2017 WL 1040372
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United States District Court,
E.D. New York.

Anthony PODIUS, #71145-054; Pedro Espada, Jr., #78764-053; Ali Nasrallah, #26229-058; Mike Lavalee, #20404-052; Victor Ofosu-Asanie, #85672-053; Miguel Larosa, #68500-050; Benjamin Green, #21317-014; Anton P. Jepson, #72742-054; Anthony Joseph, #83438-053; David Crespo, #20969-014; Reuben Treasure, #68433-054; William Alvarado, #65710-050; Juste Kesnel, #66663-019; Melvin Lowe, #69408-054; Leo Warlin, #85740-083; Carlyle Fraser, #66403-050; Ishwardat Raghunath, #78023-053; Max Marcelin, #39837-054; Khawaja Ikram, #65071-050; Eddie Robinson, #61014-054; Shawn O'Boy, #72808-054; Zaquan Holman, #10150-082; Omar Khater, #66638-050; Johan Cordero, #80427-053; Errol Campbell, #85800-053; Francis Gomez, #92275-054; Emmanuel Gonzalez, #72153-054; Sandy Batista, #69159-054; Carlos Cotto-Cruz, #42616-069; Marcus Fox, #23014-014; and Rolfi Espinal, #97951-038, Plaintiffs,

v.

FEDERAL BUREAU OF PRISONS; Department of Justice; Loretta Lynch, Attorney General, in her official capacity; Herman Quay Iii, Warden, Mdc Brooklyn; Petrucci, Associate Warden; Travers, Health Services Administrator; J. Childress, Unit Manager; K. Spivey, Case Manager; Kyler, Case Manager; Bennett, Counselor; McMillian, Counselor; Dr. M. Segal, Psychology Chief; and Dr. L. Nicholas, SPU Coordinator, Defendants.

16-CV-6121 (RRM)(PK)
|
Signed 03/16/2017

**Attorneys and Law Firms**

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Marcus Fox, Brooklyn, NY, pro se.

Rolfi Espinal, Brooklyn, NY, pro se.

**Opinion**

**ORDER**

PEGGY KUO, United States Magistrate Judge

***1** On October 27, 2016, the Court received a submission from several prisoners and detainees at the Metropolitan Detention Center ("MDC") in Brooklyn.

**I. Procedural History**

The caption names 31 individuals as prospective plaintiffs, but only 20 of those individuals signed the Complaint. The submission included a joint application to proceed *in forma pauperis* ("IFP") under 28 U.S.C. § 1915, but did not include specific financial information for any prospective plaintiff and was not signed by any of the prospective plaintiffs. None of the prospective plaintiffs initially submitted the Prisoner Authorization form required by the Prisoner Litigation Reform Act ("PLRA"). An attached cover letter, dated October 23, 2016 and signed "The Petitioners," states: "The individual Pro Se Plaintiffs assert that the claims set forth in this Complaint are made on an individual basis. No individual seeks to represent the interest of a third party." (Dkt. 1-2.) It also states: "Plaintiffs seek the assistance of counsel who can then represent their interest as a class." (*Id.*) The Complaint itself contains generalized allegations referring to a class of "inmates who are now or will in the future be housed or assigned to the four (4) Cadre units ... at the Metropolitan Detention Center, and who are now or will in the future be subjected to the policy and practice of being arbitrarily and capriciously designated and assigned to the maximum security prison as minimum security inmates." (Compl. at 1, Dkt. 1.) It describes general conditions for Cadre inmates. (*Id.* at 9-11.) It includes specific allegations of retaliatory threats by corrections officers. (*Id.* at 4-5.) The Complaint incorporates six signed affidavits, from five of the prospective plaintiffs and one other individual, detailing specific incidents, only some of which involve those six individuals. No specific allegations related to the remaining prospective plaintiffs are included.

By letters dated November 4, 2016, the Court informed each of the named prospective plaintiffs that in order to proceed he must pay the filing fee or submit an IFP application and a PLRA authorization. Forms were provided to each prospective plaintiff. The PLRA form states: "I [name of plaintiff] request and authorize the facility institution or agency holding me in custody to send to the Clerk of the United States District Court for the Eastern District of New York ... a certified copy of my prison account statement for the past six months. I further request and authorize the facility or agency holding me in custody to calculate the amounts specified by 28 U.S.C. § 1915(b), to deduct those amounts from my prison trust fund account (or institutional equivalent), and to disburse those amounts to the United States District Court for the Eastern District of New York." (PLRA Form, Dkt. 3.) The following 18 of the prospective plaintiffs have since submitted both the IFP and PLRA forms: Anthony Podius, Pedro Espada, Jr., Ali Nasrallah, Victor Ofosu-Asanie, Anton Jepson, Anthony Joseph, David Crespo, William Alvarado, Juste Kesnel, Ishwardat Raghunath, Khawaja Ikram, Shawn O'Boy, Zaquan Holman, Johan Cordero, Francis Gomez, Emmanuel Gonzalez, Sandy Batista, and Rolfi Espinal. [1] Dante Callum, Mario Williams, and LaRonn Moultrie also submitted IFP and PLRA forms, although they are not named as plaintiffs in the Complaint.

1 Of these, Jepson, Nasrallah, Alvarado, O'Boy, and Cordero did not sign the Complaint. Plaintiff Melvin Lowe submitted the PLRA authorization, but not the IFP request.

***2** On November 18, 2016, the Court received a letter dated November 15, 2016, stating that "the following petitioners are no longer on the complaint: Benjamin Green, Leo Warlin, Max Marcelin, Eddie Robinson, Omar Khater, Carlos Cotto-Cruz, Marcus Fox, Rolfi Espinal, and Phillip Hai." [2] (Dkt. 57.) The November 18, 2016 letter also states: "There are a number of other 'new' petitioners and their information is enclosed." (*Id.*) The enclosed documents include a consent to referral of the entire case to a magistrate judge, and the names and signatures of many of the prospective plaintiffs in addition to the following four individuals: LaRonn Moultrie, Dante Callum, Gregory Sulafani, and Mario Williams. (Dkt. 57-1.) Separately signed magistrate consent forms were received from other prospective plaintiffs in a separate mailing received November 23, 2016. (Dkt. 63.)

