

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

LEO E. STRINE, JR.
VICE CHANCELLOR

New Castle County Courthouse
Wilmington, Delaware 19801

Date Submitted: June 16, 2010

Date Decided: July 15, 2010

Robert Saunders
SBI# 052590
James T. Vaughn Correctional Center
1181 Paddock Road
Smyrna, DE 19977

Chad J. Toms, Esquire
Whiteford Taylor Preston LLC
1220 N. Market Street, Suite 608
Wilmington, DE 19801

Catherine C. Damavandi, Esquire
Delaware Department of Justice
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801

RE: Robert Saunders v. Carl Danberg, et al.
C. A. No. 4700-VCS

Dear Mr. Saunders, Ms. Damavandi, and Mr. Toms:

Robert Saunders brought this action on his own behalf alleging that he has received deficient medical care while incarcerated at the James T. Vaughn Correctional Center. Saunders alleges that orders from specialists that he was taken to see have been ignored, and follow-up appointments with those specialists were not scheduled.¹ As relief, he seeks preliminary and permanent injunctive relief against employees of both the

¹ In addition, Saunders asks that this court implement a policy requiring that prisoners housed in the "Security Housing Unit" be seen in a timely manner after making a sick call request, that all medical staff employed by the Correctional Medical Service wear name badges, that inmates with medical problems not be handcuffed behind their backs or secured with leg shackles, and that an inmate's medication be reordered before the medication runs out. Compl. at 3-5.

Department of Correction (the “DOC”) and its contractor, Correctional Medical Services (“the CMS Defendants”).²

Saunders was initially relieved of his obligation to pay filing fees and other costs in connection with his suit in this court on June 29, 2009 after filing an affidavit conforming to 10 *Del. C.* § 8802(b)³ and the supplemental certificate required of prisoners seeking to proceed in forma pauperis by 10 *Del. C.* § 8804(a).⁴ Under 10 *Del. C.* § 8804(f), a prisoner cannot maintain in forma pauperis status if:

[T]he prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or an appeal in a federal court or constitutional or statutory court of the State that was dismissed on the grounds that it was frivolous, malicious or failed to state a claim upon

² Compl. at 1-2.

³ See Application and Affidavit to Proceed In Forma Pauperis, C.A. No. 4700 (signed by Vice Chancellor Lamb, June 29, 2009). 10 *Del. C.* § 8802(b) provides:

Before an individual shall be permitted to proceed in forma pauperis for the purposes of this chapter, the individual must submit a sworn affidavit sufficient to allow the court to determine the ability of the affiant to pay all or any portion of the court costs and fees associated with the filing of an action in that court. Such affidavit shall contain a statement that the affiant is unable to pay the costs and fees, and shall provide complete information as to the affiant’s identity, the nature, source and amount of all of the affiant’s income, the affiant’s spouse’s income, all real and personal property owned either individually or jointly, all cash or bank accounts held either individually or jointly, any dependents of the affiant and all debts and monthly expenses. The affiant shall further swear or affirm that the information in the affidavit is true and correct and made under penalty of perjury.

⁴ 10 *Del. C.* § 8804(a) provides:

When the individual seeking permission to proceed in forma pauperis is a prisoner, the prisoner shall file a certified summary of the prisoner’s inmate account, together with the affidavit required pursuant to § 8802 of this title. The summary shall contain all account activity for the 6-month period immediately preceding the filing of the complaint, or for the entire time the prisoner has been incarcerated, whichever time is less.

which relief may be granted unless the prisoner is under imminent danger of serious physical injury at the time that the complaint is filed.⁵

In his in forma pauperis application, Saunders was asked to list any actions or appeals that he had brought in either federal court or Delaware state court while incarcerated, to which Saunders responded that he had only brought a single action in Superior Court.⁶ After his in forma pauperis status was granted, the CMS Defendants moved to dismiss, arguing, among other things, that Saunders did not, in fact, qualify for in forma pauperis status and that his complaint should be dismissed for lack of subject matter jurisdiction, failure to state a claim, res judicata, and improper service of process.⁷ I have considered the CMS Defendants' argument that Saunders does not qualify for in forma pauperis status, and find it meritorious.

The CMS Defendants point out that, while incarcerated, Saunders has filed no less than 25 actions in federal court — 23 in the United States District Court for the District of Delaware (the “District Court”), and 2 in the United States District Court for the Eastern District of Pennsylvania — plus taken 22 appeals of those actions, and has filed at least five actions in the courts of this state.⁸ This is a tad more than the one action he referenced in his application for in forma pauperis relief. That is, this court granted

⁵ 10 *Del. C.* § 8804(f).

⁶ Application and Affidavit to Proceed In Forma Pauperis, C.A. No. 4700, at 4.

