

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION**

NEIL D. SWEIGART
#2145-09

PLAINTIFF

V.

4:09CV00401 BSM/HDY

M. BROWN

DEFENDANT

PROPOSED FINDINGS AND RECOMMENDATIONS

INSTRUCTIONS

The following recommended disposition has been sent to United States District Judge Brian S. Miller. Any party may serve and file written objections to this recommendation. Objections should be specific and should include the factual or legal basis for the objection. If the objection is to a factual finding, specifically identify that finding and the evidence that supports your objection. An original and one copy of your objections must be received in the office of the United States District Court Clerk no later than eleven (11) days from the date of the findings and recommendations. The copy will be furnished to the opposing party. Failure to file timely objections may result in waiver of the right to appeal questions of fact.

If you are objecting to the recommendation and also desire to submit new, different, or additional evidence, and to have a hearing for this purpose before the District Judge, you must, at the same time that you file your written objections, include the following:

1. Why the record made before the Magistrate Judge is inadequate.
2. Why the evidence proffered at the hearing before the District Judge (if such a hearing is granted) was not offered at the hearing before the Magistrate Judge.

3. The detail of any testimony desired to be introduced at the hearing before the District Judge in the form of an offer of proof, and a copy, or the original, of any documentary or other non-testimonial evidence desired to be introduced at the hearing before the District Judge.

From this submission, the District Judge will determine the necessity for an additional evidentiary hearing, either before the Magistrate Judge or before the District Judge.

Mail your objections and "Statement of Necessity" to:

Clerk, United States District Court
Eastern District of Arkansas
600 West Capitol Avenue, Suite A149
Little Rock, AR 72201-3325

DISPOSITION

On May 27, 2009, Plaintiff filed a *pro se* complaint (docket entry #2), pursuant to 42 U.S.C. § 1983. However, the \$350.00 filing fee was not paid, and Plaintiff filed an incomplete application for leave to proceed *in forma pauperis* (docket entry #1).¹ Additionally, Plaintiff's complaint was too vague to determine if he had stated a claim for relief. Accordingly, on June 3, 2009, Plaintiff was ordered to file an amended complaint, and to pay the full filing fee, or to file a completed application for leave to proceed *in forma pauperis* (docket entry #3). The order warned Plaintiff that his failure to do so within 30 days would result in the recommended dismissal of his complaint.

Plaintiff filed another incomplete application for leave to proceed *in forma pauperis* on June 15, 2009 (docket entry #5). On July 10, 2009, the Court entered an order granting Plaintiff an additional 11 days to file the filing fee, or a completed calculation sheet and certificate, along with his amended complaint, and again warned Plaintiff that his failure to comply would result in the

¹Plaintiff's application did not contain a trust fund calculation sheet or a certificate signed by an authorized official.

recommended dismissal of his complaint (docket entry #6).

More than 11 days has now passed since that order, and Plaintiff has not filed a completed calculation sheet or certificate, nor has he complied in any manner with the order of June 3, 2009, regarding the filing of an amended complaint. Under these circumstances, the Court concludes that Plaintiff's complaint should be dismissed without prejudice for failure to comply with Local Rule 5.5(c)(2), and for failure to respond to the Court's order. *See Miller v. Benson*, 51 F.3d 166, 168 (8th Cir. 1995) (District courts have inherent power to dismiss *sua sponte* a case for failure to prosecute, and exercise of that power is reviewed for abuse of discretion).

IT IS THEREFORE RECOMMENDED THAT:

1. Plaintiff's complaint be DISMISSED WITHOUT PREJUDICE for failure to comply with Local Rule 5.5(c)(2), and for failure to respond to the Court's order.
2. The Court certify that an *in forma pauperis* appeal taken from the order and judgment dismissing this action is considered frivolous and not in good faith.

DATED this 28 day of July, 2009.



UNITED STATES MAGISTRATE JUDGE