

APPENDIX A

Western District of New York, Case # 17-CV-624-FPG, Decision and Order. 09/22/2017

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JAMES ARLOTTA,

Plaintiff,

Case # 17-CV-624-FPG

v.

DECISION AND ORDER

COOK MOVING SYSTEM, INC., and
INTERNATIONAL BROTHERHOOD OF
TEAMSTERS LOCAL 264,

Defendants.

Pro se Plaintiff James Arlotta has filed a Complaint against Defendants Cook Moving System, Inc. and International Brotherhood of Teamsters Local 264 (ECF No. 1) and seeks permission to proceed *in forma pauperis* (ECF No. 2). The Court finds that Plaintiff has met the statutory requirements to proceed as a poor person pursuant to 28 U.S.C. § 1915(a). Therefore, Plaintiff's request to proceed *in forma pauperis* is granted. The Court has also screened Plaintiff's Complaint with respect to the 28 U.S.C. § 1915(e) criteria, as discussed below.

DISCUSSION

Section 1915 "provide[s] an efficient means by which a court can screen for and dismiss legally insufficient claims." *Abbas v. Dixon*, 480 F.3d 636, 639 (2d Cir. 2007) (citing *Shakur v. Selsky*, 391 F.3d 106, 112 (2d Cir. 2004)). Pursuant to Section 1915(e), the Court shall dismiss a complaint in a civil action if, at any time, the Court determines that the action (1) is frivolous or malicious; (2) fails to state a claim on which relief may be granted; or (3) seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C.A. § 1915(e)(2)(B)(i)-(iii). Generally, the Court will afford a *pro se* plaintiff an opportunity to amend or to be heard prior to dismissal "unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would succeed in stating a claim." *Abbas*, 480 F.3d at 639 (internal quotation

marks omitted). However, leave to amend pleadings is properly denied where amendment would be futile. See *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000); *Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 131 (2d Cir. 1993) (“Where it appears that granting leave to amend is unlikely to be productive, . . . it is not an abuse of discretion to deny leave to amend.”).

Plaintiff’s Complaint is difficult to decipher, but read liberally, Plaintiff appears to allege that Defendants caused him to work in excess of 70 hours per week in violation of Department of Transportation regulations, and that Defendant Local 264 somehow created an unspecified hostile work environment. Plaintiff generally alleges that he was “injured during working hours,” but there are no details regarding this incident, or how it relates to the claims in this case. Plaintiff quotes from the New York Workers Compensation Law, and says that “regarding plaintiff’s late filing of a claim for compensation, . . . plaintiff expects it to be denied on these facts.” ECF No. 1 at 5, ¶ 18.

There are several problems with Plaintiff’s Complaint, but there appear to be two insurmountable issues that would prevent the Court from hearing this case.

First, Plaintiff’s cover sheet (ECF No. 1-1) states that he is bringing this action under 42 U.S.C. § 1983, for “Civil Rights violations regarding work injury and Labor Union Rights.” But § 1983 only provides a cause of action against those acting under color of state law. Here, there is no allegation that Cook Moving Systems or Local 264 are anything other than private entities. As such, there is no cause of action against them under § 1983. Since Plaintiff is *pro se*, the Court does not limit his Complaint by the labels Plaintiff has attached, but instead reads the Complaint liberally to see if there is another federal cause of action that could be actionable. To the extent that such cause of action exists, we come to another issue.

The second issue is that, even assuming a federal cause of action exists, Plaintiff's claims appear to be barred under any statute of limitations. The Complaint does not mention any dates in the factual allegations, but in the caption, Plaintiff lists individuals at both Cook Moving System and Local 264 that "worked at this location in 2002" (as to Cook Moving System), and "membership from March 2002 – October 2002" (as to Local 264). From that information, it appears that Plaintiff brings this suite relating to incidents that took place in 2002, which is approximately fifteen years ago. Assuming those dates relate to the incidents that Plaintiff now complains of, under any statute of limitations, Plaintiff's claims against Defendants must be dismissed as untimely.

However, since the dates of the incidents at issue are unclear, the Court will permit Plaintiff to file an amended complaint, if he can allege a federal cause of action against Cook Moving and/or Local 264 that took place within the applicable statute of limitations. If facts exist upon which Plaintiff could make such allegations, he may file such an amended complaint by August 27, 2017.

