

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

BRUCE ANTHONY LEWIS,

Plaintiff,

:

Case No. 3:16-cv-189

- vs -

District Judge Walter Herbert Rice
Magistrate Judge Michael R. Merz

CAROLYN CARTY, et al., ,

Defendants.

:

REPORT AND RECOMMENDATIONS

Plaintiff Bruce Anthony Lewis brought this action for copyright infringement *in forma pauperis*. The case is before the Court for review prior to issuance of process. Plaintiff was granted leave to proceed *in forma pauperis* under 28 U.S.C. § 1915. 28 U.S.C. § 1915(e)(2), as amended by the Prison Litigation Reform Act of 1995 Title VIII of P.L. 104-134, 110 Stat. 1321(effective April 26, 1996)(the "PLRA"), reads as follows:

Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that

(A) the allegation of poverty is untrue; or

(B) the action or appeal --

(i) is frivolous or malicious;

(ii) fails to state a claim upon which relief can be granted; or

(iii) seeks monetary relief against a defendant who is immune from such relief.

A complaint is frivolous under this statute if it lacks an arguable basis either in law or in fact. *Denton v. Hernandez*, 504 U.S. 25 (1992); *Neitzke v. Williams*, 490 U.S. 319 (1989). In deciding whether a complaint is “frivolous,” that is, the Court does not consider whether a plaintiff has good intentions or sincerely believes that he or she has suffered a legal wrong. Rather the test is an objective one: does the complaint have an arguable basis in law or fact?

It is appropriate for a court to consider this question *sua sponte* prior to issuance of process "so as to spare prospective defendants the inconvenience and expense of answering such complaints." *Neitzke*, 490 U.S. at 324; *McGore v. Wrigglesworth*, 114 F.3d 601 (6th Cir. 1997); *Franklin v. Murphy*, 745 F.2d 1221, 1226 (9th Cir. 1984). The Court "is not bound, as it usually is when making a determination based solely on the pleadings, to accept without question the truth of the plaintiff's allegations." *Denton v. Hernandez*, 504 U.S. 25, 32 (1992). Dismissal is permitted under § 1915(e) only "if it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief." *Spruytte v. Walters*, 753 F.2d 498, 500 (6th Cir. 1985), disagreed with by *Walker v. Mintzes*, 771 F.2d 920 (6th Cir. 1985); *Brooks v. Seiter*, 779 F.2d 1177 (6th Cir. 1985). § 1915(e)(2) does not apply to the complaint of a non-prisoner litigant who does not seek *in forma pauperis* status. *Benson v. O'Brian*, 179 F.3d 1014 (6th Cir. 1999). Filing an *in forma pauperis* application tolls the statute of limitations. *Powell v. Jacor Communications Corporate*, 320 F.3d 599 (6th Cir. 2003)(diversity cases); *Truitt v. County of Wayne*, 148 F.3d 644, 648 (6th Cir. 1998)(federal question cases).

Plaintiff claims that he is the original author of a poem entitled “Footprints” which he claims he wrote in 1979 (Complaint, ECF No. 1-2, PageID 7). He asserts the Defendants infringed on his copyright in that poem in 1986. *Id. Id.* 17 U.S.C. § 507(b) provides that “No

civil action shall be maintained under the [Copyright Act] unless it is commenced within three years after the claim accrued.” Plaintiff has thus missed the statute of limitations by some twenty-seven years.

A quick internet search reveals that the four people named as Defendants have prominently and for years claimed to be the author of the poem. Mary Stevenson, Margaret Fishback Powers, and Carolyn Joyce Carty all have registered copyrights for the poem. Essay, Enter Sandman: Who Wrote Footprints?, by Rachel Aviv (www.poetryfoundation.org visited May 17, 2016). According to the New York Daily News on May 18, 2008, Defendant Basil Zangare is the son of the late Mary Stevenson and has sued the other two Defendants in federal court in New York about the copyright. (www.nydailynews.com visited May 17, 2016). Thus it is clear that Plaintiff could have readily discovered at least eight years ago the claims of all the people he wishes to sue.

Because Lewis’ claims are barred by the statute of limitations, his Complaint should be dismissed with prejudice and this Court should certify to the Sixth Circuit that any appeal would be objectively frivolous and should not be permitted to proceed *in forma pauperis*.

May 18, 2016.

s/ *Michael R. Merz*
United States Magistrate Judge

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Pursuant to Fed. R. Civ. P. 6(d), this period is extended to seventeen days because this Report is being served by one of the methods of service listed in Fed. R. Civ. P. 5(b)(2)(C), (D), (E), or (F). Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report

and Recommendations are based in whole or in part upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140, 153-55 (1985).