

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

MARCO CONTRERAS MARTINEZ,

Plaintiff,

v.

MARK S. INCH,

Defendant.

CIVIL ACTION NO.: 5:17-cv-152

ORDER and MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Plaintiff, currently housed at the Federal Correctional Institution-Williamsburg (“FCI Williamsburg”) in Salters, South Carolina, filed this cause of action pursuant to 42 U.S.C. § 1983 (recharacterized and analyzed as a Bivens claim), contesting certain conditions of his federal confinement. (Doc. 1.) For the reasons that follow, the Court **DENIES** Plaintiff’s Motion for Leave to Proceed *in Forma Pauperis*. (Doc. 2.) Furthermore, I **RECOMMEND** the Court **DISMISS WITHOUT PREJUDICE** Plaintiff’s Complaint, **DIRECT** the Clerk of Court to **CLOSE** this case and enter the appropriate judgment of dismissal, and **DENY** Plaintiff leave to appeal *in forma pauperis*.¹

¹ A “district court can only dismiss an action on its own motion as long as the procedure employed is fair. . . . To employ fair procedure, a district court must generally provide the plaintiff with notice of its intent to dismiss or an opportunity to respond.” Tazoe v. Airbus S.A.S., 631 F.3d 1321, 1336 (11th Cir. 2011) (citations and internal quotations marks omitted). A Magistrate Judge’s Report and Recommendation (“R&R”) provides such notice and opportunity to respond. See Shivers v. Int’l Bhd. of Elec. Workers Local Union 349, 262 F. App’x 121, 125, 127 (11th Cir. 2008) (indicating that a party has notice of a district court’s intent to *sua sponte* grant summary judgment where a magistrate judge issues a report recommending the *sua sponte* granting of summary judgment); Anderson v. Dunbar Armored, Inc., 678 F. Supp. 2d 1280, 1296 (N.D. Ga. 2009) (noting that R&R served as notice that claims would be *sua sponte* dismissed). This Report and Recommendation constitutes fair notice to Plaintiff that his suit is barred and due to be dismissed. As indicated below, Plaintiff will have the opportunity to present his objections to this finding, and the District Court will review *de novo* properly submitted objections. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72; see also Glover v. Williams, No. 1:12-CV-3562-TWT-JFK,

PLAINTIFF'S ALLEGATIONS

Plaintiff filed this cause of action on November 9, 2017, along with a Motion for Leave to Proceed *in Forma Pauperis*. (Docs. 1, 2.) In his Complaint, Plaintiff alleges that Defendant, director of D. Ray James Federal Correctional Institute, failed to protect him while he was housed there in November 2015. (Doc. 1, p. 2–4.) Plaintiff states that Defendant housed him with an inmate, known to be mentally disturbed, who attacked Plaintiff on November 9, 2015, causing him to completely lose his left eye. (Id.) Though he was taken to the hospital following the attack, Plaintiff alleges that Defendant denied him proper follow-up medical care. (Id.) Plaintiff alleges that he was not permitted to see an ocularist and did not receive a prosthetic eye until June 2017, after he was transferred to FCI Williamsburg. (Id.) As relief, Plaintiff requests monetary damages for his physical and emotional harm. (Id.)

STANDARD OF REVIEW

Plaintiff seeks to bring this action *in forma pauperis*. (Doc. 2). Under 28 U.S.C. § 1915(a)(1), the Court may authorize the filing of a civil lawsuit without the prepayment of fees if the plaintiff submits an affidavit that includes a statement of all of his assets and shows an inability to pay the filing fee and also includes a statement of the nature of the action which shows that he is entitled to redress. Even if the plaintiff proves indigence, the Court must dismiss the action if it is frivolous or malicious, or fails to state a claim upon which relief may be granted. 28 U.S.C. §§ 1915(e)(2)(B)(i)–(ii). Additionally, pursuant to 28 U.S.C. § 1915A, the Court must review a complaint in which a prisoner seeks redress from a governmental entity. Upon such screening, the Court must dismiss a complaint, or any portion thereof, that is

2012 WL 5930633, at *1 (N.D. Ga. Oct. 18, 2012) (explaining that magistrate judge's report and recommendation constituted adequate notice and petitioner's opportunity to file objections provided a reasonable opportunity to respond).

frivolous or malicious, or fails to state a claim upon which relief may be granted or which seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b).

