

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1061

DONALD D. HIGGS

v.

DEPARTMENT OF CORRECTIONS; JOHN/JANE DOE, In his/her personal and official capacities; JOHN BLAKESLEE, In his personal and his official capacities; RONALD CONSTANTINE, In his personal and official capacities; ALANA WALLBILLICH, In her personal and official capacities; LT. BERRYMAN, In his personal and official capacities; SGT. CALLUCIO, In his personal and official capacities; SGT SAQUAY, In his personal and official capacities; STATE OF NEW JERSEY DEPARTMENT OF TREASURY DIVISION OF RISK MANAGEMENT, In official capacity; NISA RIZVI, In her personal and official capacities; MARCUS HICKS; VICTORIA K.; STATE OF NEW JERSEY

Donald D. Higgs,
Appellant

(D.C. No. 2-22-cv-05450)

SUR PETITION FOR REHEARING

Present: CHAGARES, *Chief Judge*, JORDAN, HARDIMAN, SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, CHUNG, SCIRICA*, *Circuit Judges*

* Judge Scirica's vote is limited to panel rehearing only.

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 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/ Cindy K. Chung
Circuit Judge

Date: July 11, 2023
Tmm/cc: Donald D. Higgs

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **23-1061**

DONALD D. HIGGS, Appellant

VS.

DEPARTMENT OF CORRECTIONS, ET AL.

(D.N.J. Civ. No. 2-22-cv-05450)

Present: JORDAN, CHUNG, and SCIRICA, Circuit Judges

Submitted are:

- (1) By the Clerk for possible dismissal due to a jurisdictional defect
- (2) By the Clerk for possible dismissal pursuant to 28 U.S.C. § 1915(e)(2) or summary action pursuant to Third Circuit L.A.R. 27.4 and I.O.P. 10.6
- (3) Appellant's jurisdictional response; and
- (4) Appellant's Informal Brief, treated as a document in support of appeal

in the above-captioned case.

Respectfully,

Clerk

ORDER

In general, our appellate jurisdiction is limited to reviewing "final" orders of the district courts. See 28 U.S.C. § 1291. The District Court's dismissal order entered October 28, 2022, does not qualify as a "final" order, as that decision dismissed Appellant's complaint without prejudice, and he subsequently filed an amended pleading. See Borelli v. City of Reading, 532 F.2d 950, 951-52 (3d Cir. 1976) (per curiam)

(explaining that a district court order that dismisses a complaint without prejudice does not qualify as a "final" order unless "the plaintiff cannot amend or declares his intention to stand on his complaint"). The District Court has not otherwise entered a "final" order in this case or any other order that is appealable at this time. Accordingly, we dismiss this appeal for lack of jurisdiction. In light of this disposition, we do not decide whether it would be appropriate to dismiss this appeal under 28 U.S.C. § 1915(e)(2) or resolve it via summary action.

By the Court,

s/ Cindy K. Chung
Circuit Judge

Dated: May 16, 2023
Tmm/cc: Donald D. Higgs



A True Copy:

Patricia S. Dodszeit

Patricia S. Dodszeit, Clerk
Certified Order Issued in Lieu of Mandate

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DONALD D. HIGGS,

Plaintiff

v.

DEPARTMENT OF CORRECTIONS, et al.,

Defendants

Civil Action No. 22-5450
(SDW/JBC)

ORDER


This matter comes before the Court on *pro se* Plaintiff Donald D. Higgs' motion to reopen this matter. (ECF No. 21). On December 27, 2022, Plaintiff filed a notice of appeal (ECF No. 13) of this Court's order (ECF No. 7), dismissing Plaintiff's civil rights complaint and granting Plaintiff leave to file an amended complaint. On May 16, 2023, the Third Circuit Court of Appeals dismissed the notice of appeal for lack of jurisdiction (ECF No. 22), noting Plaintiff had filed an amended complaint in this Court, and therefore, it lacked jurisdiction. (*See* ECF No. 8). This matter is no longer closed pending appeal. This Court will dismiss Plaintiff's motion to reopen as moot.

Plaintiff also submitted a letter request to file a motion to amend his complaint. (ECF No. 24). Plaintiff may file a Second Amended Complaint. In general, an amended complaint renders all prior complaints of no legal effect. *W. Run Student Hous. Assocs., LLC v. Huntington Nat. Bank*, 712 F.3d 165, 171 (3d Cir. 2013) (citing *New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc.*, 101 F.3d 1492, 1504 (3d Cir. 1996)). Therefore, Plaintiff's Second Amended Complaint must contain all claims against all defendants who are properly joined in this matter. This Court will *sua sponte* screen the Second Amended Complaint pursuant to 28 U.S.C. § 1915(e)(2)(B), prior to service on the defendants.

