

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

JAMES ARTHUR BIGGINS,
Plaintiff,
v.
E. STEPHEN CALLAWAY, ESQ.,
A. DEAN BETTS, JR., ESQ.,
ROSEMARY BEAUREGARD, ESQ.,
and JOHN G. RUSSELL, ESQ.,
Defendants.

: C.A. No. 01C-08-026
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DECISIONS ON MOTION TO PROCEED IN FORMA PAUPERIS
AND UPON REVIEW OF COMPLAINT

DATE SUBMITTED: September 4, 2001

DATE DECIDED: October 30, 2001

James A. Biggins, DCC, 1181 Paddock Road, P.O. Box 500,
Smyrna, DE 19977

Bradley, J.

Plaintiff James Arthur Biggins ("plaintiff") has filed with this Court a complaint alleging legal malpractice against E. Stephen Callaway, Esquire; Dean Betts, Jr., Esquire; Rosemary Beauregard Esquire and John G. Russell, Esquire ("defendants"). Plaintiff also has filed with this Court a motion to proceed in forma pauperis. This is my decision in the matter.

PROCEDURAL DISCUSSION

In 10 Del. C., ch. 88. 10 Del. Laws, c. 411, the legislature has mandated that a plaintiff 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. 10 Del. C. § 8802(b).¹ If a plaintiff is an inmate, then he or she must provide a certified summary of the plaintiff's inmate account which contains "all account activity for the 6-month period immediately preceding the filing of the petition, or for the entire time the prisoner has

¹In 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.

been incarcerated, whichever time is less." 10 Del. C. § 8804(a).² If a plaintiff provides the threshold information, then the Court determines whether it should grant the motion to proceed in forma pauperis. 10 Del. C. § 8802(b).

If it does grant the motion, then the Court reviews the complaint to determine whether it is factually frivolous, malicious, or legally frivolous. 10 Del. C. § 8803(a), (b).³ As explained in *Smith v. C.M.S. Medical System*, Del. Super., C.A. No. 98-02-248, Herlihy, J. (March 9, 1998) at 1:

²In 10 Del. C. § 8804(a), it is provided:

(a) 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.

³In 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.

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

If a complaint fails to state a claim upon which relief may be granted, then it is deemed legally frivolous. See Gibbs v. Hewes, Del. Super., C.A. No. 98C-03-294, Del Pesco, J. (April 16, 1998). If the Court determines the complaint is faulty because it is legally frivolous, malicious or factually frivolous, then the Court dismisses it. 10 Del. C. § 8803. If not, it allows service of process to issue. Id. ⁴ And, in certain situations, the Court may dismiss the complaint as to some defendants but allow it to proceed against other defendants. See Smith v. New Castle County Police Department, Del. Super., C.A. No. 99C-03-177, Herlihy, J. (March 23, 1999).

DISCUSSION REGARDING MOTION TO PROCEED IN FORMA PAUPERIS

Plaintiff has provided the statutorily required information and that information shows he is indigent. However, I now must review the complaint to determine whether it is legally or factually frivolous.

DISCUSSION REGARDING REVIEW OF THE COMPLAINT

Plaintiff alleges the following in the complaint.

E. Stephen Callaway, Esquire ("Callaway") represented

⁴Allowing 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).

plaintiff in a criminal matter.⁵ Callaway failed to respond to plaintiff's letters, only met with him three times before trial, did not investigate the case or request funds for an experienced DNA expert, did not follow leads and did not subpoena witnesses for the defense and others.

Plaintiff was convicted. Callaway represented him on appeal. Contrary to plaintiff's request, Callaway filed a motion pursuant to Supreme Court Rule 26(d)(iii). The Supreme Court dismissed Callaway's brief as unacceptable and ordered him replaced by Rosemary Beauregard, Esquire ("Beauregard").

As a result of the defendant's performance, the defendant was totally ineffective as pretrial, trial and first appeal counsel. Because of the deficiencies that can not be characterized as a product of strategic judgment, the defendant [sic] performance and conduct falls short of any and all objective reasonableness. [Emphasis in original.]

After Beauregard became counsel, she and John Russell, Esquire ("Russell") met with plaintiff, but then did not keep in contact with him on their efforts or follow up on any of plaintiff's information or requests, despite the fact that "there was plenty to raise with valid merits."

Thereafter, Beauregard was allowed to withdraw as counsel and A. Dean Betts, Jr., Esquire ("Betts") was substituted as appellate counsel. Betts never met with plaintiff and has sent him only one letter. That letter informed him that Russell was in charge of perfecting his appellate review. Russell raised only one issue.

⁵This Court takes judicial notice of the fact that the criminal matter is State v. Biggins, Def. ID# 9609015504.

