

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL CREWS,	:	
	:	
Plaintiff,	:	CIVIL ACTION NO. 16-978
	:	
v.	:	
	:	
COMMISSIONER MICHAEL RESNICK,	:	
MAYOR NUTTER, and MAYOR	:	
KENNEY,	:	
	:	
Defendants.	:	

MEMORANDUM OPINION

Smith, J.

April 4, 2017

The *pro se* plaintiff was an inmate in the City of Philadelphia Prison System when he commenced this action claiming that the defendants violated his Eighth Amendment rights when they periodically placed him in a three-person cell and required him to sleep in a “boat” on the floor. After the court dismissed the complaint for the failure to state a claim, the court provided the plaintiff with a period of 30 days to file an amended complaint. Despite the passage of a few months since the court granted the plaintiff leave to file an amended complaint, he has failed to file an amended complaint.

The defendants move to have the court dismiss the action for lack of prosecution. They apparently attempted to serve the plaintiff with the motion only to discover that he is no longer incarcerated and they have no manner to contact him. The plaintiff has not notified the court that he has changed his address.

As stated further below, the plaintiff’s failure to notify the court of his change of address would, in itself, warrant dismissal of this action without prejudice without considering the factors set forth in *Poullis v. State Farm Fire and Casualty Co.*, 747 F.2d 863 (3d Cir. 1984) to govern

motions to dismiss for failure to prosecute. Nonetheless, even if the court were to consider the *Poulis* factors, the court would still dismiss the action for failure to prosecute because it is the only appropriate sanction for the plaintiff's failure to file an amended complaint or to update his address in this case.

I. ALLEGATIONS AND PROCEDURAL HISTORY

The *pro se* plaintiff, Michael Crews, filed an application to proceed *in forma pauperis* and a proposed complaint against the defendants, Commissioner Michael Resnick, Mayor Nutter, and Mayor Kenney, on February 23, 2016.¹ Doc. No. 1. The Honorable Norma L. Shapiro, now deceased, entered an order (1) denying without prejudice the application to proceed *in forma pauperis* because the plaintiff failed to file a certified copy of his prisoner account statement for the six-month period preceding the filing of the complaint, and (2) requiring the plaintiff to either pay the filing and administrative fees or supply the court with the certified prisoner account statement within 30 days of the court's order. Doc. No. 2. In response to this order, the plaintiff provided the court with a copy of his prisoner account statement that the clerk of court docketed on March 28, 2016. Doc. No. 4. On the same date, the plaintiff also filed a notice of change of address indicating that prison officials were transferring him from one Philadelphia jail, the Curran Fromhold Correctional Facility ("CFCF"), to another Philadelphia jail, the Philadelphia Industrial Correctional Center ("PICC"). Doc. No. 3.

After receipt of the plaintiff's account statement, Judge Shapiro granted his application to proceed *in forma pauperis* on April 5, 2016, and the clerk of court subsequently docketed the

¹ In the complaint, the plaintiff declares that he delivered the complaint to prison officials for mailing to the clerk of court on February 23, 2016. See Complaint at ECF p. 8, Doc. No. 1-1. Pursuant to the federal "prisoner mailbox rule," a *pro se* prisoner plaintiff's complaint (or petition) is deemed filed "at the time petitioner delivered it to the prison authorities for forwarding to the court clerk." *Houston v. Lack*, 487 U.S. 266, 275-76 (1988). Although this doctrine arose in the context of habeas corpus petitions, the Third Circuit has extended it to civil actions brought under 42 U.S.C. § 1983. See *Pearson v. Secretary Dep't of Corr.*, 775 F.3d 598, 600 n.2 (3d Cir. 2015) (applying rule in section 1983 action and determining that *pro se* prisoner plaintiff filed complaint on date he signed it). The court has therefore used February 23, 2016, as the filing date for this action.

complaint. Doc. Nos. 5, 6. In the complaint, the plaintiff alleges that his Eighth Amendment rights were violated when, starting on March 16, 2015, he was housed in a three-person cell at the CFCF and was sleeping in a “boat” on the floor. Complaint at ECF p. 2.² It appears that the plaintiff had to sleep on the boat in the three-person cell every other month from March 2015 through February 2016. *Id.* at ECF pp. 2-3. The plaintiff also alleges that he suffers from back pain due to a prior car accident and sleeping on the boat made it harder for him to sleep.³ *Id.* at ECF p. 3. The plaintiff states that he has grieved the issue of him sleeping on the boat in the three-person cell, but nothing has come of his grievances. *Id.* at ECF p. 4. With regard to his requested relief, the plaintiff seeks \$10,000 for his pain and suffering and a transfer to a two-person cell. *Id.* at ECF p. 5.