When reviewing a Complaint on an application to proceed *in forma pauperis*, the Court is guided by the instructions for pleading contained in the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 8 (“A pleading that states a claim for relief must contain [among other things] . . . a short and plain statement of the claim showing that the pleader is entitled to relief.”); Fed. R. Civ. P. 10 (requiring that claims be set forth in numbered paragraphs, each limited to a single set of circumstances). Further, a claim is frivolous under Section 1915(e)(2)(B)(i) “if it is ‘without arguable merit either in law or fact.’” Napier v. Preslicka, 314 F.3d 528, 531 (11th Cir. 2002) (quoting Bilal v. Driver, 251 F.3d 1346, 1349 (11th Cir. 2001)).

Whether a complaint fails to state a claim under Section 1915(e)(2)(B)(ii) is governed by the same standard applicable to motions to dismiss under Federal Rule of Civil Procedure 12(b)(6). Thompson v. Rundle, 393 F. App’x 675, 678 (11th Cir. 2010). Under that standard, this Court must determine whether the complaint contains “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A plaintiff must assert “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not” suffice. Twombly, 550 U.S. at 555. Section 1915 also “accords judges not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint’s factual allegations and dismiss those claims whose factual contentions are clearly baseless.” Bilal, 251 F.3d at 1349 (quoting Neitzke v. Williams, 490 U.S. 319, 327 (1989)).

In its analysis, the Court will abide by the long-standing principle that the pleadings of unrepresented parties are held to a less stringent standard than those drafted by attorneys and, therefore, must be liberally construed. Haines v. Kerner, 404 U.S. 519, 520 (1972); Boxer X v. Harris, 437 F.3d 1107, 1110 (11th Cir. 2006) (“*Pro se* pleadings are held to a less stringent standard than pleadings drafted by attorneys”) (quoting Hughes v. Lott, 350 F.3d 1157, 1160 (11th Cir. 2003)). However, Plaintiff’s unrepresented status will not excuse mistakes regarding procedural rules. McNeil v. United States, 508 U.S. 106, 113 (1993) (“We have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel.”).

DISCUSSION

I. Dismissal for Plaintiff’s Failure to State a Claim

Plaintiff, proceeding *pro se*, filed this Complaint pursuant to Section 1983. (Doc. 1, p. 3.) However, Plaintiff’s claims are against officials at a federal facility, which are not cognizable under Section 1983 and must be asserted in a Bivens action. Abella v. Rubino, 63 F.3d 1063, 1065 (11th Cir. 1995). Even so, “[f]ederal courts sometimes will ignore the legal label that a *pro se* litigant attaches to a motion and recharacterize the motion in order to place it within a different legal category.” Retic v. United States, 215 F. App’x 962, 964 (11th Cir. 2007) (quoting Castro v. United States, 540 U.S. 375, 381 (2003)). This Court may “recharacterize a *pro se* litigant’s motion to create a better correspondence between the substance of the motion and its underlying legal basis.” Rameses v. United States Dist. Court, 523 F. App’x 691, 694 (11th Cir. 2013). In this case, however, it would be futile to recharacterize Plaintiff’s claims under Section 1983 as a Bivens action.

The United States Supreme Court has held that a federal prisoner cannot bring a Bivens claim against employees of a privately operated federal prison seeking damages when state tort law authorizes adequate alternative remedies.² Minneeci v. Pollard, 565 U.S. 118, 131, 132 S. Ct. 617, 626 (2012). The Minneeci Court concluded an inmate in a privately operated federal prison could not bring a Bivens claim against private employees for conduct that violates the Eighth Amendment because that conduct could be remedied through a negligence or malpractice state tort claim. Id. The Court stated that “in the case of a privately employed defendant, state tort law provides an ‘alternative, existing process’ capable of protecting the constitutional interests at stake.” Id. at 126 (quoting Wilkie v. Robbins, 551 U.S. 537, 559 (2007) (declining to extend Bivens liability to allow a landowner to pursue a private action against employees of the Bureau of Land Development)); see also Goia v. CitiFinancial Auto, 499 F. App’x 930, 936 (11th Cir. 2012) (“[T]he Supreme Court has declined to expand Bivens to encompass a suit against private corporations acting under color of federal law.”) (citing Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 71, 74 (2001)). Thus, employees of privately operated federal prisons are exempt from damages liability under Bivens where state law provides a “roughly similar” remedy. Minneeci, 565 U.S. at 130.

