Barrow v. Wexford Health Sources, Inc. et al Doc. 264

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

RONALD BARROW,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 3:14-CV-00800-NJR-DGW**
	)	
WEXFORD HEALTH SOURCES, INC., DR. ROBERT SHEARING, and DR. J. TROST,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

ROSENSTENGEL, District Judge:

This matter is before the Court on several motions filed by Plaintiff Ronald Barrow relating to the Court's entry of summary judgment, in part, in favor of Defendants Wexford Health Sources, Inc. ("Wexford") and Dr. J. Trost (Doc. 240). Barrow has filed a motion to alter or amend the order pursuant to Rule 59(e) of the Federal Rules of Civil Procedure (Doc. 243), a motion to certify the order for appeal pursuant to Rule 54(b) (Doc. 247), and a motion for leave to proceed *in forma pauperis* on appeal (Doc. 256). For the reasons set forth below, Barrow's motions are denied.

BACKGROUND

Barrow, an inmate of the Illinois Department of Corrections ("IDOC") housed at Menard Correctional Center, initiated this action pursuant to 42 U.S.C. § 1983 alleging that Defendants were deliberately indifferent to his chronic medical conditions in violation of the Eighth Amendment. After threshold review of his Complaint pursuant

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to 28 U.S.C. § 1915A, Barrow was permitted to proceed on six counts of deliberate indifference. Defendant Wexford was named in all six counts, while Defendants Dr. John Trost and Dr. Robert Shearing were only named in Counts 2 through 5.

On July 15, 2016, Defendants timely filed a motion for summary judgment arguing they were entitled to judgment as a matter of law on various grounds (Doc. 176). On March 1, 2017, the Court granted Defendants' motion in part (Doc. 240), entering summary judgment as to Wexford on Count 1 (Barrow's claim that Wexford had a policy or practice of elevating cost over the care and wellbeing of its patients) and dismissing Counts 2 through 6 as they pertained to Wexford. The Court also granted summary judgment to Defendant Dr. Trost on Counts 3, 5, and 6 (denial of treatment for his chronic back, knee, and shoulder problems). Summary judgment was denied as to Defendant Dr. Trost on Count 2 (denial of access to prescription medications) and Count 4 (denial of treatment for chronic rectal bleeding), as well as on Counts 2 through 6 as to Defendant Dr. Shearing.

On March 8, 2017, Barrow filed a "Motion Pursuant to Fed. R. Civ. P. 59(e) to Alter or Amend [Doc. 240] Memorandum and Order Filed March 1, 2017" (Doc. 243). A few days later, before the Court ruled on his motion to alter or amend, Barrow filed a motion to certify the summary judgment order pursuant to Rule 54(b) of the Federal Rules of Civil Procedure (Doc. 247). On March 17, 2017—before the Court ruled on either his motion to alter or amend or his motion to motion to certify the summary judgment order as a final, appealable order—Barrow filed a "Petition for Permission to Appeal" pursuant to 28 U.S.C. § 1292(b) (Doc. 250), which was captioned in the Seventh Circuit

Court of Appeals and docketed by the Clerk of Court as a Notice of Appeal. Barrow also filed a motion to proceed *in forma pauperis* on appeal on March 22, 2017 (Doc. 256).

DISCUSSION

A. Motion to Alter or Amend Pursuant to Rule 59(e)

The Court begins its analysis with Barrow's Motion to Alter or Amend pursuant to Rule 59(e) (Doc. 243), because a ruling in Barrow's favor on this motion would render the remaining motions moot.

Rule 59(e) permits the Court to amend a judgment only where the movant clearly establishes: "(1) that the court committed a manifest error of law or fact, or (2) that newly discovered evidence precluded entry of judgment." *Cincinnati Life Ins. Co. v. Beyrer*, 722 F.3d 939, 954 (7th Cir. 2013) (quoting *Blue v. Hartford Life & Accident Ins. Co.*, 698 F.3d 587, 598 (7th Cir. 2012)). A manifest error "is not demonstrated by the disappointment of the losing party. It is the wholesale disregard, misapplication, or failure to recognize controlling precedent." *Oto v. Metropolitan Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000) (citation and quotation marks omitted). Relief under this rule is an extraordinary remedy "reserved for the exceptional case." *Foster v. DeLuca*, 545 F.3d 582, 584 (7th Cir. 2008). "The decision whether to grant or deny a Rule 59(e) motion is entrusted to the sound judgment of the district court." *Matter of Prince*, 85 F.3d 314, 324 (7th Cir. 1996).

