

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

SHAWN LABARRON DAVIS

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PLAINTIFF

v.

Civil No. 1:16cv80-HSO-JCG

COUNTY OF JACKSON,
MISSISSIPPI, *et al.*

DEFENDANTS

**ORDER ADOPTING IN PART AND MODIFYING IN PART
MAGISTRATE JUDGE’S [65] REPORT AND RECOMMENDATION;
DISMISSING WITH PREJUDICE PLAINTIFF’S CLAIMS FOR FAILURE
TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED;
ISSUING PLAINTIFF A STRIKE; AND DENYING AS MOOT
DEFENDANTS’ [63] MOTION FOR SUMMARY JUDGMENT**

This matter comes before the Court on the Report and Recommendation [65] of United States Magistrate Judge John C. Gargiulo, entered in this case on December 13, 2017, and the Motion for Summary Judgment [63] filed by Defendants County of Jackson, Mississippi, Mike Wright, Wendy Nevals, and Mike Ezell on May 12, 2017. Based upon a review of the pleadings and relevant legal authority, the Magistrate Judge recommended that Defendants’ Motion for Summary Judgment [63] be granted, that Plaintiff’s claims be dismissed with prejudice for failure to state a claim upon which relief can be granted, and that Plaintiff be issued a strike pursuant to 28 U.S.C. § 1915(g). R. & R. [65] at 7.

For the reasons that follow, the Court finds that the Report and Recommendation [65] should be adopted in its entirety as the finding of this Court,

except to the extent it recommends granting Defendants' Motion for Summary Judgment [63]. Because Plaintiff's claims will be dismissed for failure to state a claim upon which relief may be granted pursuant to 28 U.S.C. §1915(e)(2)(B)(ii), the Court need not proceed beyond the pleading stage, and Defendants' Motion for Summary Judgment [63] is rendered moot. The dismissal of this action for failure to state a claim counts as a strike under 28 U.S.C. § 1915(g).

I. BACKGROUND

Plaintiff Shawn LaBarron Davis ("Plaintiff"), proceeding *in forma pauperis*, filed a pro se Complaint [1] in this Court on March 3, 2016. The Complaint advances claims pursuant to 42 U.S.C. § 1983 against Defendants County of Jackson, Mississippi, Mike Wright, Wendy Nevals, and Mike Ezell. Compl. [1] at 1-7; Mot. to Amend [23] at 1. On January 18, 2017, the Magistrate Judge conducted an omnibus hearing, which operated as a *Spears*¹ and case management hearing, to require Plaintiff to elaborate on his claims in order to determine whether this case or any portion of it should proceed. *See* Order Setting Omnibus Hearing [37] at 1-3 (citing 28 U.S.C. §§ 1915A(b) & 1915(e)(2)(B)); *see also* Tr. [50] at 1-45.

On May 12, 2017, Defendants filed a Motion for Summary Judgment [63], seeking dismissal of Plaintiff's claims. Plaintiff did not respond to the Motion [63]. On December 13, 2017, the Magistrate Judge entered his Report and Recommendation [65], recommending that Defendants' Motion for Summary

¹ *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985).

Judgment [63] be granted, that Plaintiff's claims against all Defendants be dismissed with prejudice for failure to state a claim upon which relief can be granted, and that Plaintiff be issued a strike pursuant to 28 U.S.C. § 1915(g). R. & R. [31] at 7. The Report and Recommendation [65] was mailed to Plaintiff on December 13, 2017, via certified mail return receipt requested and was received by Plaintiff sometime prior to December 22, 2017. Return [66] at 1 (undated return receipt filed by Clerk of Court on December 22, 2017).

Any objection to the Magistrate Judge's Report and Recommendation [65] was due within fourteen (14) days of service. L.U. Civ. R. 72(a)(3). To date, Plaintiff has not filed any objection to the Magistrate Judge's Report and Recommendation [65], and the time for doing so has passed.

II. DISCUSSION

Where no party has objected to a Magistrate Judge's report and recommendation, the Court need not conduct a de novo review of it. 28 U.S.C. § 636(b)(1) ("a judge of the court shall make a de novo determination of those portions of the report or specified proposed findings and recommendations to which objection is made"). In such cases, the Court applies the "clearly erroneous, abuse of discretion and contrary to law" standard of review. *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir. 1989).

Having conducted the required review, the Court concludes that the Magistrate Judge's findings that the Complaint fails to state a claim upon which relief may be granted and should be dismissed with prejudice are not clearly

erroneous, nor are they an abuse of discretion or contrary to law. The Court will adopt the Magistrate Judge's Report and Recommendation [65] as the opinion of this Court to the extent it recommends dismissal with prejudice of Plaintiff's claims for failure to state a claim upon which relief can be granted pursuant to 28 U.S.C. §§ 1915A(b)(1) and 1915(e)(2)(B)(ii), and this civil action will be dismissed with prejudice. Plaintiff has been given notice of the inadequacy of his Complaint and has had an opportunity to respond, but Plaintiff has not done so.

The Magistrate Judge's Report and Recommendation [65] will be modified to the extent it recommends that Defendants' Motion for Summary Judgment [63] be granted. Because the Court has not proceeded beyond the pleading stage, it need not consider the merits of the Motion [63], and Defendants' Motion for Summary Judgment [63] is rendered moot. Because the dismissal of this action will be for failure to state a claim upon which relief may be granted, rather than based upon Defendants' Motion for Summary Judgment, such dismissal counts as a strike under 28 U.S.C. § 1915(g). *But see Brown v. Megg*, 857 F.3d 287, 292 (5th Cir. 2017) (vacating strike where some claims proceeded beyond pleading stage, but failed at summary judgment).

III. CONCLUSION

IT IS, THEREFORE, ORDERED AND ADJUDGED that, the Report and Recommendation [65] of United States Magistrate Judge John C. Gargiulo, entered in this case on December 13, 2017, is **ADOPTED IN PART and MODIFIED IN PART**, as stated herein.

IT IS, FURTHER, ORDERED AND ADJUDGED that, Plaintiff's claims are **DISMISSED WITH PREJUDICE** for failure to state a claim upon which relief can be granted, and this dismissal for failure to state a claim counts as a **STRIKE** under 28 U.S.C. § 1915(g).

IT IS, FURTHER, ORDERED AND ADJUDGED that, the Motion for Summary Judgment [63] filed by Defendants County of Jackson, Mississippi, Mike Wright, Wendy Nevals, and Mike Ezell on May 12, 2017, is **DENIED AS MOOT**. A separate final judgment will be entered pursuant to Federal Rule of Civil Procedure 58.

SO ORDERED AND ADJUDGED, this the 12th day of January, 2018.

s/ Halil Suleyman Ozerden

HALIL SULEYMAN OZERDEN
UNITED STATES DISTRICT JUDGE