2002 WL 31427349
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

Zayd RASHID, Plaintiff,
v.
Kevin MCGRAW, DDS, Sullivan Correctional Facility, et al., Defendants.

No. 01CIV10996DABHBP.
|
Oct. 29, 2002.

Prisoner who brought § 1983 action against city correctional facility and others, alleging deliberate indifference to serious dental problems, moved for pro bono counsel. The District Court, Pitman, J., held that claim was sufficiently meritorious to warrant submission of case to panel of pro bono attorneys for possible representation of prisoner by pro bono counsel.

Motion granted.

West Headnotes (1)

[1] **Civil Rights**
Criminal Law Enforcement;Prisons

Prisoner's § 1983 claim against city correctional facility and others for alleged deliberate indifference to serious dental problems was sufficiently meritorious to warrant submission of case to panel of pro bono attorneys for possible representation of prisoner by pro bono counsel, where claim alleged that prisoner would likely lose all of his lower teeth as result of defendants actions, and prisoner previously recovered judgment against city for loss of his upper teeth. 42 U.S.C.A. § 1983.

2 Cases that cite this headnote

MEMORANDUM OPINION AND ORDER

PITMAN, Magistrate J.

***1** By a motion dated May 20, 2002, plaintiff moves for *pro bono* counsel. [1] For the reasons set forth below, the motion is granted.

[1] In a civil case, such as this, the Court cannot actually "appoint" counsel for a litigant. Rather, in appropriate cases, the Court submits the case to a panel of volunteer attorneys. The members of the panel consider the case and each decides whether he or she will volunteer to represent the plaintiff. If no panel member agrees to represent the plaintiff, there is nothing more the Court can do. *See generally Mallard v. United States District Court,* 490 U.S. 296, 109 S.Ct. 1814, 104 L.Ed.2d 318 (1989). Thus, even in cases where the Court finds it is appropriate to request volunteer counsel, there is no guarantee that counsel will actually volunteer to represent plaintiff.

The factors to be considered in ruling on a motion for *pro bono* counsel are well settled and include "the merits of plaintiff's case, the plaintiff's ability to pay for private counsel, [plaintiff's] efforts to obtain a lawyer, the availability of counsel, and the plaintiff's ability to gather the facts and deal with the issues if unassisted by counsel." *Cooper v. A. Sargenti Co.,* 877 F.2d 170, 172 (2d Cir.1986). Of these, "[t]he factor which command[s] the most attention [is] the merits." *Id. Accord Odom v. Sielaff,* 90 Civ. 7659(DAB), 1996 WL 208203 (S.D.N.Y. April 26, 1996). As noted fifteen years ago by the Court of Appeals:

> Courts do not perform a useful service if they appoint a volunteer lawyer to a case which a private lawyer would not take if it were brought to his or her attention. Nor do courts perform a socially justified function when they request the services of a volunteer lawyer for a meritless case that no lawyer would take were the plaintiff not indigent.

Cooper v. A. Sargenti Co., supra, 877 F.2d at 174. *See also Hendricks v. Coughlin,* 114 F.3d 390, 392 (2d Cir.1997) (" 'In deciding whether to appoint counsel ... the district judge should first determine whether the indigent's position seems likely to be of substance." ').

Plaintiff's motion papers adequately establish all of the grounds for *pro bono* counsel except the potential merit of the claim. However, I conclude that the motion papers, in conjunction with the complaint, do establish a sufficient basis for the submission of this matter to the *pro bono* panel.

This action is brought pursuant to 42 U.S.C. § 1983; plaintiff, an incarcerated inmate, alleges that defendants were deliberately indifferent to serious dental problems from which he suffered with the result that plaintiff suffered prolonged an unnecessary pain and now suffers from an increased likelihood that plaintiff will lose all of his lower teeth.[2] The complaint sets forth the alleged facts giving rise to plaintiff's claim, including plaintiff's numerous requests for treatment of his lower teeth and the actions taken in response. Although it is impossible to determine the ultimate merits of plaintiff's claim at this time, the detailed allegations in the complaint, the nature of the deficient health care alleged and plaintiff's allegation that he previously recovered a judgment in the New York Court of Claims for the loss of his upper teeth lead me to conclude that the plaintiff's claim is at least sufficiently meritorious for the complaint to be considered by the *pro bono* panel.

