requiring him to remove his hinged knee brace when passing through a metal detector. (*Id.* at pp. 9-13). Third, Folk asserts that Defendant Smith denied him consistent physical therapy. (*Id.* at p. 6). Fourth, Defendant Washington allegedly ignored Folk's medical complaints. (*Id.* at pp. 12-13). Fifth, Folk alleges that Defendant Parker retaliated against him by telling UNICOR that Folk should be fired for not paying his financial obligations. (*Id.* at pp. 4-5). Finally, Folk alleges that Defendant Dr. Ball failed to prescribe a hinged knee brace and refused to perform surgery on his Quadricep because Dr. Ball believed such an operation would not work and could lead to severe nerve damage. (*Id.* at pp. 7-9). And, as noted above, the complaint contains no allegations as to Defendants BOP, Elizabeth Stahl, Dr. John Burn, and Dr. Robert Pucell. Under Rule 20, these disconnected and unrelated claims against multiple Defendants cannot stand.²

Noncompliance with Rule 20 is particularly problematic in cases under the Prison Litigation Reform Act of 1995 ("PLRA"). The PLRA substantially changed judicial treatment of prisoner civil rights actions. Specifically, under the PLRA, the full filing fee must ultimately be paid in a non-habeas action. Allowing a prisoner to include a plethora of independent claims in a civil action without making the required connection among joined Defendants under Rule 20 would circumvent the filing fee requirement of the PLRA.

In the interests of justice to this *pro se* litigant, see *Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972), Folk will be granted a final opportunity to file an amended complaint in this action. As the amended complaint stands right² now, it appears that Folk seeks to litigate several separate incidents in the same action. Any second amended complaint must comply with both Rule 8 and Rule 20. To the extent Folk believes he has been subjected to a violation of his rights by Defendants unable to be joined in this case, Folk must file separate complaints addressing the separate occurrences.

III. Conclusion

For the reasons set forth above, the Court will grant the DOC Defendants' motion (Doc. 32) to dismiss the amended complaint based on Folk's failure to comply with Rule 20 of the Federal Rules of Civil Procedure. Folk will be afforded a final opportunity to amend the complaint to comply with the Federal Rules of Civil Procedure. Defendant Dr. Ball's motion (Doc. 72) to dismiss will be dismissed as moot.

A separate Order shall issue.

Dated: March 9, 2020

/s/ Robert D. Mariani

Robert D. Mariani

United States District Judge

ORDER

AND NOW this 9th day of March, 2020, upon consideration of the motion (Doc. 32) to dismiss filed by the DOC Defendants, and the motion (Doc. 71) to dismiss filed by Defendant Dr. Ball, and for the reasons set forth in the Court's Memorandum of the same date, **IT IS HEREBY ORDERED THAT:**

1. The DOC Defendants' motion (Doc. 32) to dismiss the amended complaint for{2020 U.S. Dist. LEXIS 8} Plaintiffs failure to comply with Rule 20 of the Federal Rules of Civil Procedure is **GRANTED**.
2. The amended complaint is **DISMISSED**. (Doc. 7).
3. Plaintiff is granted twenty (20) days from the date of this Order to file a proposed second amended complaint. Any second amended complaint shall comply with the Federal Rules of Civil Procedure, specifically Rules 8 and 20 as detailed in the accompanying Memorandum.
4. The second amended complaint shall contain the same case number that is already assigned to this action, 3:18-CV-2252, shall be direct and concise, and shall stand-alone without reference to any other document filed in this matter.
5. Plaintiff is admonished that failure to amend his pleading to cure the deficiencies identified in the accompanying Memorandum may result in dismissal of this action without further notice of Court.
6. Defendant Dr. Ball's motion (Doc. 71) to dismiss is **DISMISSED** as moot.
7. Plaintiffs motion (Doc. 67) to compel service is **DISMISSED** as moot.

/s/ Robert D. Mariani
Robert D. Mariani
United States District Judge

Footnotes

1

Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) (holding that there exists an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights).

2

Before Defendants filed their motions to dismiss, Folk submitted an unauthorized second amended complaint (Doc. 30) that seeks to add twenty-three (23) additional Defendants and several unrelated claims. The Court did not grant leave to file a second amended complaint and Defendants did not concur in the filing of a second amended complaint. See Fed. R. Civ. P. 15(a)(2). Review of the second amended complaint reveals that Folk improperly includes unrelated claims against multiple Defendants in violation of Federal Rule of Civil Procedure 20, and the pleading does not correct the deficiencies of the amended complaint.