In his motion, Barrow takes issues with several of the Court's findings. First, he claims the Court abused its discretion when it refused to consider the substantial amount of irrelevant documents presented by Barrow or to address each and every factual dispute (Barrow disputed nearly all of Defendants' facts) and only address genuine issues of material facts. Barrow claims the Court's failure to address his

disputed facts and documents in support, and to construe this evidence in the light most favorable to him, was manifestly erroneous and prejudiced him.

Barrow's argument ignores the summary judgment standard. Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any ***material*** fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c) (emphasis added). Under this standard, only disputes about material facts—that is, disputes about facts that are of consequence in determining the outcome of the case—are relevant. Therefore, the Court properly disregarded any disputed facts that were not material to the outcome of the case.

Furthermore, the facts Barrow alleges the Court disregarded were actually noted as being disputed. For example, Barrow complains that the Court erroneously stated "Barrow did not complain about pain" during his visit to Dr. Trost on February 28, 2014. In actuality, the Court stated that Barrow disputed Dr. Trost's version of the events, claiming that the visit was rushed and he only had a few minutes to talk about his issues (Doc. 240, p. 8). The Court's assessment of the evidence is supported both by evidence of Barrow's medical records (*see* Doc. 177-2, p. 6) and evidence of a letter Barrow sent Dr. Trost where he says he informed Dr. Trost of his medical issues in a previous letter but was only allowed a few minutes to address them at the visit on February 28, 2014 (Doc. 200-1, p.65). Thus, the Court's statement of fact was accurate. Moreover, contrary to Barrow's argument, the Court construed the facts in the light most favorable to

Barrow. Indeed, in its discussion the Court noted that "Barrow saw Dr. Trost for the first time on February 28, 2014, and briefly discussed his back pain with the doctor" (Doc. 240, p. 19).

Barrow goes on to dispute the Court's consideration of various other facts, as well as references to his "letter writing campaign." He fails, however, to demonstrate how any of his complaints rise to the level of manifest error, i.e., the wholesale disregard, misapplication, or failure to recognize controlling precedent. He further argues that the Court failed to "assume the truth of Plaintiff's evidence" and draw all inferences in his favor. But the Court cannot simply assume the truth of Barrow's statements, for "[s]elf-serving assertions without factual support in the record will not defeat a motion for summary judgment." *Jones v. Merchants Nat'l Bank & Trust Co.*, 42 F.3d 1054, 1057 (7th Cir. 1994); *see also First Commodity Traders, Inc. v. Heinold Commodities, Inc.*, 766 F.2d 1007, 1011 (7th Cir. 1985) ("Conclusory statements in affidavits opposing a motion for summary judgment are not sufficient to raise a genuine issue of material fact.").

Barrow also protests the Court's decision to strike his affidavit purporting to analyze the contract between Wexford and IDOC, while also accepting an affidavit authored by Joe Ebbitt, Director of Risk Management, HIPAA Compliance, and Legal Affairs for Wexford. Barrow argues that Mr. Ebbitt was not disclosed in Defendants' initial or supplemental disclosures. As discussed by the Court and by Defendants in response to Barrow's current motion, however, discovery in this case was governed by the Court's Scheduling and Discovery Order (Docs. 54, 155), which did not require the disclosure of Mr. Ebbitt. Furthermore, Barrow has not identified any discovery requests

he made seeking the disclosure of Mr. Ebbitt. And, while Mr. Ebbitt's affidavit was made upon personal knowledge of Wexford's policies (he attested that he is familiar with Wexford's written Policies and Procedures as a result of his position at Wexford), Barrow's affidavit lacked any personal knowledge. It merely purported to analyze the contract between Wexford and IDOC and included arguments rather than statements of fact. Affidavits opposing summary judgment "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." FED. R. CIV. P. 56(c)(4). Because Barrow's affidavit failed to meet these requirements, it was properly stricken.