[2] The complaint alleges that plaintiff has already lost all of his upper teeth as a result of deficient dental care provide by prison authorities.

Accordingly, plaintiff's motion to have this matter added to the list of cases considered by the Court's *pro bono* panel is granted. The Pro Se Clerk is directed to submit a copy of the complaint and a copy of this Order to the members of the panel.

All Citations

Not Reported in F.Supp.2d, 2002 WL 31427349

2007 WL 1199475
Only the Westlaw citation is currently available.
United States District Court,
W.D. New York.

Shawn M. CLARK P.O.A.
James M. Clark, Petitioner,
v.
Superintendent John BURGE, Respondent.

No. 06CV658.
|
April 19, 2007.

Attorneys and Law Firms

Shawn M. Clark P.O.A. James M. Clark, Elmira, NY, pro se.

Lisa Ellen Fleischmann, New York State Department of Law, New York, NY, for Respondent.

Order

HUGH B. SCOTT, United States Magistrate Judge.

***1** Before the Court is respondent's motion to dismiss for failure to exhaust state court remedies (Docket No. 11) and petitioner's cross-motion for an evidentiary hearing (Docket No. 15). The parties consented to proceed before the undersigned as Magistrate Judge on February 22, 2007 (Docket No. 13).

BACKGROUND

Petitioner, attorney in fact James M. Clark for inmate Shawn M. Clark [1], filed this Petition for Habeas Corpus in the United States District Court for the Southern District of New York (Case No. 06-cv-06979, Docket No. 1, Pet.). The Petition does not allege any disability or incapacity on the inmate's part to allow for an attorney in fact to file for him, although there is a reference there to a mental evaluation under New York Criminal Procedure Law § 30.30 that was not performed and that petitioner objects to (Docket No. 1, Pet. at 5). James Clark signed the Petition as power of attorney for inmate Shawn Clark, but the Petition was not verified by Shawn Clark, see 28 U.S.C. § 2242.

[1] When necessary, this Order will distinguish between attorney in fact James Clark and inmate Shawn Clark. "Petitioner" when citing the Petition will refer only to inmate Shawn Clark.

The Petition states that inmate Shawn Clark was convicted in Cattaraugus County Court for three counts of sodomy in the first degree and one count of endangering the welfare of a child, and petitioner was sentenced to three consecutive prison terms of 25 years on each sodomy count and a one-year term on the endangering count, to run concurrently with the sodomy convictions (Docket No. 11, Resp't Atty. Decl. ¶ 1; *see* Docket No. 1, Pet. at 1). The Petition raises several grounds for habeas relief, namely that the conviction was obtained through coerced confession and perjured testimony; petitioner was unlawfully arrested and the evidence obtained during that arrest was thus tainted; the conviction was obtained in violation of petitioner's right of self-incrimination; the prosecution failed to disclose favorable evidence; the grand jury that indicted petitioner was unconstitutionally selected and impaneled; petitioner was denied effective assistance of counsel; and petitioner was denied the right to appeal due to ineffectiveness of appellate counsel (Docket No. 1, Pet.).

The United States District Court for the Southern District of New York transferred this case to this Court (Docket Nos. 3, 4). Once here, petitioner moved for *in forma pauperis* status (Docket No. 6) but also paid the $5 filing fee; this motion was denied as moot (Docket No. 7).

After being granted an extension of time to file an Answer (Docket No. 10; *see* Docket No. 8), respondent moved to dismiss the Petition for failure to exhaust his state court remedies (mainly, by not appeal to the New York State Court of Appeals) (Docket No. 11). Petitioner (through his power of attorney) has cross-moved for an evidentiary hearing (Docket No. 15).

DISCUSSION

Petitioner here is "Shawn M. Clark, P.O.A. [Power of Attorney] James M. Clark." The attorney in fact is proceeding *pro se* on behalf of the inmate petitioner. While the record includes the power of attorney executed by the inmate (including the conduct of litigation for him), see Docket No. 11, Resp't Motion to Dismiss, Ex. C, Supp'al

Pro Se Brief, at first unnumbered page), it is not clear why the power is needed or whether there is a capacity issue involving the inmate.

