

AMENDED CLD-171

NOT PRECEDENTIAL

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

No. 22-1288

**BARRETT S. TUNSIL,
Appellant**

v.

GOVERNOR THOMAS W. WOLF; D.O.C. SECRETARY JOHN E. WETZEL;
D.O.C. DEPUTY SECRETARY SHIRLEY MOORE SMEAL; SUPERINTENDENT
THOMAS S. MCGINLEY; SGT. HOPWOOD; SGT. KOPP; DR. MOCLOCK;
DR.COOPER; SGT. SCHELL; DR. WALLACE, M.D.; PATTY, LPN,
Nurse Practitioner; MS. BURASLAW, Physician Assistant; SGT. RUDISIL;
SGT. ADAMS; LT. BROWNAWELL; LT. KRAMER; MR. DUNN; KATHY BISCOE;
FRIESE, Correctional Officer; MS. FISHER; LT. HOWELL

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil Action No. 1:19-cv-00386)
District Judge: Honorable Jennifer P. Wilson

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
June 9, 2022

Before: AMBRO, SHWARTZ, and BIBAS, Circuit Judges

(Opinion filed: June 23, 2022)

OPINION*

PER CURIAM

Barrett S. Tunsil, a Pennsylvania inmate who is proceeding pro se, appeals from the District Court's dismissal of his complaint with prejudice for failure to prosecute. We will summarily affirm.

In March 2019, Tunsil filed a complaint against Pennsylvania Governor Wolf and various prisons officials, corrections officers, and members of prison medical staff. (ECF 1.) He claimed in conclusory fashion that the defendants subjected him to physical and emotional abuse and deprived him of needed medical treatment. The District Court sua sponte dismissed the complaint under 28 U.S.C. § 1915(e)(2)(B) and 28 U.S.C. § 1915A because it failed to comply with Federal Rule of Civil Procedure 8's mandate that the complaint contain "short and plain" statements of the claims. (ECF 14.)

Tunsil filed an amended complaint in July 2019 (ECF 16), which was served on the defendants. The defendants filed motions under Federal Rule of Civil Procedure 12(e) for a more definite statement of the allegations asserted in the amended complaint.¹ (ECF 38 & 39; 56 & 57.) Ultimately, the District Court concluded that Tunsil's amended

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

¹ While the defendants' motions were pending, Tunsil appealed from an order denying various non-dispositive motions. (ECF 104.) The matter was temporarily stayed in the District Court while that appeal was pending. We dismissed the appeal for lack of jurisdiction in March 2021. C.A. No. 20-2563 (order entered Mar. 18, 2021).

complaint still failed to comply with Rule 8 because the “conclusory allegations of constitutional violations cannot be separated into claims against individual Defendants defined by a date and time, and are not supported by any factual allegations.” (ECF 157, at 8.) Accordingly, by order entered July 21, 2021, the District Court granted the defendants’ motions for a more definite statement and provided Tunsil with an opportunity to file a second amended complaint. (ECF 158.) The District Court cautioned that the failure to file a second amended complaint that complied with the Federal Rules of Civil Procedure would result in dismissal of the lawsuit. (ECF 157, at 9-10; ECF 158, at 1.)

Tunsil sought an indefinite stay of the proceedings. (ECF 163.) The District Court denied that motion by order entered August 4, 2021, and directed Tunsil to file a second amended complaint by November 2, 2021. (ECF 166.) On September 24, 2021, the District Court denied several motions filed by Tunsil and reminded him of the due date for his second amended complaint. (ECF 182.) Tunsil continued to file motions, some of which described alleged mistreatment by the defendants, but he did not file a second amended complaint. By order entered January 31, 2022, the District Court dismissed the case for failure to prosecute under Federal Rule of Civil Procedure 41(b) after weighing the factors of Poulis v. State Farm Fire & Casualty Co., 747 F.2d 863 (3d Cir. 1984).² (ECF 230.) Tunsil timely appealed. (ECF 232.)

² Although Rule 41(b) “does not explicitly provide for *sua sponte* dismissals,” we have concluded that the rule “is broad enough to authorize such dismissals on the same basis as it authorizes dismissals upon motion of the defendant.” Donnelly v. Johns-Manville Sales Corp., 677 F.2d 339, 341 (3d Cir. 1982).

We have jurisdiction under 28 U.S.C. § 1291, and review for abuse of discretion a District Court's decision to dismiss a suit for failure to prosecute. See Mindek v. Rigatti, 964 F.2d 1369, 1373 (3d Cir. 1992). We may summarily affirm if the appeal presents no substantial question. See 3d Cir. L.A.R. 27.4; 3d Cir. I.O.P. 10.6.

