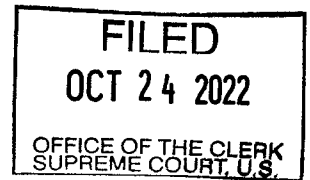


NO. 22-689

ORIGINAL



IN THE
SUPREME COURT OF THE UNITED STATES

ROCHELLE DRIESSEN,

Petitioner,

-vs-

BARCLAYS BANK, PLC,

Respondent.

ON APPEAL FROM THE U.S. COURT OF APPEALS
FOR THE 11TH CIRCUIT

CASE NO.: 21-13437-DD

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

WHETHER THE 11TH CIRCUIT ENTERED THE INCORRECT DECISION IN ITS AUGUST 2, 2022, OPINION OF THE COURT IN ITS AFFIRMANCE OF THE DISTRICT COURT'S DENIAL OF THE RESPONDENT'S 12(B)(6) MOTION TO DISMISS AMENDED COMPLAINT AS MOOT GIVEN THAT THE PETITIONER'S COMPLAINT SURVIVED DISMISSAL UNDER 12(B)(6)

WHETHER THE 11TH CIRCUIT FAILED TO ISSUE A CORRECTED OPINION OF ITS AUGUST 2, 2022, OPINION OF THE COURT BY DENYING PETITIONER'S PETITIONER FOR REHEARING AND PETITION FOR REHEARING EN BANC

WHETHER THE DISMISSAL OF PETITIONER'S COMPLAINT AS FRIVOLOUS PURSUANT TO 28 USC § 1915(e)(2)(B)(i) WAS APPROPRIATE AT THAT STAGE OF THE PROCEEDING GIVEN THAT SERVICE WAS EFFECTED ON THE RESPONDENT

WHETHER THE 11TH CIRCUIT'S AUGUST 2 2022, OPINION OF THE COURT IS IN DIRECT CONFLICT WITH ROMAN V. JEFFES, 904 F.2d 192 (3d CIR. 1990), OATESS v. SOBOLVITCH, 914 F.2d 428 (3d CIR. 1990), AND NEITZKE V. WILLIAMS, 490 U.S. 319 (1989)

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **Federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix C to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court
Appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒] For cases from **Federal courts**:

The date on which the United States Court of Appeals decided my case was August 2, 2022.

☐] No petition for rehearing was timely filed in my case,

☒] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: October 18, 2022, and a copy of the order denying rehearing appears at Appendix B.

☐] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

☐] For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ArtIII.S1.1.1.2.1.1 Inherent Powers of Federal Courts: Procedural Rules

Article III, Section 1

The Supreme Court has also acknowledged that federal courts possess the inherent power to control other aspects of regulating internal court proceedings, including having the inherent power to (1) hear a motion *in limine*; ¹⁷ (2) dismiss a case for the convenience of the parties or witnesses because of the availability of an alternative forum; ¹⁸ and (3) stay proceedings pending the resolution of parallel actions in other courts. ¹⁹ The courts of the United States also possess inherent power to amend their records, correct the errors of the clerk or other court officers, and to rectify defects or omissions in their records even after the lapse of a term, subject, however, to the qualification that the power to amend records conveys no power to create a record or re-create one of which no evidence exists. ²⁰

12 U.S.C. § 25a - Participation by National Banks in Lotteries and Related Activities

(d) LAWFUL BANKING SERVICES CONNECTED WITH OPERATION OF LOTTERIES

Nothing contained in this section prohibits a national bank from accepting deposits or cashing or otherwise handling checks or other negotiable instruments, or performing other lawful banking services for a State operating a lottery, or for an officer or employee of that State who is charged with the administration of the lottery.