***2** Respondent has moved to dismiss for failure to exhaust state court remedies (Docket No. 11). But the Court notes the issue of whether petitioner, the attorney in fact James Clark, has standing to proceed on behalf of the inmate. "Application for a writ of habeas corpus shall be in writing singed and verified by the person for whose relief it is intended or by someone acting in his behalf," 28 U.S.C. § 2242; see *Weber v. Garza,* 570 F.2d 511, 513 (5th Cir.1978). A habeas Petition is an application on behalf of a person in custody, 28 U.S.C. § 2254. The right of one person to sue for habeas corpus relief to secure the release of another person exists only when the application for the writ sets forth some reason or explanation satisfactory to the Court showing why the detained person did not sign and verify and who the next friend is, *Wilson v. Dixon,* 256 F.2d 536, 537-38 (9th Cir.1958) (one convict filing habeas petition for fellow inmate). "When the application for habeas corpus filed by a would be 'next friend' does not set forth an adequate reason or explanation of the necessity for resort to the 'next friend' device, the court is without jurisdiction to consider the petition," *Weber, supra,* 570 F.2d at 514. Further, next friend status is not automatically given to whomever seeks to pursue habeas relief for another person, the next friend must provide an adequate explanation (such as inaccessibility, mental incompetence, or other disability) to justify the intervention, *Whitmore v. Arkansas,* 495 U.S. 149, 163, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990) (capital habeas). The burden is upon the party claiming next friend status to establish the propriety of this status and thus the Court's jurisdiction, *id.* at 164 (citation omitted). Absent that proof, the purported next friend lacks standing and the Court lacks jurisdiction, *id.* at 166. Courts have held that a father lacked standing in his son's habeas proceeding where there was no finding that the son was unable to prosecute that action, *Weber, supra,* 570 F.2d at 513; *Arocho v. Camp Hill Correctional Facilities,* 417 F.Supp.2d 661 (M.D.Pa.2005).

Another issue is, assuming the attorney in fact is allowed to proceed as the next friend of the inmate petitioner, whether an attorney in fact (such as James Clark here) can proceed *pro se* on behalf of a habeas petitioner. A power of attorney does not allow that person to proceed *pro se* on behalf of their principal, *see Mandeville v. Wertheimer,* No. 01 Civ. 4469, 2002 WL 432689 (S.D.N.Y. Mar.19, 2002) (Freeman, Mag. J.); *see also Taylor v. Henderson,* No. 99 Civ. 4941, 2002 WL 14423 (S.D.N.Y. Jan.4, 2002) (Peck, Mag. J.) (citing Second Circuit cases). The next friend status in a habeas proceeding cannot be used to end run the prohibition against unlicensed practice of law, *see Weber, supra,* 570 F.2d at 513. This is similar to the context of parents suing on behalf of their infant children, *see* Fed.R.Civ.P. 17(b). In those situations, the Second Circuit has held that the parents could not proceed *pro se* on behalf of their children, see *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.,* 297 F.3d 195, 201 (2d Cir.2002); *Cheung v. Youth Orchestra Found.,* 906 F.2d 59, 61 (2d Cir.1990); *see also Prigden v. Andresen,* 113 F.3d 391, 393 (2d Cir.1997) ("Appearance *pro se* denotes (in law latin) appearance for one's self; so that a person ordinarily may not appear *pro se* in the cause of another person or entity"). In the context of the legal disability being infancy, the Second Circuit has held that "The court has a duty to enforce the Cheung rule *sua sponte,* for 'the infant is always the ward of every court wherein his rights or property are brought into jeopardy, and is entitled to the most jealous care that no injustice be done to him,' " *Wenger v. Canastota Cent. Sch. Dist.,* 146 F.3d 123, 125 (2d Cir.1998) (per curiam) (quoting, without internal quotations or citation, *Johns v. County of San Diego,* 114 F.3d 874, 877 (9th Cir.1997)). This logic applies in the habeas context where a next friend is filing on the petitioner's behalf.

***3** Petitioner's papers (the Petition itself, his supporting memorandum, Docket No. 2, and his cross-motion, Docket No. 15) are a jumble of copies of other documents, some annotated with notes (probably from the attorney in fact), justifying at least requiring an attorney of law be involved (either by the attorney in fact or petitioner retaining counsel or by Court appointment). Petitioner has not moved for appointment of counsel.

