

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF GEORGIA  
WAYCROSS DIVISION**

DELWIN BERRY,

Plaintiff,

v.

STATE,

Defendants.

CIVIL ACTION NO.: 5:16-cv-72

**ORDER and MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

This matter comes before the Court on Plaintiff's failure to comply with the Court's Order of August 23, 2016, to furnish the Court with his prison trust fund account statement. (Doc. 4.) For the following reasons, I **RECOMMEND** that the Court **DISMISS** Plaintiff's Complaint, (doc. 1), **without prejudice**, for Plaintiff's failure to follow this Court's Orders. I further **RECOMMEND** that the Court **DENY** Plaintiff leave to appeal *in forma pauperis*.

**BACKGROUND**

Plaintiff, an inmate at Ware State Prison in Waycross, Georgia, brought this action pursuant to 42 U.S.C. § 1983 on August 19, 2016. (Doc. 1.) In addition to his Complaint, Plaintiff filed a Motion for Leave to Proceed *In Forma Pauperis*. (Doc. 2.) However, Plaintiff failed to include within that Motion a certified copy of his prison trust fund account statement for the 6-month period immediately preceding the filing of the action as required by 28 U.S.C. § 1915(a)(2). (Doc. 4, p. 1.) Accordingly, on August 23, 2016, the Court deferred ruling on Plaintiff's Motion for Leave to Proceed *In Forma Pauperis*, provided him an additional a copy of the Application to Proceed in District Court Without Prepaying Fees or Costs form, and

permitted Plaintiff fourteen (14) additional days to provide his prison trust account form. (Id.) Though Plaintiff submitted another Application to Proceed without Prepayment of Fees form on September 6, 2016, he did not include his prison trust fund account form as directed. In lieu of providing the prison trust fund account form, Plaintiff submitted a document labeled “History of Accounts.” (Doc. 5-1.) That document was created on July 5, 2016, prior to this Court’s Order directing Plaintiff to provide his prison trust fund account form, (doc. 4), and does not include any information regarding his prison trust fund account at Ware State Prison where he is presently incarcerated.<sup>1</sup>

## **DISCUSSION**

The Court must now determine how to address Plaintiff’s failure to comply with this Court’s directive. For the reasons set forth below, I recommend that the Court dismiss Plaintiff’s Complaint and deny Plaintiff leave to appeal *in forma pauperis*.

### **I. Dismissal for Failure to Follow this Court’s Order.**

A district court may dismiss a plaintiff’s claims *sua sponte* pursuant to either Federal Rule of Civil Procedure 41(b) (“Rule 41(b)”) or the court’s inherent authority to manage its docket. Link v. Wabash R.R. Co., 370 U.S. 626 (1962);<sup>2</sup> Coleman v. St. Lucie Cty. Jail, 433 F. App’x 716, 718 (11th Cir. 2011) (citing Fed. R. Civ. P. 41(b) and Betty K Agencies, Ltd. v. M/V MONADA, 432 F.3d 1333, 1337 (11th Cir. 2005)). In particular, Rule 41(b) allows for the involuntary dismissal of a plaintiff’s claims where he has failed to prosecute those claims, comply with the Federal Rules of Civil Procedure or local rules, or follow a court order. Fed. R.

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<sup>1</sup> Though Plaintiff filed a letter, (doc. 6), in addition to his second Motion for Leave to Proceed *In Forma Pauperis*, that letter does not appear to provide any explanation for Plaintiff’s failure to provide the requisite information pertaining to his prison trust fund account. As best the Court can discern, Plaintiff merely reasserts his prior arguments within that letter.

<sup>2</sup> In Wabash, the Court held that a trial court may dismiss an action for failure to prosecute “even without affording notice of its intention to do so.” 370 U.S. at 633.

Civ. P. 41(b); see also Coleman, 433 F. App'x at 718; Sanders v. Barrett, No. 05-12660, 2005 WL 2640979, at \*1 (11th Cir. Oct. 17, 2005) (citing Kilgo v. Ricks, 983 F.2d 189, 192 (11th Cir. 1993)); cf. Local R. 41.1(b) (“[T]he assigned Judge may, after notice to counsel of record, *sua sponte* . . . dismiss any action for want of prosecution, with or without prejudice[,] . . . [based on] willful disobedience or neglect of any order of the Court.” (emphasis omitted)). Additionally, a district court’s “power to dismiss is an inherent aspect of its authority to enforce its orders and ensure prompt disposition of lawsuits.” Brown v. Tallahassee Police Dep’t, 205 F. App'x 802, 802 (11th Cir. 2006) (quoting Jones v. Graham, 709 F.2d 1457, 1458 (11th Cir. 1983)).