IT IS on this 24th day of May, 2023

ORDERED that Petitioner's motion to reopen is DISMISSED (ECF No. 21) as moot;
and it is further

ORDERED that Plaintiff may file a Second Amended Complaint within 30 days of the
date of entry of this Order.



Hon. Susan D. Wigenton,
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DONALD D. HIGGS,

Plaintiff,

v.

DEPARTMENT OF CORRECTIONS, et
al.,

Defendants.

Civil Action No. 22-5450 (SDW-JBC)

ORDER

This matter comes before this Court upon Pro Se Plaintiff Donald D. Higgs' motion to amend/correct (Docket No. 9), and for screening his second amended complaint (ECF No. 9) under 28 U.S.C. § 1915(e)(2)(B). For the reasons set forth in the accompanying memorandum opinion,

IT IS THEREFORE on this 4th day of January 2023,

ORDERED that the Clerk of the Court shall reopen this matter; and it is further

ORDERED that Plaintiff's motion to amend/correct (ECF No. 9) is **GRANTED**; and it is further

ORDERED that the second amended complaint (ECF No. 9) shall be filed; and it is further

ORDERED that Plaintiff's First Amendment claim for right of access to reading materials **MAY PROCEED** against Defendant Sgt. A. Saquay; and it is further

ORDERED that the Clerk of the Court shall provide Plaintiff with a copy of the USM-285 form for Defendant Sgt. A. Saquay; and it is further

ORDERED that Plaintiff shall complete the form and return it to the Clerk of Court, Martin Luther King Building & U.S. Courthouse, 50 Walnut Street, Newark, NJ 07101; and it is further

ORDERED that upon Plaintiff's sending of the completed form to the Clerk of the Court, the Clerk shall issue summons, and the United States Marshal shall serve a copy of the second

amended complaint (ECF No. 9), summons, and this Order upon Defendant Sgt. A. Saquay pursuant to 28 U.S.C. § 1915(d), with all costs of service advanced by the United States; and it is further

ORDERED that Defendant Sgt. A. Saquay shall file and serve a responsive pleading within the time specified in Federal Rule of Civil Procedure 12, pursuant to 42 U.S.C. § 1997e(g)(2); and it is further

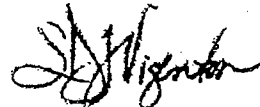
ORDERED that Plaintiff's claim[s] under 42 U.S.C. § 1983 against New Jersey Department of Treasury, Division of Risk Management is **DISMISSED with prejudice**, pursuant to 28 U.S.C. § 1915(e)(2)(B); and it is further

ORDERED that Plaintiff may not reallege his claims against John/Jane Doe, Business Manager, Bayside State Prison, John Blakeslee, and Alana Wallbillich, which were dismissed with prejudice by Order dated October 28, 2022 (ECF No. 7); and it is further

ORDERED that the remainder of the claims in the second amended complaint are **DISMISSED** without prejudice; the Clerk of Court shall administratively terminate all defendants from this matter, with the exception of Sgt. A. Saquay; and it is further

ORDERED that Plaintiff is granted leave to file a third amended complaint within thirty days; and it is finally

ORDERED that the Clerk of the Court shall serve a copy of this order and the accompanying memorandum opinion upon Plaintiff by regular mail.



Hon. Susan D. Wigenton,
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DONALD D. HIGGS,

Plaintiff,

v.

DEPARTMENT OF CORRECTIONS,
et al.,

Defendants.

Civil Action No. 22-5450 (SDW-JBC)

MEMORANDUM OPINION

IT APPEARING THAT:

1. On or about September 7, 2022, Plaintiff Donald D. Higgs, a convicted state prisoner incarcerated in Northern State Prison in Newark, New Jersey, filed a pro se civil rights complaint under 42 U.S.C. § 1983. (ECF No. 1). After this Court administratively terminated the action based on deficiencies in Plaintiff's application to proceed *in forma pauperis* ("IFP") under 28 U.S.C. § 1915(a) (ECF No. 2), Plaintiff filed a corrected IFP application. (ECF No. 3). This matter was reopened, and this Court granted Plaintiff's IFP application but dismissed the complaint upon screening pursuant to 28 U.S.C. § 1915(e)(2)(B), and granted leave to file an amended complaint. (ECF Nos. 6, 7). Specifically, this Court dismissed with prejudice Plaintiff's Fourteenth Amendment due process claims for deprivation of Plaintiff's inmate funds against Defendants John/Jane Doe, Business Manager, Bayside State Prison, John Blakeslee and Alana Wallbillich. (ECF No. 7). The remaining claims in the original complaint were dismissed without prejudice. (*Id.*)