Alternatively, respondent's motion suggests that petitioner has not exhausted his state court remedies, a prerequisite for federal habeas relief *see* Docket No. 11). Dismissal of this action would allow petitioner to exhaust his state court remedies.

Absent an allegation why petitioner Shawn Clark cannot file his Petition on his own, this Court lacks jurisdiction to hear this Petition and attorney in fact James Clark lacks standing to file it.

CONCLUSION

For the reasons stated above, the Petition is **dismissed.**

So Ordered.

All Citations

Not Reported in F.Supp.2d, 2007 WL 1199475

2006 WL 618576
Only the Westlaw citation is currently available.
United States District Court,
W.D. New York.

Juan CANDELARIA, 89-T-5069, Plaintiff,
v.
R. BAKER, J. Perry, Sergeant, Lane E. Eck, New York State Department of Correctional Services, C. Pinker, Nancy O'Connor, RN, Arnot Ogden Medical Center, Floyd G. Bennett, Jr., Kathy Crippen and Timothy Doty, Defendants.

No. 00-CV-0912E(SR).
|
March 10, 2006.

Attorneys and Law Firms

Juan Candelaria, Alden, NY, pro se.

Stephen F. Gawlik, Assistant Attorney General, Buffalo, NY, Lawrence LeClair, Sayles & Evans, Elmira, NY, for Defendants.

MEMORANDUM and ORDER [1]

[1] This decision may be cited in whole or in any part.

ELFVIN, J.

***1** Plaintiff, proceeding *pro se,* commenced this action on October 24, 2000. Plaintiff filed an amended complaint on January 1, 2001. The Court, [2] on April 6, 2001, dismissed several of plaintiff's claims, terminated a few defendants and granted plaintiff leave to file a second amended complaint. On April 23, 2001, plaintiff filed a second amended complaint and a third amended complaint. On August 15, 2001, the Court transferred the second amended complaint to the Southern District of New York, dismissed some of the claims in the third amended complaint and terminated several more defendants. The various defendants answered in October and November 2001. On April 11, 2003, plaintiff moved to amend his complaint for a fourth time and, on November 5, 2003, plaintiff filed a motion for a preliminary injunction.

[2] This case was initially assigned to Judge William M. Skretny and then assigned to the undersigned on April 18, 2001.

The undersigned referred this case on May 9, 2003 to Magistrate Judge H. Kenneth Schroeder, Jr. pursuant to 28 U.S.C. §§ 636(b)(1)(A) and (B) for all pre-trial matters and to hear and report upon dispositive motions. Judge Schroeder, on April 20, 2004, denied plaintiff's April 11, 2003 motion to amend and gave plaintiff 60 days to move to amend his complaint and to submit a proposed amended complaint. Plaintiff, after receiving an extension, moved on August 5, 2004 to amend. Judge Schroeder issued a Decision and Order ("D & O") on April 12, 2005 denying plaintiff's August 5, 2004 motion to amend. Also on April 12, 2005, Judge Schroeder issued a Report and Recommendation ("R & R") in which he recommended that plaintiff's motion for a preliminary injunction be denied. On May 12, 2005, plaintiff filed his objections to Judge Schroeder's D & O and R & R ("Objections"). For the reasons set forth below, the D & O and R & R will be upheld in their entirety and plaintiff's motions to amend and for a preliminary injunction will be denied.

The facts and claims relevant to the determination of the Objections are found as follows and are undisputed. Plaintiff is currently an inmate of the Wende Correctional Facility ("Wende"). Plaintiff, a wheelchair bound paraplegic, has been on dialysis starting in November 6, 1997. He was incarcerated in Elmira Correctional Facility ("Elmira") and received dialysis treatment at Arnot Ogden Medical Center from December 2, 1997 to August 28, 2001, when he was transferred to Wende. Plaintiff alleges that, while at Elmira, he was denied proper medical treatment with respect to his End-Stage Renal Disease and was retaliated against for filing grievances and lawsuits. Plaintiff claims that Elmira staff retaliated against him by, *inter alia,* changing his dialysis schedule to a less favorable one, filing falsified misbehavior reports and denying him access to medical treatment and files.