STATEMENT OF THE CASE

Pursuant to Rule 13 of the Supreme Court Rules, Petitioner hereby files Petitioner's Petition for Writ of Certiorari for review of the 11th Circuit's per curiam August 2, 2022, Opinion of the Court affirming the district court. Petitioner filed a timely petition for rehearing and petition for rehearing en banc in which both petitions were denied on October 18, 2022, without the 11th Circuit making the corrections to its August 2, 2022, Opinion of the Court as petitioned to the 11th Circuit by the Petitioner in the Petitioner's petition for rehearing and petition for rehearing en banc.

By the 11th Circuit affirming the district court's ruling in denying the Respondent's 12(b)(6) motion to dismiss amended complaint for failure to state a claim as moot in its August 2, 2022, Opinion of the Court, the Petitioner's complaint survived dismissal under Rule 12(b)(6). The 11th Circuit appears to have a quirk in its rationale in reviewing *de novo* the district court's ruling on the Respondent's 12(b)(6) motion because affirming the district court means that the Petitioner has successfully stated a claim in the complaint upon which relief can be granted.

However, according to the 11th Circuit's August 2, 2022, Opinion of the Court, the 11th Circuit's ruling is not indicative that (1) the district court denied Respondent's 12(b)(6) motion to dismiss amended complaint for failure to state a claim as moot, or that (2) the district court's denial of the Respondent's 12(b)(6) motion to dismiss for failure to state a claim the dispositive factor of the case.

The 11th Circuit's frivolity dismissal ruling under 28 USC § 1915(e)(2)(B)(i), and its review of a district court's ruling on a Rule 12(b)(6) motion de novo in its August 2, 2022, Opinion of the Court at Section I is somewhat the 11th Circuit's misunderstanding of the district court's denial of the Respondent's 12(b)(6) motion to dismiss amended complaint for failure to state a claim as moot wherein Section I encompasses the 11th Circuit's ruling on pp. 2-4 on the sufficiency of Petitioner's Complaint when in fact the Petitioner's Complaint survived dismissal under 12(b)(6) in the district court.

The district court's September 29, 2021, paperless order denying Petitioner's Rule 60(b) motion dismissing Petitioner's complaint on the grounds of frivolous under the provisions of 28 USC § 1915(e)(2)(B)(i) refers Petitioner's allegations as frivolous, and it is this determination of frivolity under the provisions of 28 USC § 1915(e)(2)(B)(i) that appears to be dispositive and the merits of the case, and not the district court's denial of the Respondent's 12(b)(6) motion to dismiss amended complaint for failure to state a claim.

The 11th Circuit failed to make corrections of the foregoing mistakes in a corrected Opinion of the Court during the rehearing phase of the appeal such that the inequities of justice would prevail, and therefore the balance of equities favors the granting of Petitioner's Petition for Writ of Certiorari.

Petitioner filed in the district court on March 15, 2019, a Complaint, and a Motion for Leave to Proceed *In Forma Pauperis*, respectively, pursuant to 12 USC § 25a Participation by National Banks in Lotteries and Related Activities for the

Respondent's failure to transfer Petitioner's lottery winnings deposited with the Respondent in Petitioner's name by the Coca Cola prize promotion to Petitioner's nominated bank account in the amount of £1,000,000 which was converted to the US equivalent of \$1,263,441.00 by the Respondent.

The district court granted the Motion for Leave to Proceed *In Forma Pauperis* nunc pro tunc on January 21, 2020, 10 months after Petitioner filed the Motion for Leave to Proceed *In Forma Pauperis* on March 15, 2019, ordering the U.S. Marshal Service to serve the Respondent. **Nunc pro tunc** means "now for then" and is commonly defined as "[h]aving retroactive legal effect through a court's inherent power." Black's Law Dictionary (9th Ed.2009) 1174.

Nunc pro tunc in Latin, literally means "now for then" and is a "phrase typically used by courts to specify that an order entered at a later date should be given effect retroactive to an earlier date—that is, that it should be treated for legal purposes as if entered on the earlier date." Fierro v. Reno, 217 F.3d 1, 5 (1st Cir. 2000).

