

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

April 4, 2024

Lyle W. Cayce
Clerk

MICHAEL JARROW,

Plaintiff—Appellant,

versus

HEATH H ORR, *Lieutenant of Correctional Officers,*

Defendant—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 2:21-CV-65

CLERK'S OFFICE:

Under 5TH CIR. R. 42.3, the appeal is dismissed as of April 4, 2024, for want of prosecution. The appellant failed to timely pay the fee.

LYLE W. CAYCE
Clerk of the United States Court
of Appeals for the Fifth Circuit

Lisa E. Ferrara

By: _____
Lisa E. Ferrara, Deputy Clerk



A True Copy
Certified order issued Apr 04, 2024 ENTERED AT THE DIRECTION OF THE COURT

Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

MICHAEL JARROW,

Plaintiff,

v.

2:21-CV-065-Z-BR

HEATH H. ORR,

Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR REOPENING AND RELIEF

Before the Court is Plaintiff's Motion under Federal Rule of Civil Procedure 60(b) (ECF No. 30) ("Motion"), filed on October 2, 2023.¹ For the following reasons, the Motion is **DENIED**.

LEGAL STANDARD

"Federal Rule of Civil Procedure 60(b) permits a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances." *Kemp v. United States*, 142 S. Ct. 1856, 1861 (2022) (internal marks omitted). Under Rule 60(b)(1), reopening and relief may be justified for "mistake, inadvertence, surprise, or excusable neglect." *Id.* "Rules 60(b)(2) through (b)(5) supply other grounds for reopening a judgment." *Id.* "Finally, Rule 60(b)(6) provides a catchall for 'any other reason that justifies relief' . . . available only when Rules 60(b)(1) through (b)(5) are inapplicable." *Id.* "Even then, 'extraordinary circumstances' must justify reopening." *Id.* "The decision to grant or deny relief under Rule 60(b) lies within the sound discretion of the district court and will be reversed only for abuse of that discretion." *Hesling v. CSX Transp., Inc.*, 396 F.3d 632, 638 (5th Cir. 2005) (internal marks omitted).

¹When a motion is filed "within the window provided by Rule 59(e), the motion falls under Rule 59(e)" and should be construed as a motion to alter or amend judgment. *Sentry Select Ins. Co. v. Home St. Cnty. Mut. Ins. Co.*, 582 Fed. Appx. 284, 286 (5th Cir. 2014) (internal marks omitted). "[A]fter that time," as here, "it falls under Rule 60(b)." *Id.*

Time to file such a motion is likewise limited. “All [Rule 60(b) motions] must be filed ‘within a reasonable time,’” and for Rule 60(b)(1) through (b)(3) reasons, “that ‘reasonable time’ may not exceed one year.” *Kemp*, 142 S. Ct. at 1861 (citing Rule 60(c)(1)).

APPLICATION

Plaintiff’s Motion contains myriad citations to legal authorities — some of them relevant. His primary argument is that he allegedly received late notice of the Magistrate Judge’s findings of fact, conclusions of law, and recommendation (“FCR”) (ECF No. 23) to dismiss his complaint as three strikes barred under 28 U.S.C. § 1915(g). *See generally* ECF No. 30. He also takes issue with the Court’s order denying his motion for an extension to file untimely objections (ECF Nos. 28, 29), filed after judgment had been entered, without prejudice to filing a Rule 59(e) or 60(b) motion. *Id.*

Plaintiff has presented nothing more than an “unexplained and uncorroborated assertion that he lacked notice,” which is insufficient to warrant the “extraordinary remedy” contemplated by Rule 60(b). *Romanowski v. Wells Fargo Bank, N.A.*, 2019 WL 3429064, at *2 (N.D. Tex. July 30, 2019) (citing *Davila v. Walmart Stores, Inc.*, 2017 WL 1509303, at *2 (N.D. Tex. April 27, 2017) (Fitzwater, J.); *Bahsoon v. Wells Fargo Bank, NA*, 2013 WL 1831786, at *1 (N.D. Tex. May 1, 2023) (Fitzwater, C.J.). Additionally, he repeatedly alleges that his objection was in fact contained in his August 17, 2023 motion for extension of time. *See, e.g.*, ECF No. 30 at 14. The only objection the Court can discern is that he received untimely notice of the FCR. *See* ECF No. 28 (“I was delivered the legal mail relevant to the findings, conclusions and recommendation . . . 23 calendar days subsequent to the entry of the recommended dismissals.”). In addition to being an “unexplained and uncorroborated assertion,” it is also wholly irrelevant to the reasoning on which dismissal was based — namely, 28 U.S.C. § 1915(g). *Compare* ECF No. 23 *with* ECF Nos. 23, 30. Thus, even if the Court were to consider his objection, the Court would still not grant relief under Rule 60(b).

