

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Jan 16, 2025
KELLY L. STEPHENS, Clerk

No. 24-3895

HOWARD E. MARTIN III,

Plaintiff-Appellant,

v.

TIM SHOOP, Warden; CORBY FREE,
Institutional Inspector; CLARK GOBLE, Unit
Manager Administration,

Defendants-Appellees.

Before: GILMAN, GIBBONS, and THAPAR, Circuit Judges.

JUDGMENT

THIS MATTER came before the court upon consideration of appellate jurisdiction.

IN CONSIDERATION THEREOF, it is ORDERED that the appeal is DISMISSED.

ENTERED BY ORDER OF THE COURT


Kelly L. Stephens, Clerk

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HOWARD E. MARTIN III,

Plaintiff-Appellant,

V.

TIM SHOOP, Warden; CORBY FREE,
Institutional Inspector; CLARK GOBLE, Unit
Manager Administration,

Defendants-Appellees.

ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF
OHIO

ORDER

Before: GILMAN, GIBBONS, and THAPAR, Circuit Judges.

This court must examine the basis of its jurisdiction, on its own initiative if necessary. *Alston v. Advanced Brands & Importing Co.*, 494 F.3d 562, 564 (6th Cir. 2007). Generally, in a civil case where neither the United States, a United States agency, nor a United States officer or employee is a party, a notice of appeal must be filed within 30 days after the judgment or order appealed from is entered. *See* 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1).

On September 9, 2024, the district court denied Howard E. Martin's motion for reconsideration of the court's judgment dismissing his civil action. Any notice of appeal was due to be filed on or before October 9, 2024. Martin's notice of appeal was filed in the district court on October 14, 2024.

Because the notice of appeal was late and Martin had not moved in the district court for an extension of the time to appeal under Federal Rule of Appellate Procedure 4(a)(5) or for reopening the time to appeal under Federal Rule of Appellate Procedure 4(a)(6), this court directed Martin to show cause why his appeal should not be dismissed on the basis of a late notice of appeal.

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Martin responds that he did not receive the district court's September 9, 2024, order until October 9, 2024, after he was issued a pass to receive his legal mail. He states that the law library was under construction until October 12, 2024, and that he was not able to contact the court until October 14, 2024. However, between September 9 and October 9, the docket reflects that Martin made three attempts at e-filing documents. The district court mailed back each of Martin's attempted e-filings with a copy of the September 9, 2024, order.

Compliance with the statutory requirement in Section 2107(a) that a notice of appeal be filed within 30 days is a jurisdictional prerequisite that this court may not waive. *See Hamer v. Neighborhood Hous. Servs. of Chi.*, 583 U.S. 17, 20, 26 (2017); *Bowles v. Russell*, 551 U.S. 205, 214 (2007). And although the statute and Federal Rule of Appellate Procedure 4(a)(5) allow for an extension of the time to appeal, "both the text and structure of Rule 4(a) and 28 U.S.C. § 2107 provide that if a losing party wants more time to file an appeal, it must file a motion in the district court asking for more time." *Martin v. Sullivan*, 876 F.3d 235, 237 (6th Cir. 2017) (per curiam). Martin did not file a formal motion for an extension in the district court, and the time to do so has expired. *See Fed. R. App. P. 4(a)(5)(A)(i)*.

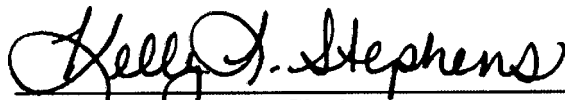
Nor can Martin's notice of appeal be construed as a motion for an extension. Pertinent to the timing of his notice of appeal, the notice states only that "[d]ue to the Order by this Court that was Received on October 9, 2024, The Plaintiff, Howard E. Martin III, hereby submit[s] his Notice of Appeal." R. 19, PageID 101. Martin's notice of appeal did not otherwise explain the circumstances of the receipt of the district court's order or why he could not have filed his notice earlier. *See Winters v. Taskila*, 88 F.4th 665, 670 (6th Cir. 2023) (explaining that a barebones notice of appeal will not serve as a motion for extension). Finally, we cannot construe Martin's response to the show-cause order as a motion for an extension. Because no extension or reopening of the time to appeal has been granted, Martin's notice of appeal is untimely.

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Martin's appeal is accordingly **DISMISSED** for lack of jurisdiction.

ENTERED BY ORDER OF THE COURT



Kelly L. Stephens, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Howard E. Martin, III

Plaintiff,

v.

Tim Shoop, Warden, *et al.*,

Defendants.