It is true that dismissal with prejudice for failure to prosecute is a “sanction . . . to be utilized only in extreme situations” and requires that a court “(1) conclud[e] a clear record of delay or willful contempt exists; and (2) mak[e] an implicit or explicit finding that lesser sanctions would not suffice.” Thomas v. Montgomery Cty. Bd. of Educ., 170 F. App'x 623, 625–26 (11th Cir. 2006) (quoting Morewitz v. West of Eng. Ship Owners Mut. Prot. & Indem. Ass’n (Lux.), 62 F.3d 1356, 1366 (11th Cir. 1995)); see also Taylor v. Spaziano, 251 F. App'x 616, 619 (11th Cir. 2007) (citing Morewitz, 62 F.3d at 1366). By contrast, dismissal without prejudice for failure to prosecute is not an adjudication on the merits, and, therefore, courts are afforded greater discretion in dismissing claims in this manner. Taylor, 251 F. App'x at 619; see also Coleman, 433 F. App'x at 719; Brown, 205 F. App'x at 802–03.

While the Court exercises its discretion to dismiss cases with caution, dismissal of this action without prejudice is warranted. See Coleman, 433 F. App'x at 719 (upholding dismissal without prejudice for failure to prosecute Section 1983 complaint, where plaintiff did not respond to court order to supply defendant’s current address for purpose of service); Taylor, 251 F. App'x at 620–21 (upholding dismissal without prejudice for failure to prosecute, because

plaintiffs insisted on going forward with deficient amended complaint rather than complying, or seeking an extension of time to comply, with court's order to file second amended complaint); Brown, 205 F. App'x at 802–03 (upholding dismissal without prejudice for failure to prosecute Section 1983 claims, where plaintiff failed to follow court order to file amended complaint and court had informed plaintiff that noncompliance could lead to dismissal). As Plaintiff has failed to provide the Court with his prison trust fund account statement, the Court has no means to evaluate Plaintiff's indigence or to collect the filing fees in this case as required by 28 U.S.C. § 1915(b)(1). Furthermore, Plaintiff's continued failure to provide the proper form demonstrates a disregard for this Court's Orders, and a sanction other than dismissal would not suffice to remedy his deficiencies.

Thus, the Court should **DISMISS** Plaintiff's Complaint, (doc. 1), **without prejudice**, for failure to follow this Court's Order, and this case should be **CLOSED**.

## **II. Leave to Appeal *In Forma Pauperis*.**

The Court should also deny Plaintiff leave to appeal *in forma pauperis*. Though Plaintiff has, of course, not yet filed a notice of appeal, it is proper to address these issues in the Court's order of dismissal. See FED. R. APP. P. 24(a)(3) (trial court may certify that appeal of party proceeding *in forma pauperis* is not taken in good faith "before or after the notice of appeal is filed").

An appeal cannot be taken *in forma pauperis* if the trial court certifies that the appeal is not taken in good faith. 28 U.S.C. § 1915(a)(3); FED. R. APP. P. 24(a)(3). Good faith in this context must be judged by an objective standard. Busch v. Cty. of Volusia, 189 F.R.D. 687, 691 (M.D. Fla. 1999). A party does not proceed in good faith when he seeks to advance a frivolous claim or argument. See Coppedge v. United States, 369 U.S. 438, 445 (1962). A claim or

argument is frivolous when it appears the factual allegations are clearly baseless or the legal theories are indisputably meritless. Neitzke v. Williams, 490 U.S. 319, 327 (1989); Carroll v. Gross, 984 F.2d 392, 393 (11th Cir. 1993). Or, stated another way, an *in forma pauperis* action is frivolous and, thus, not brought in good faith, if it is “without arguable merit either in law or fact.” Napier v. Preslicka, 314 F.3d 528, 531 (11th Cir. 2002); see also Brown v. United States, Nos. 407CV085, 403CR001, 2009 WL 307872, at \*1–2 (S.D. Ga. Feb. 9, 2009).

Based on the above analysis of Plaintiff’s action, there are no non-frivolous issues to raise on appeal, and an appeal would not be taken in good faith. Thus, the Court should **DENY** Plaintiff *in forma pauperis* status on appeal should.

#### **CONCLUSION**

For the above-stated reasons, I **RECOMMEND** that the Court **DISMISS** this action, without prejudice, **and DIRECT** the Clerk of Court to enter the appropriate judgment of dismissal and to **CLOSE** this case. I further recommend that the Court **DENY** Plaintiff leave to proceed *in forma pauperis* on appeal.

Any party seeking to object to this Report and Recommendation is **ORDERED** to file specific written objections within fourteen (14) days of the date on which this Report and Recommendation is entered. Any objections asserting that the undersigned failed to address any contention raised in the pleading must also be included. Failure to do so will bar any later challenge or review of the factual findings or legal conclusions herein. See 28 U.S.C. § 636(b)(1)(C); Thomas v. Arn, 474 U.S. 140 (1985). Objections to a Report and Recommendation are not the proper vehicle to raise issues and arguments not previously brought before the Court. A copy of the objections must be served upon all other parties to the action. Upon receipt of objections meeting the specificity requirement set out above, a United States

District Judge will make a de novo determination of those portions of the report, proposed findings, or recommendation to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made herein. Objections not meeting the specificity requirement set out above will not be considered by the District Judge.

**SO ORDERED** and **REPORTED** and **RECOMMENDED**, this 20th day of September, 2016.



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R. STAN BAKER  
UNITED STATES MAGISTRATE JUDGE  
SOUTHERN DISTRICT OF GEORGIA