Prior to determining that dismissal is an appropriate sanction, a District Court must balance the following six factors: “(1) the extent of the party’s personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party . . . was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim.” Poulis, 747 F.2d at 868 (emphasis omitted). We “do not have a magic formula or mechanical calculation to determine whether a District Court abused its discretion in dismissing a plaintiff’s case.” Briscoe v. Klaus, 538 F.3d 252, 263 (3d Cir. 2008) (internal quotation marks omitted). “None of the Poulis factors is alone dispositive, and . . . not all of the factors need to be satisfied to justify dismissal of a complaint for lack of prosecution.” Hildebrand v. Allegheny Cnty., 923 F.3d 128, 132 (3d Cir. 2019).

We begin by noting our disagreement with the District Court’s conclusion that Tunsil had a history of dilatoriness. Although he failed to file a second amended complaint during the six-month period after the District Court first directed him to do so, he did not demonstrate consistent non-responsiveness “over the life of the case.” Donnelly, 677 F.2d at 343; see also Briscoe, 538 F.3d at 261 (stating that “conduct that occurs one or two times is insufficient to demonstrate a ‘history of dilatoriness’” (quoting Scarborough

v. Eubanks, 747 F.2d 871, 875 (3d Cir. 1984))). Nevertheless, the other Poulis factors weigh in favor of dismissal or are neutral. In particular, the responsibility for Tunsil’s failure to file a second amended complaint falls on him, as he proceeded pro se. See Briscoe, 538 F.3d at 258-59 (“[I]t is logical to hold a pro se plaintiff personally responsible for delays in his case because a pro se plaintiff is solely responsible for the progress of his case”). In addition, the defendants were prejudiced because Tunsil’s failure to file a second amended complaint frustrated their ability to prepare a defense. See Ware v. Rodale Press, Inc., 322 F.3d 218, 222 (3d Cir. 2003). Moreover, the record supports the District Court’s finding that Tunsil “demonstrated a willful disregard for the procedural rules and this court’s orders” by electing not to file a second amended complaint “despite being provided with clear instructions and plenty of time to prepare and file such complaint.” (ECF 230, at 6.) Further, the District Court properly found that “no sanction other than dismissal would be effective or appropriate as the matter cannot move forward without an active pleading.” (Id. at 7.) In “careful[ly] consider[ing]” this factor, the District Court accurately explained that Tunsil had “been given repeated opportunities and ample time to file a complaint that conforms with the requisite pleading standards” but “instead has used the docket as an open forum to lodge numerous grievances, but not to file a second amended complaint.” (Id. at 6-7). We also agree that the meritoriousness-of-the-claim factor is neutral because, without a pleading that complies Rule 8, it is not possible to determine whether Tunsil’s allegations would support recovery.

In sum, although dismissal under Rule 41(b) is appropriate only in limited circumstances and doubts should be resolved in favor of reaching a decision on the merits, see

Emerson v. Thiel Coll., 296 F.3d 184, 190 (3d Cir. 2002), the District Court did not abuse its discretion in concluding that the Poulis factors weighed in favor of dismissal of Tunsil's complaint. Accordingly, because this appeal presents no substantial question, we will summarily affirm the District Court's judgment.³

³ We deny Tunsil's motion for appointment of counsel (Doc. 14), his motion to add additional defendants (Doc. 16), and his motions to disqualify counsel (Docs. 25; 30). In addition, we deny Tunsil's motion for an injunction (Doc. 20), his motions for an emergency temporary restraining order, his motion for a temporary restraining order or an injunction (Docs. 23; 24), his motions for a temporary restraining order (Docs. 27; 28; and 29), his emergency motion to be placed in federal custody (Doc. 31), and his motion for a physical examination, to disqualify counsel, and to be placed in federal custody (Doc. 32).

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v.

GOVERNOR THOMAS W. WOLF; D.O.C. SECRETARY JOHN E. WETZEL;
D.O.C. DEPUTY SECRETARY SHIRLEY MOORE SMEAL; SUPERINTENDENT
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SGT. ADAMS; LT. BROWNAWELL; LT. KRAMER; MR. DUNN; KATHY BISCOE;
FRIESE, Correctional Officer; MS. FISHER; LT. HOWELL

(M.D. Pa. 1-19-cv-00386)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, and McKEE, AMBRO, JORDAN,
HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO,
BIBAS, PORTER, MATEY, and PHIPPS, Circuit Judges

The petition for rehearing filed by Appellant in the above-captioned case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc is **DENIED**.

By the Court,

s/Stephanos Bibas
Circuit Judge

Dated: August 23, 2022

kr/cc: Barrett S. Tunsil
Sean A Kirkpatrick, Esq.
Alexander R. Ferrante, Esq.