Case No: 2:23-cv-2358

Judge Graham

Magistrate Judge Gentry

Order

This matter is before the Court on the third objection of plaintiff Howard E. Martin, III, proceeding *pro se*, to the Court's May 13, 2024 Order adopting the Magistrate Judge's Report and Recommendation. Because plaintiff has no procedural right to object to the Order (as he did to the Report and Recommendation), the Court will construe his filing as a motion for reconsideration. A party moving to reconsider must show: "(1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice." *Leisure Caviar, LLC v. U.S. Fish & Wildlife Serv.*, 616 F.3d 612, 615 (6th Cir. 2010) (quotation omitted).

Plaintiff has once again failed to satisfy this standard. Plaintiff proffers a claim that his intellectual property was stolen by prison officials. In attempting to show a concrete injury, Plaintiff states that this intellectual property would have provided thousands of jobs to Ohio residents. Additionally, Plaintiff refers to his status as the statutory agent for "Top Level LLC" and argues that this qualifies as newly presented evidence. The Court finds all of Plaintiff's arguments to be unsupported and without merit. Aside from merely reciting them, Plaintiff does not articulate any facts supporting these claims. Once again, Plaintiff fails to present new information or show that an intervening change in controlling law merits reconsideration. Plaintiff also fails to show that a clear error or law is present or that reconsideration is necessary to prevent manifest injustice.

Accordingly, Plaintiff's third motion for reconsideration is **DENIED** (ECF No. 9). As the Sixth Circuit has recognized, the district court has the authority to impose reasonable and tailored limitations upon a litigant who has engaged in a pattern of repetitive and frivolous

filings. *Feathers v. Chevron U.S.A., Inc.*, 141 F.3d 264 (6th Cir. 1998); *see Filipas v. Lemons*, 835 F.2d 1145, 1146 (6th Cir. 1987). The Magistrate Judge issued a Report and Recommendation on January 29, 2024, which this Court adopted on February 23, 2024. Plaintiff has now filed three motions for reconsideration, all of which have failed to show a clear error of law, newly discovered evidence, an intervening change in controlling law, or a need to prevent manifest injustice. Since Plaintiff has continued to submit meritless and frivolous filings, the Clerk's office is instructed that it should no longer accept filings concerning the Court's Order (ECF No. 7) adopting the Magistrate's Report and Recommendation, other than a notice of appeal from Plaintiff. Any filings received should be returned to Plaintiff, along with a copy of this order.

IT IS SO ORDERED.

s/ James L. Graham
JAMES L. GRAHAM
United States District Judge

DATE: September 9, 2024

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

HOWARD E. MARTIN, III,	:	Case No. 2:23-cv-02358
	:	
Plaintiff,	:	
	:	
vs.	:	District Judge James L. Graham
	:	Magistrate Judge Caroline H. Gentry
	:	
TIM SHOOP, <i>et al.</i> ,	:	
	:	
Defendants.	:	

ORDER AND REPORT AND RECOMMENDATION

This matter is before the Court following Plaintiff's failure to pay the filing fee necessary to commence this action. Plaintiff filed an Application for Leave to Proceed *In Forma Pauperis* on August 16, 2023. (Doc. No. 3.) The undersigned Magistrate Judge recommended that the Application be denied. (Doc. No. 5.) On February 23, 2024, the District Judge denied that Application and ordered Plaintiff to pay the full \$402 filing fee within thirty days. (Doc. No. 7.) That deadline has now elapsed and Plaintiff has not paid the required filing fee.

District courts have the power to *sua sponte* dismiss civil actions for want of prosecution to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R.R.*, 370 U.S. 626, 630-31 (1962). *See also Jordan v. Jabe*, 951 F.2d 108, 109 (6th Cir. 1991). Though Plaintiff is proceeding *pro se*, the Supreme Court "[has] never suggested that procedural rules in ordinary civil litigation

should be interpreted so as to excuse mistakes by those who proceed without counsel.”

McNeil v. United States, 508 U.S. 106, 113 (1993).

In the instant case, the Court explicitly warned Plaintiff that failure to timely pay the full filing fee would result in the dismissal of this action. (Doc. No. 7, PageID 65.) Nevertheless, Plaintiff failed to comply with this Court’s Order. Accordingly, the undersigned Magistrate Judge **RECOMMENDS** that this matter be dismissed for failure to prosecute. *See, e.g.*, Fed. R. Civ. P. 41(b) (dismissal warranted when plaintiff fails to abide by Rules or to obey court order); *White v. Chambers-Smith*, 1:21-CV-00214, 2021 U.S. Dist. LEXIS 159487 (S.D. Ohio 2021) (Bowman, M.J.); *Jefferson v. Shaver*, 1:20-CV-00707, 2021 U.S. Dist. LEXIS 195853 (S.D. Ohio 2021) (Bowman, M.J.).

In addition, the undersigned’s review of this case has revealed a filing error. It appears that when Plaintiff submitted his Objections to Report and Recommendation for filing (Doc. No. 6), he included an Application to Proceed *In Forma Pauperis* in a separate case, No. 2:24-cv-00327. Due to clerical error, that Application was docketed in the instant case as part of Plaintiff’s Objections. Accordingly, the Clerk is **DIRECTED** to re-docket that filing, currently Doc. No. 6, PageID 51-62, in the appropriate case.

