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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KELVIN ALLEN,

Plaintiff,

v.

MEYER, et al.,

Defendants.

CASE NO. 1:09-cv-00729-GBC (PC)

ORDER FINDING THAT PLAINTIFF IS
ENTITLED TO PROCEED IN FORMA
PAUPERIS ON APPEAL FILED JULY 15,
2011

(ECF No. 40)

ORDER DIRECTING CLERK'S OFFICE TO
SERVE COPY OF ORDER ON NINTH
/ CIRCUIT

ORDER

Kelvin Allen ("Plaintiff") is a state prisoner and proceeded pro se and in forma pauperis in this civil rights action filed pursuant to 42 U.S.C. § 1983. On July 1, 2011, the Court dismissed Plaintiff's action, without prejudice, for failure to exhaust administrative remedies. (ECF No. 35.) On July 15, 2011, Plaintiff filed a notice of appeal and on July 21, 2011, the Ninth Circuit remanded for the limited purpose of determining whether in forma pauperis status should continue for this appeal or whether the appeal is frivolous or taken in bad faith. (ECF Nos. 37 & 40.)

Pursuant to the Federal Rules of Appellate Procedure,

A party who was permitted to proceed in forma pauperis in the district-court action . . . may proceed on appeal in forma pauperis without further authorization, unless:

(A) the district court - before or after the notice of appeal is filed - certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis and states in writing its

1 reasons for the certification or finding;
2 or

3 (B) a statute provides otherwise.

4 Fed. R. App. P. 24(a)(3).

5 The district clerk must immediately notify the parties and the court of appeals
6 when the district court does any of the following:

7 (A) denies a motion to proceed on appeal in forma pauperis;

8 (B) certifies that the appeal is not taken in good faith; or

9 (C) finds that the party is not otherwise entitled to proceed in forma pauperis.

10 Fed. R. App. P. 24(a)(4).

11 Because Plaintiff proceeded in forma pauperis in this action, Plaintiff is entitled to
12 proceed in forma pauperis on appeal unless the Court finds his appeal is not taken in good
13 faith or finds that he is not otherwise entitled to proceed in forma pauperis. As set forth
14 below by this Order, the Court finds that Plaintiff is entitled to proceed in forma pauperis
15 on appeal.

16 “An appeal may not be taken in forma pauperis if the trial court certifies in writing
17 that it is not taken in good faith.” 28 U.S.C. § 1915(a)(3). “In the absence of some evident
18 improper motive, the applicant’s good faith is established by the presentation of any issue
19 that is not plainly frivolous.” Ellis v. United States, 356 U.S. 674 (1958). An action is
20 frivolous “where it lacks an arguable basis either in law or in fact.” Neitzke v. Williams, 490
21 U.S. 319, 325 (1989). In other words, the term “frivolous”, as used in § 1915 and when
22 applied to a complaint, “embraces not only the inarguable legal conclusion, but also the
23 fanciful factual allegation.” Id.

24 Pursuant to 28 U.S.C. § 1291, Plaintiff can appeal the Court’s July 1, 2011 Order
25 dismissing the action as a final and appealable order. Here, Defendant filed a Motion to
26 Dismiss for failure to exhaust administrative remedies. (ECF No. 25.) Plaintiff filed his
27 Opposition to the Motion and Defendant replied. (ECF Nos. 32 & 33.) The Court found
28 that Plaintiff had not exhausted all available administrative remedies for this action. Thus,
the Motion was granted and Plaintiff’s action was dismissed without prejudice.

Given that Plaintiff’s action was dismissed for failure to exhaust administrative

1 remedies and the absence of improper motive, Plaintiff's appeal is not plainly frivolous. It
2 does not appear to lack an arguable basis either in law or in fact.

3 Based on the foregoing, it is HEREBY ORDERED that:

4 Plaintiff's appeal is taken in good faith. 28 U.S.C. § 1915(a). The Clerk's Office
5 shall serve a copy of this order on the Ninth Circuit.

6 IT IS SO ORDERED.

7 Dated: July 26, 2011


UNITED STATES MAGISTRATE JUDGE

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