If an amended complaint is not filed by October 27, 2017, the Complaint will be dismissed for failure to state a claim upon which relief could be granted under 28 U.S.C. §§ 1915(e)(2)(b)(ii).

CONCLUSION

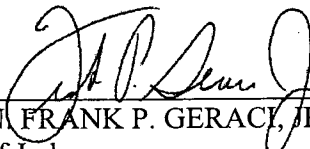
For the foregoing reasons, Plaintiff's motion to proceed *in forma pauperis* is GRANTED, and unless he files an Amended Complaint by October 27, 2017 as directed above, the Complaint will be dismissed with prejudice as of that date, without further order.

Plaintiff is informed that any amended complaint he files will completely replace the original complaint, so all of his allegations must be contained within any amended complaint he files, if he elects to do so.

If no amended complaint is filed, and the Complaint is therefore dismissed as of October 27, 2017, the Court hereby certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this Order would not be taken in good faith, and leave to appeal to the Court of Appeals as a poor person is denied. *See Coppedge v. United States*, 369 U.S. 438 (1962). Requests to proceed on appeal as a poor person should be directed, on motion, to the United States Court of Appeals for the Second Circuit, in accordance with Rule 24 of the Federal Rules of Appellate Procedure.

IT IS SO ORDERED.

DATED: September 22, 2017
Rochester, New York



HON. FRANK P. GERACY, JR.
Chief Judge
United States District Court

APPENDIX B

Western District of New York, Case # 17-CV-624-FPG, Decision and Order. 12/15/2017

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JAMES PAUL ARLOTTA,

Plaintiff,

Case # 17-CV-624-FPG

v.

DECISION AND ORDER

COOK MOVING SYSTEMS INC., GREG FIERLE,
DEBRA FIERLE, FRANK GAGLIONE, JAMES W.,
CYNTHIA, INT'L BROTHEROOD OF TEAMSTERS
LOCAL 246, & BRIAN DICKMAN,

Defendants.

On September 22, 2017, the Court granted *pro se* Plaintiff James P. Arlotta's *in forma pauperis* motion and screened his Complaint pursuant to 28 U.S.C. §1915(e). ECF No. 4. The Court dismissed Plaintiff's Complaint but allowed him to file an amended complaint. *Id.* On September 27, 2017, Plaintiff filed an Amended Complaint and on November 27, 2017, he filed a "Motion for Service by US-Marshal." ECF Nos. 5, 7. The Court screened Plaintiff's Amended Complaint with respect to the 28 U.S.C. §1915(e) criteria and, for the reasons that follow, this case is DISMISSED WITH PREJUDICE and his motion is DENIED AS MOOT.

DISCUSSION

I. Legal Standard

Section 1915 "provide[s] an efficient means by which a court can screen for and dismiss legally insufficient claims." *Abbas v. Dixon*, 480 F.3d 636, 639 (2d Cir. 2007) (citing *Shakur v. Selsky*, 391 F.3d 106, 112 (2d Cir. 2004)). Pursuant to Section 1915(e), the Court must dismiss a complaint in a civil action if the Court determines at any time that the action (1) is frivolous or malicious; (2) fails to state a claim upon which relief may be granted; or (3) seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B)(i)-(iii).

Generally, the Court will afford a *pro se* plaintiff an opportunity to amend or be heard before dismissal “unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would succeed in stating a claim.” *Abbas*, 480 F.3d at 639 (internal quotation marks omitted). Thus, leave to amend pleadings is properly denied where amendment would be futile. *See Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000); *Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 131 (2d Cir. 1993) (“Where it appears that granting leave to amend is unlikely to be productive, . . . it is not an abuse of discretion to deny leave to amend.”).

II. Analysis

After reviewing Plaintiff’s Amended Complaint, the Court finds that it must be dismissed because it is nearly identical to the original Complaint the Court dismissed previously. ECF Nos. 1, 5. Plaintiff again alleges that Defendants made him work hours that exceeded Department of Transportation regulations and created an unspecified hostile work environment. ECF No. 5-1 at 4. He alleges that he was “injured during working hours,” but he provides no details about this incident or how it relates to the claims in his case. *Id.* at 5, ¶ 11. He again quotes New York’s Workers’ Compensation Law and says that “regarding plaintiff’s late filing of a claim for compensation . . . plaintiff expects it to be denied on these facts.” *Id.* at 6, ¶ 22.