⁷ See CMS Defs.' Motion to Dismiss Brief.

⁸ CMS Defs.' Motion to Dismiss Brief at 3.

Saunders' in forma pauperis status based on a false affidavit, and Saunders has not denied the CMS Defendants' claim that he is well beyond the three-suit limit in § 8804(f).

In a 2005 District Court action (the "Federal Action"), Saunders' in forma pauperis status was revoked because he had filed at least eight frivolous actions.⁹ The United States Court of Appeals for the Third Circuit affirmed that ruling in substance, finding that Saunders had reached the federal three-strike limit¹⁰ on filing frivolous actions, and was no longer entitled to in forma pauperis status.¹¹ In § 8804(f) of our Title 10, Delaware's General Assembly enacted a provision similar to the federal statute on this subject.¹² Because Saunders has filed three or more civil actions or appeals "in a federal court or constitutional or statutory court of th[is] State" that were dismissed frivolous or meritless, he has exhausted his ability to claim in forma pauperis status under § 8804(f), and this status must be revoked.¹³

Upon evaluating whether a litigant is entitled to in forma pauperis status, 10 *Del. C.* § 8803(b) requires that the court also conduct a review of the litigant's complaint, and

⁹ *Id.* Ex. D (*Shamisdin Ali, aka Robert Saunders v. Howard et al.*, C.A. No. 05-102-KAJ (D. Del. Apr. 12, 2005)).

¹⁰ 28 U.S.C. § 1915(g) (prohibiting a prisoner from bringing a new civil action or appeal of a judgment in a civil action if the prisoner has three times or more, while incarcerated, brought a civil action or appeal in federal court that was dismissed as frivolous, malicious, or that failed to state a claim).

¹¹ CMS Defs.' Motion to Dismiss Brief Ex. G (*Shamsidin Ali, aka Robert Saunders v. Howard et al.*, C.A. No. 09-1654 (3d Cir. Oct. 29, 2009)) at 3.

¹² 10 *Del. C.* § 8804(f).

¹³ *Id.*

dismiss the complaint if it is found to be frivolous or malicious. Section § 8803(b) provides that:

Upon establishing the amount of fees and costs to be paid, the court shall review the complaint. Upon such review, the complaint shall be dismissed if the court finds the action is factually frivolous, malicious or, upon a court's finding that the action is legally frivolous and that even a pro se litigant, acting with due diligence, should have found well settled law disposing of the issue(s) raised.¹⁴

A complaint is malicious for purposes of § 8803(b) if it “realleges pending or previously litigated claims.”¹⁵ That is, § 8803(b) prevents a litigant seeking in forma pauperis status from proceeding on a claim that he has already asserted in another court.

Because Saunders filed a false affidavit, he also compromised the review process required by § 8803(b) by failing to identify relevant pending litigation. Now that the court has been made aware that Saunders has, in fact, exceeded the three-strike limit on filing frivolous claims, and has determined that Saunders cannot proceed in forma pauperis, the court must also re-evaluate Saunders’ complaint under § 8803(b).

After doing so, I find that Saunders brought claims arising from the same core facts raised here in an earlier case and, therefore, § 8803(b) mandates that this case be dismissed. As the CMS Defendants point out in their motion to dismiss, in the same Federal Action that revoked Saunders’ in forma pauperis status, Saunders raised claims pursuant to 42 U.S.C. § 1983 against both CMS and employees of the DOC and the

¹⁴ *Id.* § 8803(b).

¹⁵ *Id.* § 8801(7).

Vaughn Correctional Center. Those claims alleged, among other things, that Saunders was dissatisfied with his cancelled follow-up appointments with specialists, with his medications, and with the sick call process.¹⁶ The claims raised in this action largely rehash the substance of those Federal Action claims, but add more recent information about the defendants' alleged continued failure to provide proper medical care and to take Saunders to follow-up visits with specialists.¹⁷ That is, this case simply alleges more facts in a pattern of ongoing so-called abuse by CMS and the DOC.

In fact, some of Saunders' allegations in this action occurred *before* Magistrate Judge Stark's September 30, 2008 Report and Recommendation, and could have been raised by Saunders in the Federal Action by amending his complaint.¹⁸ But, instead of moving to amend his complaint, or moving the District Court for reconsideration of its

¹⁶ See CMS Defs.' Motion to Dismiss Brief Ex. C (*Shamsidin Ali, aka Robert Saunders v. Howard et al.*, Civ. No. 05-102-SLR-LPS, Report and Recommendation of Magistrate Judge Leonard P. Stark (Sep. 30, 2008)) ("Report and Recommendation") at 17-21.