2. Plaintiff timely filed an amended complaint on November 21, 2022. (ECF No. 8). Thereafter, on December 19, 2022, Plaintiff filed a motion to amend/correct, together with a

second amended complaint. (ECF No. 9). Pursuant to Federal Rule of Civil Procedure 15(a), this Court will grant Plaintiff's motion to amend/correct, and accept his second amended complaint. Because Plaintiff has been granted *in forma pauperis* status, this Court is required to screen Plaintiff's second amended complaint pursuant to 28 U.S.C. § 1915(e)(2)(B), and *sua sponte* dismiss any claim that is frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. "The legal standard for dismissing a complaint for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) is the same as that for dismissing a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6)." *Schreane v. Seana*, 506 F. App'x 120, 122 (3d Cir. 2012) (citing *Allah v. Seiverling*, 229 F.3d 220, 223 (3d Cir. 2000)).

4. In deciding a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a district court is "required to accept as true all factual allegations in the complaint and draw all inferences in the facts alleged in the light most favorable to the [Plaintiff]." *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 228 (3d Cir. 2008). "[A] complaint attacked by a . . . motion to dismiss does not need detailed factual allegations." *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007). However, a plaintiff's "obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). A court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan*, 478 U.S. at 286. Instead, assuming the factual allegations in the complaint are true, those "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

5. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556

U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for misconduct alleged.” *Id.* “Determining whether the allegations in a complaint are plausible is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.* at 679. “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’” *Id.* (citing Fed. R. Civ. P. 8(a)(2)). Moreover, while *pro se* pleadings are liberally construed, “*pro se* litigants still must allege sufficient facts in their complaints to support a claim.” *Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 245 (3d Cir. 2013) (citation omitted) (emphasis added).

6. There are thirteen defendants identified in the second amended complaint: (1) Marcus Hicks, former Commissioner of New Jersey Department of Corrections (“NJDOC”); (2) Victoria Kuhn, present Commissioner of NJDOC; (3) John/Jane Doe, Business Office Manager, Bayside State Prison; (4) Ombudsman John Blakeslee; (5) Ronald Constantine; (6) Alana Wallbillich, Business Office Manager, Northern State Prison; (7) Lt. Berryman; (8) Sergeant A. Saquay; (9) Sgt. Nicholas Caliccio; (10) State of New Jersey, Department of the Treasury, Division of Risk Management; (11) Nisa Rizvi, Claims Administrator; (12) NJDOC employee[s]; and (13) United States Postal Employee.

7. This Court incorporates by reference the Memorandum Opinion and Order, dismissing Plaintiff’s original complaint. (ECF Nos. 6, 7). With few exceptions, described below, Plaintiff brings the same claims against the same defendants, without providing additional factual allegations required to state a plausible claim for relief.

8. The New Jersey Department of Treasury, Division of Risk Management is immune from § 1983 claims under the Eleventh Amendment, and is not a "person" who can be held liable under § 1983. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) ("It is clear, of course, that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment."); *Robinson v. Bureau of Health Care Services, Food Service Division et al.*, No. 22-1913, 2022 WL 17984477, at *2 (3d Cir. Dec. 29, 2022) (quoting *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 64 (1989) ("[A] State [and its agencies are] not a person within the meaning of § 1983."). Therefore, the § 1983 claims against New Jersey Department of Treasury, Division of Risk Management will be dismissed with prejudice.

8. Upon screening the original complaint, this Court denied with prejudice Plaintiff's Fourteenth Amendment due process¹ and First Amendment access to courts claims against John/Jane Doe, Business Manager, Bayside State Prison, John Blakeslee and Alana Wallbillich. Therefore, Plaintiff may not reallege these claims.²

¹ In his second amended complaint, Plaintiff appears to allege that his deprivation of property claims arise under the Equal Protection Clause of the Fourteenth Amendment. In the absence of alleged discrimination, such claims are governed by the Due Process Clause of the Fourteenth Amendment. *Hudson v. Palmer*, 468 U.S. 517 (1984).