This Court may reconsider a D & O issued by a magistrate judge if "it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A); *see also United States v. Mingle,* 2004 WL 1746936, at *2 (W.D.N.Y.2004). Objections to a D & O must satisfy Rule 72.3(a)(2) of the Local Rules of Civil Procedure ("LRCvP"), which states that the Objections must

> ***2** "specify the party's objections to the Magistrate Judge's order[,][t]he specific matters to which the party objects and the manner in which it is claimed that the order is clearly erroneous or contrary to law * * *."

The Objections, taking into consideration plaintiff's *pro se* status, satisfy LRCvP 72.3(a)(2). The D & O found that plaintiff's proposed fourth amended complaint ("Proposed Complaint"), like his first four complaints, is long and difficult to comprehend. Plaintiff's 96-page Proposed Complaint adds parties, includes all the previously asserted claims and asserts additional claims, most of which do not relate to those asserted. The Proposed Complaint, for the most part, asserts claims that relate to events that occurred after plaintiff commenced this action and was transferred to Wende. (*See* D & O at 6.)

Rule 15(a) of the Federal Rules of Civil Procedure ("FRCvP") provides that leave to amend a complaint "shall be freely given when justice so requires" and whether to grant such leave is within the court's discretion. *Cramer v. Fedco Auto. Components Co., Inc.,* 2004 WL 1574691, at *1 (2004 W.D.N.Y.) (J. Elfvin). When no prior amendment has been made, it is rare that leave should be denied; however, when leave to amend a complaint would be futile, it should be denied. *Hollander v. Flash Dancers Topless Club,* 2006 WL 267148, at *3 (2d Cir.2006) (citations and internal quotations omitted). In this case, plaintiff has had three prior opportunities to amend his complaint, all of which, evidently, have been futile. There is no reason to believe that a fourth opportunity to amend-amounting to a fifth opportunity to file a complaint-would be anything but futile. The undersigned agrees with the D & O that the Proposed Complaint does not comply with FRCvP 8(a)'s requirement that a complaint be a "short and plain statement of the claim[s]" and that the newly alleged claims do not relate to events asserted in the prior complaints. This case has been pending for over five years and further complication would be unduly burdensome to the parties and the Court. *See, e.g., De Jesus v. Sears, Roebuck & Co., Inc.,* 87 F.3d 65, 72 (2d Cir.1996) (upholding the district court's denial of plaintiff's fifth attempt to amend his complaint because he had been given "ample prior opportunity to allege a claim"); *Armstrong v. McAlpin,* 699 F.2d 79, 93-94 (2d Cir.1983) ("Because the complaint whose allegations were being considered by the district court was plaintiffs' second amended complaint, the district court did not abuse its discretion in refusing to give plaintiffs a fourth attempt to plead.").

Finally, as the D & O found, plaintiff has commenced another action in this Court in which he asserts many of the same claims that he alleges in the Proposed Complaint. *See Candelaria v. Higley,* 04-CV-0277E(Sr). The Court has, on several occasions, denied plaintiff's requests to consolidate the cases and, as such, plaintiff should not be able to litigate the same issues in two cases before the same Court. The Court has given plaintiff ample opportunity to amend his complaint and the D & O's denial of a fourth opportunity was not clearly erroneous and will be affirmed.

***3** With regards to the R & R, the Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate" and may adopt those parts of the R & R to which no *specific* objection is raised, so long as such are not clearly erroneous. 28 U.S.C. § 636(b)(1)(c); *see also Black v. Walker,* 2000 WL 461106, at *1 (W.D.N.Y.2000). Conversely, the undersigned must make a *de novo* determination with respect to those portions of the R & R to which specific objections have been made. 28 U.S.C. § 636(b)(1)(c); *United States v. Raddatz,* 447 U.S. 667, 675-676, 100 S.Ct. 2406, 65 L.Ed.2d 424 (1980); *Sieteski v. Kuhlmann,* 2000 WL 744112, at *1 (W.D.N.Y.2000). Objections to an R & R must satisfy LRCvP 72.3(a)(3), which states that

> "[t]he written objections shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for such objection and shall be supported by legal authority."