2 Phillip Hai was not named in the Complaint.

Also on November 18, 2016, the Court sent letters to the Warden at the MDC for each of the individuals who

  

both signed the Complaint and submitted IFP and PLRA forms (the "Plaintiffs"). (Dkts. 8, 11, 14, 17, 20, 23, 26, 29, 32, 35, 38, 41, 44, 47, 53 & 56.) These letters enclosed copies of the completed PLRA forms for each Plaintiff, directed the institution to send a certified copy of each Plaintiff's trust fund account for the past six months to this Court, and authorized disbursement of funds from prison trust fund accounts to the Court. Partial payments have been received from several Plaintiffs. (Dkts. 66-75.) Many of these individuals have now requested that these funds be returned to them, arguing that the failure of the Bureau of Prisons to provide them personally with certified copies of their trust fund accounts has delayed this Court's decision about granting IFP. (December 16, 2016 Letter, Dkt. 108.)

On March 6, 2017, Attorney Eric Hochstadt filed a notice of appearance, *pro bono*, for Plaintiffs Crespo, Espada, and Podius, and submitted on their behalf a notice of voluntary withdrawal without prejudice. (Dkts. 127-28.)

**II. IFP**

The filing fee to commence a civil lawsuit in federal court is currently $400 (consisting of the $350 civil action filing fee and an administrative fee of $50 – the administrative fee does not apply where IFP is granted). A litigant who is unable to pay the filing fee may submit an application to proceed IFP pursuant to 28 U.S.C. § 1915. However, pursuant to the Prison Litigation Reform Act, prisoners who request IFP status are required to pay the filing fee, notwithstanding their eligibility for IFP status, and the Court must collect partial payments of the fees as funds become available, according to a formula provided in 28 U.S.C. § 1915(b). Where multiple plaintiffs file a joint action, each incarcerated plaintiff is required to pay the full filing fee. *See Lasher v. Dagostino*, No. 16-CV-0198, 2016 WL 1717205, at *2 (N.D.N.Y. Apr. 28, 2016) (citing *Ashford v. Spitzer*, No. 08-CV-1036, Dkt. No. 127 (Decision and Order filed Mar. 16, 2010) (N.D.N.Y.) (holding that, in an action filed by multiple prisoners proceeding IFP, each of the plaintiffs "must individually comply with the [terms of] Section 1915(b)(1) which requires a prisoner to pay the full amount of the filing fee for any civil action commenced.")). [3]

[3] The Court of Appeals for the Second Circuit has not specifically addressed this issue. Most other circuit courts to consider the question have required each prisoner to pay the full filing fee. *See Hagan v. Rogers*, 570 F.3d 146, 153-56 (3d Cir. 2009); *Boriboune v. Berge*, 391 F.3d 852, 856 (7th Cir. 2004) ("Complaints about prison-wide practices do not require more than one plaintiff. Complaints with a common core plus additional claims by different prisoners increase each plaintiff's risks under Rule 11 and § 1915(g) without a corresponding reduction in the filing fee; many prisoners will opt to litigate by themselves once they understand this, and the process will simplify litigation."); *Hubbard v. Haley*, 262 F.3d 1194 (11th Cir. 2001), *cert. denied*, 534 U.S. 1136 (2002); *but see In re Prison Litig. Reform Act*, 105 F.3d 1131, 1138 (6th Cir. 1997) ("[E]ach prisoner should be proportionally liable for any fees and costs that may be assessed. Thus, any fees and costs that the district court or the court of appeals may impose shall be equally divided among all the prisoners.")

***3** The following individuals' applications to proceed IFP under 28 U.S.C. § 1915 are granted: Anthony Podius, Pedro Espada, Jr., Ali Nasrallah, Victor Ofosu-Asanie, Anthony Joseph, David Crespo, William Alvarado, Juste Kesnel, Ishwardat Raghunath, Khawaja Ikram, Shawn O'Boy, Zaquan Holman, Johan Cordero, Francis Gomez, Emmanuel Gonzalez, Sandy Batista, Rolfi Espinal, and Anton Jepson. These individuals are currently Plaintiffs in this case. The United States Marshals Service is ordered to serve the summons and the Complaint upon Defendants.

To the extent that Plaintiffs request the refund of the funds already disbursed from their prison trust accounts (Dkt. 108), this request is denied. Plaintiffs were informed that the PLRA requires collection of the full filing fee, even where IFP has been granted.

**III. Proper Plaintiffs and Opportunity to Amend**

Not all of the prospective plaintiffs named in the Complaint actually signed the Complaint, [4] some who signed it failed to properly file by paying the filing fee or requesting IFP status, and other purported plaintiffs have attempted to be added or dropped by letters submitted to the Court. Only those individuals who signed the Complaint and filed IFP and PLRA forms are properly considered Plaintiffs at this time. *See* Fed. R. Civ. P. 11(a) ("Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented."). In addition, the Complaint cannot be amended by letter. If any individuals are to be added, the

Plaintiffs and those purported plaintiffs must together file an Amended Complaint naming all the individuals who wish to continue as plaintiffs or be added as plaintiffs, and this Amended Complaint must be signed by all those individuals. Any individual who is not named in the Amended Complaint and any individual who does not sign the Amended Complaint will be dismissed from this action. Any individual who is added must also complete IFP and PLRA forms, or they will be dismissed from this action.

4 Ali Nasrallah, Miguel Larosa, William Alvarado, Melvin Lowe, Carlyle Fraser, Max Marcelin, Eddie Robinson, Shawn O'Boy, Johan Cordero, Errol Campbell, and Carlos Cotto-Cruz were named as prospective plaintiffs but did not sign the Complaint.

The Court reminds Plaintiffs that a non-attorney appearing *pro se* may not represent another *pro se* litigant, including in a proposed class action. *See Iannaccone v. Law*, 142 F.3d 553, 558 (2d Cir. 1998) ("[B]ecause *pro se* means to appear for one's self, a person may not appear on another person's behalf in the other's cause."); *McLeod v. Crosson,* No. 89-CV-1952, 1989 WL 28416, at *1 (S.D.N.Y. Mar. 21, 1989) ("It is well settled in this circuit that *pro se* plaintiffs cannot proceed as class representatives."); *Johnson v. Newport Lorillard,* No. 01-CV-9587, 2003 WL 169797, at *1 n.4 (S.D.N.Y. Jan. 23, 2003) ("It is plain error for a *pro se* inmate to represent other inmates in a class action.") (quotation marks omitted). Every *pro se* litigant must represent only himself or herself.