² For purposes of Plaintiff's Fourteenth Amendment due process claims, there is no meaningful distinction between unauthorized deductions from his inmate account, as alleged in his original complaint, and theft from his inmate account, as alleged in his second amended complaint. State law provides an adequate post-deprivation remedy for unauthorized removal of funds from his account, which encompasses his allegation of stealing. *Raglund v. Commissioner New Jersey Department of Corrections*, 717 F. App'x 175, 177-78 (3d Cir. 2017) (New Jersey Tort Claims Act provides adequate post-deprivation remedy for unauthorized removal of funds from an inmate account). Moreover, Plaintiff has not alleged that his tort claim was dismissed as untimely, depriving him of an adequate post deprivation remedy. The allegations are vague, but it appears that although Plaintiff was delayed in filing his tort claim, it was ultimately denied on the merits by the New Jersey Department of Treasury, Risk Management Division, named as a defendant in the second amended complaint. If this Court has misunderstood the allegations, and Plaintiff's tort

9. In his second amended complaint, Plaintiff realleges his First Amendment access to courts claims. Plaintiff, however, has not alleged that Defendants caused him to lose a nonfrivolous claim or the ability to pursue a nonfrivolous claim. If Plaintiff has lost a particular claim or the ability to pursue it, he must allege so with sufficient detail. For example, it is not sufficient for Plaintiff to allege he was deprived of medical records that he would have used as evidence in *Higgs v. Myers*, 15cv2900 (D.N.J.) Plaintiff must explain the nature of his claim and how his failure to submit the medical records in support of the claim resulted in his loss of the claim. *See Rivera v.89 Monko*, 37 F.4th 909, 916 (3d Cir. 2022) (holding the plaintiff stated an actual injury in support of First Amendment access of courts claim by alleging the name and case number of his civil action, the nature of the nonfrivolous action, and that the defendant's conduct resulted in an adverse verdict.) Therefore, Plaintiff's First Amendment access to courts claims are dismissed without prejudice, including his claim that an unidentified NJDOC employee stole a copy of his original tort claim while searching his cell.

10. In his original complaint, Plaintiff alleged that Lt. Berryman, Sergeant A. Saquay and Sgt. Nicholas Caliccio were liable as mailroom supervisors because mailroom staff opened Plaintiff's legal mail and removed his medical records. This Court dismissed Plaintiff's First Amendment interference with legal mail claims without prejudice. In his second amended complaint, Plaintiff alleges that Lt. Berryman, Sergeant A. Saquay, and Sgt. Nicholas Caliccio *acted in concert and/or through employees under their supervision* to open his legal mail and confiscate medical documents sent to him. Plaintiff's claims are conclusory, and they will be

claim was denied because it was untimely, he may seek reconsideration of the dismissal of this claim with prejudice. It is, however, the availability of an adequate procedure, whether or not relief is granted, that satisfies the procedural due process required when a State deprives a person of property. *See generally, Hudson*, 468 U.S. 517.

dismissed without prejudice. Plaintiff must demonstrate some basis for his belief that the identified defendants acted in concert in opening his legal mail and confiscating his medical records or that they directed someone else to do so. These claims will be dismissed without prejudice.

10. In his second amended complaint, Plaintiff alleges Sgt. Saquay confiscated business and educational books sent to Plaintiff, without providing an "unauthorized slip." This Court liberally construes this claim as alleging that Sgt. Saquay confiscated books that Plaintiff was authorized to receive. This First Amendment claim may proceed. *See Monroe v. Beard*, 536 F.3d 198, 209 (3d Cir. 2008) (recognizing that prisoners have a broad "First Amendment right to view and possess First Amendment materials.")

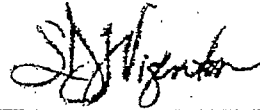
11. Plaintiff realleges, in his second amended complaint, his supervisory liability claims against the commissioner and former commissioner of NJDOC. There is no vicarious liability of supervisors for their subordinates' violations of 42 U.S.C. § 1983. *Iqbal*, 556 U.S. at 676. To state a claim of supervisory liability under § 1983, a plaintiff must allege, in a nonconclusory manner, that the supervisor "established and maintained a policy, practice or custom which directly caused [the] constitutional harm," or that the supervisor "participated in violating plaintiff's rights, directed others to violate them, or, as the person[s] in charge, had knowledge of and acquiesced in [their] subordinates' violations." *Santiago v. Warminster Twp.*, 629 F.3d 121, 129 (3d Cir. 2010) (quoting *A.M. ex rel. J.M.K. v. Luzerne Cnty. Juvenile Det. Ctr.*, 372 F.3d 572, 586 (3d Cir. 2004) (second alteration in original)). Plaintiff's supervisory liability claims under § 1983 against the present and former commissioners of the NJDOC in the second amended complaint are no more than bare legal conclusions. Therefore, Plaintiff's claims against Marcus Hicks and Victoria Kuhn will be dismissed without prejudice.

12. Plaintiff failed to state a plausible claim that an unidentified United States Post Office employee conspired with mailroom staff in New Jersey State Prison to place return to sender labels on Plaintiff's mail. This First Amendment interference with mail claim in the second amended complaint is dismissed without prejudice.

