

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

ALTON CANNON,)
) C.A. No. 02C-09-047 JTV
 Plaintiff,)
)
 v.)
)
 GEORGE COVENTRY,)
)
 Defendant.)

Submitted: December 10, 2002

Decided: March 6, 2003

Alton Cannon, *Pro se.*

Department of Justice, Dover, Delaware. Attorney for Defendant.

*Upon Consideration of Defendant's Civil Complaint
and Motion to Proceed In Forma Pauperis*

DENIED In Part
GRANTED In Part

VAUGHN, Resident Judge

ORDER

Upon consideration of plaintiff's civil complaint, Motion to Proceed *In Forma Pauperis*, and the record in this case, it appears:

1. The plaintiff filed a civil complaint and Motion to Proceed *In Forma*

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Pauperis with the Court on September 30, 2002.

2. In the complaint, the plaintiff alleged that on one occasion, October 17, 2000, the defendant refused to allow him to enter the “chowhall” and receive a food tray. The plaintiff is seeking compensatory and punitive damages totaling \$5,000 and has asked the Court to enter a declaratory judgment finding that the defendant’s actions violated plaintiff’s rights.

3. The matter was referred to the Court Commissioner Andrea M. Freud for proposed findings of fact and conclusion of law pursuant to Superior Court Civil Rule 132(4).

4. The plaintiff filed a Motion to Proceed *In Forma Pauperis* and attached paperwork which established the fact that he was indigent. The Commissioner recommended that the Motion to Proceed *In Forma Pauperis* be granted. With regard to the complaint, the plaintiff failed to provide justification or facts to support his claim for damages. The Commissioner recommended that the Court dismiss the petition as legally frivolous.

5. A copy of the Commissioner’s report dated November 27, 2002 is attached hereto. The defendant failed to file an Appeal from the Commissioner’s Report and Recommendation.

NOW, THEREFORE, IT IS ORDERED that:

- a. Having conducted a *de novo* review of the proceedings I adopt the well-reasoned Commissioner’s Report and Recommendation;
- b. The defendant’s Motion to Proceed *In Forma Pauperis* is ***granted*** and the

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civil compliant is *dismissed*.

Resident Judge

oc: Prothonotary
cc: Hon. Andrea M. Freud
Department of Justice
Mr. Alton Cannon
File

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IN AND FOR KENT COUNTY

ALTON CANNON,)	
)	C.A. No. 02C-09-047 JTV
Plaintiff,)	
)	
)	
)	
GEORGE COVENTRY,)	
)	
Defendant.)	

COMMISSIONER’S REPORT AND RECOMMENDATION

**Upon Plaintiff’s Civil Complaint and
Motion to Proceed In Forma Pauperis**

FREUD, Commissioner
November 27, 2002

Plaintiff, Alton Cannon ("Cannon") has filed this civil complaint seeking compensatory and punitive damages stemming from Defendant’s alleged refusal to provide Cannon with a food tray in the “chow line” on one occasion. He also has filed a motion to proceed in forma pauperis. The Court has referred this matter to the Commissioner pursuant to 10 *Del. C.* § 512(b), and this constitutes my proposed findings of fact and recommendations on the motion to proceed in forma pauperis and on a review of the complaint pursuant to 10 *Del. C.* § 8803.

PROCEDURAL DISCUSSION

In 1996, legislation regarding in forma pauperis proceedings was enacted; that legislation is located in 10 *Del. C.*, ch. 88.¹ The legislation clearly mandates what a petitioner must file in connection with a motion to proceed in forma pauperis: a sworn affidavit addressing his or her ability to pay court costs and filing fees and complete information as to his or her income.² If a petitioner is an inmate, then he or she must provide additional information: a certified summary of the petitioner's inmate account which contains "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."³ If a petitioner provides the threshold information, then the

¹ 10 *Del. Laws*, c. 411.

² 10 *Del. C.* § 8802(b). In 10 Del. C. § 8802(b), it is provided:

(b) 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.