Barrow further directs this Court to a recent decision from this district that he claims is at odds with the order in this case.[1] In *Gills v. Coe*, the court held there was a genuine issue of fact as to whether Wexford has a policy or practice of denying medical care. *See Gills v. Coe*, No. 3:13-cv-791-DGW (S.D. Ill. Feb. 21, 2017). In that case, the plaintiff suffered from an inguinal hernia and presented evidence, through Defendants' deposition testimony, that Wexford had an unwritten policy of refusing surgery unless the hernia was strangulated or incarcerated. Here, Barrow has not presented any evidence indicating that Wexford had a policy of placing profits over the health and wellbeing of its patients, as he alleged. Thus, his citation to *Gills* is unpersuasive.

The Court has reviewed the remainder of Barrow's arguments and, likewise, finds them meritless. Barrow has not identified any manifest errors of law committed by

[1] Barrow's motion for leave to file supplemental authority in support of his motion to alter or amend (Doc. 248) is **GRANTED**.

the Court, but rather only complains about the Court's reasoning. Accordingly, Barrow's Motion to Alter or Amend Pursuant to Rule 59(e) is **DENIED**.

B. Certification of Final Judgment under Rule 54(b)

The Court next addresses Barrow's motion for certification of a final judgment under Rule 54(b) (Doc. 247). Within this motion, Barrow incorporates the Petition for Permission to Appeal that he filed with the Seventh Circuit Court of Appeals on March 13, 2017 (Doc. 250). Barrow asks the Court to also consider the arguments made in the Petition in determining whether certification is appropriate.

The courts of appeals have authority to hear "appeals from all final decisions of the district courts." 28 U.S.C. § 1291. A decision is final and appealable when it "disposes of all claims against all parties." *Dale v. Lappin*, 376 F.3d 652, 654 (7th Cir. 2004). In multiple party suits, an order dismissing one defendant while leaving claims against other defendants pending is not a final, appealable order. *House v. Belford*, 956 F.2d 711, 716 (7th Cir. 1992) (citing *Auriemma v. City of Chicago*, 906 F.2d 312, 313 (7th Cir. 1990)). A party may immediately appeal a non-final decision, however, when a partial final judgment pursuant to Rule 54(b) is entered. Under Rule 54(b),

> When an action presents more than one claim for relief . . . the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

The rule creates "a practical means of permitting an appeal to be taken from one or more final decisions on individual claims, in multiple claims actions, without waiting for final

decisions to be rendered on all the claims in the case." *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 435 (1956).

A district court must undergo a two-step analysis to determine whether Rule 54(b) certification is appropriate. *Curtiss–Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 7 (1980). First, a district court must determine whether the judgment on a claim to be appealed is final. *Id.* "It must be a 'judgment' in the sense that it is a decision upon a cognizable claim for relief, and it must be 'final' in the sense that it is 'an ultimate disposition of an individual claim entered in the course of a multiple claims action.'" *Id.* (quoting *Sears, Roebuck & Co.*, 351 U.S. at 436)). Second, a district court must determine whether there is any just reason for delay. *Id.* at 8. In determining whether there is no just reason to delay the appeal of individual claims, "a district court must take into account judicial administrative interests as well as the equities involved." *Id.* A district court considers "such factors as whether the claims under review were separable from the others remaining to be adjudicated and whether the nature of the claims already determined was such that no appellate court would have to decide the same issue more than once even if there were subsequent appeals." *Id.*

"If an examination of the record reveals that the claims on appeal are too similar to the issues remaining in the district court," then there is no partial final judgment as contemplated by Rule 54(b). *Marseilles Hydro Power, LLC v. Marseilles Land & Water Co.*, 518 F.3d 459, 463–64 (7th Cir. 2008). "At a minimum, claims cannot be separate unless separate recovery is possible on each. . . . Hence, mere variations of legal theory do not constitute separate claims . . . . Nor are claims so closely related that they would fall afoul

of the rule against splitting claims if brought separately. . . .” *Id.* at 464 (quoting *Amalgamated Meat Cutters & Butcher Workmen v. Thompson Farms Co.*, 642 F.2d 1065, 1070–71 (7th Cir. 1981)).