Again, because plaintiff is proceeding *pro se,* LRCvP 72.3(a)(3) has been loosely met and the Court will make a *de novo* determination of the issues raised in the Objections as they relate to the R & R.

Plaintiff seeks an injunction requiring defendants to transfer him back to the general population at Elmira or Wende and to replace him on the active kidney transplant

waiting list. Again, as in his Proposed Complaint, plaintiff is addressing issues not included in and/or related to his Third Amended Complaint. "Interim injunctive relief is an extraordinary and drastic remedy which should not be routinely granted". *Buffalo Forge Co. v. Ampco-Pittsburgh Corp.,* 638 F.2d 568, 569 (2d Cir.1981) (citation and internal quotations omitted). "[A] party seeking preliminary injunction must demonstrate (1) that it will be irreparably harmed in the absence of an injunction, and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits of the case to make them a fair ground for litigation, and a balance of hardships tipping decidedly in its favor." *Brewer v. W. Irondequoit Cent. Sch. Dist.,* 212 F.3d 738, 743-744 (2d Cir.2000). The purpose of issuing a preliminary injunction is to "preserve the status quo and prevent irreparable harm until the court has an opportunity to rule on the * * * merits." *Devose v. Herrington,* 42 F.3d 470, 471 (8th Cir.1994) (per curiam).

"To prevail on a motion for preliminary injunctive relief, the moving party must establish a relationship between the injury claimed in the motion and the conduct giving rise to the complaint." *McKinnon v. Tresman,* 2004 WL 78091, at *1 (2004 D. Conn.) (citing *Devose,* at 471 (denying the inmate plaintiff's motion for preliminary injunction when the inmate's complaint alleged denial of adequate medical treatment and his motion for preliminary injunction sought relief for alleged retaliation based on filing the instant lawsuit)); *see also Omega World Travel, Inc. v. Trans World Airlines,* 111 F.3d 14, 16 (4th Cir.1997) ("[A] preliminary injunction may never issue to prevent an injury or harm which not even the moving party contends was caused by the wrong claimed in the underlying action."). In *McKinnon,* the inmate plaintiff commenced the action claiming violations of his right to privacy of medical information and then sought a preliminary injunction concerning a possible transfer among correctional facilities. *Id.* at *1-*2. The court denied his request for preliminary injunctive relief because it was "beyond the scope of th[e] action." *Id.* at *2. Similarly here, plaintiff's Third Amended Complaint asserts violations that occurred while at Elmira and now seeks preliminary injunctive relief concerning activities that occurred subsequent to the commencement of this action-*viz.,* activities that occurred after he was transferred to Wende. Plaintiff, as a matter of law, is not entitled to a preliminary injunction and the Court agrees with the R & R's recommendation that plaintiff's motion for a preliminary injunction should be denied.

***4** As mentioned *supra,* plaintiff has another case pending before the Court to which the issues raised in his preliminary injunction are similar. As such, plaintiff's motion will be denied without prejudice inasmuch as he can seek injunctive relief in that action.

Accordingly, it is hereby ORDERED that plaintiff's Objections are overruled, that Judge Schroeder's Decision and Order filed on April 12, 2005 (docket no. 85) is affirmed, that Judge Schroeder's Report and Recommendation filed on April 12, 2005 (docket no. 86) is adopted in its entirety, that plaintiff's motion for a preliminary injunction (docket no. 43) is denied without prejudice and that plaintiff's motion to amend (docket no. 64) is denied.

All Citations

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United States District Court,
N.D. New York.

Ruben SLACKS, Plaintiff,
v.
GRAY, et al., Defendants.

No. 9:07-CV-0510 (NAM)(GJD).
|
June 25, 2008.

Attorneys and Law Firms

Ruben Slacks, Napanoch, NY, pro se.

Hon. Andrew M. Cuomo, New York State Attorney General, Christina L. Roberts-Ryba, Esq., Assistant Attorney General, of Counsel, Albany, NY, for Defendants.

MEMORANDUM-DECISION AND ORDER

NORMAN A. MORDUE, Chief Judge.

***1** Plaintiff Ruben Slacks commenced this action by filing a *pro se* civil rights complaint on May 14, 2007. Dkt. No. 1. Currently before the Court is plaintiff's motion for injunctive relief. Dkt. No. 42. Defendants oppose the motion. Dkt. No. 43.