Plaintiff’s Amended Complaint suffers the same defects as his original Complaint: (1) he cannot sue private actors pursuant to 42 U.S.C. § 1983; and (2) any potential federal cause of action that he may have appears to be time-barred under any relevant statute of limitations.

Plaintiff again sues Defendants who are private actors and therefore are not subject to Section 1983 liability. *See Ciambriello v. Cnty. of Nassau*, 292 F.3d 307, 323 (2d Cir. 2002) (“[T]o state a claim under § 1983, a plaintiff must allege that he was injured by either a state actor or a private party acting under color of state law.”). Plaintiff has not alleged that any of these private

actors were acting under color of state law and, reading Plaintiff's submissions liberally, the Court does not see any reason to believe that they were.

Plaintiff's Amended Complaint also lacks any dates as to when the alleged incidents occurred. Like the caption in his original Complaint, the caption in his Amended Complaint lists individuals at Cook Moving System who "worked at this location in 2002" and at Local 264 with "membership from March 2002 – October 2002." Thus, it appears that Plaintiff's case is about events that happened in 2002, which is nearly 16 years ago. Assuming 2002 is the relevant time period at issue, Plaintiff's claims are untimely under any statute of limitations and must be dismissed. Although the statute of limitations is an affirmative defense, dismissal is appropriate when the facts supporting the statute of limitations defense are set forth in the papers that the plaintiff submits. *See, e.g., Messeroux v. Maimonides Medical Ctr.*, No. 11-CV-5343, 2013 WL 2414690, at *1 (E.D.N.Y. May 31, 2013) (*citing Leonhard v. United States*, 633 F.2d 599, 609 n.11 (2d Cir. 1980)). Moreover, the Court's prior Decision and Order (ECF No. 4) informed Plaintiff of the statute of limitations defect and gave him an opportunity to amend his complaint. *See Abbas*, 480 F.3d at 640 (finding that the district court erred by dismissing a *pro se* complaint as time-barred *sua sponte* without notice and an opportunity to be heard);

Although the Court let Plaintiff amend his Complaint to allege a timely federal cause of action against Defendants, his Amended Complaint suffers the same defects as his original Complaint and therefore is dismissed with prejudice for failure to state a claim upon which relief may be granted under 28 U.S.C. § 1915(e)(2)(b)(ii).

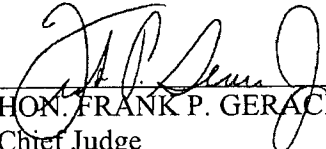
CONCLUSION

Plaintiff's case is DISMISSED WITH PREJUDICE and his motion for service is DENIED AS MOOT. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this Order

would not be taken in good faith and that leave to appeal to the Court of Appeals as a poor person is denied. *See Coppedge v. United States*, 369 U.S. 438 (1962). Requests to proceed on appeal as a poor person should be directed on motion to the United States Court of Appeals for the Second Circuit in accordance with Rule 24 of the Federal Rules of Appellate Procedure.

IT IS SO ORDERED.

Dated: December 15, 2017
Rochester, New York



HON. FRANK P. GERACI, JR.
Chief Judge
United States District Court

APPENDIX C

W.D.N.Y., Case # 17-CV-624-FPG, JUDGEMENT IN A CIVIL CASE. Filed 12/18/2017

Judgment in a Civil Case

United States District Court
WESTERN DISTRICT OF NEW YORK

JAMES P. ARLOTTA

JUDGMENT IN A CIVIL CASE
CASE NUMBER: 17-CV-624-G

v.

COOK MOVING SYSTEM, INC.

☐ **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 Plaintiff's case is dismissed with prejudice and his motion for service is denied as moot. The Court certifies that any appeal from this order would not be taken in good faith and leave to appeal as a poor person is denied.

Date: December 18, 2017

MARY C. LOEWENGUTH
CLERK OF COURT

By: s/K.McMillan
Deputy Clerk