

FILED: February 7, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-7276 (L)
(1:16-cv-00577-LCB-JEP)

ROBERT GENE BAILEY

Plaintiff - Appellant

v.

JOSEPH GARDNER; C. C. BLAKE; R. M. ASHLEY; P. J. GRAHAM; RON
SMITH; JEFFREY BAREFOOT; UNKNOWN FEMALE OFFICER; R.
THOMPSON; EDWARD GRANNIS; E. LYNN JOHNSON; WILLIAM C.
TOMAN, JR.; K. D. MACKEY; NORTH CAROLINA DEPARTMENT OF
MOTOR VEHICLES

Defendants - Appellees

O R D E R

The court dismisses this proceeding for failure to prosecute pursuant to Local
Rule 45.

For the Court--By Direction

/s/ Patricia S. Connor, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

ROBERT GENE BAILEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:17CV144
	)	
JOSEPH GARDNER, et al.,	)	
	)	
Defendants.	)	

ORDER

On June 28, 2017, the United States Magistrate Judge's Recommendation was filed and notice was served on the parties pursuant to 28 U.S.C. § 636. Plaintiff filed objections (Doc. 6) within the time limit prescribed by Section 636.

The court has reviewed Plaintiff's objections *de novo* and finds that they do not change the substance of the United States Magistrate Judge's Recommendation (Doc. 4), which is affirmed and adopted.

In addition, as set out in the Recommendation, Plaintiff's continued filings have reached the point where the court must consider the entry of a pre-filing injunction against Plaintiff. The present action is the forty-ninth case filed by Plaintiff in this court. The filings contain hundreds of repetitive handwritten pages which relate to the same basic facts and often name the same sets or subsets of Defendants and demand similar relief. Despite

imposing a considerable burden on the court, none of the filings states any viable claim for relief. Further, Plaintiff's current course of action mirrors closely his prior conduct in the Eastern District of North Carolina. There, Plaintiff filed dozens of cases, some after being warned about his conduct. As a result, that court issued a pre-filing injunction limiting Plaintiff's ability to file these cases in the Eastern District of North Carolina. Upon his transfer to a prison located in this District, Plaintiff simply continued his course of conduct by filing in this court instead of in the Eastern District.

The entry of a pre-filing injunction is appropriate in "exigent circumstances, such as a litigant's continuous abuse of the judicial process by filing meritless and repetitive actions." Cromer v. Kraft Foods N. Am., Inc., 390 F.3d 812, 818 (4th Cir. 2004) (quotation omitted). In considering whether to impose such a pre-filing injunction, the court must consider "(1) the party's history of litigation, in particular whether he has filed vexatious, harassing, or duplicative lawsuits; (2) whether the party had a good faith basis for pursuing the litigation, or simply intended to harass; (3) the extent of the burden on the courts and other parties resulting from the party's filings; and (4) the adequacy of alternative sanctions." Id. Considering these factors with respect to Plaintiff, the court finds that a pre-filing

injunction is appropriate. As stated above, Plaintiff filed dozens of similar actions in the Eastern District of North Carolina before being warned and enjoined in that district. He is now continuing the conduct in this court, thereby evading the prior injunction. The filings are frivolous, harassing, duplicative, and devoid of any reasonable chance of producing relief for Plaintiff. The burden on the court in having to file and process these cases is significant. Finally, the court notes that no other alternative sanctions appear to adequately address this abuse of the judicial process by the Plaintiff, particularly in light of the prior warning and injunction in the Eastern District of North Carolina. The only way to prevent abusive filings by Plaintiff is to require him to obtain permission from this court before again attempting to file an action similar to those already filed.

Plaintiff was given notice of the proposed pre-filing injunction and was allowed twenty (20) days to show cause why such a pre-filing injunction should not be imposed. Plaintiff has failed to provide any reason for not imposing such a pre-filing injunction in this District.

Pre-filing injunctions must be narrowly crafted. Here, Plaintiff's repetitive, frivolous claims include the same core group of named defendants and/or the same general demand for

relief. Therefore, the pre-filing injunction will apply to any new civil action filed by Plaintiff in this court which:

1. Names any of the following as a defendant, regardless of the other defendants named: R.M. Ashley, C.C. Blake, Joseph Gardner, K.D. Mackey, North Carolina Department of Motor Vehicles, Ron Smith, William C. Toman, Jr., D.J. Dooer, or Jeffrey Barefoot; or
2. Contains any allegation of the illegal taking and holding of titles, vehicles, files, cash, jewelry, home files, pool files, or bath files; or
3. Fails to either (a) include the \$400.00 filing fee, or (b) contain a statement on a separate page from the complaint that makes specific, clear factual allegations showing a possibility that Plaintiff is in imminent danger of serious physical injury pursuant to 28 U.S.C. § 1915(g).