13. For the reasons discussed above, Plaintiff may proceed with his § 1983 claim for violation of his First Amendment right of access to reading materials against Sgt. A. Saquay. Plaintiff is granted leave to file a third amended complaint to amend any claims that are dismissed without prejudice.

An appropriate order follows.

Dated: January 4, 2023



Hon. Susan D. Wigenton,
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DONALD D. HIGGS,

Plaintiff,

v.

DEPARTMENT OF CORRECTIONS, et
al.,

Defendants.

Civil Action No. 22-5450 (SDW-JBC)

ORDER

This matter comes before this Court upon Pro Se Plaintiff Donald D. Higgs' application to proceed *in forma pauperis* under 28 U.S.C. § 1915(a), and review for *sua sponte* dismissal of his prisoner civil rights complaint under § 1915(e)(2)(B). For the reasons set forth in the accompanying memorandum opinion,

IT IS THEREFORE on this 27th day of October 2022,

ORDERED that the Clerk shall reopen this matter; and it is further

ORDERED that Plaintiff's application to proceed *in forma pauperis* (ECF No. 4) is **GRANTED**; and it is further

ORDERED that the Complaint (ECF No. 1) shall be filed; and it is further

ORDERED that, pursuant to 28 U.S.C. § 1915(b) and for purposes of account deduction only, the Clerk shall serve a copy of this Order by regular mail upon the Attorney General of the State of New Jersey and the warden of Northern State Prison; and it is further

ORDERED that Plaintiff is assessed a filing fee of \$350.00 and shall pay the entire filing fee in the manner set forth in this Order pursuant to 28 U.S.C. § 1915(b)(1) and (2), regardless of the outcome of the litigation, meaning that if the Court dismisses the case as a result of its *sua sponte* screening, or Plaintiff's case is otherwise administratively terminated or closed, § 1915

does not suspend installment payments of the filing fee or permit refund to the prisoner of the filing fee, or any part of it, that has already been paid; and it is further

ORDERED that pursuant to *Bruce v. Samuels*, 136 S. Ct. 627, 632 (2016), if Plaintiff owes fees for more than one court case, whether to a district or appellate court, under the Prison Litigation Reform Act (PLRA) provision governing the mandatory recoupment of filing fees, Plaintiff's monthly income is subject to a simultaneous, cumulative 20% deduction for *each* case a court has mandated a deduction under the PLRA; *i.e.*, Plaintiff would be subject to a 40% deduction if there are two such cases, a 60% deduction if there are three such cases, etc., until all fees have been paid in full; and it is further

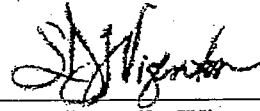
ORDERED that pursuant to 28 U.S.C. § 1915(b)(2), in each month that the amount in Plaintiff's account exceeds \$10.00, the agency having custody of Plaintiff shall assess, deduct from Plaintiff's account, and forward to the Clerk of the Court payment equal to 20% of the preceding month's income credited to Plaintiff's account, in accordance with *Bruce*, until the \$350.00 filing fee is paid. Each payment shall reference the civil docket numbers of the actions to which the payment should be credited; and it is further

ORDERED that Plaintiff's Fourteenth Amendment due process claims under 42 U.S.C. § 1983 for deprivation of funds in his inmate account and failure to remedy such against John/Jane Doe Business Manager, Bayside State Prison; John Blakeslee, Assistant Ombudsman, NJDOC; Alana Wallbillich, Business Officer Manager, NJDOC are **DISMISSED** with prejudice for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii); and it is further

ORDERED that the remainder of Plaintiff's claims under § 1983 are **DISMISSED WITHOUT PREJUDICE**, and this Court further declines to exercise jurisdiction over state law claims, pursuant to 28 U.S.C. § 1367(c)(3); and it is further

ORDERED that Plaintiff is granted leave to file an amended complaint within thirty days; and it is finally

ORDERED that the Clerk of the Court shall serve a copy of this order and the accompanying memorandum opinion upon Plaintiff by regular mail, and shall CLOSE the file.



Hon. Susan D. Wigenton,
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DONALD D. HIGGS,

Plaintiff,

v.

DEPARTMENT OF CORRECTIONS, et
al.,

Defendants.

Civil Action No. 22-5450 (SDW-JBC)

MEMORANDUM OPINION

IT APPEARING THAT:

1. On or about September 7, 2022, Plaintiff Donald D. Higgs, a prisoner confined in Northern State Prison in Newark, New Jersey, filed a pro se complaint raising civil rights claims regarding alleged unauthorized deductions from his inmate trust account, interference with his incoming and outgoing mail, and violation of his right to privacy in medical records. (ECF No. 1).