Plaintiff also contends he was not provided adequate time to file a Rule 59(e) motion. *See* ECF No. 30 at 16. Plaintiff is mistaken. The Court noted that Plaintiff's deadline to file a Rule 59(e) motion was September 6, 2023 — being "28 days after the entry of the judgment." *See* ECF No. 29; FED. R. CIV. P. 59(e). The Rule 59(e) clock began to run at entry of judgment, not the order denying his extension to file objections. Relief under this argument is also **DENIED**.

CONCLUSION

Having failed to provide a satisfactory reason for Rule 60(b) relief, the Motion is **DENIED**.

SO ORDERED.

October 5, 2023.



MATTHEW J. KACSMARYK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

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MICHAEL JARROW,

Plaintiff,

v.

2:21-CV-065-Z-BR

HEATH H. ORR,

Defendant.

ORDER

Before the Court is Plaintiff's Motion for Extension of Time to File Objections ("Motion") (ECF No. 28), filed August 17, 2023. The Court adopted the findings, conclusions, and recommendations ("FCR") of the Magistrate Judge to dismiss Plaintiff's complaint as three-strikes barred. *See* ECF Nos. 23, 26, 27. Plaintiff did not timely file objections to the FCR. Plaintiff now requests an extension of time to file objections — in this and seven other cases. The time for objections has passed and judgment has been entered. Plaintiff's Motion is therefore **DENIED**.

Plaintiff may file a motion under Federal Rules of Civil Procedure 59(e) to alter or amend the Court's judgment or 60(b) for relief from a final judgment and request reopening of his case.¹ The deadline for Rule 59(e) is September 6, 2023. Thereafter, only Rule 60(b) is available.

SO ORDERED.

August 24, 2023


MATTHEW J. KACSMARYK
UNITED STATES DISTRICT JUDGE

¹When a motion is filed "within the window provided by Rule 59(e), the motion falls under Rule 59(e)" and should be construed as a motion to alter or amend judgment. *Sentry Select Ins. Co. v. Home St. Cnty. Mut. Ins. Co.*, 582 Fed. Appx. 284, 286 (5th Cir. 2014) (internal marks omitted). "[A]fter that time, it falls under Rule 60(b)." *Id.*

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

MICHAEL JARROW,

Plaintiff,

v.

2:21-CV-065-Z-BR

HEATH H. ORR,

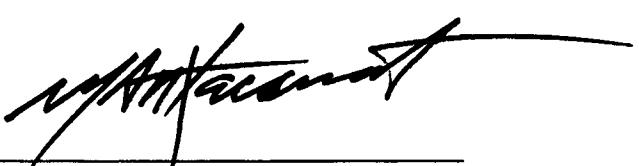
Defendant.

**ORDER ADOPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATION
AND
DISMISSING CIVIL RIGHTS CLAIM**

Before the Court are the findings, conclusions, and recommendation of the United States Magistrate Judge to dismiss the civil rights complaint filed by Plaintiff. ECF No. 23. No objections to the findings, conclusions, and recommendation have been filed. After making an independent review of the pleadings, files, and records in this case, the Court concludes that the findings, conclusions, and recommendation of the Magistrate Judge are correct. It is therefore **ORDERED** that the findings, conclusions, and recommendation of the Magistrate Judge are **ADOPTED** and the case is **DISMISSED**.

IT IS SO ORDERED.

August 9, 2023



MATTHEW J. KACSMARYK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

MICHAEL JARROW,

§

Plaintiff,

§

v.

§

2:21-CV-065-Z-BR

HEATH H. ORR,

§

Defendant.

§

**FINDINGS, CONCLUSIONS AND RECOMMENDATION TO DISMISS
COMPLAINT AS THREE STRIKES BARRED**

This is a civil rights action brought by Michael Jarrow, a Texas inmate appearing *pro se*, against state employees pursuant to 42 U.S.C. § 1983. Plaintiff is an inmate confined in the Clements Unit of TDCJ in Amarillo, Texas. Plaintiff is an inmate confined in the Clements Unit of TDCJ in Amarillo, Texas. Plaintiff was allowed to proceed *in forma pauperis*. (ECF 6). While incarcerated, Plaintiff has filed at least three prior civil actions that were dismissed as frivolous or for failure to state a claim. Plaintiff has not shown that at the time of the filing of this lawsuit, he was “under imminent danger of serious physical injury.” Therefore, it is recommended that this action be dismissed as barred by the three-strike provision of 28 U.S.C. § 1915(g).