³ 10 *Del. C.* § 8804(a). In 10 Del. C. § 8804(a), it is provided:

(a) When the individual seeking permission to proceed in forma pauperis is a
(continued...)

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Court determines whether it should grant the motion to proceed in forma pauperis.⁴

If it does grant the motion, then the Court reviews the complaint to determine whether it is factually frivolous, malicious, or legally frivolous.⁵ As explained in *Smith v. C.M.S. Medical System*.⁶

This initial review is to determine whether service of process will issue or the complaint will be dismissed as factually frivolous, malicious or legally frivolous. All well-pled matters are accepted as true to determine

³(...continued)

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.

⁴ 10 *Del. C.* § 8802(b).

⁵ 10 *Del. C.* § 8803(a), (b). In 10 *Del. C.* § 8803(a) and (b), it is provided:

(a) In all cases in which a court has granted an individual leave to proceed in forma pauperis, the court shall issue an order authorizing the filing of the complaint and establishing the amount of court costs and filing fees to be paid. The court may, in its discretion, establish a schedule for the payment of the costs and fees.

(b) 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. Any order of dismissal shall specifically identify whether the complaint was factually frivolous, legally frivolous and/or malicious. Service of process shall not issue unless and until the court grants leave following its review.

⁶ *Del. Super.*, C.A. No. 98-02-248, Herlihy, J. (March 9, 1998) at 1:

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whether ... [petitioner] can recover under any conceivable set of circumstances susceptible of proof under the complaint.

If a complaint fails to state a claim upon which relief may be granted, then it is deemed legally frivolous.⁷ If the Court determines the complaint is faulty because it is legally frivolous, malicious or factually frivolous, then the Court dismisses it.⁸ If not, it allows service of process to issue.⁹ In certain situations, the Court may dismiss the complaint as to some defendants but allow it to proceed against other defendants.¹⁰

REGARDING MOTION TO PROCEED IN Forma pauperis

On September 30, 2002, Cannon filed the complaint in this matter. He filed a motion to proceed in forma pauperis on the same date. The motion to proceed in forma pauperis includes the necessary documentation: a sworn affidavit as 10 *Del. C.* § 8802 requires and an inmate account summary. The documents establish that petitioner is indigent. Consequently, I recommend that the Court grant the motion to proceed in forma pauperis.

CONCERNING REVIEW OF THE COMPLAINT

⁷ See *Gibbs v. Hewes*, Del. Super., C.A. No. 98C-03-294, Del Pesco, J. (April 16, 1998).

⁸ 10 *Del. C.* § 8803.

⁹ *Id.* Allowing the complaint to proceed does not preclude a subsequent determination of the issue of whether the complaint should be dismissed on the grounds it is factually frivolous or malicious or the action is legally frivolous. 10 *Del. C.* § 8803(c).

¹⁰ See *Smith v. New Castle County Police Department*, Del. Super., C.A. No. 99C-03-177, Herlihy, J. (March 23, 1999).

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If the Court grants the motion to proceed in forma pauperis, then the Court will need to review the petition.¹¹ Cannon alleges that the defendant did not give him a food tray while he was in the “chow line” on or about October 17, 2000. Cannon seeks compensatory damages in the amount of \$2,500.00 and punitive damages in an equal amount. Cannon also asks this Court to enter a declaratory judgement that “the actions or omissions by defendant violated plaintiffs rights”. Cannon provides no justification or facts supporting his damage claims. If this type of claim does not fall under the definition of a “legally frivolous” claim, I do not see how any claim could meet the definition. Cannon has alleged no specific damages and his claim is clearly frivolous. Thus, I recommend that the Court dismiss the petition as legally frivolous.

Commissioner Andrea M. Freud

oc: Prothonotary
xc: Hon. James T. Vaughn, Jr.
Alton Cannon-DCC

¹¹ 10 *Del. C.* § 8803(b).

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George Coventry
Department of Justice
Notebook