The Respondent was served by the U.S. Marshal Service on January 27, 2020, and thereafter filed a 12(b)(6) motion to dismiss amended complaint for failure to state a claim. The district court denied the Respondent's 12(b)(6) motion to dismiss as moot, and entered an Order Dismissing Case on December 21, 2020, dismissing Petitioner's complaint as frivolous pursuant to the *in forma pauperis* provisions of 28 USC § 1915(e)(2)(B)(i).

Petitioner filed a Rule 60(b) motion for relief from the December 21, 2020, Order Dismissing Case raising the issue that there was no *In Forma Pauperis* motion

pending. The district court denied Petitioner's Rule 60(b) motion in a September 29, 2021, paperless order ruling that the court can deny Petitioner's *ifp* status at anytime. The "anytime" provision of the district court denying Petitioner's *ifp* status was after service on the Respondent. Petitioner appealed the September 29, 2021, paperless order to the 11th Circuit.

However, it was held in Roman v. Jeffes, 904 F.2d 192 (3d Cir. 1990) In light of the Supreme Court's reasoning in *Neitzke* and the underlying purposes of § 1915, we hold that the appropriate time to make a decision to dismiss a case pursuant to § 1915(d) is before service of a complaint.⁶ Accord Williams v. White, 897 F.2d 942, 944 n. 1 (8th Cir.1990) (Section 1915(d) should be used to screen out frivolous claims only at the outset of litigation, before service).

The 11th Circuit's ruling in its August 2, 2022, Opinion of the Court that "because her claims that the court erroneously declared suit frivolous when her motion to proceed *in forma pauperis* was no longer pending lack merit" is an erroneous interpretation of the law. The district court abused its discretion in denying Petitioner's Rule 60(b) motion as frivolous as the district court applied the incorrect legal standard, applied the law in an unreasonable or incorrect manner, followed improper procedures, and made findings of fact that are clearly erroneous.

REASONS FOR GRANTING THE PETITION

It appears that the district court judge was just determined to dismiss Petitioner's complaint *sua sponte* as frivolous pursuant to the *in forma pauperis* provisions of 28 USC § 1915(e)(2)(B)(i), when she could not but did so anyway,

because the *sua sponte* dismissal of the complaint as frivolous was entered after service on the Respondent was effected by the US Marshal Service, and due to the fact that the cause of action was that of an extraordinary UK lottery that was supported by the laws of the United States pursuant to 12 USC § 25a Participation by National Banks in Lotteries and Related Activities.

Pursuant to Oatess v. Sobolevitch, 914 F.2d 428 (3rd Cir. 1990) Plaintiff, Dale Oatess, is an inmate at the State Correctional Institution at Cresson, Pennsylvania. On June 12, 1989, he submitted his civil rights complaint and motion to proceed *in forma pauperis* to the District Court for the Western District of Pennsylvania. Oatess' complaint alleged that defendants had conspired to ensure the dismissal of a civil case which he had filed in the Court of Common Pleas of Erie County, Pennsylvania. The defendants in the federal suit were two state court judges, a prosecuting attorney, several court administrators, and several private attorneys.

A complaint that is filed *in forma pauperis* under 28 U.S.C. § 1915(a) is subject to dismissal by the district court under 28 U.S.C. § 1915(d) only if it is frivolous or malicious. *Neitzke v. Williams*, 490 U.S. 319, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989). As *Neitzke* made clear, a complaint may fail to state a claim upon which relief may be granted under Rule 12(b)(6) but not be frivolous within the meaning of § 1915(d). *Id.* at 1829. In the ordinary course, if the complaint is not frivolous so as to warrant dismissal at the initiation of the suit under § 1915(d), it should proceed as any civil case would and be governed by the usual civil procedures, including Rule 12(b)(6) if appropriate. This reasoning is implicit in *Roman v. Jeffes*, 904 F.2d 192 (3d

Cir. 1990), where we ruled that a district court could not dismiss an action under 28 U.S.C. § 1915(d) after the granting of *in forma pauperis* status and the service of the complaint. As we discuss below, this reasoning also leads us to the conclusion that a district court cannot *sua sponte* dismiss a complaint under Rule 12(b)(6) *before* service of process.