An Amended Complaint completely replaces the Complaint. Any Plaintiff who does not wish to be included in this litigation may decline to join the Amended Complaint, or may submit a signed notice of voluntary withdrawal. Plaintiffs Podius, Crespo, and Espada have submitted a request to withdraw, and that request is granted.

The Complaint generally alleges poor conditions of confinement for Cadre inmates at the MDC, including lack of windows and fresh air, mold, airborne particulate matter, pest infestations, spoiled food, and limited access to educational and rehabilitative programming. Aside from a few references to retaliatory threats allegedly made by corrections officers who are identified in the Complaint but not named as defendants, the Complaint itself does not describe specific incidents. The affidavits attached to the Complaint assert some specific claims as to some Plaintiffs. Although several individuals are named as defendants in this action, the Complaint does not include any specific allegations against these Defendants. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), permits an action for constitutional violations by federal actors, even in the absence of a statute conferring such a right, but *Bivens* claims must be brought against the individuals personally responsible for the alleged deprivation of a plaintiff's constitutional rights. *F.D.I.C. v. Meyer*, 510 U.S. 471, 486 (1994). Because the doctrine of *respondeat superior* does not apply in *Bivens* actions, plaintiffs must allege that "each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009).

***4** Accordingly, Plaintiffs are advised that if they file an Amended Complaint, they should specify what each individual Defendant did or failed to do to each individual Plaintiff that violated Plaintiffs' constitutional rights.

To the extent that Plaintiffs wish to seek class certification, they must find counsel who can represent the interests of the entire class. The cover letter that accompanied the Complaint suggested that Plaintiffs are seeking the assistance of counsel, but no further information was provided. Should Plaintiffs wish to request the appointment of *pro bono* counsel, they may mail a request to the Court.

**IV. Conclusion**

Plaintiffs' request for the return of fees already paid is denied. The applications to proceed IFP are granted. The action may proceed as to Victor Ofosu-Asanie, Anthony Joseph, Juste Kesnel, Ishwardat Raghunath, Khawaja Ikram, Zaquan Holman, Francis Gomez, Emmanuel Gonzalez, Sandy Batista, Rolfi Espinal, and Anton Jepson.[5] The Clerk of Court is directed to note the removal of the other prospective plaintiffs from the caption of the Complaint.

5 These are the prospective plaintiffs who are named in the Complaint, signed the Complaint, filed IFP and PLRA forms, and have not voluntarily withdrawn. They are the only current plaintiffs.

  

The United States Marshals Service is directed to serve the summons and Complaint upon Defendants without prepayment of fees.

Should Plaintiffs choose to file an Amended Complaint, they are reminded that an Amended Complaint completely replaces the Complaint. The Amended Complaint must be captioned "Amended Complaint," and must bear the same docket number as this order. It must be signed by each plaintiff named in its caption. Any Amended Complaint must be received within 30 days from the date of this Order.

**SO ORDERED:**

**All Citations**

Slip Copy, 2017 WL 1040372

2010 WL 5051083
Only the Westlaw citation is currently available.
NOT FOR PUBLICATION
United States District Court,
E.D. New York.

Kevin RAZZOLI, Philip Barrios, David Sunday, Joseph Barrafato, Anothony Scalfine, and Milton Morales, Plaintiffs,
v.
EXECUTIVE OFFICE OF U.S. MARSHALS, Executive Office of F.B.I., Executive Office of Federal Bureau of Prisons, and Unknown Federal Agents, Defendants.

No. 10–CV–4269 (CBA).
|
Dec. 2, 2010.

**Attorneys and Law Firms**

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Philip Barrios, Brooklyn, NY, pro se.

Avid Sunday, Brooklyn, NY, pro se.

Joseph Barrafato, Brooklyn, NY, pro se.

Anthony Scalfini, Brooklyn, NY, pro se.

Milton Morales, Brooklyn, NY, pro se.

**Opinion**

*MEMORANDUM & ORDER*

AMON, District Judge.

***1** Plaintiff Kevin Razzoli ("Razzoli"), who is currently incarcerated at the Metropolitan Detention Center ("MDC"), bring this *pro se* Civil Rights Complaint, ostensibly as a "class action" on behalf of himself, five other named plaintiffs (the "additional plaintiffs"), and "known + unknown fed. + military inmates et al." Razzoli's request to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915 is granted. For the reasons set forth below, the complaint is dismissed with respect to the United States Marshals Service, the Federal Bureau of Investigations, and the Bureau of Prisons (the "agency defendants") with leave to submit an amended complaint within 30 days from the date of this Order.

*BACKGROUND*

Plaintiff Kevin Razzoli is a frequent litigator in this Court and other District Courts, and his litigation history was previously summarized in *Razzoli v. U.S. Parole Commission, et al.,* No. 10–CV–1842 (CBA) (docket no. 16). The instant case seeks certification as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure and includes the names and signatures of Philip Barrios, David Sunday, Joseph Barrafato, Anothony Scalfine, and Milton Morales, other inmates housed at the MDC. These additional plaintiffs have not filed applications to proceed *in forma pauperis* or the prisoner authorizations required under the Prison Litigation Reform Act.

The complaint alleges that the MDC limits inmates' access to the courts by only permitting two and one-half to three hours per week of monitored legal research, including typewriter access, and by not providing carbon paper. The complaint alleges that this "violates 'p' rule or creating a conflict of interest." (Compl. at 9.)[1] The MDC is alleged to have employed " 'Mkultra/Bluebird' now known as 'chirp' " and data-mining techniques using "thermal gamma imagetry equiptment" [*sic* ]. (Compl. at 11.) The complaint also alleges that the "computer law library does not list judges' opinions correctly and court decisions are altered in some cases dealing with BOP, U.S. Marshals and other DOJ agencies." (Compl. at 18.)

[1] As the complaint is not consecutively paginated, the Court refers to the page numbers assigned by the Electronic Case Filing System.