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

BARRETT S. TUNSIL, : Civil No. 1:19-CV-0386

Plaintiff, :

v. :

GOVERNOR THOMAS WOLF, *et al.*, :

Defendants. :

Judge Jennifer P. Wilson

ORDER

Presently before the court for review is the above-captioned action of self-represented Plaintiff Barrett S. Tunsil filed pursuant to 42 U.S.C. § 1983. For the reasons set forth below, this case is dismissed pursuant to Federal Rule of Civil Procedure 41(b). In light of the dismissal of this action, all pending motions are denied as moot.

RELEVANT BACKGROUND AND PROCEDURAL HISTORY

Barrett S. Tunsil (“Tunsil”), a state inmate presently housed at the State Correctional Institution in Dallas, Pennsylvania (“SCI-Dallas”), initiated the above action on March 4, 2019, by filing a complaint against more than twenty (20) Pennsylvania Department of Corrections (“DOC”) and contract medical care employees at three (3) different facilities. (Doc. 1.) On June 13, 2019, the court screened the complaint and dismissed it pursuant to 28 U.S. 1915(e)(2)(B) and 28 U.S.C. § 1915A because it failed to comply with Fed. R. Civ. P. 8. (Doc. 14.)

Tunsil filed an amended complaint on July 12, 2019. (Doc. 16.) The amended complaint was served on both the Commonwealth¹ and Medical² Defendants. In January 2020, both Commonwealth and Medical Defendants filed motions for a more definite statement under Fed. R. Civ. P. 12(e). (Docs. 38, 56.) After receiving several enlargements of time, Tunsil only filed an opposition to Medical Defendants' motion. This matter was temporarily stayed while Tunsil pursued an appeal before the United States Court of Appeals for the Third Circuit. (Doc. 130.)

After lifting the stay on July 21, 2021, the court found Tunsil's amended complaint inscrutable and failing to satisfy the minimum requirements of Fed. R. Civ. P. 8(a). Tunsil was granted leave to file a second amended complaint and provided with specific instructions to follow when filing his amended pleading. The court cautioned Tunsil that his failure to file a conforming complaint within twenty-one (21) days would result in the dismissal of his action pursuant to Fed. R. Civ. P. 41. (Docs. 157-58.)

After Tunsil learned of his transfer to SCI-Dallas, he sought an indefinite stay of these proceedings. (Doc. 163.) The court denied his request on August 4,

¹ The Commonwealth Defendants are Governor Wolf, Secretary Wetzel, Deputy Secretary Moore-Smeal, Superintendent McGinley, Sgt. Hopwood, Sgt. Schell, Kulenguskey, Sgt. Rudisill, Sgt. Adams, Lt. Brownawell, Lt. Kramer, Mr. Dunn, Ms. Biscoe, Correctional Officer ("CO") Friese, Ms. Fisher, and Lt. Howal.

² The Medical Defendants are Nicholle Boguslaw, PA, Michael Moclock, M.D., and Mary Jo Monsalud, M.D.

2021, and directed him to file a second amended complaint that complied with the court's previous order by November 2, 2021. (Doc. 166.) On September 24, 2021, when addressing a myriad of motions filed by Tunsil, the court again advised Plaintiff to file his second amended complaint by November 2, 2021. (Doc. 182.) To date, although Tunsil has filed numerous documents with the court, he has not filed a second amended pleading that complies with the court's July 21, 2021 order or the Federal Rules of Civil Procedure.

JURISDICTION

This court has jurisdiction under 28 U.S.C. § 1331, which allows a district court to exercise subject matter jurisdiction in civil cases arising under the Constitution, laws, or treaties of the United States.

DISCUSSION

Federal Rule of Civil Procedure 41(b) allows for the dismissal of an action for “failure of the plaintiff to prosecute or comply with these rules or order of the court.” *See Fed. R. Civ. P. 41(b).* District courts have the inherent authority to dismiss an action *sua sponte* for failure to prosecute or to comply with an order of court. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991).

In the instant case, Tunsil has both failed to prosecute this action and to comply with orders of this court with respect to the filing of a second amended

complaint that comports with the court's July 21, 2021 order. When considering whether to dismiss for failure to prosecute under Rule 41(b), the court must balance six (6) factors set forth in *Poulis v. State Farm Fire & Cas. Co.*, 747 F.2d 863 (3d Cir. 1984). The *Poulis* factors include:

- (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.

Mondelli v. Berkely Heights Nursing and Rehab. Ctr., 1 F.4th 145, 148 n.2 (quoting *Poulis*, 747 F.2d at 868). Although the *Poulis* factors taken as a whole must support dismissal for the court to dismiss a case, no single *Poulis* factor is dispositive, and not all of the factors must be satisfied in order to dismiss. *Hildebrand v. Allegheny Cnty.*, 923 F.3d 128, 132 (3d Cir. 2019).