Any such civil action filed by Plaintiff within that scope will be subject to summary review and screening by the court and an Order of Dismissal incorporating by reference the findings set out herein, unless the court concludes that permission should be granted to allow the filing to proceed.

IT IS THEREFORE ORDERED that this action is DISMISSED *sua sponte* without prejudice.

IT IS FURTHER ORDERED that for any new civil action filed by Plaintiff in this court which:

1. Names any of the following as a defendant, regardless of the other defendants named: R.M. Ashley, C.C. Blake, Joseph Gardner, K.D. Mackey, North Carolina Department of Motor Vehicles, Ron

Smith, William C. Toman, Jr., D.J. Dooer, or
Jeffrey Barefoot; or

2. Contains any allegation of the illegal taking and holding of titles, vehicles, files, cash, jewelry, home files, pool files, or bath files; or
3. Fails to either (a) include the \$400.00 filing fee, or (b) contain a statement on a separate page from the complaint that makes specific, clear factual allegations showing a possibility that Plaintiff is in imminent danger of serious physical injury pursuant to 28 U.S.C. § 1915(g),

such civil action will be subject to summary review and screening by the court and an Order of Dismissal incorporating by reference the findings set out herein, unless the court concludes that permission should be granted to allow the filing to proceed.

/s/ Thomas D. Schroeder
United States District Judge

September 26, 2017

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

ROBERT GENE BAILEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:17CV144
	)	
JOSEPH GARDNER, et al.,	)	
	)	
Defendant(s).	)	

ORDER AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Plaintiff, a prisoner of the State of North Carolina, submitted a civil action alleging, at least in part, that Defendants violated his constitutional rights. This is one of a number of similar actions filed by Plaintiff in this Court in which Plaintiff alleges the existence of a civil and criminal conspiracy in 2008 to confiscate his business and personal property as part of his state criminal prosecution. Given the nature of the allegations, the Court filed it as a civil rights action pursuant to 42 U.S.C. § 1983. However, the form of the Complaint is such that serious flaws make it impossible to further process the Complaint. The problems are:

1. The filing fee was not received nor was a proper affidavit to proceed *in forma pauperis* submitted, with sufficient information completed or signed by Plaintiff, to permit review. Moreover, Plaintiff may not proceed *in forma pauperis* unless he is under imminent danger of serious physical injury. The Prison Litigation Reform Act provides that:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g). Plaintiff is a frequent *pro se* litigator in federal courts in North Carolina who has had at least three previous suits dismissed for being frivolous, malicious, or failing to state a claim upon which relief may be granted. See Bailey v. City of Fayetteville, No. 4:13CV156 (E.D.N.C. Aug. 19, 2013) (unpublished). Therefore, unless he can establish imminent danger of serious physical injury, Plaintiff must pay the \$400.00 filing fee. The facts in the present Complaint do not support any such allegation of imminent danger of serious physical injury. Therefore, Plaintiff must pay the \$400.00 filing fee if he wishes to file in this Court.

2. The Complaint is not on forms prescribed for use by this Court, nor is the information requested by such forms and necessary to process the Complaint pursuant to 28 U.S.C. § 1915A contained in Plaintiff's submission. See LR 7.1(e).
3. Plaintiff does not appear to state a viable claim for relief. Plaintiff's claims are generally conclusory in nature. Further, they may call into question his current criminal convictions, which is not proper in a § 1983 action. Heck v. Humphrey, 512 U.S. 477 (1994). In addition, the events involved all occurred in 2008, which means that to the extent they are not barred by Heck, the claims are likely barred by the applicable three-year statute of limitations. See Wilson v. Garcia, 471 U.S. 261, 276-80 (1985) (holding that, in section 1983 actions, state statute of limitations for personal injury applies); Brooks v. City of Winston Salem, 85 F.3d 178, 181 (4th Cir. 1996) (applying North Carolina's three-year statute of limitations for personal injuries to section 1983 actions); N.C. Gen. Stat. § 1-52 (establishing three-year statute of limitations for personal injury).

The Court also notes that it appears that the potential defendants may be located in the Eastern District of North Carolina, and the events challenged in the Complaint are all alleged to have occurred there as well. Therefore, it appears that venue would be proper in that District. However, Plaintiff is limited in his ability to file cases in the Eastern District of North Carolina against at least some of the Defendants listed in the present

Complaint or based on at least some of the allegations in the present Complaint, due to that court's entry of a pre-filing injunction against him. Bailey v. City of Fayetteville, No. 4:13CV156 (E.D.N.C. Aug. 19, 2013) (unpublished).