The complaint further alleges that plaintiffs "have been denied Sunday mass by Protestant and Jewish chaplain(s) [;] i.e.: manditory [*sic* ] Sunday Catholic mass." (Compl. at 18.) In addition, the complaint alleges that each of the original named plaintiffs has attempted to resolve different problems through administrative remedies, but has received no response. (Compl. at 13, 16.) Plaintiff Razzoli alleges that his warrant application incorrectly listed his race as "Black" and that the MDC "has tried to say he has mental problems without court hearing or N.Y. State licensed psyc[h]ologist." (Compl. at 10; *see*

*also* Compl. at 18.) He further alleges that: "Razzoli ... is being arbitrarily denied visits and access to e-mail by not allow[ing] such to leave institution to attorney and future wife.... Denied to have children against Catholic rights and Sunday mass." (Compl. at 17.) Inmate David Sunday is alleged to have been arrested on the basis of false statements by government informants or agents. (Compl. at 12.) Inmate Philip Barrios arrived at MDC on March 29, 2010, "and his 'halfway house' paperwork 10% date has 'not' been started nor attempt to be started, which violates 'court's ruling and BOP 13 month policy.' " (Compl. at 13.) Inmate Anthony Scalfini was "denied to be housed with his 'co-defendants' to marshal a proper defense." (Compl. at 14.) Inmate Milton Morales claims to have a valid actual innocence claim for a pending writ of habeas corpus. (Compl. at 15.)

***2** The complaint seeks a series of injunctions, including: "Injunction and appointment of lawyer" (Compl. at 9), "injunction ... for Catholic Sunday mass and release" (Compl. at 10), "injunction ... to cease and desist" (Compl. at 11), "injunction pursuant to 28 U.S.C. § 1331" (Compl. at 16, 17), "injunction to cease religious genocide/Catholic mass on Sunday(s) and [manditory] [*sic* ] observance of Catholic Church" (Compl. at 19). It also seeks $10 million in damages (Compl. at 12), access to law library typewriters and legal books, trial by jury, discovery, monetary damages, and an "end to mkultra/now known a[s] chirp/ and cowboy program/ SERE program" (Compl. at 19).

Finally, the complaint seeks class certification, citing Rule 23(b) and "class action case law, *Carter v. Ridge,* 1997 U.S. Dist. LEXIS 20516, 1997 WL 523787." The cited case held that: "a class action should not be maintained by *pro se* litigants who cannot adequately represent and protect the interests of the class, Fed.R.Civ.P. 23(a)(4), but also because, even if plaintiffs had counsel, the court does not believe that they can now describe with any specificity the actual parameters of a class which shares common questions of law or fact. Fed.R.Civ.P. 23(a)(2)." *Carter v. Ridge,* No. CIV. A. 97–5414, 1997 WL 792967, at *3 (E.D.Pa. Dec.19, 1997).

## *DISCUSSION*

### *A. Standard of Review*

Title 28 of the United States Code, § 1915A requires this Court to review the complaint in a civil action in which a prisoner seeks redress from a governmental entity or from officers or employees thereof, and to "identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint ... fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915A(b); *see also Abbas v. Dixon,* 480 F.3d 636, 639 (2d Cir.2007). "A document filed *pro se* is to be liberally construed, and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus,* 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (internal quotation marks and citations omitted). If a liberal reading of the complaint "gives any indication that a valid claim might be stated," this Court must grant leave to amend the complaint. *See Cuoco v. Moritsugu,* 222 F.3d 99, 112 (2d Cir.2000).

### *B. Class Action Certification*

Plaintiffs seek class certification pursuant to Rule 23 of the Federal Rules of Civil Procedure. "[B]ecause *pro se* means to appear for one's self, a [*pro se* litigant] may not appear on another person's behalf." *Iannaccone v. Law,* 142 F.3d 553, 558 (2d Cir.1998); *see also Daniels v. Niagara Mohawk Power Corp.,* No. 04–CV–734S (SC), 2004 WL 2315088, at *1 (W.D.N.Y. Oct.12, 2004) ("[N]on-attorneys cannot represent anyone other than themselves and cannot prosecute class actions on behalf of others."). Thus, "[i]t is well settled in this circuit that *pro se* plaintiffs cannot proceed as class representatives." *McLeod v. Crosson,* No. 89 Civ.1952, 1989 WL 28416, at *1 (S.D.N.Y. Mar.21, 1989); *see also Johnson v. Newport Lorillard,* No. 01 Civ. 9587(SAS), 2003 WL 169797, at *1 n. 4 (S.D.N.Y. Jan.23, 2003) ("It is plain error for a *pro se* inmate to represent other inmates in a class action." (quotation omitted)). Accordingly, plaintiffs' request for class certification is denied.

### *C. Plaintiffs Barrios, Sunday, Barrafato, Scalfini, and Morales*

***3** Although inmates Barrios, Sunday, Barrafato, Scalfini, and Morales signed the complaint, they did not file applications to proceed *in forma pauperis* or prisoner authorization forms. 28 U.S.C. § 1915(a)(2) and (b)(1) requires a "prisoner" to file an *in forma pauperis* application and a copy of his prisoner authorization form, and to pay the filing fee. Where there are multiple prisoner plaintiffs, each must comply with the above cited

provisions. *See Amaker v. Goord,* No. 09–CV–0396A(Sr), 2009 WL 1586560, at *2 (W.D.N.Y. June 04, 2009) (citing cases).

Accordingly, the Clerk of the Court is directed to forward to each of plaintiffs Barrios, Sunday, Barrafato, Scalfini, and Morales an application to proceed *in forma pauperis* and a prison authorization form. Plaintiffs Barrios, Sunday, Barrafato, Scalfini, and Morales are directed to submit within 30 days separate applications to proceed *in forma pauperis* and separate prison authorization forms. Failure to comply with this order will result in the dismissal of the additional plaintiffs' claims.

***D. Improper Defendants***

Civil actions alleging violations of constitutional rights are cognizable under 42 U.S.C. § 1983 if defendants are state actors and pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), when defendants are federal agents. As plaintiffs are presently incarcerated in a federal facility, and as plaintiffs name as defendants federal agencies and "unknown federal agents," the Court construes the complaint as raising claims pursuant to *Bivens.* The agency defendants named in the Complaint, however, are not amenable to suit. "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *FDIC v. Meyer,* 510 U.S. 471, 475, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994). Plaintiffs' *Bivens* claims must be brought against the individual officials responsible for the alleged deprivations of rights, not against the federal government or the agencies where they are employed. Accordingly, the offices of the United States Marshals Service, the Federal Bureau of Investigations, and the Bureau of Prisons are dismissed as defendants.