In support of his motion for injunctive relief, plaintiff alleges that defendant Farrell "made a verbal threat of bodily harm" against him and that defendant Gray called him "a punk and a snitch" in front of other inmates. Dkt. No. 42 at 3. Plaintiff asserts that, as a result of the threats and Gray having referred to him as a "snitch," his life is in danger. *Id.* Plaintiff asks that "the entire list of defendant's [*sic*] listed in [his] compliant [*sic*] as well as any staff member of Eastern [be ordered] to stay away from [him] unless it relates directly to their job performance." *Id.* at 4.

The standard a court must utilize in considering whether to grant a request for injunctive relief is well-settled in this Circuit. As the Second Circuit noted in *Covino v. Patrissi,* 967 F.2d 73 (2d Cir.1992), the movant must show: (a) irreparable harm and (b) either (1) a likelihood of success on the merits of the claim or (2) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly toward the party seeking injunctive relief. *Id.* at 77 (affirming district court's denial of inmate's request for preliminary injunction); *see also Roucchio v. LeFevre,* 850 F.Supp. 143, 144 (N.D.N.Y.1994) (McAvoy, C.J.) (adopting Report-Recommendation of Magistrate Judge that denied inmate's request for injunctive relief).

(a) Irreparable harm

As to this first factor, with respect to the defendants' alleged threatening behavior, harassment, and threats, the Court notes that allegations of future injury without more do not establish a real threat of injury. *Gibson v. Walker,* 95-CV-1649, (N.D.N.Y. Dec. 7, 1995) (DiBianco, M.J.) (Docket No. 6), *adopted,* (Docket No. 8) (Feb. 2, 1996) (citing *Garcia v. Arevalo,* No. 93-CV-8147, 1994 WL 383238 (S.D.N.Y. June 27, 1994)). "The irreparable harm necessary to support injunctive relief must be 'actual and imminent,' not 'remote [or] speculative.' " *Young-Flynn v. Wright,* No. 05 Civ. 1488, 2007 WL 241332, at 7 (S.D.N.Y. Jan. 26, 2007) (citing *Forest City Daly Hous., Inc. v. Town of N. Hempstead,* 175 F.3d 144, 153 (2d Cir.1999)." Plaintiff's contention of threats and harassment without more are too speculative to establish irreparable harm.

(b) Likelihood of success on the merits or sufficiently serious questions going to the merits and a balance of hardships tipping decidedly toward the plaintiff

In addition, a party is not entitled to injunctive relief unless there is also **proof** of a likelihood of succeeding on the merits of a claim, or **evidence** that establishes sufficiently serious questions going to the merits of such a claim and a balance of hardships tipping decidedly toward the party seeking such relief. *See Covino,* 967 F.2d at 77. In the present case, plaintiff has submitted only his own affidavit containing his request for injunctive relief and the reasons why he believes his request should be granted. Plaintiff has failed to submit **proof or evidence** which meets this standard. Plaintiff has failed to demonstrate to the satisfaction of this Court that he has either a likelihood of succeeding on the merits of his claims or sufficiently serious questions going to the merits of such claims and a balance of hardships tipping decidedly toward him. [1]

[1] Moreover, to the extent that plaintiff is seeking injunctive relief against not only the defendants, but "any staff member of Eastern," plaintiff's request is denied. Plaintiff is advised that, except in limited

circumstances not relevant herein, a Court may not order injunctive relief as to nonparties to an action. *See* Rule 65(d) of the Federal Rules of Civil Procedure ("[e]very order granting an injunction ... is binding only upon the parties to the action ..."); *United States v. Regan,* 858 F.2d 115, 120 (2d Cir.1988); *Sumpter v. Skiff,* No. 9:05-CV-0869, 2006 WL 3453416, at * 1 (N.D.N.Y. Nov. 28, 2006).

***2** Since plaintiff has failed to establish either of the two requisite elements discussed above, plaintiff's request for injunctive relief is denied.

WHEREFORE, it is hereby

ORDERED that plaintiff's motion for injunctive relief (Dkt. No. 42) is **DENIED,** and it is further

ORDERED that the Clerk serve a copy of this Order on the parties in accordance with the Local Rules.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2008 WL 2522075