This Court likewise concludes that Plaintiff's continued filings have reached the point where the Court must consider the entry of a pre-filing injunction against Plaintiff. The present action is the forty-ninth case filed by Plaintiff in this Court. The filings contain hundreds of repetitive handwritten pages which relate to the same basic facts and often name the same sets or subsets of Defendants and demand similar relief. Despite imposing a considerable burden on the Court, none of the filings states any viable claim for relief. Further, Plaintiff's current course of action mirrors closely his prior conduct in the Eastern District of North Carolina. There, Plaintiff filed dozens of cases, some after being warned about his conduct. As a result, that court issued a pre-filing injunction limiting Plaintiff's ability to file these cases in the Eastern District of North Carolina. Upon his transfer to a prison located in this District, Plaintiff simply continued his course of conduct by filing in this Court instead of in the Eastern District. Accordingly, the Court will consider whether a pre-filing injunction is appropriate in this District as well.

The entry of a pre-filing injunction is appropriate in "exigent circumstances, such as a litigant's continuous abuse of the judicial process by filing meritless and repetitive actions." Cromer v. Kraft Foods N. Am., Inc., 390 F.3d 812, 818 (4th Cir. 2004) (quotation omitted). In considering whether to impose such a pre-filing injunction, the Court must consider "(1) the party's history of litigation, in particular whether he has filed vexatious, harassing, or duplicative lawsuits; (2) whether the party had a good faith basis for pursuing

the litigation, or simply intended to harass; (3) the extent of the burden on the courts and other parties resulting from the party's filings; and (4) the adequacy of alternative sanctions." Id. Considering these factors with respect to Plaintiff, it appears that a pre-filing injunction is appropriate. As stated above, Plaintiff filed dozens of similar actions in the Eastern District of North Carolina before being warned and enjoined in that district. He is now continuing the conduct in this Court, thereby evading the prior injunction. The filings are frivolous, harassing, duplicative, and, as should be readily apparent to Plaintiff by now, devoid of any reasonable chance of producing relief for Plaintiff. The burden on the Court in having to file and process these cases is significant. Finally, the Court notes that no other alternative sanctions appear to adequately address this abuse of the judicial process by the Plaintiff, particularly in light of the prior warning and injunction in the Eastern District of North Carolina. It appears likely that the only way to prevent abusive filings by Plaintiff is requiring him to obtain permission from this Court before again attempting to file an action similar to those already filed.

In considering the scope of such a requirement, the Court notes that pre-filing injunctions must be narrowly crafted. Here, Plaintiff's repetitive, frivolous claims include the same core group of named defendants and/or the same general demand for relief. Therefore, a pre-filing injunction could potentially apply to any new civil action filed by Plaintiff in this Court which:

1. Names any of the following as a defendant, regardless of the other defendants named: R.M. Ashley, C.C. Blake, Joseph Gardner, K.D. Mackey, North Carolina Department of Motor Vehicles, Ron Smith, William C. Toman, Jr., D.J. Dooer, or Jeffrey Barefoot; or

2. Contains any allegation of the illegal taking and holding of titles, vehicles, files, cash, jewelry, home files, pool files, or bath files; or
3. Fails to either (a) include the \$400.00 filing fee, or (b) contain a statement on a separate page from the complaint that makes specific, clear factual allegations showing a possibility that Plaintiff is in imminent danger of serious physical injury pursuant to 28 U.S.C. § 1915(g).

If such a pre-filing injunction is adopted, any such civil action filed by Plaintiff within that scope would be subject to summary review and screening by the Court and an Order of Dismissal incorporating by reference the findings set out herein, unless the Court concludes that permission should be granted to allow the filing to proceed.

However, before imposing a pre-filing injunction, the Court must provide Plaintiff with notice and an opportunity to be heard on the matter. See Cromer, 390 F.3d at 819. Therefore, before recommending the entry of an Order imposing a pre-filing injunction, the Court will allow Plaintiff twenty (20) days to file a Brief showing cause why such a pre-filing injunction should not be imposed.

In forma pauperis status is granted for the sole purpose of entering this Order and Recommendation.

IT IS THEREFORE ORDERED that *in forma pauperis* status is granted for the sole purpose of entering this Order and Recommendation.

IT IS FURTHER ORDERED that within twenty (20) days of the entry of this Order and Recommendation, Plaintiff shall file a Brief showing cause why a pre-filing injunction should not be imposed.

IT IS RECOMMENDED that this action be filed and dismissed *sua sponte* without prejudice.

This, the 28th day of June, 2017.

/s/ Jbi Elizabeth Peake
United States Magistrate Judge

**Additional material
from this filing is
available in the
Clerk's Office.**