

United States Court of Appeals For the First Circuit

No. 18-1079

MANUEL ROBERT LUCERO, V,

Plaintiff, Appellant,

v.

THOMAS A. TURCO, III, individually and in his official capacity; LEWIS G. EVANGELIDIS, individually and in his official capacity; CORRECT CARE SOLUTIONS, individually and in its official capacity,

Defendants, Appellees.

Before

Howard, Chief Judge,
Kayatta and Barron, Circuit Judges.

JUDGMENT

Entered: May 10, 2018

Plaintiff Manuel Robert Lucero appeals from the district court's denial of preliminary injunctive relief. See 28 U.S.C. § 1292(a) (allowing for appellate review of denials of injunctive relief). Defendant Correct Care Solutions LLC moves to dismiss the case as moot in light of Lucero's transfer from Worcester County Jail and House of Corrections and subsequent release from incarceration. Other defendant-appellees have filed briefs arguing the seeming mootness of the matter, which focuses exclusively on the district court's denial of injunctive relief. Having considered the parties' filings and relevant portions of the record, we conclude that the appeal must be dismissed as moot. See CMM Cable Rep., Inc. v. Ocean Coast Properties, Inc., 48 F.3d 618, 621 (1st Cir. 1995) ("[A]n appeal from the denial of a motion for a preliminary injunction is rendered moot when the act sought to be enjoined has occurred.") (internal quotations omitted); Ford v. Bender, 768 F.3d 15, 29-30 (1st Cir. 2014) (release from custody rendered moot all claims for equitable relief).

Correct Care Solutions LLC's motion to dismiss is **GRANTED**. Because the appeal as a whole is moot, it is **DISMISSED** as to all defendant-appellees. See 1st Cir. R. 27.0(c). All other pending motions are denied as moot.

Appeal dismissed.

By the Court:

/s/ Margaret Carter, Clerk

cc:

Carolyn A. Marcotte
Manuel Robert Lucero V
Mary Eiro-Bartevyan
Margaret Melville
Andrew John Abdella

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MANUEL ROBERT LUCERO,
Plaintiff,

V.

LEWIS G. EVANGELIDIS, et al.,
Defendants.

**CIVIL ACTION
No. 17-40118-TSH**

MEMORANDUM AND ORDER

HILLMAN, J.

October 11, 2017

For the reasons set forth below, the plaintiff's motion to proceed *in forma pauperis* is allowed and plaintiff is assessed an obligation to make payments towards the \$350.00 filing fee pursuant to 28 U.S.C. § 1915(b)(2). Plaintiff's motion for leave to file an amended complaint is allowed and the motion to appoint counsel is denied without prejudice. The Clerk shall issue summonses for service of the amended complaint and shall send the summonses, copies of the amended complaint and affidavit in support of motion for preliminary injunction to the plaintiff, who must serve the defendants with these documents in accordance with Federal Rule of Civil Procedure 4(m).

Background

On August 11, 2017, *pro se* plaintiff Manuel Robert Lucero, a pretrial detainee in custody at the Worcester County Jail and House of Correction, filed a complaint naming as defendants the Massachusetts Commissioner of Corrections, the Worcester County Sheriff, Correct Care Solutions, the healthcare provider for inmates at the Worcester County Jail and House of Correction. Docket Entry No. 1. With his complaint, Lucero filed motions for appointment of

counsel, appointment of U.S. Marshal for service and for leave to proceed *in forma pauperis*. Docket Entry Nos. 2 - 4.

On October 4, 2017, Lucero filed a motion seeking leave to file an amended complaint with the proposed amended complaint naming the same defendants as the original complaint. Docket Entry No. 7. Plaintiff also filed an affidavit in support of his request for temporary restraining order and/or preliminary injunction. Docket Entry No. 6.