IT IS SO ORDERED AND RECOMMENDED.

/s/ Caroline H. Gentry
Caroline H. Gentry
United States Magistrate Judge

Procedure on Objections

If any party objects to this Report and Recommendation (Report), that party may, within fourteen (14) days of the date that this Report was filed, file and serve written objections to specific findings or recommendations along with supporting authority for the objection(s). Responses to objections are due ten days after objections are filed and replies by the objecting party are due seven days thereafter. A District Judge will then make a *de novo* determination of the portions of the report, findings, or recommendations to which objection is made. The District Judge may accept, reject, or modify, in whole or in part, this Court's findings or recommendations, may receive further evidence, or may recommit this matter to the Magistrate Judge with instructions. 28 U.S.C. § 636(b)(1).

The parties are advised that a failure to object to the Report will result in a waiver of a party's right (1) to have the District Judge review the Report *de novo* and (2) to appeal a decision of the District Court adopting the Report. *See Thomas v. Arn*, 474 U.S. 140 (1985); *U.S. v. Walters*, 638 F.2d 947 (6th Cir. 1981).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

HOWARD E. MARTIN, III,

Plaintiff,

v.

Case No. 2:23-cv-2358

Judge James L. Graham

Magistrate Judge Caroline H. Gentry

TIM SHOOP, WARDEN, et al.,

Defendants.

Order

This matter is before the Court to consider a Report and Recommendation (doc. 5) issued by Magistrate Judge Gentry on January 29, 2024. Plaintiff Howard E. Martin, III, an Ohio State inmate proceeding without the assistance of counsel, brings this action against numerous prison officials. Plaintiff attempts to bring this claim under 17 U.S.C. §106(b), alleging that prison officials revoked his “JPay tablet” which contained his personal intellectual property and “unreplaceable photographs.” Plaintiff also claims that his constitutional rights were violated because Defendants’ actions deprived him of his rights under the Fifth Amendment. Plaintiff’s complaint was not accompanied by the \$402.00 filing fee as he wishes to proceed *in forma pauperis*.

The Magistrate Judge found that Plaintiff’s right to proceed *in forma pauperis* was restricted under Section 804(d) of the Prison Litigation Reform Act (“PLRA”) of 1995, Pub. L. No. 104- 134, 110 Stat. 1321, amending 28 U.S.C. § 1915, also known as the “three strikes” rule. The Plaintiff was determined to be a “three striker” due to four prior lawsuits or appeals he filed that were ultimately dismissed as frivolous or for failure to state a claim pursuant to 28 U.S.C. § 1915(e). Due to the Plaintiff’s multiple strikes, he may not proceed *in forma pauperis* unless he falls within the statutory exception outlined in §1915(g). This exception states that prisoners who

are under imminent danger of serious physical injury may proceed *in forma pauperis* despite the number of “strikes.” Based on the facts provided, the Magistrate Judge found that Plaintiff failed to plausibly allege that he falls under the “imminent danger” exception and is not entitled to proceed *in forma pauperis*.

A. Standard of Review

If a party objects within the allotted time to a report and recommendation, the Court “shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made.” 28 U.S.C. § 636(b)(1); *see also* Fed. R. Civ. P. 72(b)(3). Upon review, the Court “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1).

B. Plaintiff’s Objections to Report and Recommendation

Plaintiff timely filed an objection to the Report and Recommendation. In his objection, Plaintiff asserts that some of his prior filings did not appear on the prison computer (doc. 6). Plaintiff also rejects the Magistrate Judge’s finding that he does not qualify under the imminent danger exception. He references several health incidents he has suffered from while incarcerated and asserts that prison officials failed to protect him during said occurrences. However, the alleged health incidents bear no relation to the subject matter of the complaint, which is the revocation of Plaintiff’s JPAY Tablet privileges. Aside from referencing unrelated incidents, Plaintiff fails to further address the merits of the Magistrate Judge’s findings that he is a “three striker” under §1915.

The Court agrees with the Magistrate Judge that the plaintiff may not proceed *in forma pauperis*. Plaintiff has accrued “three strikes” and fails to present a plausible case that he falls under the “imminent danger exception.”

C. Conclusion

The Court agrees with the Magistrate Judge's R&R (doc. 5) and **ADOPTS** the same. The Plaintiff's objection (doc. 6) is **OVERRULED**.

Plaintiff is advised that failure to pay the full \$402 filing fee within thirty days will result in the dismissal of this action. The Court certifies pursuant to 28 U.S.C. §1915(a)(3) that an appeal of this Order would not be taken in good faith.

It is so ORDERED.

s/ James L. Graham
JAMES L. GRAHAM
United States District Judge

DATE: February 23, 2024