2. On September 23, 2022, this Court administratively terminated this matter because Plaintiff failed to pay the \$402 filing and administrative fees for a civil action or alternatively submit an application to proceed *in forma pauperis* ("IFP") under 28 U.S.C. § 1915(a).

3. This Court received Plaintiff's IFP application on October 17, 2022 (ECF No. 4), and will now reopen this matter. Upon review of Plaintiff's IFP application, he is financially eligible to proceed without prepayment of the filing fee, and his application will be granted.

4. Because Plaintiff will proceed *in forma pauperis*, this Court is required to screen his complaint, pursuant to 28 U.S.C. § 1915(e)(2)(B), and *sua sponte* dismiss any claim that is frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. "The legal standard for dismissing a

complaint for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) is the same as that for dismissing a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).” *Schreane v. Seana*, 506 F. App’x 120, 122 (3d Cir. 2012) (citing *Allah v. Seiverling*, 229 F.3d 220, 223 (3d Cir. 2000)).

5. In deciding a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a district court is “required to accept as true all factual allegations in the complaint and draw all inferences in the facts alleged in the light most favorable to the [Plaintiff].” *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 228 (3d Cir. 2008). “[A] complaint attacked by a . . . motion to dismiss does not need detailed factual allegations.” *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007). However, the Plaintiff’s “obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Id.* (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). A court is “not bound to accept as true a legal conclusion couched as a factual allegation.” *Papasan*, 478 U.S. at 286. Instead, assuming the factual allegations in the complaint are true, those “[f]actual allegations must be enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555.

6. “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim for relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for misconduct alleged.” *Id.* “Determining whether the allegations in a complaint are plausible is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.* at 679. “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has

not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* (citing Fed. R. Civ. P. 8(a)(2)). Moreover, while *pro se* pleadings are liberally construed, "*pro se* litigants still must allege sufficient facts in their complaints to support a claim." *Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 245 (3d Cir. 2013) (citation omitted) (emphasis added).

7. Plaintiff brings the following claims against thirteen officials, employees and agencies of the State of New Jersey.

8. The first two defendants are Marcus Hicks, former Commissioner of New Jersey Department of Corrections ("NJDOC"), and Victoria K, Commissioner of NJDOC, sued in their personal and official capacities for ignoring Plaintiff's prison grievances.

9. The third defendant is John/Jane Doe, Business Office Manager, Bayside State Prison, sued in his/her personal and official capacities for withdrawing money from Plaintiff's inmate account for legal calls that were already paid in full. The fourth defendant is John Blakeslee, Assistant Ombudsmen, NJDOC, sued in his personal and official capacities for covering up the unauthorized withdrawals from Plaintiff's inmate account by Defendant #3. The fifth defendant is Ronald Constantine, Central Office Revenue Unit, NJDOC, sued in his personal and official capacities for failing to respond to Plaintiff's correspondence concerning the investigation of the alleged cover-up of the unauthorized withdrawals from Plaintiff's inmate account. The sixth defendant is Alana Wallbillich, Business Office Manager, Northern State Prison, sued in her personal and official capacities for sporadically taking mandatory \$15 monthly deductions from Plaintiff's inmate account, and intentionally delaying placement of funds in Plaintiff's phone account, for the purpose of delaying or hindering this litigation, and for failing to respond to Plaintiff's grievances.

10. The seventh, eighth and ninth defendants, Lieutenant Berryman, Sergeant Callucio, and Sergeant Saquay, are former and/or current mailroom supervisors at Northern State Prison, sued in their personal and official capacities because employees under their supervision interfered with Plaintiff's incoming and outgoing mail, including legal mail, by opening legal mail outside his presence, removing documents, and/or discarding mail, and violating Plaintiff's right to privacy in his medical records by opening mail containing medical records.

✓ 11. The tenth defendant is the State of New Jersey, Department of Treasury, Division of Risk Management, sued in its official capacity for failing to timely investigate and respond to Plaintiff's tort claim. The eleventh defendant is Nisa Rizvi, Claims Investigator, State of New Jersey, Department of Treasury, Division of Risk Management, sued in her personal and official capacities for intentionally delaying her response to Plaintiff's January 26, 2021 tort claim until June 2, 2022, in an attempt to thwart Plaintiff from filing a civil action.

12. The twelfth defendant is the NJDOC, sued for the alleged misconduct of its employees in violation of Plaintiff's rights, privileges and immunities under the Fourteenth Amendment.

