

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

MELVIN JOSEPH SIMMONS,  
Plaintiff,  
v.  
T. SANDERS,  
Defendant.

Case No. 1:10-cv-01259-LJO-SKO (PC)  
Appeal No. 11-80144

**NOTICE AND ORDER FINDING THAT  
PLAINTIFF IS NOT ENTITLED TO  
PROCEED IN FORMA PAUPERIS ON  
THE APPEAL FILED MARCH 10, 2014**

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

(CAED Doc. 132 / C09 Docs. 12, 13)

\_\_\_\_\_ /

This civil rights action was filed pursuant to 42 U.S.C. § 1983 by Plaintiff Melvin Joseph Simmons, a state prisoner proceeding pro se and in forma pauperis, on July 14, 2010. Jury trial commenced on January 22, 2014, and the case was dismissed on Plaintiff's oral motion on January 22, 2014. Judgment was entered on February 5, 2014, and Plaintiff filed a notice of appeal on March 10, 2014.

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 reasons for the certification or finding;  
or

(B) a statute provides otherwise.

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

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

- (A) denies a motion to proceed on appeal in forma pauperis;
- (B) certifies that the appeal is not taken in good faith; or
- (C) finds that the party is not otherwise entitled to proceed in forma pauperis.

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

Because Plaintiff was proceeding in forma pauperis in this action in the district court, Plaintiff is entitled to proceed in forma pauperis on appeal unless the Court makes a finding to the contrary. For the reason that follows, the Court finds that Plaintiff is not entitled to proceed in forma pauperis on his appeal filed March 10, 2014.

28 U.S.C. § 1915 governs proceedings in forma pauperis. Section 1915(g) provides that “[i]n no event shall a prisoner bring a civil action . . . under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.” Plaintiff has been to section 1915(g) since 2012, when his third action was dismissed for failure to state a claim upon which relief may be granted. Because Plaintiff is subject to section 1915(g) and he does not meet the imminent danger exception, Plaintiff is not entitled to proceed in forma pauperis on appeal. Fed. R. App. P. 24(a)(4)(C).

Based on the foregoing, it is HEREBY ORDERED that:

1. Pursuant to 28 U.S.C. § 1915(g), Plaintiff is not entitled to proceed in forma pauperis on the appeal filed on March 10, 2014;
2. Pursuant to Federal Rule of Appellate Procedure 24(a)(4)(C), this order serves as notice to the parties and the United States Court of Appeals for the Ninth Circuit of the finding that Plaintiff is not entitled to proceed in forma pauperis for this appeal; and

///

///

///

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

3. The Clerk of the Court shall serve a copy of this order on Plaintiff and the United States Court of Appeals for the Ninth Circuit.  
IT IS SO ORDERED.

Dated: April 9, 2014

/s/ Lawrence J. O'Neill  
UNITED STATES DISTRICT JUDGE