

W.D.N.Y.
23-cv-503
Vilardo, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 24th day of October, two thousand twenty-four.

Present:

Pierre N. Leval,
Denny Chin,
Raymond J. Lohier, Jr.,
Circuit Judges.

David C. Lettieri,

Plaintiff-Appellant,

v.

24-1723

Federal Bureau of Investigation,

Defendant-Appellee.

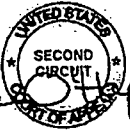
Appellant, proceeding pro se, moves for in forma pauperis (“IFP”) status to challenge the denial of IFP status in the district court under the three-strikes rule of 28 U.S.C. § 1915(g), the denial of reconsideration, and the denial of a motion to compel an FBI agent’s arrest. The district court has since entered a separate sanction—independent of the three-strikes rule—barring Appellant from proceeding IFP in any cases in the district court due to his vexatious litigation practices. Appellant has not appealed the sanction order. Thus, as to the three-strikes ruling and denial of reconsideration, the appeal is moot. Even if we were to determine that the district court had erred in its three-strikes ruling, such a ruling would not provide any effective relief to Appellant because of intervening events: his case would remain closed based on the independent (and unchallenged) sanction order and his failure to pay the filing fee. *See Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 161 (2016) (explaining that a matter becomes moot “when it is impossible for a court to grant any effectual relief whatever to the prevailing party”). Accordingly, upon due consideration, it is hereby ORDERED that the appeal is DISMISSED in part as to Appellant’s challenge to the three-strikes ruling and the denial of reconsideration. *See Video Tutorial Servs., Inc. v. MCI Telecomms. Corp.*, 79 F.3d 3, 6 (2d Cir. 1996) (per curiam) (explaining that this Court must dismiss a moot appeal).

It is further ORDERED that, as to the denial of the motion to compel, the IFP motion is DENIED and the appeal is DISMISSED in remaining part because it “lacks an arguable basis either in law or in fact.” *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *see* 28 U.S.C. § 1915(e); *Leeke v. Timmerman*, 454 U.S. 83, 85–87 (1981) (per curiam) (holding that prisoners lacked a judicially cognizable interest to compel the issuance of arrest warrants for prison guards); *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (“[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.”).

FOR THE COURT:

Catherine O’Hagan Wolfe, Clerk of Court

Catherine O'Hagan Wolfe

The seal of the United States Second Circuit Court of Appeals is circular. It features the words "UNITED STATES" at the top, "SECOND CIRCUIT" in the center, and "COURT OF APPEALS" at the bottom, separated by small stars.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DAVID C. LETTIERI,

Plaintiff,

v.

23-CV-503-LJV
ORDER

FEDERAL BUREAU OF
INVESTIGATION,¹

Defendant.

The *pro se* plaintiff, David Lettieri, is a prisoner confined at the Niagara County Jail. He filed a complaint asserting claims against the Federal Bureau of Investigation, Docket Item 1, but he did not pay the filing fee, nor did he submit a complete application to proceed *in forma pauperis* (that is, as someone who should have the prepayment of the ordinary filing fee waived because he cannot afford it), see Docket Item 2.

The Clerk of the Court therefore shall administratively terminate this action. If the plaintiff wishes to reopen this case, he must notify the Court in writing **within 30 days of the date of this order** and must include either (a) a properly supported motion to proceed *in forma pauperis* along with the required certification of the plaintiff's inmate trust fund account (or institutional equivalent) and authorization form or (b) the \$350.00 filing fee and the \$52.00 administrative fee (\$402.00 total).

¹ The Clerk of the Court shall correct the caption accordingly.

DISCUSSION

A party commencing a civil action in this Court ordinarily must pay a \$350.00 filing fee as well as a \$52.00 administrative fee.² See 28 U.S.C. § 1914; Judicial Conference Schedule of Fees, District Court Miscellaneous Fee Schedule;³ Western District of New York, District Court Schedule of Fees.⁴ If a “prisoner” (as defined in 28 U.S.C. § 1915(h)) wishes to commence a civil action, the prisoner must either (1) pay those fees or (2) obtain permission to proceed *in forma pauperis* under 28 U.S.C. § 1915.