✓ 13. The thirteenth defendant is John/Jane Doe postal employee, sued in his/her individual and official capacities for intentionally placing "return to sender" stickers on numerous letters mailed to "a specific person" at the suggestion of the mailroom handlers at Northern State Prison, for the purpose of thwarting Plaintiff's lawsuit in *Higgs v. Myers, et al.*, 2:15-2900.

✱ 14. For relief against each defendant, Plaintiff seeks damages and other unspecified relief, which this Court construes to include injunctive relief against the defendants in their official capacities.

15. A prisoner has a protected property interest in funds in his inmate account and, thus, cannot be deprived of those funds without due process. *Ragland v. Comm'r New Jersey Dep't of*

Corr., 717 F. App'x 175, 177 (3d Cir. 2017) (citing *Higgins v. Beyer*, 293 F.3d 683, 693 (3d Cir. 2002)). A state, however, can avoid liability by providing adequate post-deprivation procedures for random, unauthorized deprivations. *Id.* (citing *Zinerman v. Burch*, 494 U.S. 113, 115 (1990)). NJDOC's internal grievance system and the New Jersey Tort Claims Act provide adequate post-deprivation remedies, even if the prisoner is unsuccessful in obtaining a remedy. *Raglund*, 717 F. App'x at 177-78 (citing *Hudson v. Palmer*, 468 U.S. 517, 535 (1984) (post-deprivation tort remedy is all the process a state need provide for random, unauthorized taking) (additional citations omitted)). Plaintiff's Fourteenth Amendment due process claims for deprivation of funds in his inmate account against John/Jane Doe Business Manager, Bayside State Prison; John Blakeslee, Assistant Ombudsman, NJDOC; and Alana Wallbillich, Business Officer Manager, NJDOC will be dismissed with prejudice.

16. Because there is no constitutional right to prison grievance procedures, *Heleva v. Kramer*, 214 F. App'x 244, 247 (3d Cir. 2007) (citing *Massey v. Helman*, 259 F.3d 641, 647 (7th Cir. 2001) (collecting cases), this Court construes these claims as alleging denial of access to the courts in violation of the First Amendment right to seek redress for grievances. "'Where prisoners assert that defendants' actions have inhibited their opportunity to present a past legal claim, they must show (1) that they ... lost a chance to pursue a 'nonfrivolous' or 'arguable' underlying claim; and (2) that they have no other 'remedy that may be awarded as recompense' for the lost claim other than in the present denial of access suit.'" *Rivera v. Monko*, 37 F.4th 909, 915 (3d Cir. 2022) (quoting *Monroe v. Beard*, 536 F.3d 198, 205 (3d Cir. 2008) (citing *Christopher v. Harbury*, 536 U.S. 403, 415 (2002)). In other words, a plaintiff must show an actual injury due to interference with his right of access to courts, such as dismissal of a complaint or inability to file a complaint. *Lewis v. Casey*, 518 U.S. 343, 351 (1996)). With respect to his unanswered prison grievances,

Plaintiff has not alleged that he lost a chance to pursue a nonfrivolous underlying legal claim. Therefore, Plaintiff's First Amendment access to courts claims will be dismissed without prejudice against all defendants in their personal and official capacities.

17. Likewise, with respect to Plaintiff's tort claim for deprivation of funds from his inmate account under the New Jersey Tort Claims Act, Plaintiff alleged that State of New Jersey, Department of Revenue employee Ronald Constantine failed to respond to Plaintiff's correspondence; Nisa Rizvi, the investigator of Plaintiff's tort claim, intentionally failed to respond in a timely fashion; and that their employer is liable, in its official capacity, for their actions. Plaintiff further alleged that, to hinder this litigation, Alana Wallbillich delayed placing funds in Plaintiff's phone account. This Court construes these claims as alleged violations of Plaintiff's First Amendment right of access to courts, and dismisses the claims without prejudice because Plaintiff has not alleged that he lost his tort claim or the chance to pursue it. Insofar as Plaintiff may be attempting to assert that tort claim here, this Court will decline to exercise supplemental jurisdiction at this time because the complaint fails to state a claim over which this Court has original jurisdiction, based on the dismissal of Plaintiff's § 1983 claims. 28 U.S.C. § 1367(c)(3) (providing that district court may decline to exercise supplemental jurisdiction over state law claims when it has dismissed all claims over which it has original jurisdiction.) If Plaintiff files an amended complaint that states a cognizable federal claim, he may bring his related state tort claims in federal court at that time.