***E. Claims by Plaintiff Razzoli***

Plaintiff Kevin Razzoli[2] alleges constitutional claims arising from the alleged impairment of his access to the prison law library and the alleged denial of access to catholic mass.[3] With respect to Razzoli's claims involving the prison law library, Razzoli alleges that the MDC has impaired his access to the courts by limiting and monitoring library time and typewriter and computer access. The Constitution guarantees prisoners meaningful access to the courts, and one way of achieving that end is through reasonable access to a law library. *See Lewis v. Casey,* 518 U.S. 343, 351, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996); *Bounds v. Smith,* 430 U.S. 817, 825–28, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977); *Morello v. James,* 810 F.2d 344, 347 (2d Cir.1987). However, the Constitution does not require unlimited and unsupervised access to a law library at the demand of a prisoner. Prison officials may impose reasonable restrictions on the use of a prison law library. *See Lewis,* 518 U.S. at 351–52; *Morello,* 810 F.2d at 347 (inmates' access to courts may be "shaped and guided by the state"); *Jermosen v. Coughlin,* No. 89 Civ. 1866, 1995 WL 144155, at *5 (S.D.N.Y. Mar.30, 1995) ("[I]nterferences that merely delay an inmate's ability to work on a pending cause of action or to communicate with the courts do not violate this constitutional right.").

2 To the extent plaintiffs other than Kevin Razzoli intended to bring the following claims, any amended complaint should so specify.

3 Razzoli's claims regarding his ongoing incarceration are barred by *Heck v. Humphrey,* 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), as applied to *Bivens* actions by *Tavarez v. Reno,* 54 F.3d 109, 110 (2d Cir.1995), and are accordingly dismissed. Under *Heck,* a prisoner is not allowed to pursue a claim for money damages where success on that cause of action would necessarily imply the invalidity of his confinement. *Heck,* 512 U.S. at 486–87. "Federal courts have held that *Heck* applies to ... actions that challenge the fact or duration of confinement based on the revocation of parole." *Davis v. Cotov,* 214 F.Supp.2d 310, 316 (E.D.N.Y.2002) (collecting cases). Accordingly, Razzoli's claims arising from the revocation of his parole are dismissed. Plaintiff Razzoli is, of course, entitled to challenge the fact of his confinement pursuant to a writ of habeas corpus, as indeed Razzoli has done in this instance. *See Razzoli v. U.S. Parole Commission, et al.,* No. 10–CV–1842 (CBA).

Likewise, Razzoli's claims regarding "mKultra/ Bluebird" and the use of "Thermal Gamma Imagetry Equiptment [sic]" are devoid of merit and are accordingly dismissed. *See Denton v. Hernandez,* 504 U.S. 25, 33, 112 S.Ct. 1728, 118 L.Ed.2d 340 (1992) ("[A finding of] factual frivolousness is appropriate when the facts alleged rise to the level of the irrational or the wholly incredible whether or not there are judicially noticeable facts available to contradict them."); *see also Razzoli v. United States Navy et al.,* No. 09 Civ. 4323, 2010 WL 1438999, at *3 (S.D.N.Y.

Apr. 12, 2010) (finding inter alia, that petitioner's allegations that the government used thermal gamma imagery to sterilize him are frivolous).

***4** To state a claim for denial of access to the courts, a plaintiff must allege that the defendant "took or was responsible for actions that 'hindered [a plaintiff's] efforts to pursue a legal claim.' " *Monsky v. Moraghan,* 127 F.3d 243, 247 (2d Cir.1997) (quoting *Lewis,* 518 U.S. at 351). The plaintiff must also show that the defendant's actions resulted in actual injury, "such as the dismissal of an otherwise meritorious legal claim." *Cancel v. Goord,* No. 00 Civ.2042, 2001 WL 303713, at *4 (S.D.N.Y. Mar. 29, 2001); *see also Lewis,* 518 US. at 351–52; *Monsky,* 127 F.3d at 2467 (2d Cir.1997). Here, Razzoli does not allege any facts pertinent to the injury he may have suffered.

With respect to Razzoli's claim regarding the denial of access to a religious service, his allegation that he was "denied Sunday mass by protestant and Jewish chaplain(s)" is conclusory. The complaint, however, could be asserting a claim under the First Amendment's Free Exercise Clause.

In light of the plaintiff's *pro se* status, the Court grants leave to amend the Complaint. *Cuoco v. Moritsugu,* 222 F.3d 99, 112 (2d Cir.2000) (explaining that if a liberal reading of a complaint "gives any indication that a valid claim might be stated," a court should grant leave to amend the complaint before dismissing). The amended complaint must name proper defendants who may be held liable for the alleged impairment of access to the prison law library and the denial of access to Catholic mass. Even if Razzoli does not know the names of these individuals, he may name them as John Doe Correctional Officer or Jane Doe Chaplain or the like. He should include as much identifying information as possible, including the positions and roles of the officials involved, and should specify how each defendant may have violated his rights with respect to his claims. The complaint should also include allegations of fact regarding the alleged violations, such as the dates on which Razzoli was allegedly denied religious worship and whether he filed administrative grievances regarding such denial.

## *CONCLUSION*

For the reasons stated, Razzoli's request to proceed *in forma pauperis* is granted. Plaintiffs' request for class certification is denied. Plaintiffs Barrios, Sunday, Barrafato, Scalfini, and Morales are directed to submit within 30 days separate applications to proceed *in forma pauperis* and separate prison authorization forms. Failure to comply with this order will result in the dismissal of the additional plaintiffs' claims. As to the agency defendants, the complaint is dismissed for failure to state a claim, pursuant to 28 U.S.C. § 1915A, but plaintiffs are granted leave to file within 30 days an amended complaint in accordance with this Order. The amended complaint must be captioned, "Amended Complaint," and shall bear the same docket number as this Order. No summons shall issue at this time, and all further proceedings shall be stayed for 30 days. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal would not be taken in good faith and therefore *in forma pauperis* status is denied for purpose of an appeal. *See Coppedge v. United States,* 369 U.S. 438, 444–45, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962).