D. Ray James Correctional Facility is a private entity that operates under a contract with the Bureau of Prisons. The employees of D. Ray James are employees of The GEO Group, Inc., a private entity. Like the plaintiffs in Minneeci and Alba, so long as Plaintiff has adequate state law remedies available to him, he may not maintain a cause of action pursuant to Bivens against Defendant because The GEO Group, Inc. and its employees are private parties. Thus, Plaintiff’s

² It should be noted that, in the Eleventh Circuit, such a claim has been foreclosed since 2008. See Alba v. Montford, 517 F.3d 1249 (11th Cir. 2008) (declining to extend Bivens to cover a claim for deliberate indifference to medical needs against Corrections Corporation of America, a private facility under contract with the Bureau of Prisons, and its employees). Under Alba, a Bivens action against employees of private prisons fails to state a claim. Id. at 1256.

cause of action against Defendant, if any, lies in state court under general principles of tort law, which provide “roughly similar” remedies in this case.³ See Scotton v. Johns, No. 5:16-cv-40, 2017 WL 125039, at *5 (S.D. Ga. Jan. 12, 2017) (discussing alternative remedies to Bivens available under Georgia tort law, such as a negligence or malpractice action), *report and recommendation adopted*, 2017 WL 1015332 (S.D. Ga. Mar. 15, 2017). Consequently, Plaintiff cannot bring a Bivens action against Defendant. As such, the Court should **DISMISS** Plaintiff’s Complaint for failure to state a claim.

II. Leave to Appeal in *Forma Pauperis*

The Court should also deny Plaintiff leave to appeal *in forma pauperis*.⁴ Though Plaintiff has, of course, not yet filed a notice of appeal, it would be appropriate to address these issues in the Court’s order of dismissal. Fed. R. App. P. 24(a)(3) (trial court may certify that appeal 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). 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.

³ The Court offers no opinion as to the efficacy of such a pursuit.

⁴ A certificate of appealability is not required in this civil rights action.

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.

CONCLUSION

For the reasons set forth above, the Court **DENIES** Plaintiff's Motion for Leave to Proceed *in Forma Pauperis* before this Court. (Doc. 2.) Additionally, I **RECOMMEND** the Court **DISMISS WITHOUT PREJUDICE** Plaintiff's Complaint, **DIRECT** the Clerk of Court to **CLOSE** this case and enter the appropriate judgment of dismissal, and **DENY** Plaintiff leave to appeal *in forma pauperis*.

The Court **ORDERS** any party seeking to object to this Report and Recommendation 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 Magistrate Judge failed to address any contention raised in the Complaint must also be included. Failure to do so will bar any later challenge or review of the factual findings or legal conclusions of the Magistrate Judge. See 28 U.S.C. § 636(b)(1)(C); Thomas v. Arn, 474 U.S. 140 (1985). A copy of the objections must be served upon all other parties to the action. The filing of objections is not a proper vehicle through which to make new allegations or present additional evidence.

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 by the Magistrate Judge. Objections not

meeting the specificity requirement set out above will not be considered by a District Judge. A party may not appeal a Magistrate Judge's report and recommendation directly to the United States Court of Appeals for the Eleventh Circuit. Appeals may be made only from a final judgment entered by or at the direction of a District Judge. The Court **DIRECTS** the Clerk of Court to serve a copy of this Report and Recommendation upon Plaintiff.

SO ORDERED and **REPORTED** and **RECOMMENDED**, this 19th day of December, 2017.



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