This analysis requires comparing the issues involved in the appealed claims and those remaining in the district court and determining whether there is a “significant factual overlap.” *Id.* (quoting *Automatic Liquid Packaging, Inc. v. Dominik*, 852 F.2d 1036, 1037 (7th Cir.1988)). The scope of Rule 54(b) is confined to “situations where one of multiple claims is fully adjudicated—to spare the court of appeals from having to keep relearning the facts of a case on successive appeals.” *Id.* (quoting *Indiana Harbor Belt R.R. Co. v. American Cyanamid Co.*, 860 F.2d 1441, 1444 (7th Cir. 1988). “[I]f there are different facts (and of course different issues) consideration of the appeals piecemeal rather than all at once will not involve a duplication in the efforts required of the judges to prepare for argument in, and to decide, each appeal.” *Id.* (quoting *Jack Walters & Sons Corp. v. Morton Bldg., Inc.,* 737 F.2d 698, 702 (7th Cir. 1984)). Two claims arising from the same event or occurrence may be separable for Rule 54(b) purposes if they rely on entirely different legal entitlements yielding separate recoveries, rather than different legal theories aimed at the same recovery. *Id.*

In this case, the Court dismissed all counts as to Wexford and Counts 3, 5, and 6 as to Dr. Trost. The Court acknowledges that the entry of summary judgment in favor of Defendants on these claims was a “final” decision in the sense that it was an ultimate decision upon a claim for relief entered in the course of a multiple claims action. *See Curtiss–Wright Corp.*, 446 U.S. at 7. Taking into account judicial administrative interests,

however, the Court cannot say there is no just reason to delay the appeal. The claims Barrow seeks to appeal are premised on the same facts as the claims remaining in this case and on which he is proceeding to trial. Barrow's claims against Dr. Trost related to his alleged denial of prescription medication and his rectal bleeding stem from the same set of facts on which Barrow based his now-dismissed claims. In fact, as Defendants argue, each claim is a "mere variation" of the same legal theory—that Dr. Trost was deliberately indifferent to Barrow's medical needs. *See Marseilles*, 518 F.3d at 664. If the dismissed claims were to proceed on appeal now, and Barrow later appeals the outcome of his remaining claims, the appellate court would be required to duplicate its efforts by reviewing the voluminous record twice in deciding each appeal. Accordingly, there is no partial final judgment as contemplated by Rule 54(b) with regard to the claims against Dr. Trost.

The Court comes to the same conclusion with regard to the claims against Wexford. Barrow attempted to use the care he personally received by Dr. Shearing and Dr. Trost in support of his claim that Wexford's policies and practices are unconstitutional. This Court held that, while a jury may find that Defendants' actions exhibited deliberate indifference, such isolated incidents do not add up to a pattern of behavior sufficient to support an inference of a policy or custom (Doc. 240, p. 23). The Court also relied on affidavits by Dr. Shearing and Dr. Trost related to their care of Barrow and evidence of Barrow's medical records to assess the severity of his chronic conditions. In short, the Court of Appeals would be required to review the same evidence that Barrow relies upon to support his remaining claims in this case. As such,

the claims are not separate, and certification pursuant to Rule 54(b) is not appropriate in this instance. Barrow's Motion for Certification pursuant to Rule 54(b) is **DENIED**.

C. Certification of Interlocutory Appeal Under 28 U.S.C. § 1292

Because Barrow incorporated the arguments made in his Petition for Permission to Appeal, the Court next addresses his contention that the summary judgment order is an appealable interlocutory order under both 28 U.S.C. § 1292(a)(1) and § 1292(b).

1. An Interlocutory Appeal is Inappropriate Under 28 U.S.C. § 1292(a)(1)

Barrow first argues that the order granting summary judgment as to Wexford on Counts 1 and 3 and as to Dr. Trost on Count 3 is clearly a denial of Barrow's request for injunctive relief in both his Complaint (Doc. 30) and his Motion for Preliminary Injunction (Doc. 214). Thus, Barrow claims, the order is immediately appealable under 28 U.S.C. § 1292(a)(1).

