

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

RANDELL WARREN *et al.*

PLAINTIFFS

V.

NO: 4:09CV00722 GTE/HDY

KARL BYRD *et al.*

DEFENDANTS

PROPOSED FINDINGS AND RECOMMENDATIONS

INSTRUCTIONS

The following recommended disposition has been sent to United States District Judge G. Thomas Eisele. 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

Plaintiffs Randell Warren and Sylvester Mitchell filed this complaint on September 9, 2009. Neither Plaintiff paid the filing fee, and only Warren filed an application for leave to proceed *in forma pauperis*. Warren’s application was granted, and Mitchell was directed to either pay the full filing fee, or to file an application for leave to proceed *in forma pauperis*. Additionally, on September 11, 2009, both Plaintiffs were ordered to file amended complaints (docket entry #3). That order warned Plaintiffs that their failure to file an amended complaint as ordered would result in the recommended dismissal of their claims. On October 22, 2009, the Court entered an order granting Warren’s motion for an extension of time to file his amended complaint, and directed him to file his amended complaint within 30 days (docket entry #8). More than 30 days has passed since the entry of that order, and Warren has not filed an amended complaint, or otherwise responded. Mitchell has failed to respond in any manner to the order entered on September 11, 2009, directing him to file an amended complaint, and either the filing fee or an application for leave to proceed *in forma pauperis*. Mail sent to each Plaintiff has been returned as undeliverable (docket entries #10 & #11). Under

these circumstances, the Court concludes that Plaintiffs' complaint should be dismissed without prejudice for failure to comply with Local Rule 5.5(c)(2), and for failure respond to the Court's orders. *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. Plaintiffs' 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 orders.
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 25 day of November, 2009.


UNITED STATES MAGISTRATE JUDGE