***5** SO ORDERED.

**All Citations**

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

Anthony D. AMAKER, Grace Amaker, Shaheen Amaker, Phyllis Amaker, Booker Amaker, Shaniev AH Amaker, Deloris Amaker, Lissette Amaker, Batise Amaker, and All Those Similarly Situated, Plaintiffs,
v.
Comm. G.S. GOORD, L.J. Leclaire, Dr. L.N. Wright, Supt. J. Conway, Supt. G. Greene, Supt. M. McGinnis, Dep. Supt. J. Chappius, C.O. W. Huffer, Sgt. K. Hendry, C.O. J. Rando, C.O. W. Rogoza, C.O. Gilbert, C.O. Ayers, C.O. Pierson, Cho Harvey, B. Harder, R. Brandt, Sgt. P. Gavigan, Zimmerman, J. Whiteford, Dept. Supt. R. James, L. Vough, D Selsky, L. McNamara, K. Washburn, Paribella, Seymore, Dhier, J. Judasz, Schuck, W. Hays, J. Mootz, S. Dolce, C.J. Martinez, R. Chistensen, and Kolowski, Defendants.

No. 09–CV–0396A(Sr).
|
June 4, 2009.

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**Opinion**

DECISION AND ORDER

WILLIAM M. SKRETNY, District Judge.

***INTRODUCTION***

***1** Plaintiff, Anthony Amaker, who is currently incarcerated at the Southport Correctional Facility,[1] initially brought this action under 42 U.S.C. § 1983 on behalf of himself and various family members, in the United States District Court for the Southern District of New York. He alleges, *inter alia,* excessive force and denial of adequate medical treatment on October 6 and October 20, 2004, while at the Great Meadow Correctional Facility (Docket No. 7, Part 1, Complaint, ¶¶ 6–7); retaliation, in the form of the filing of a false misbehavior report arising out of the October 6, 2004 assault and use of excessive force, which also is somehow alleged to be related to some unspecified United States Department of Labor complaint or report (*ibid.*); a denial of due process during the Superintendent's Hearing held in relation to the assault of October 6, 2004 and resulting misbehavior report (*id.,* ¶¶ 9–10); religious and racial discrimination relating to the denial of eight days of Ramadan meals at the Attica Correctional Facility and three days of Ramadan meals upon his transfer to Southport (*id.,* ¶ 10); excessive force on or about November 13, 2004, and the denial of adequate medical care at the Southport Correctional Facility for the period of January through September 16, 2005 (*id.,* ¶¶ 11–12); interference with Anthony Amaker's ability to receive documents relating to a state court petition (*id.,* ¶ 13); and a myriad First Amendment violations relating to the removal of names of Anthony Amaker's family members, who are also Plaintiffs here, from his approved call list, which has caused him and his family members a great deal of stress and emotional damage because many of his family members had been forced to travel long distances to see him, some of whom cannot travel easily, and their inability to visit has resulted in defendants and others subjecting Anthony Amaker to, or targeting him for, racial oppression and gang assaults (*id.,* ¶ 18). Plaintiffs also allege that defendants Nuttal, Goord and LeClaire have conspired with MCI/Verizon to charge Anthony Amaker or his family members "outlandish" fees and he thus was unable to communicate with his family

members.[2] (*Id.*) Suffice to say, the Complaint is not a model of clarity and is, for the most part, difficult to understand as to what allegedly occurred, when and where it occurred, and which defendants are alleged to have performed the acts claimed to be constitutional deprivations.

1 He was incarcerated at Shawangunk when he filed this action.

2 The Court notes some inconsistency with respect to Anthony Amaker's claim that his family members were removed from his phone list and his inability to communicate with his family members because of outlandish telephone charges.

## *DISCUSSION*

Prior to transferring the action to this Court on the basis that a substantial part of the events or omissions giving rise to the claims occurred at the Attica, Southport and Great Meadow Correctional Facilities, two of which are located within this District, the Southern District ordered **each** Plaintiff to submit a Complaint with original signatures,[3] a separate Application to Proceed *In Forma Pauperis* ("IFP Application"), and a Prison Authorization Form for each Plaintiff currently incarcerated. (Docket No. 7, Part 7, Transfer Order at 1–2; Docket No. 7, Part 3, 30 Day Order). That Court had ordered each Plaintiff to sign a copy of the signature page of the Complaint. (Docket No. 11). At the time of transfer of this action, only one Plaintiff had submitted an IFP Application and Prison Authorization Form, Anthony Amaker, and the Court had received back from Plaintiffs the signature page of the Complaint[4] which contained what appeared to be original signatures of all but two of the Plaintiffs, Shaniev Amaker and Lissette Amaker. (Docket No. 7, Part 7, Transfer Order, at 2).[5] The Southern District left to this Court the determination of whether Plaintiffs should be permitted to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915(a).

3 *See* Fed.R.Civ.P. 11(a) ("[e]very pleading, written motion, and other paper shall be signed by at least one attorney of record ... or, if the party is not represented by an attorney, shall be signed by the party.") *See also Iannaccone v. Law,* 142 F.3d 553, 558 (2d Cir.1998) (A non-attorney *pro se* party may not represent another's interests.) (citation omitted).

4 At the time of receipt of the file from the Southern District the signature page had not been docketed but it has now been docketed.

5 The Transfer Order notes that the Complaint (Docket No. 7, Part 2) was received on October 7, 2008, and that at the time the Complaint was submitted it already bore a stamped date of July 3, 2007, "from a Pro Se Office." (Docket No. 7, Part 7, Transfer Order, at 1, n. 1). The Transfer Order also notes that a letter submitted by Anthony Amaker alleges that he had previously "attempted to submit the Complaint through his mother's lawyer, but it had been returned to him for lack of original signatures." The Southern District had no record of having received previously the Complaint on July 3, 2007. (*Id.*) In a letter later submitted by Anthony Amaker, wherein he requested an extension of time to comply with the Southern District's 30 Day Order (Docket No. 7, Part 3), he alleges that the signatures on the complaint were the original signatures "on the "original submitted Complaint back in October 2007," but that, as directed by the Court, he had mailed the signature page of the Complaint to Florida to be signed by the other Plaintiffs again. He claims that the Complaint's signature page was previously signed by the Plaintiffs when he submitted the Complaint originally back in 2007.