Under § 1292(a)(1), "the courts of appeals shall have jurisdiction of appeals from . . . [i]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions . . . ." 28 U.S.C. § 1291(a)(1). If an order does not explicitly grant or deny a specific request for an injunction, the order may still be appealable if it has the "practical effect" of doing so. *Salazar ex rel. Salazar v. D.C.*, 671 F.3d 1258, 1261–62 (D.C. Cir. 2012) (quoting *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 83 (1981)). Even if an interlocutory order has the "practical effect" of denying an injunction, if it does not "dispose of all requests for injunctive relief," a litigant must also show that the order has a "serious, perhaps irreparable, consequence," and that the order can be "effectually challenged" only by immediate appeal. *Brown v. Kerr-McGee*

Chem. Corp., 767 F.2d 1234, 1238 (7th Cir. 1985); *S. Bend Consumers Club, Inc. v. United Consumers Club, Inc.*, 742 F.2d 392, 393 (7th Cir. 1984); *see also Carson*, 450 U.S. at 84 ("Because § 1292(a)(1) was intended to carve out only a limited exception to the final-judgment rule, we have construed the statute narrowly to ensure that appeal as of right under § 1292(a)(1) will be available only in circumstances where an appeal will further the statutory purpose of 'permit[ting] litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence.'").

In this case, Barrow seeks a preliminary injunction ordering Defendants "to provide community standard of care treatment for Plaintiff's chronic lower back degenerative disc disease, including physical therapy, lumbar epidural steroid injections, adequate pain management with recommended medication, continual monitoring and/or surgery, if necessary," and ordering that medical care be provided by a provider other than Dr. Trost. The requested relief is directed at all three Defendants. Thus, while the summary judgment order dismissing the claims against Wexford and Count III as to Dr. Trost may have the practical effect of precluding the grant of an injunction as to those Defendants, it did not dispose of all requests for injunctive relief. Accordingly, Barrow is required to also demonstrate that the summary judgment order has a "serious, perhaps irreparable, consequence," and that the order can be "effectually challenged" only by immediate appeal.

Barrow has not made such a showing, nor has he even attempted to do so. In fact, Barrow relies on *Robert Bosch LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1147 (Fed. Cir. 2011), which states that "a party appealing an order that expressly grants or denies a

permanent injunction need not also demonstrate that the order will have a 'serious, perhaps irreparable consequence' and that 'the order can be effectively challenged only by immediate appeal.'" *Robert Bosch*, 659 F.3d at 1147. The decision in *Robert Bosch* is not binding on this Court, however, and it refers to orders "expressly" granting or denying a permanent injunction, which this order did not do. Therefore, Barrow's reliance on *Robert Bosch* is misplaced.

Because Barrow has not made the required showing that the Court's summary judgment order has a serious, perhaps irreparable, consequence and can only be effectually challenged by immediate appeal, an interlocutory appeal is not appropriate pursuant to 28 U.S.C. §1291(a)(1).

2. Barrow Has Not Met the Requirements for an Interlocutory Appeal Under 28 U.S.C. § 1292(b)

Section 1292(b) provides that a district court may certify for immediate appeal interlocutory orders that present a "controlling question of law as to which there is substantial ground for difference of opinion" whose resolution would "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). "There are four statutory criteria for the grant of a section 1292(b) petition to guide the district court: there must be a question of *law*, it must be *controlling*, it must be *contestable*, and its resolution must promise to *speed up* litigation." *Ahrenholz v. Bd. of Trustees of Univ. of Ill.*, 219 F.3d 674, 675 (7th Cir. 2000) (emphasis in original). Additionally, "the petition must be filed in the district court within a reasonable time after the order sought to be appealed." *Id.* "Unless all these criteria are satisfied, the district court may not and

should not certify its order to [the appellate court] for an immediate appeal under section 1292(b)." *Id.* at 676.