Plaintiff's amended complaint requests varying injunctive relief and compensatory and punitive damages. As in his original complaint, the amended complaint itemizes a laundry list of claims based either on distinct incidents or distinct conditions of which he complains. Moreover, Lucero alleges that he is a pretrial detainee, and as such, he has a right "to be free from punishment." Bell v. Wolfish, 441 U.S. 520, 534 (1979). "For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." Id. at 535. Because the plaintiff is proceeding pro se, his pleadings are to be "liberally construed." Erickson v. Pardus, 551 U.S. 89, 94 (2007) (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)) (internal quotation marks omitted); see also Fed. R. Civ. P. 8(e) ("Pleadings must be construed so as to do justice").

Discussion

I. Plaintiff's motion to proceed *in forma pauperis*

Plaintiff's motion to proceed *in forma pauperis* is granted. Plaintiff is currently without funds. Pursuant to 28 U.S.C. § 1915(b)(2), plaintiff is obligated to make monthly payments of 20 percent of the preceding month's income credited to his account until the statutory filing fee has been paid in full. The Clerk shall send a copy of this order to the treasurer of the institution having custody of plaintiff.

II. Plaintiff's motion to appoint counsel

Plaintiff's motion to appoint counsel is denied without prejudice. Although the Court "may request an attorney to represent any person unable to afford counsel," 28 U.S.C. §1915(e)(1), a civil plaintiff lacks a constitutional right to free counsel, see DesRosiers v. Moran, 949 F.2d 15, 23 (1st Cir. 1991). The Court does not have the funds to pay attorneys to represent plaintiffs in civil cases, and it is difficult to find attorneys who will accept appointment as pro bono counsel. To qualify for this scarce resource, a party must be indigent and exceptional circumstances must exist such that the denial of counsel will result in fundamental unfairness impinging on the party's due process rights. See DesRosiers, 949 F.2d at 23. To determine whether there are exceptional circumstances sufficient to warrant the appointment of counsel, a court must examine the total situation, focusing on the merits of the case, the complexity of the legal issues, and the litigant's ability to represent himself. See id. at 24. Because the defendants have not responded to the complaint, the Court cannot determine whether exceptional circumstances exist that would justify appointment of counsel. The plaintiff may renew the motion after the defendants have responded to the complaint.

III. Plaintiff's motion to amend

Pursuant to Federal Rule of Civil Procedure 15(a)(1)(B) a party may amend his complaint as a matter of course (i.e., without seeking leave of court) within 21 days after serving [the original complaint], or if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier. In this case, summons have not yet issued and plaintiff filed his motion to amend well within the 21-day period set forth in Rule 15. Therefore, the plaintiff was not required to seek leave of court to amend his original complaint and the motion is allowed.

The proposed amended complaint and all attachments thereto will be the operative amended complaint. Plaintiff's amended complaint completely supercedes the original complaint, see Ramallo Bros. Printing, Inc. v. El Dia, Inc., 490 F.3d 86, 88 n. 2 (1st Cir. 2007), and the original complaint will no longer perform any function in this case. Connectu LLC v. Zuckerberg, 522 F.3d 82 (1st Cir. 2008). The Clerk shall add the proposed amended complaint to the cm/ecf docket.

IV. Plaintiff's Request for Injunctive Relief

Now before the Court is Lucero's two-page affidavit that appears to be submitted in support of the plaintiff's request for a preliminary injunction and temporary restraining order. Docket Entry No. 6. With the affidavit is a proposed, seven-page Order. Id. The Clerk entered this document on the docket both as an affidavit and motion for injunctive relief. Id. Lucero seeks a court order mandating that the three defendants immediately remedy the conditions of confinement complained of in the amended complaint. Id.

To issue a preliminary injunction under Fed. R. Civ. P. 65, a district court must find that the moving party has established (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm absent interim relief, (3) that the balance of equities weighs in his favor, and (4) that a preliminary injunction is in the public interest. Voice of the Arab World, Inc. v. MDTV Med. News Now, Inc., 645 F.3d 26, 32 (1st Cir. 2011) (citing Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)). In the First Circuit, "proving likelihood of success on the merits is the 'sine qua non' of a preliminary injunction." Arborjet, Inc. v. Rainbow Treecare Sci. Advancements, Inc., 794 F.3d 168, 173 (1st Cir. 2015) (citing New Comm Wireless Servs., Inc. v. SprintCom, Inc., 287 F.3d 1, 9 (1st Cir. 2002)).