The PLRA, enacted into law on April 26, 1996, amended 28 U.S.C. § 1915 as it relates to civil actions filed by prisoners in federal court. Among the changes effected by the PLRA was the inclusion of 28 U.S.C. § 1915(g), also known as the “three-strike” provision. Section 1915(g) precludes a prisoner from bringing a civil action *in forma pauperis* if on three or more prior occasions, he filed civil actions or appeals in federal court which were dismissed, either by a district court or appellate court, as being frivolous, malicious, or for failing to state a claim. *See Jackson v. Johnson*, 475 F.3d 261, 265 (5th Cir. 2007). When a district court dismisses a case as frivolous or for failure to state a claim, such a dismissal counts as a “strike” under 1915(g) once the judgment becomes final. *See Adepegba v. Hammons*, 103 F.3d 383, 387-

88 (5th Cir. 1996). A district court's dismissal is final when the prisoner has exhausted avenues of appeal or has waived any appellate rights. *Id.*

A prisoner is barred from proceeding *in forma pauperis* if he is subject to the "three-strike" provision "unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g); *see also Banos v. O'Guin*, 144 F.3d 883, 884 (5th Cir. 1998). The complaint must present a claim that Plaintiff is in danger of imminent serious physical injury to overcome the bar. *See Carson v. Johnson*, 112 F.3d 818, 822-823 (5th Cir. 1997). In applying the "three-strike" provision of 1915(g), a court may consider case dispositions that occurred prior to the effective date of the PLRA. *See Adepegba*, 103 F.3d at 387-88. A review of the Public Access to Court Electronic Records ("PACER") and the Sanction Database reflects that Plaintiff has had at least three prior actions dismissed with prejudice as frivolous or for failure to state a claim, as outlined herein; thus, Plaintiff is barred from proceeding *in forma pauperis* as he requests.

A review of PACER reflects that Plaintiff had the following prior actions dismissed with prejudice as frivolous or for failure to state a claim:

- a. No. 6:21-CV-1280 (W.D. Tex. Waco Division) (dismissed on February 4, 2022 for failure to state a claim – appeal affirmed on October 13, 2022);
- b. No. 6:21-CV-1281 (W.D. Tex. Waco Division) (dismissed on February 7, 2022 for failure to state a claim – appeal affirmed on October 7, 2022); and
- c. No. 6:21-CV-1282 (W.D. Tex. Waco Division) (dismissed on February 4, 2022 for failure to state a claim – no appeal taken).

Although Plaintiff accrued each of his three strikes after the initiation of this case, § 1915(b) considers the filing of three or more frivolous lawsuits to be *per se* abuse by a frivolous litigant. *See generally Green v. Carlson*, 649 F.2d 285 (5th Cir. 1981). To be sure, Plaintiff is the very definition of an abusive litigant – he has initiated no fewer than 14 separate cases against unique defendants in the last 36 months. Such an extended period of frivolous litigation, even though Plaintiff was not formally assigned strikes, constitutes "prior occasions" of abuse under § 1915(g).

Coleman v. Tollefson, 575 U.S. 532 (2015). To conclude otherwise would undermine the purpose of the three strikes provision.

RECOMMENDATION

For the above reasons, it is the recommendation of the undersigned that the complaint filed by Plaintiff be dismissed as barred by the three strikes provision of 28 U.S.C. § 1915(g).¹ This recommendation is without prejudice to Plaintiff's right to reopen the case if he pays the \$402.00 filing and administrative fees and files a motion to reopen within thirty days of the date of final judgment.

INSTRUCTIONS FOR SERVICE

The United States District Clerk is directed to send a copy of these Findings, Conclusions and Recommendation to each party by the most efficient means available.

IT IS SO RECOMMENDED.

ENTERED July 18, 2023.

Lee Ann Reno
LEE ANN RENO
UNITED STATES MAGISTRATE JUDGE

*** NOTICE OF RIGHT TO OBJECT ***

Any party may object to these proposed findings, conclusions and recommendation. In the event parties wish to object, they are hereby NOTIFIED that the deadline for filing objections is fourteen (14) days from the date of filing as indicated by the "entered" date directly above the signature line. Service is complete upon mailing, Fed. R. Civ. P. 5(b)(2)(C), or transmission by electronic means, Fed. R. Civ. P. 5(b)(2)(E). Any objections must be filed on or before the fourteenth (14th) day after this recommendation is filed as indicated by the "entered" date. See 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b)(2); see also Fed. R. Civ. P. 6(d).

Any such objections shall be made in a written pleading entitled "Objections to the Findings, Conclusions and Recommendation." Objecting parties shall file the written objections with the United States District Clerk and serve a copy of such objections on all other parties. A party's failure to timely file written objections shall bar an aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings, legal conclusions, and recommendation set forth by the Magistrate Judge and accepted by the district court. See *Douglass v. United Services Auto. Ass'n*, 79 F.3d

¹ The Court is aware that Plaintiff maintains multiple other civil rights claims at the present time. See 2:21-CV-23, 2:21-CV-46, 2:21-CV-65, 2:21-CV-69, 2:21-CV-83, 2:21-CV-123, 2:21-CV-158, 2:21-CV-200, 2:21-CV-208, 2:21-CV-227. However, pauper status was granted to Plaintiff in those cases before he became a three striker. For that reason, those cases will continue to proceed.

1415, 1428-29 (5th Cir. 1996) (en banc), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1), as recognized in *ACS Recovery Servs., Inc. v. Griffin*, 676 F.3d 512, 521 n.5 (5th Cir. 2012); *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988).