As to the first requirement, the existence of a question of law, the Court of Appeals has made clear that while an order granting or denying summary judgment, by its nature, presents a question of law, "Section 1292(b) was not intended to make denials of summary judgment routinely appealable." *Id.* Rather, "question of law" refers to "a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine rather than to whether the party opposing summary judgment had raised a genuine issue of material fact." *Id.*

Construing Barrow's *pro se* petition liberally, the first statutory requirement, that there be a pure question of law suitable for resolution by the court of appeals, is met here. In particular, the Court held that private corporations cannot be held liable under 42 U.S.C. § 1983 unless the constitutional violation was caused by an unconstitutional policy or custom of the corporation itself; *respondeat superior* does not apply to private corporations under § 1983 (Doc. 240, pp. 22, 25). In stating this principle of law, the Court cited *Shields v. Illinois Dep't of Corr.*, 746 F.3d 782, 789 (7th Cir. 2014), which questioned whether corporations should be protected from *respondeat superior* liability under § 1983 but ultimately held that the law of this circuit still extends *Monell*[2] from local governments to private corporations. *Id.* at 796. Barrow seeks to have the appellate court reconsider that question, as it indicated it would be willing to do should the

[2] *Monell v. Department of Social Services*, 436 U.S. 658 (1978), held that a plaintiff suing a local government under § 1983 must show that the violation of his constitutional rights was caused by a government policy, practice, or custom.

circumstances present themselves. Accordingly, the Court finds Barrow has properly articulated a question of law within the meaning of § 1292(b).[3]

With regard to the second statutory requirement, a question of law is controlling if it "is quite likely to affect the further course of the litigation, even if not certain to do so." *Sokaogon Gaming Enter. Corp. v. Tushi-Montgomery Assocs., Inc.*, 86 F.3d 656, 659 (7th Cir. 1996) (citing *Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991) (referencing decisions holding that a question is controlling "if interlocutory reversal might save time for the district court, and time and expense for the litigants.")). This is where Barrow's petition begins to falter. He has not argued how this question of law would affect the course of litigation; indeed, it would only settle his claims as to Wexford, leaving his dismissed claims against Dr. Trost unresolved. And while the third statutory requirement—that the question of law be contestable—is surely met, given the Seventh Circuit's discussion in *Shields*, the fourth requirement—that an immediate appeal may materially advance the ultimate termination of the litigation—is surely not. Allowing an appeal on this issue alone will only serve to prolong the litigation and delay trial on the remaining claims in this case.

For these reasons, the Court finds that Barrow has failed to meet his burden of demonstrating that the summary judgment order should be certified for immediate appeal pursuant to 28 U.S.C. § 1292(b).

[3] Barrow also presents the question of whether a First Amendment exercise of religion claim, where no injury needs to be shown, carries more importance than an Eighth Amendment claim of deliberate indifference, which requires a higher burden, and whether this makes the two amendments unfairly inequitable. Because this question is outside the record and scope of summary judgment in this case, the Court will not address it.

D. Motion for Leave to Appeal *in forma pauperis*

Finally, Barrow also has filed a motion for leave to appeal *in forma pauperis*. A federal court may permit a party to proceed on appeal without full pre-payment of fees provided the party is indigent and the appeal is taken in good faith. 28 U.S.C. § 1915(a)(1) & (3); FED. R. APP. P. 24(a)(3); *see also Walker v. O'Brien*, 216 F.3d 626, 630-31 (7th Cir. 2009). In this instance, because the Court has declined to certify its order as a final judgment under Rule 54(b) or for interlocutory appeal under 28 U.S.C. § 1292(a)(1) or § 1292(b), Barrow's motion to proceed *in forma pauperis* is also **DENIED**.

CONCLUSION

For the reasons stated above, Plaintiff's motion for leave to file supplemental authority in support of his motion to alter or amend (Doc. 248) is **GRANTED,** Plaintiff's Motion Pursuant to Rule 59(e) of the Federal Rules of Civil Procedure to Alter or Amend (Doc. 243) is **DENIED**, and Plaintiff's Motion for Federal Rule of Civil Procedure 54(b) Certificate (Doc. 247) is **DENIED**. Furthermore, because the Court declines to certify its interlocutory order for appeal, Plaintiff's Motion for Leave to Appeal *in forma pauperis* (Doc. 256) is also **DENIED**.

IT IS SO ORDERED.

DATED: April 7, 2017

s/Nancy J. Rosenstengel______________
NANCY J. ROSENSTENGEL
United States District Judge