

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

FREDERICK BANKS,

Plaintiff,

v.

JUDGE MARK HORNAK, et al.,

Defendants.

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C.A. No. 16-10962-ADB

ORDER

BURROUGHS, D.J.

Now before the Court is the plaintiff's motion to appeal *in forma pauperis*. For the reasons set forth below, the motion is DENIED.

As the Court explained in its earlier orders of June 6, 2016 [ECF No. 4] and February 7, 2017 [ECF No. 9], Banks is a pretrial detainee and therefore is a prisoner within the meaning of 28 U.S.C. § 1915(h). That he is currently hospitalized to receive mental health evaluation and treatment to possibly restore him to competency, *see United States v. Banks*, Crim. No. 2:15-cr-00168-MRH (W.D. Pa.), does not change his prisoner status. The basis of his confinement is a pending criminal prosecution—not a civil proceeding. *See, e.g., Gibson v. City Municipality of New York*, 692 F.3d 198, 202 (2d Cir. 2012) (per curiam) (holding that where state criminal proceedings were suspended but not terminated while plaintiff underwent treatment to restore capacity, plaintiff was a prisoner for purposes of 28 U.S.C. § 1915(h)).

Banks is a “three strikes” litigant, meaning that he has, while a prisoner, filed three or more civil cases in federal court that were dismissed as malicious or frivolous or for failure to

state a claim for relief. *See* 28 U.S.C. § 1915(g). He can only proceed without prepayment of a fee if his case presents a claim of imminent danger of serious physical injury. *See id.* No such claim exists in this action, which is why the Court would not allow him to proceed *in forma pauperis* and dismissed the case after he failed to pay the filing fee. Because the “three strikes” rule applies to appeals as well as cases filed in the district court, *see id.*, Banks cannot appeal *in forma pauperis*.

Further, Banks does not appear to be financially eligible for *in forma pauperis* status. He represents in his financial affidavit that he owns real estate valued at \$250,000, a vehicle valued at \$30,000, and stocks of an unspecified value. He also reports that he has cash or money in a checking or savings account. Although his handwriting is unclear, it appears that the amount thereof is \$50,000. Without further clarification of the amount and nature of these alleged assets, the Court cannot conclude that he is unable to pay the appeal fee.

The motion to appeal *in forma pauperis* [ECF No. 13] is DENIED. Banks may file a motion to appeal *in forma pauperis* with the United States Court of Appeals for the First Circuit within 30 days of service of this order. *See* Fed. R. App. P. 24(a)(5). The Clerk shall immediately transmit this order to the First Circuit.

**SO ORDERED.**

Date: 3/21/2017

/s/ Allison D. Burroughs  
ALLISON D. BURROUGHS  
UNITED STATES DISTRICT JUDGE