ROOKS et al v. PROCTOR AND GAMBLE INC Doc. 6

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF GEORGIA**
**MACON DIVISION**

**JONATHAN J. ROOKS, *et al.*** :
:
**Plaintiffs,** :
**VS.** :
: **NO. 5:16-CV-553-CAR-MSH**
**PROCTOR AND GAMBLE, INC.,** :
:
**Defendant.** :
________________________________ :

# ORDER

*Pro se* Plaintiff Jonathan J. Rooks,[1] an inmate currently confined at the Jenkins Correction Center in Millen, Georgia, has filed a complaint under 42 U.S.C. § 1983. Plaintiff also seeks leave to proceed without prepayment of the filing fee or security therefor pursuant to 28 U.S.C. § 1915(a). For the following reasons, the Court **DISMISSES** Plaintiff's claims pursuant to 28 U.S.C. § 1915(e)(2)(B). The Court **GRANTS** Plaintiff's motion for leave to proceed *in forma pauperis* (ECF No. 2) for purposes of this dismissal only.

## I. Motion for Appointment of Counsel

Plaintiff has moved for the appointment of counsel (ECF No. 5). Under 28 U.S.C. § 1915(e)(1), the Court "may request an attorney to represent any person unable to afford counsel." There is, however, "no absolute constitutional right to the appointment of counsel" in a § 1983 lawsuit. *Poole v. Lambert*, 819 F.2d 1025, 1028 (11th Cir. 1987)

[1]Plaintiff also names as a Plaintiff in this case a business entity with which he is presumably affiliated, "Rabbi Entreprenurs [sic] of America LLC."

Dockets.Justia.com

(per curiam). Appointment of counsel is a privilege that is justified only by exceptional circumstances. *Lopez v. Reyes*, 692 F.2d 15, 17 (5th Cir. 1982). In deciding whether legal counsel should be provided, the Court considers, among other factors, the merits of Plaintiff's claims and the complexity of the issues presented. *Holt v. Ford*, 862 F.2d 850, 853 (11th Cir. 1989) (en banc).

In this case, the Court is required to review Plaintiff's Complaint to determine whether Plaintiff's allegations state a colorable legal claim. This process is routine in *pro se* prisoner actions and is thus not an "exceptional circumstance" justifying appointment of counsel. The facts as stated in Plaintiff's current Complaint are not complicated, and the law governing Plaintiff's claims is neither novel nor complex. Plaintiff's motion to appoint counsel (ECF No. 5) is accordingly **DENIED**.

## II. Preliminary Screening

Because Plaintiff is proceeding *in forma pauperis* in this case, the Court will conduct a preliminary screening of Plaintiff's Complaint in accordance with the provisions of 28 U.S.C. § 1915(e)(2)(B). Having now done so, the Court finds that Plaintiff has failed to state any colorable claim against the only named Defendant in this lawsuit, and this case should therefore be **DISMISSED without prejudice.**

### A. Standard of Review

When screening a complaint under 28 U.S.C. § 1915(e), the Court must accept all factual allegations in the complaint as true. *Hughes v. Lott*, 350 F.3d 1157, 1159-60 (11th Cir. 2003). *Pro se* pleadings, like the one in this case, are "held to a less stringent

standard than pleadings drafted by attorneys and will, therefore, be liberally construed." *Id.* Still, § 1915(e)(2)(B) requires a district court to dismiss the complaint of a party proceeding *in forma pauperis* whenever the court determines the complaint is frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks monetary damages from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B)(i)-(iii).

A claim is frivolous if it "lacks an arguable basis either in law or in fact." *Miller v. Donald*, 541 F.3d 1091, 1100 (11th Cir. 2008) (internal quotation marks omitted). The Court may dismiss claims that are based on "indisputably meritless legal" theories and "claims whose factual contentions are clearly baseless." *Id.* (internal quotation marks omitted). A complaint fails to state a claim if it does not include "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The factual allegations in a complaint "must be enough to raise a right to relief above the speculative level" and cannot "merely create[] a suspicion [of] a legally cognizable right of action." *Twombly*, 550 U.S. at 555 (first alteration in original). In other words, the complaint must allege enough facts "to raise a reasonable expectation that discovery will reveal evidence" supporting a claim. *Id.* at 556. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