Here, a review of the *Poulis* factors weighs in favor of dismissing this case. First, because Tunsil is self-represented, he personally bears the responsibility for his failure to litigate this case. *Emerson v. Thiel Coll.*, 296 F.3d 184, 190 (3d Cir. 2002). Tunsil was repeatedly warned that his failure to file a timely second amended complaint that complied with the requirements of the court's July 21, 2021 order would result in the dismissal of this action. See Docs. 158, 166, 182.

Without an operative pleading, the court is unable to assist the parties in resolving their dispute as there is no complaint defining what is in dispute. To date, more than two years after his commencement of this action, Tunsil has not filed a single document that is either labeled or could be construed by the court or the defendants as a second amended complaint that complies with the court's mandate. Therefore, this factor weighs in favor of dismissal.

Second, the court must consider whether Plaintiff's failure to file a second amended complaint has prejudiced Defendants. "Generally, prejudice includes the irretrievable loss of evidence, the inevitable dimming of witness memories, or the excessive and possibly irremediable burdens or costs imposed on the opposing party." *Briscoe v. Klaus*, 538 F.3d 252, 259 (3d Cir. 2008). However, "prejudice is not limited to 'irremediable' or 'irreparable' harm. It also includes the burden imposed by impeding a party's ability to prepare effectively a full and complete trial strategy." *Id.* More than two years have passed since the inception of this action. Tunsil has filed a complaint and an amended complaint as well as a host of motions. Yet, there is no standing, let alone, viable complaint. Without question, Plaintiff's failure to file a second amended complaint prejudices Defendants' ability to address Tunsil's allegations and prepare a defense. This factor weighs in favor of dismissal.

As to the third factor, Tunsil has shown a clear history of dilatoriness.

Plaintiff has failed to file a second amended complaint despite court warnings and repeated enlargements of time to do so. Tunsil's dilatoriness in this regard is underscored by an examination of the docket in this matter which demonstrates that he regularly files letters, motions, and appeals, but not a second amended pleading as directed by the court's July 21, 2021 order. This case cannot advance without an operative pleading. As such, this factor weighs in favor of dismissal.

The fourth factor, whether Plaintiff's conduct was willful or in bad faith, also weighs in favor of dismissal. Tunsil was clearly warned of his obligations as a litigant and nonetheless has failed to prosecute his case. Tunsil's election not to file a second amended complaint despite being provided with clear instructions and plenty of time to prepare and file such complaint has demonstrated a willful disregard for the procedural rules and this court's orders.

Careful consideration has been given by the court as to the fifth factor, the effectiveness of sanctions other than dismissal, especially when considering the dismissal of an action filed by a self-represented individual. Nonetheless, the court concludes that no alternative sanctions would be effective in this situation.

Plaintiff has been given repeated opportunities and ample time to file a complaint that conforms with the requisite pleading standards. Each time Tunsil's prior pleading was dismissed, he was provided with specific direction and leave to file

an amended pleading. As noted above, two (2) years into this matter, there is no operative pleading. Plaintiff instead has used the docket as an open forum to lodge numerous grievances, but not to file a second amended complaint. This matter cannot continue in this manner. The court cannot offer Tunsil any form of relief without the basic roadmap to his claims in the form of a complaint. The court has provided Tunsil with repeated warnings of the consequences if he failed to file a second amended complaint. At this point, no sanction other than dismissal would be effective or appropriate as the matter cannot move forward without an active pleading.

Finally, as to the sixth factor, a claim is considered meritorious when the allegations of the complaint, if established at trial, would support recovery. *See Poulis*, 747 F.2d at 870. Although Tunsil obviously takes issue with the medical care provided for him at his former facility, SCI-Coal Township, as well as the alleged racial slurs he was subjected to, he has failed to present those allegations in a single complaint against Defendants in a coherent manner that would allow Defendants to address his allegations or allow them to prepare an adequate defense. Thus, it is difficult at best for the court to ascertain the ultimate merits of Tunsil's claims, especially considering the absence of a standing pleading. As such, the court finds that this factor is neutral in the dismissal analysis.

CONCLUSION

Upon balancing all of the *Poulis* factors, the court finds that the majority weigh in favor of dismissing this action pursuant to Fed. R. Civ. P. 41(b) for Plaintiff's failure to prosecute. Accordingly, **IT IS ORDERED THAT:**

1. The above-captioned action is **DISMISSED** pursuant to Federal Rule of Civil Procedure 41(b).
2. All pending motions are denied as **MOOT**.
3. The Clerk of Court is directed to **CLOSE** this case.

Dated: January 31, 2022

s/ Jennifer P. Wilson
United States District Court Judge
Middle District of Pennsylvania