[Appellate Counsels' performances] did not afford the plaintiff any advocacy to comport to the Sixth Amendment, in so much that the lack [sic] any appeal strategy lead [sic] to an affirmation of conviction, that could have been different if any one of them had investigated the plaintiff's issues in this case to have provided him with the minimal competent professional representation.

Callaway, Beauregard, and Betts are entitled to qualified immunity as set forth in 10 Del. C. § 4001.⁶ Callaway is entitled

⁶In 10 Del. C. § 4001, it is provided in pertinent part:

Except as otherwise provided by the Constitutions or laws of the United States or of the State, as the same may expressly require or be interpreted as requiring by a court of competent jurisdiction, no claim or cause of action shall arise, and no judgment, damages, penalties, costs or other money entitlement shall be awarded or assessed against the State or any public officer or employee, including the members of any board, commission, conservation district or agency of the State, whether elected or appointed, and whether now or previously serving as such, in any civil suit or proceeding at law or in equity, or before any administrative tribunal, where the following elements are present:

(1) The act or omission complained of arose out of and in connection with the performance of an official duty requiring a determination of policy, the interpretation or enforcement of statutes, rules or regulations, the granting or withholding of publicly created or regulated entitlement or privilege or any other official duty involving the exercise of discretion on the part of the public officer, employee or member, or anyone over whom the public officer, employee or member shall have supervisory authority;

(2) The act or omission complained of was done in good faith and in the belief that the public interest would best be served thereby; and

(3) The act or omission complained of was done without gross or wanton negligence;

... provided further that in any civil action or proceeding against the State or a public officer, employee or member of the State, the plaintiff shall have the burden of proving the absence of 1 or more of the elements of immunity as set forth in this section.

to the qualified immunity as a public defender. *Vick v. Haller*, Del. Super., 512 A.2d 249, 251, 252 (1986), *aff'd*, Del. Supr., 514 A.2d 782 (1986). *Beauregard and Betts* are entitled to qualified immunity as contract counsel. *Browne v. Robb*, Del. Supr., 583 A.2d 949 (1990). This means that they "have qualified immunity from liability in any civil suit or proceeding; that is, they are immune if the three criteria enumerated in ... [10 Del. C. § 4001] are satisfied." *Vick v. Haller*, 512 A.2d at 251. These three criteria include that the act or omission complained of (1) arose out of or in connection with official duties involving the exercise of discretion; (2) was done in good faith and in the belief that the public interest would best be served thereby; or (3) was done without gross or wanton negligence. Id.

Due to the burden on a plaintiff to prove the absence of one or more of the criteria, a plaintiff must allege in his complaint specific circumstances that would support the absence of one or more of these three criteria. Id. at 252. Plaintiff, with due diligence, could have located this law.

Where the complaint fails to allege specific circumstances which would support the absence of one or more of these three criteria, then this complaint must be dismissed as failing to state a cause of action. *Evans v. Perillo*, Del. Supr., 766 A.2d 956 (2001); *Browne v. Robb*, 583 A.2d at 952-53; *Proctor v. Sullivan*, Del. Supr., No. 241, 2000, *Veasey*, C.J. (October 18, 2001) at 3; *Brown v. Weiler*, Del. Super., C.A. No. 97C-10-214, *Del Pesco*, J. (December 2, 1997), app. dismiss., Del. Supr., 719 A.2d 489 (1998);

Trader v. Streett, Del. Super., C.A. No. 97C-03-010, Quillen, J. (April 2, 1997); Abdul-Akbar v. Figliola, Del. Super., C.A. No. 88C-NO-110-1-CV, Del Pesco, J. (May 18, 1990), aff'd, Del. Supr., 584 A.2d 1228 (1990); Folks v. Baumeister, Del. Super., C.A. No. 85C-FE-46, Stiftel, J. (July 27, 1987). In this case, plaintiff has failed to allege, generally, the absence of one or more of these three criteria and in particular, he has failed to allege specific circumstances that would support the absence of one or more of these three criteria, which failure also requires dismissal of the complaint. Thus, the complaint must be dismissed as to Callaway, Beauregard and Betts.

Because Russell was not a member of the public defender's office and nothing in the record shows that he was a contract attorney, the Court cannot find that he was entitled to any immunity. However, the claim is for malpractice, but the complaint does not state the circumstances constituting negligence with particularity as Superior Court Civil Rule 9(b) requires.⁷ Consequently, the complaint against Russell fails.

For the foregoing reasons, I dismiss the complaint as legally frivolous.

IT IS SO ORDERED.

⁷In Superior Court Civil Rule 9(b), it is stated in pertinent part:

In all averments of ... negligence ..., the circumstances constituting ... negligence ... shall be stated with particularity.