***2** Following the transfer of this action, Plaintiff Anthony Amaker filed a Motion for a Temporary Restraining Order ("TRO") and Preliminary Injunction, and Declaration in Support.[6] (Docket Nos. 8–9). For the following reasons, each Plaintiff, other than Anthony Amaker, will be provided one last opportunity to submit an IFP Application, as previously ordered by the Southern District, and Anthony Amaker's Motion for a TRO and Preliminary Injunction is denied without prejudice.

6 Anthony Amaker notes that he first filed this Motion with the Southern District but upon notification of the transfer of this action here, he re-submitted the Motion to this Court and that the Memorandum of Law originally submitted with the Motion in the Southern District will be forwarded to this Court upon its receipt from the Southern District.

### A. *In Forma Pauperis* Applications

1. *Anthony Amaker*

Because Anthony Amaker has submitted an IFP Application and a Prison Authorization (Docket No. 7, Part 5), and has met the statutory requirements, he is granted permission to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915(a). [7]

7 Following receipt of the remaining IFP Applications, the Court will review or "screen" the Complaint pursuant to 28 U.S.C. § § 1915(e)(2)(B) and 1915A.

2. *Other Plaintiffs*

As noted, the Southern District's initial 30 Day Order, filed February 23 and entered February 26, 2009, directed each Plaintiff to file IFP Applications and, if any of the Plaintiffs were currently incarcerated, a Prison Authorization Form, pursuant to 28 U.S.C. § 1915(b), within 30 days of the Order. (Docket No. 7, Part 2, 30 Day Order, at 1). Plaintiff Anthony Amaker is the only Plaintiff who submitted an IFP application and Prison Authorization Form prior to the transfer of this action. He also submitted a letter to the Southern District, filed March 16, 2009, asking for an extension of time until April 8, 2009, to submit the other Plaintiffs' original signatures. The letter is ambiguous, however, as to whether he was requesting, on behalf of the other Plaintiffs, an extension of time to submit their IFP Applications as ordered by the Southern District. (Docket No. 7, Part 3). The letter notes that he is "currently enclosing the requested In Forma Pauperis [Application] and prison authorization form. I will need to know whether Shaheem Amaker [who is currently incarcerated in New Jersey] must fill one out, and I am mailing out a form to [Plaintiff] Grace D. Amaker to provide him with and fill out." (*Id.,* at 2–3).

It appears that Anthony Amaker may have believed that IFP applications were required only for the other Plaintiffs who are prisoners. That is not the case, however. The Southern District granted the request for an extension of time for each Plaintiff to comply with its 30 Day Order. Thereafter, the action was transferred to this Court on April 23, 2009, "[d]espite plaintiff Anthony Amaker's omissions," which presumably refers to the failure to submit separate IFP Applications for each Plaintiff, and Prison Authorization Forms for each Plaintiff currently incarcerated. (Docket No. 7, Part 7, Transfer Order, at 2). To date, no Plaintiff, other than Anthony Amaker, has submitted an IFP application.

This Court finds, as did the Southern District, that each Plaintiff, prisoner or not, must file an IFP application. Accordingly, before this case can proceed as to any Plaintiff other than Anthony Amaker, each Plaintiff must, as ordered by the Southern District, submit by **July 15, 2009,** a separate Application to Proceed *In Forma Pauperis,* and, for each Plaintiff who is a "prisoner," *see* 28 U.S.C. § 1915(h), a separate Prison Authorization form. Stated another way, and as previously ordered by the Southern District, "[s]hould [each] plaintiff[ ] decide to proceed with this action, they must submit ... [a] separate IFP application[ ] and a Prisoner Authorization form for each plaintiff who is incarcerated ...." [8] (Docket No. 7, Part 2, 30 Day Order, at 1–2).

8 28 U.S.C. § 1915(a)(2) and (b)(1) requires a "prisoner" to file an IFP application and copy of his inmate account statement (Prisoner Authorization Form), and to pay the filing fee. Therefore, as directed by the Southern District, each prisoner plaintiff herein must file a separate IFP Application and Prison Authorization form. *Compare Boribourne v. Berge,* 391 F.3d 852 (7th Cir.2004) (multiple prisoner plaintiffs may join claims in a single action but each must file a separate IFP Application and pay filing fee pursuant to § 1915(b)), *with Hubbard v. Haley,* 262 F.3d 1194 (11th Cir.2001) (mandatory provision of § 1915(b) disallows the filing of a single action by multiple prisoner plaintiffs). *See also Purifoy v. Kelley,* (NO. CIV 08–CV–581–DRH, 2009 WL 535947 (S.D.Ill., March 04, 2009) (If plaintiffs, each "prisoners" as defined in § 1915(h), seek to proceed *in forma pauperis,* each must file a separate motion, accompanied by a certified copy of his prison trust fund account statement), *Madden v. Jackson,* No. 5:08CV00090 SWW/BD, 2008 WL 1930517, at *2 (one of the prisoner/plaintiffs failed to file a separate application to proceed IFP as required by § 1915(b)(1)); *Horton v. Evercom Inc.,* NO. 07–3183–SAC; 2008 WL 45738 (D.Kan., January 02, 2008) ("Courts examining the impact of multiple plaintiffs on this statutory requirement have decided that prisoner plaintiffs may not undermine this statutory obligation by joining in the filing of a single action, and have held that each prisoner plaintiff must pay the full district court filing fee."); *cf. Sisneroz v. Ahlin,* No. 1:08–cv–01358–SMS PC, 2009 WL 224899 (E.D.Cal., 2009) (plaintiffs, civil detainees, are not "prisoners" under § 1915(h), and each filed separate applications to proceed *in forma pauperis.*)

  

***3** The Clerk of the Court shall forward to each Plaintiff an Application to Proceed In Forma Pauperis and Prison Authorization Form. The Prisoner Authorization Form needs to be submitted by only those Plaintiffs who are also prisoners, but **each** Plaintiff **must** submit their own IFP Application. A Plaintiff's failure to submit an IFP Application and, if a prisoner, a Prison Authorization Form, by **July 15, 2009,** will result in the dismissal of this action as to him or her without prejudice and without further order or notice from the Court. If any of the Plaintiffs have not complied with this order by **July 15, 2009,** the Clerk of the Court is directed to dismiss them as a party to this action without prejudice, without further order.