Additionally, "[t]he burden of demonstrating that a denial of interim relief is likely to cause irreparable harm rests squarely upon the movant." Charlesbank Equity Fund II v. Blinds To Go,

Inc., 370 F.3d 151, 162 (1st Cir. 2004). To obtain the more extraordinary relief of a temporary restraining order, a party must allege “immediate and irreparable” injury or loss will occur before the adverse party can be heard in opposition. Fed. R. Civ. P. 65(b)(1)(A).

After preliminary review of the plaintiff’s complaint, the Court concludes that some of Lucero’s claims survive preliminary screening pursuant to 28 U.S.C. §§ 1915(e)(2)(B)(ii), 1915A(b)(1), (2). Even so, it does not necessarily follow that Lucero has demonstrated a likelihood of success on the merits to warrant the entry of injunctive relief. Assuming that some, or all of, the conditions of plaintiff’s confinement rise to the level of constitutional violations, the plaintiff has not demonstrated that he will suffer irreparable harm if he is not granted injunctive relief.

The Court does not deem it appropriate to order such relief without first considering the response of the defendants (one of whom is a medical provider). Ultimately, “trial courts have wide discretion in making judgments regarding the appropriateness of such relief.” Sanchez v. Esso Standard Oil Co., 572 F.3d 1, 14 (1st Cir. 2009). “In general, injunctive relief is ‘to be used sparingly, and only in a clear and plain case.’” Rohm & Haas Elec. Materials, LLC v. Elec. Circuits Supplies, Inc., 759 F.Supp.2d 110, 117 (D.Mass.2010) (quoting Rizzo v. Goode, 423 U.S. 362, 378 (1976)).

Conclusion

Based on the foregoing, it is hereby Ordered that:

1. Plaintiff’s Motion for Leave to Proceed *in forma pauperis* (Docket Entry No. 4) is ALLOWED and plaintiff is assessed an obligation to make payments towards the \$350.00 filing fee pursuant to 28 U.S.C. § 1915(b)(2). The Clerk shall send a copy of this order to the treasurer of the institution having custody of plaintiff.

2. Plaintiff's Motion for Leave to File Amended Complaint (Docket Entry No. 7) is ALLOWED. The Clerk shall enter on the cm/ecf docket the proposed Amended Complaint (Docket No. 7-1).

3. Plaintiff's Motion to Appoint Counsel (Docket Entry No. 2) is DENIED without prejudice to renew after the defendants have responded to the complaint.

4. The Clerk shall issue summonses for service of the amended complaint and shall send the summonses, copies of the amended complaint and affidavit in support of motion for preliminary injunction to the plaintiff, who must serve the defendants with these documents in accordance with Federal Rule of Civil Procedure 4(m).

5. Plaintiff's Motion for the Appointment of U.S. Marshal (Docket Entry No. 3) is ALLOWED to the extent that the plaintiff may elect to have service made by the United States Marshals Service. If directed by the plaintiff to do so, the United States Marshals Service shall serve the above-referenced documents and this Order upon the defendants, in the manner directed by the plaintiff, with all costs of service to be advanced by the United States. Notwithstanding this Order, it remains plaintiff's responsibility to provide to the United States Marshals Service all necessary paperwork and service information. Notwithstanding Fed. R. Civ. P. 4(m) and Local Rule 4.1, the plaintiff shall have 90 days from the date of this Order to complete service.

6. Plaintiff's affidavit and motion (Docket Entry No. 6) is denied without prejudice.

7. Pursuant to 42 U.S.C. § 1997e(g)(2), the defendants shall respond to the complaint as provided for in the Federal Rules of Civil Procedure.

SO ORDERED.

/s/ Timothy S. Hillman
UNITED STATES DISTRICT JUDGE

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