While there are no time constraints in Rule 12(b)(6) for the filing of motions or the dismissal of complaints, other procedural requirements suggest that service of process first be accomplished before consideration of dismissal. For instance, Fed.R.Civ.P. 4(a) commands the clerk to issue forthwith a summons to plaintiff upon the filing of a complaint. The requirement of 28 U.S.C. § 1915(c) that the court shall serve all process also indicates that once leave to proceed *in forma pauperis* is granted, and the complaint is not dismissed as frivolous under 28 U.S.C. § 1915(d), the case should go forward. Dismissal of the complaint under Rule 12(b)(6) prior to service is inconsistent with these rules, and it interferes with the orderly process of the case. As we explained in *Wilson v. Rackmill*, 878 F.2d 772 (3d Cir. 1989).

The Petitioner's Complaint was not ruled as frivolous at the initiation of the action wherein the magistrate judge granted Petitioner's initial Motion for Leave to Proceed *In Forma Pauperis* nunc pro tunc on January 21, 2020, ordering the US Marshal Service to serve the Respondent in which service was effectuated on the Respondent by the US Marshal Service on January 27, 2020.

The district court's (1) December 21, 2020, *sua sponte* Order Dismissing Case of the district court's subsequent screening of the Complaint under the *In Forma Pauperis* provision of 28 USC § 1915(e)(2)(B)(i) denying Petitioner's Complaint as frivolous; (2) the district court's January 29, 2021, paperless order appealed to the 11th Circuit and (3) the 11th Circuit's August 2, 2022, Opinion of the Court all failed to state that the Petitioner was granted leave to proceed *in forma pauperis* nunc pro tunc at the initiation of the action by order dated January 21, 2020, and failed to state that the US Marshal Service had effectuated service of process on the Respondent on January 27, 2020.

The district court failed to allow the case to go forward. Petitioner briefed the granting of the motion for leave to proceed *in forma pauperis* at the initiation of the action, and briefed the service of process on the Respondent by the US Marshal Service on appeal with the 11th Circuit.

Martinez v. Kristi Kleaners, Inc., 364 F.3d 1305, 1306 (11th Cir. 2004) vacated and remanded ruling that the district court must provide a sufficient explanation for its determination on IFP status to allow for meaningful appellate review. O'Neal v. United States, 411 F.2d 131, 138 (5th Cir. 1969); Phipps v. King, 866 F.2d 824, 825 (6th Cir. 1988); Besecker v. State of Ill., 14 F.3d 309, 310 (7th Cir. 1994) (per curiam).

It was held in Neitzke v. Williams, 490 U.S. 319 (1989) _A complaint filed *in forma pauperis* is not automatically frivolous within the meaning of § 1915(d) because it fails to state a claim under Rule 12(b)(6). The two standards were devised to serve distinctive goals, and have separate functions. Under Rule 12(b)(6)'s failure to state

a claim standard -- which is designed to streamline litigation by dispensing with needless discovery and factfinding -- a court may dismiss a claim based on a dispositive issue of law without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one, whereas, under § 1915(d)'s frivolousness standard -- which is intended to discourage baseless lawsuits -- dismissal is proper only if the legal theory (as in Williams' Fourteenth Amendment claim) or the factual contentions lack an arguable basis. The considerable common ground between the two standards does not mean that one invariably encompasses the other, since, where a complaint raises an arguable question of law which the district court ultimately finds is correctly resolved against the plaintiff, dismissal on Rule 12(b)(6) grounds is appropriate, but dismissal on the basis of frivolousness is not.

In the instant action, Petitioner's complaint survived dismissal under Rule 12(b)(6), and based on Neitzke v. Williams dismissal on the basis of frivolousness is not appropriate.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Rochelle Driessen

Date: January 17th, 2023