To state a claim for relief under § 1983, a plaintiff must allege that (1) an act or omission deprived him of a right, privilege, or immunity secured by the Constitution or a

statute of the United States; and (2) the act or omission was committed by a person acting under color of state law. *Hale v. Tallapoosa County*, 50 F.3d 1579, 1582 (11th Cir. 1995). If a litigant cannot satisfy these requirements or fails to provide factual allegations in support of his claim or claims, the complaint is subject to dismissal. *See Chappell v. Rich*, 340 F.3d 1279, 1282-84 (11th Cir. 2003).

B. Factual Allegations and Plaintiff's Claims

According to the Complaint, Plaintiff is the "President/CEO/Inventor of Rabbi Entreprenurs [sic] of America, LLC." (Compl. 5, ECF No. 1.) Among Plaintiff's inventions is a design for a toothbrush system he calls the "R2K Diamondback Toothbrush Collection." *Id.* Plaintiff contends Defendant Proctor and Gamble "violated [his] constitutional rights when they illegally cloned [Plaintiff's] product" by creating a toothbrush called the "Oral B Deep Sweep brush." *Id.* Plaintiff contends the "Deep Sweep" product is a "direct replica" of Plaintiff's "R2K Diamondback single head toothbrush collection." *Id.* Plaintiff alleges his toothbrush collection had a patent pending in 2015 and that it has "been published and digital copyrighted." *Id.* Plaintiff asserts he and his company "have lost millions of dollars in revenue" due to the alleged infringement. *Id.* at 6.

To the extent Plaintiff contends Defendant is subject to § 1983 liability because its alleged actions have violated Plaintiff's constitutional rights, such claims must fail. Private conduct is not actionable under § 1983. To state a claim for relief under that statute, the alleged deprivation of a constitutional right must occur "under color of state law." *See Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1276-

77 (11th Cir. 2003). Defendant is a private company, and Plaintiff has alleged no facts that suggest Defendant acted under color of state law. Accordingly, Plaintiff has failed to state a § 1983 claim against Defendant, and any such claims must be **DISMISSED without prejudice.**

To the extent Plaintiff is attempting to raise a direct patent infringement claim, his claims are also subject to dismissal. (*See, e.g.,* Compl. 3 (contending this lawsuit is for "criminal & direct infringement").) Plaintiff does not actually allege that he *owns* a patent on his toothbrush system; instead, he alleges only that he has *applied* for a patent. *See id.* at 5, 7. "There is no claim for patent infringement unless a patent has issued." *Ogindo v. DeFleur*, No. 07-CV-1322, 2008 WL 5105157, at *1 (N.D.N.Y. Dec. 1, 2008); *see also GAF Bldg. Materials Corp. v. Elk Corp. of Dallas*, 90 F.3d 479, 482 (Fed. Cir. 1996) (holding there was no justiciable case or controversy where the patent had not issued before the case was filed); *Muskegon Piston Ring Co. v. Olsen*, 307 F.2d 85, 89 (6th Cir. 1962) (holding plaintiff "could have no right of action in federal court . . . for damages by virtue of his application for a patent until a patent was issued to him and no damages would accrue to him prior to the issuance of a patent"). Because Plaintiff has not alleged that the patent ever issued for his R2K toothbrush system, his claims for direct patent infringement are properly **DISMISSED without prejudice.** *See Ogindo*, 2008 WL 5105157, at *1 (finding patent infringement claim was properly dismissed where plaintiff had filed and received a provisional patent application but conceded that the patent had never been issued).

### III. Conclusion

For the foregoing reasons, and because the statute of limitations would not appear to bar their refiling, Plaintiff's claims as alleged in his Complaint must be **DISMISSED without prejudice**. Plaintiff's motion to appoint counsel (ECF No. 5) is **DENIED**, and Plaintiff's motion to proceed *in forma pauperis* (ECF No. 2) is **GRANTED** for purposes of this dismissal only.

**SO ORDERED**, this 4th day of April, 2017.

S/ C. Ashley Royal
C. ASHLEY ROYAL
UNITED STATES DISTRICT SENIOR JUDGE