I. REQUIREMENTS FOR *IN FORMA PAUPERIS* APPLICATION

The Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (April 26, 1996), which amended 28 U.S.C. § 1915, established certain requirements that a prisoner must meet in order to proceed *in forma pauperis*. Those requirements are summarized below.

² Effective May 1, 2013, the Judicial Conference of the United States added an administrative fee of \$50.00 to the cost of filing a civil lawsuit in district court. See September 2012 Report of the Proceedings of the Judicial Conference of the United States (“September 2012 Report”), available at <http://www.uscourts.gov/about-federal-courts/reports-proceedings-judicial-conference-us>. Effective December 1, 2020, this fee was increased to \$52.00. See <https://www.uscourts.gov/services-forms/fees/district-court-miscellaneous-fee-schedule>. But this additional administrative fee does not apply to prisoners who are granted permission to proceed *in forma pauperis*. See generally September 2012 Report.

³ Available at <http://www.uscourts.gov/services-forms/fees/district-court-miscellaneous-fee-schedule>.

⁴ Available at <http://www.nywd.uscourts.gov/fee-schedule>.

A. Supporting Affidavit or Affirmation

Under 28 U.S.C. § 1915(a)(1), a prisoner seeking to bring a civil action *in forma pauperis* must submit an affidavit or affirmation detailing the prisoner's assets and liabilities and swearing under oath that the prisoner is unable to pay the \$350.00 filing fee. A motion to proceed *in forma pauperis* should be supported by such an affidavit or affirmation filed at the same time as the complaint. The United States District Court for the Western District of New York has made available a form motion to proceed *in forma pauperis* with supporting affirmation⁵ that is designed to help *pro se* litigants (such as the plaintiff here) comply with 28 U.S.C. § 1915(a)(1). The plaintiff submitted a motion to proceed *in forma pauperis* with a signed and dated affirmation, but he did not provide any of the financial information requested in the affirmation. See Docket Item 2.

B. Certification of Inmate Trust Fund Account

Under 28 U.S.C. § 1915(a)(2), a prisoner seeking to proceed *in forma pauperis* also must submit a certified copy of his or her inmate trust fund account statement (or an institutional equivalent) for the six months immediately before the prisoner's complaint was filed. The prisoner must obtain this certified account statement from the appropriate official at each correctional facility where the prisoner was confined during that six-month period. See 28 U.S.C. § 1915(a)(2). Alternatively, the prisoner may have prison officials complete and sign the "Prison Certification Section" of the Court's form motion referred to above. See *supra* note 4. In the "Prison Certification Section,"

⁵ The Clerk of the Court shall mail Lettieri a form motion to proceed *in forma pauperis* with supporting affirmation. The form also is available at <http://www.nywd.uscourts.gov/pro-se-forms>.

prison officials provide the information in the prisoner's trust fund account statement required by 28 U.S.C. § 1915(a)(2). The plaintiff did not submit the required certification.

C. Authorization Form

A prisoner seeking to proceed *in forma pauperis* also must submit a signed authorization form⁶ permitting the institution in which the prisoner is confined to pay—over time, if necessary—the \$350.00 filing fee from the prisoner's trust fund account (or institutional equivalent). See 28 U.S.C. § 1915(b)(1)-(4). In other words, even if the prisoner is granted *in forma pauperis* status, the prisoner still must pay the full \$350.00 filing fee in installments. See 28 U.S.C. § 1915(b)(1)-(2). The initial payment will be 20% of the average monthly deposits to the prisoner's account or 20% of the average monthly balance in the prisoner's account for the six-month period immediately preceding the filing of the complaint, whichever is greater. See 28 U.S.C. § 1915(b)(1). For each month after that, as long as the amount in the prisoner's account exceeds \$10.00, the agency having custody of the prisoner will deduct from the prisoner's account and forward to the Clerk of the Court an installment payment equal to 20% of the preceding month's income that was credited to the prisoner's account. See 28 U.S.C. § 1915(b)(2). Those payments continue until the \$350.00 fee is paid in full. *Id.* The plaintiff did not submit the required authorization.