There is an additional matter to be addressed with regard to the family member Plaintiffs. It is evident to the Court that Anthony Amaker has prepared the initial pleadings and other papers in this action and is directing this litigation on behalf of all of the Plaintiffs. For example, the recently submitted Motion for a TRO and Preliminary Injunction is signed only by him and he is the only one to submit a Declaration in support of the Motion. While there is no "rule" that prohibits one *pro se* plaintiff from directing litigation brought by himself and others, it is clear that one *pro se* litigant **cannot** appear on another person's behalf. This seems to be what Anthony Amaker is attempting to do here. Each Plaintiff must therefore understand, and is hereby placed on notice, that by signing the signature page of the Complaint and filing an IFP Application each is acknowledging that (1) they have agree to proceed as a Plaintiff in this matter *pro se,* (2) they must represent and appear on behalf of themselves in this matter, and (3) Anthony Amaker cannot act as their attorney or on their behalf in this matter. *See* Fed.R.Civ.P. 11;[9] *see, e.g., Iannaccone,* 142 F.3d at 558 (A non-attorney *pro se* party may not represent another's interest). Each Plaintiff must be aware of his or her obligations under Fed.R.Civ.P. 11 to sign each pleading and paper submitted to the Court and to appear on behalf of themselves in this action.

9 **Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions**

**(a) Signature.** Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—*or by a party personally if the party is unrepresented....*

**(b) Representations to the Court.** By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or *unrepresented party* certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
**(1)** it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
**(2)** the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
**(3)** the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
**(4)** the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.
**(c) Sanctions.**
**(1) In General.** If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or *party* that violated the rule or is responsible for the violation....
**(2) Motion for Sanctions.** A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.
**(3) On the Court's Initiative.** On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).
**(4) Nature of a Sanction.** A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives;

  

> an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.
>
> **(5) Limitations on Monetary Sanctions.** The court must not impose a monetary sanction:
>
> (**A**) against a represented party for violating Rule 11(b) (2); or
>
> (**B**) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(Emphasis in italics supplied).

**B. Anthony Amaker's Motion for a Temporary Restraining Order and Preliminary Injunction**

Plaintiff Anthony Amaker's Motion for a TRO and Preliminary Injunction seeks

> [A]n order pursuant to [Fed.R.Civ.P.] 57, 65(a)(1)(2), (b), (d); Title 28 U.S.C. § § 2201; 2202; the Religious Land Use & Institutionalized Person Act of 2000, Title 42 U.S.C. § 2000cc; United States Constitution Article I, § 8, Cl. 3; Article I, § 8, cl. 8; Article VI, § 2; The Second Chance Act, Title 42 U.S.C. 17501 ... to prevent destruction and confiscat [ion] mail, drawings, illustration, legal documents through the mail and disrupting commerce and the free exercise of religion practice, financial business and publishing of Afrocentric books based on content and viewpoint discrimination.

***4** (Docket No. 9, Declaration in Support, at 1–2).

The Court notes initially that the TRO and Preliminary Injunction is sought against a number of DOCS supervisory officials who are not named as defendants in this matter—Fischer, Napoli, Bartlett, Bezio and Covent [sic]—but are claimed to be "successors" to some of the supervisory officials that are named in the Complaint—*e.g.,* Goord, McGinnis, McNamara, Selsky, and Chappius. [10] The injunction is sought against at least two supervisory officials who are named in the Complaint—LeClaire and Washburn.

10 While Fed.R.Civ.P. 25(d) provides that a public officer who is a party in an official capacity who ceases to hold public officer is automatically substituted as a party by his successor, the defendants herein are not sued solely in their official capacity.

First, this Court finds that Anthony Amaker has not established the criteria for the granting of a TRO and Preliminary Injunction, *see* Fed.R.Civ.P. 65(b); *Abdul_Wali v. Coughlin,* 754 F.2d 1015, 1025 (2d Cir.1985), *Paulsen v. County of Nassau,* 925 F.2d 65, 68 (2d Cir.1991), because he has not established, among other things, a likelihood of success on the merits. Moreover, the Motion seeks relief from what appear to be allegations of the withholding of mail privileges among Anthony Amaker and Grace Amaker and censorship relating to the publication and sale of children's books that Anthony Amaker writes and his mother, Grace Amaker, illustrates. These allegations are not in any way connected to the allegations set forth in the Complaint.

The Complaint, as summarized above, *see* Introduction, *supra,* at 1–2, alleges a number of acts and constitutional violations including excessive force and assault, denial of medical care, a denial of due process, religious and racial discrimination, and a conspiracy among a number of defendants and MCI/Verizon to remove Anthony Amaker's family members from his approved phone call list and to charge exorbitant fees. To the extent the Complaint may implicate mail privileges at all, it is with regard to Anthony Amaker's receipt of documents relating to a state court petition. The Complaint does not allege that mail privileges were withheld so as to censor or obstruct Anthony Amaker's ability to write and publish children's books, which is the gravaman of the Motion for a TRO and Preliminary Injunction. The Complaint's allegations of First Amendment violations are pleaded in terms of retaliation against Anthony Amaker, not in terms of some restraint on his mail in order to foreclose his attempts to publish children's books. Accordingly, the Motion for a TRO and Preliminary Injunction (Docket No. 8) is denied without prejudice.

If Plaintiffs wish to pursue the relief set forth in the Motion for a TRO and Preliminary Injunction they may file an amended or supplemental Complaint pursuant to

  

Fed.R.Civ.P. 15(a) and (d), which includes the allegations and claims for relief set forth in the Motion.

***ORDER***

IT IS HEREBY ORDERED that **each Plaintiff,** other than Anthony Amaker, must submit an Application to Proceed *In Forma Pauperis* and, if a prisoner, a Prison Authorization, by **July 15, 2009;**

FURTHER, that if any Plaintiff, other than Anthony Amaker does not submit to the Court by **July 15, 2009,** an Application to Proceed *In Forma Pauperis* and, if a prisoner, a Prison Authorization Form, the Clerk of the Court is directed to dismiss them as a party to this action without prejudice and without further order or notice;

***5** FURTHER, that plaintiff Anthony Amaker is granted permission to proceed *in forma pauperis;* and

FURTHER, that Plaintiff Anthony Amaker's Motion for a TRO and Preliminary Injunction (Docket No. 8) is DENIED, without prejudice.

SO ORDERED.

* * *

**All Citations**

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