18. "[P]risoners, by virtue of their incarceration, do not forego their First Amendment right to the use of the mails." *Nixon v. Sec'y Pennsylvania Dep't of Corr.*, 501 F. App'x 176, 177 (3d Cir. 2012) (quoting *Jones v. Brown*, 461 F.3d 353, 358 (3d Cir. 2006)). This right is not absolute and may be restricted for legitimate penological purposes. *Id.* (citing *Thornburgh v.*

Abbott, 490 U.S. 401, 407 (1989); *Turner v. Safley*, 482 U.S. 78, 89 (1987)). "Allegations that legal mail is intentionally opened and read, delayed for an inordinate period of time, or stolen may also state a First Amendment claim." *Maddox v. Mendoza*, No. CV 22-938 (FLW), 2022 WL 1785451, at *2-3 (D.N.J. June 1, 2022) (citing *McLeod v. Monmouth Cty. Corr. Inst.*, No. CIV.A. 05-4710 (AET), 2006 WL 572346, at *3 (D.N.J. Mar. 8, 2006) (citing *Antonelli v. Sheahan*, 81 F.3d 1422, 1431-32 (7th Cir. 1996)); *Castillo v. Cook County Mail Room Dep't*, 990 F.2d 304 (7th Cir. 1993); *Thompson v. Hayman*, No. 09-1833, 2011 WL 2652185, at *5 (D.N.J. July 6, 2011)).

Plaintiff brings his First Amendment interference with use of the mails claims against Lieutenant Berryman, Sergeant Saquay,¹ and Sergeant Callucio, prison mailroom supervisors, for the alleged misconduct of their subordinates, and against former and current NJDOC Commissioners Marcus Hicks and Victoria K as their supervisors, and against the NJDOC, in its official capacity, as the employer of these defendants. "Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior."

✓ *Iqbal*, 556 U.S. at 676. Thus, to state a claim of supervisory liability under § 1983 in the Third Circuit, a plaintiff must allege, in more than a conclusory manner, that the supervisor "established and maintained a policy, practice or custom which directly caused [the] constitutional harm," or "participated in violating plaintiff's rights, directed others to violate them, or, as the person[s] in charge, had knowledge of and acquiesced in [their] subordinates' violations." *Santiago v. Warminster Twp.*, 629 F.3d 121, 129 n. 5 (3d Cir. 2010) (quoting *A.M. ex rel. J.M.K. v. Luzerne Cnty. Juvenile Det. Ctr.*, 372 F.3d 572, 586 (3d Cir.2004) (second alteration in original). Plaintiff

¹ Plaintiff also alleges Sergeant Saquay was responsible for interception of Plaintiff's educational and business books ordered from the source, but Plaintiff has not alleged that Sergeant Saquay, or the employee under his supervision, intercepted the books without any legitimate penological purpose. Therefore, he fails to state a claim. This claim is also dismissed without prejudice.

has not alleged sufficient facts to state a claim of supervisory liability for the acts of their subordinates, and these claims will be dismissed without prejudice.

19. Plaintiff's First Amendment claims for interference with use of the mails and denial of access to the courts against Defendant John/Jane Doe postal employee, for returning mail to the sender, also fails to state a claim. Assuming Plaintiff has standing to bring this claim as either the sender or addressee, Plaintiff relies on nothing but pure speculation that a postal employee was acting at the direction of someone within Northern State Prison for the purpose of frustrating Plaintiff's litigation or simply preventing the addressee from obtaining the information contained in the returned letters. This claim will be dismissed without prejudice for insufficient factual basis.

20. The constitutional right to privacy in one's medical information exists in prison. *Doe v. Delie*, 257 F.3d 309, 317 (3d Cir. 2001). This right, however, is "subject to substantial restrictions and limitations in order for correctional officials to achieve legitimate correctional goals and maintain institutional security." *Id.* Thus, "an inmate's constitutional right may be curtailed by a policy or regulation that is shown to be 'reasonably related to legitimate penological interests.'" *Id.* (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)). Plaintiff alleges only that mail containing his medical records was opened in the prison mailroom. This is insufficient to state a claim for violation of his right to privacy in his medical information because it is not clear that anyone read his medical records or that there was no legitimate correctional or security interest in doing so. Therefore, this claim against Sergeants Berryman and Callucio, as the supervisors of the subordinate who opened mail containing Plaintiff's medical records, will be dismissed without prejudice, as will the § 1983 supervisory liability claims against former and current NJDOC Commissioners Marcus Hicks and Victoria K, and against NJDOC, in its official capacity, as their employer.

21. In sum, Plaintiff's complaint fails to state a § 1983 claim upon which relief may be granted, and his complaint will be dismissed in part with prejudice, and in part without prejudice, with leave to file an amended complaint.

An appropriate order follows.

Dated: October 27, 2022



Hon. Susan D. Wigenton,
United States District Judge