⁶ The Clerk of the Court shall mail Lettieri an authorization form. The form also is available at <http://www.nywd.uscourts.gov/pro-se-forms>.

II. ADMINISTRATIVE TERMINATION OF THIS ACTION

The plaintiff did not pay the \$350.00 filing fee or the \$52.00 administrative fee that ordinarily is required to commence a civil action. The plaintiff submitted a motion to proceed *in forma pauperis*, but he did not submit a completed affirmation, the required certification of his inmate trust fund account, or an authorization form. See 28 U.S.C. § 1915(a), (b). Therefore, the Clerk of the Court shall administratively terminate this action⁷ without filing the complaint or assessing a filing fee, as ordered below. As also ordered below, the plaintiff is granted leave to reopen this action no later than thirty days from the date of this order.

III. DEFERMENT OF SCREENING UNDER 28 UNITED STATES CODE SECTIONS 1915(e)(2) & 1915A

The court is required to screen civil actions filed by prisoners and dismiss them if they: (1) are frivolous or malicious; (2) fail to state a claim upon which relief may be granted; or (3) seek monetary relief against a defendant who is immune from such relief. See 28 U.S.C. § 1915(e)(2); 28 U.S.C. § 1915A; see also 42 U.S.C. § 1997e(c) (dismissal of prisoner actions brought with respect to prison conditions). Because the plaintiff did not properly commence this action, this Court will defer the mandatory screening process until this case is reopened—if, in fact, it is reopened. If this action is reopened and then dismissed, installment payments of the filing fee under 28 U.S.C.

⁷ Such an administrative termination is not a “dismissal” for purposes of the statute of limitations. Therefore, if the case is reopened under the terms of this order, it is not subject to the statute of limitations time bar as long as it originally was timely filed. See *Houston v. Lack*, 487 U.S. 266 (1988) (prisoner mailbox rule); *McDowell v. Del. State Police*, 88 F.3d 188, 191 (3d Cir. 1996); see also *Williams-Guice v. Bd. of Educ.*, 45 F.3d 161, 163 (7th Cir. 1995).

§ 1915 will not be suspended, and the prisoner will not be permitted to obtain a refund of the filing fee or any part of it that already has been paid.

Additionally, if a prisoner has, on three or more prior occasions while incarcerated, brought in federal court an action or appeal that was dismissed because it was frivolous or malicious or because it failed to state a claim upon which relief may be granted, he or she will not be permitted to bring another action *in forma pauperis* unless he or she is “under imminent danger of serious physical injury.” See 28 U.S.C. § 1915(g).

ORDER

Based on the above, it is hereby

ORDERED that the Clerk of the Court shall administratively terminate this action without filing the complaint or assessing a filing fee; and it is further

ORDERED that the Clerk of the Court shall send to the plaintiff a form motion to proceed *in forma pauperis* with supporting affirmation; and it is further

ORDERED that if the plaintiff wishes to reopen this action, he shall so notify this Court, in writing, no later than **30 days from the date of this order**. This writing must include either (a) a properly supported motion to proceed *in forma pauperis* along with the required certification of the plaintiff's inmate trust fund account (or the institutional equivalent) and authorization form or (b) the \$350.00 filing fee and the \$52.00 administrative fee (\$402.00 total); and it is further

ORDERED that upon the plaintiff's submission of either (a) a complete motion to proceed *in forma pauperis* along with the required certification and authorization form, or (b) the \$350.00 filing fee and the \$52.00 administrative fee (\$402.00 total), the Clerk of the Court shall reopen this case.

SO ORDERED.

Dated: July 7, 2023
Buffalo, New York

/s/ Lawrence J. Vilardo
LAWRENCE J. VILARDO
UNITED STATES DISTRICT JUDGE

Judgment in a Civil Case

United States District Court
WESTERN DISTRICT OF NEW YORK

DAVID C. LETTIERI

JUDGMENT IN A CIVIL CASE
CASE NUMBER: 23-CV-503

v.

FEDERAL BUREAU OF INVESTIGATION

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the case is administratively terminated.

Date: July 7, 2023

MARY C. LOEWENGUTH
CLERK OF COURT

By: s/ Colin
Deputy Clerk