¹⁷ Compl. at 3-5. For example, Saunders alleged in the Federal Action that he was not given sufficient care for a skin condition, but acknowledged that he was taken to a dermatologist for that condition and given creams to treat it. See Report and Recommendation at 17-18. His claim in this court picks up where the Federal Action claim left off, alleging that he was not taken back to the dermatologist, and that the creams he was given did not work. Compl. at 3.

¹⁸ Saunders' complaint in this action alleges that he was not taken for a follow-up appointment with a urologist on June 2008, and that his sick call requests had been mishandled from September 2008 onward. Compl. at 3, 5. Saunders had amended his complaint once in the Federal Action. See CMS Defs.' Motion to Dismiss Brief Ex. F (Docket For *Shamsidin Ali, aka Robert Saunders v. Howard et al.*, Civ. No. 05-102-SLR/LPS (D. Del.)) at Docket Entry 19. Thus, he could have moved for leave of court pursuant to Federal Rule of Civil Procedure 15(a)(2) to add these allegations prior to the filing of the Report and Recommendation.

February 24, 2009 Order¹⁹ adopting the Report and Recommendation and dismissing Saunders' complaint,²⁰ he appealed the District Court's Order, and filed this action on June 14, 2009 while his appeal of the Federal Action was still pending. The decision on the appeal in the Federal Action did not issue until October 29, 2009, after this case was filed.²¹ Thus, all of the behavior Saunders challenges in this action therefore took place while he was actively litigating about the same course of conduct in the pending federal litigation. Saunders should have moved to reopen the federal judgment and to amend his complaint in the pending federal action and not burden another court with an overlapping case.

Previous decisions from this court support this conclusion. In *Tillmon v. Snyder*, this court rejected a pro se litigant's attempt to distinguish claims filed in this court from claims in an earlier-filed federal action by arguing that his Court of Chancery claims

¹⁹ CMS Defs.' Motion to Dismiss Brief Ex. E (*Shamsidin Ali, aka Robert Saunders v. Howard et al.*, Civ. No. 05-102-SLR/LPS (D. Del. Feb. 24, 2009)).

²⁰ Under Federal Rule of Civil Procedure 59(e), a party may move for reconsideration of a judgment to correct manifest errors of law or fact, or to present newly discovered evidence. *See* Fed. R. Civ. P. 59(e). Similarly, Federal Rule of Civil Procedure 60(b) permits a party to move for relief from a final judgment for reasons including "newly discovered evidence." Fed. R. Civ. P. 60(b). If Saunders had successfully reopened the District Court's judgment under Rule 59(e) or Rule 60(b), he could have thereafter moved to amend his complaint under Federal Rule of Procedure 15. *See Walsh v. Quinn*, 327 Fed. Appx. 353, 356 (3d Cir. 2009) (discussing that a party may move for leave to amend under Federal Rule of Civil Procedure 15 after a final judgment is reopened under Federal Rules of Civil Procedure 59 or 60). But, instead of pursuing these avenues in a case that was already underway, Saunders chose to bring an entirely new action in this court.

²¹ CMS Defs.' Motion to Dismiss Brief Ex. G (*Shamsidin Ali, aka Robert Saunders v. Howard et al.*, C.A. No. 09-1654 (3d Cir. Oct. 29, 2009)).

arose from with events arising later than those alleged in the federal case.²² The court found that “the nature of the claims alleged in the two cases is virtually the same,” and that, because the plaintiff had re-filed previously litigated claims instead of pursuing remedies in federal court, dismissal of the complaint was required under § 8803(b).²³ Similarly, in *Abraham v. Delaware Department of Correction*, this court rejected a litigant’s request to file a petition raising claims that alleged a pattern of abuse that had already been raised in several federal cases.²⁴ The court held that “[all] of [the plaintiffs’] related claims should proceed together in the federal courts and . . . [be] addressed through the appellate processes available in that system.”²⁵

The circumstances in this case are similar, and warrant the same result. Saunders brings claims concerning the same course of abuse that formed the basis of the Federal Action. He filed his claims in this court while his appeal of the Federal Action was still pending, falling within the definition of “malicious” in § 8801(7).²⁶ Thus, § 8803(b) mandates that this court defer to the federal courts in which Saunders initially chose to bring his claims.²⁷

²² 2001 WL 312470, at *1 n.1 (Del. Ch. Mar. 27, 2001).

²³ *Id.* at *1-2.

²⁴ *Abraham v. Dept. of Corr. et al.*, 2009 WL 2620287, at *3 (Del. Ch. Aug. 13, 2009).

²⁵ *Id.*

²⁶ 10 *Del. C.* § 8801(7).

²⁷ *Id.* § 8803(b).

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For these reasons, Saunders' in forma pauperis status is revoked, and his claims in this action are dismissed. All scheduled proceedings in this action are therefore cancelled. IT IS SO ORDERED.

Very truly yours,

/s/ Leo E. Strine, Jr.

Vice Chancellor