

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

DARIAN DEWIGHT GARLAND *et al.*

PLAINTIFFS

V.

NO: 4:09CV00852 JLH/HDY

KARL BYRD *et al.*

DEFENDANTS

PROPOSED FINDINGS AND RECOMMENDATIONS

INSTRUCTIONS

The following recommended disposition has been sent to United States District Judge J. Leon Holmes. 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 fourteen (14) 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 Darian Dewight Garland and David Dewayne Garland filed this complaint on November 9, 2009. Neither Plaintiff paid the filing fee, or filed an application for leave to proceed *in forma pauperis*. Accordingly, on November 12, 2009, Plaintiffs were ordered to each submit either the \$350.00 filing fee, or an application for leave to proceed *in forma pauperis* (docket entry #2). Plaintiffs were warned that their failure to do so within 30 days would result in the recommended dismissal of their claims. More than 30 days has passed since the entry of that order, and neither Plaintiff has paid the filing fee, filed an application for leave to proceed *in forma pauperis*, or otherwise responded to the order. Mail sent to each Plaintiff has been returned as undeliverable (docket entries #4-#7). 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 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. 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 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 17 day of December, 2009.



UNITED STATES MAGISTRATE JUDGE