It appears that the United States Marshal’s Service served the summonses and copies of the complaint upon the defendants, and the defendants later filed a motion to dismiss the complaint on July 11, 2016. Doc. No. 7. In the motion to dismiss, the defendants generally contended that the court should dismiss the complaint because the plaintiff failed to allege that they were personally involved in the alleged wrongs. Memorandum of Law in Supp. of Defs.’ Mot. to Dismiss for Failure to State a Claim at 1-3. The plaintiff never filed a response to the motion to dismiss.

On August 1, 2016, Chief Judge Petrese B. Tucker reassigned this case, along with 12 other cases, to the Honorable Mitchell S. Goldberg. Doc. No. 9. Judge Goldberg then entered a memorandum opinion and order on November 30, 2016, in which the court dismissed the complaint without prejudice because (1) the plaintiff’s allegations “do not show that Crews’s basic needs were not met or that unnecessary pain was inflicted sufficient to prove a violation of

² The court refers to the page numbers on the CM/ECF docket because some of the pages of the complaint are unpaginated.

³ The plaintiff acknowledges that the medical department has provided him with medication for his back pain. Complaint at ECF p. 3.

the Eighth Amendment[.]” (2) the complaint did not provide sufficient facts to “assess the totality of the circumstances of the prison conditions Crews experienced” so the court could determine if the “conditions were intended to punish or were not rationally related to a legitimate government purpose,” (3) the plaintiff failed to allege “sufficient facts to establish that any of the supervisor defendants were personally involved in a constitutional violation[.]” and (4) “[t]he complaint does not allege a policy of housing inmates in overcrowded cells.”⁴ Memorandum Op. at 4-6, Doc. No. 10. Because it was “conceivable” that the plaintiff could cure the aforementioned deficiencies in the complaint, Judge Goldberg granted the plaintiff leave until December 30, 2016, to file an amended complaint. *Id.* at 6-7; Order, Doc. No. 11.

Prior to the expiration of the period for the plaintiff to file an amended complaint, Chief Judge Tucker reassigned the case from Judge Goldberg to the undersigned. Doc. No. 12. The plaintiff did not file an amended complaint on or before December 30, 2016, and the defendants filed the instant motion to have the court dismiss the action for lack of prosecution on February 13, 2017. Doc. No. 13. To date, the plaintiff has not filed an amended complaint and he has not responded to the motion to dismiss. Regarding the plaintiff’s lack of response to the motion to dismiss, the defendants sent a letter to the court in which they indicate that they attempted to serve the motion upon the plaintiff at his address in the prison, but they were unable to do so because he is no longer incarcerated.⁵ Doc. No. 14.

II. DISCUSSION

Rule 41(b) of the Federal Rules of Civil Procedure provides that “[i]f the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the

⁴ Judge Goldberg explained that although it was unclear from the complaint whether the plaintiff was a pretrial detainee at the time he filed the complaint, thus requiring an analysis under the Fourteenth Amendment rather than the Eighth Amendment, the plaintiff failed to allege a constitutional violation under either Amendment. *See* Memorandum Op. at 3.

⁵ The court docketed the defendants’ letter.

action or any claim against it.” Fed. R. Civ. P. 41(b). In the instant motion to dismiss, the defendants assert that the court should dismiss the action for lack of prosecution because the plaintiff has failed to file an amended complaint as ordered by the court and an analysis of the factors set forth in *Poullis v. State Farm Fire and Casualty Co.*, 747 F.2d 863 (3d Cir. 1984) supports dismissing this action with prejudice. See Memorandum of Law in Supp. of Mot. to Dismiss for Lack of Prosecution (“Defs.’ Mem.”) at 1-3, Doc. No. 13.

As discussed in more detail below, the court need not even consider the *Poullis* factors before finding that dismissal is appropriate here because it appears that the plaintiff has changed his address after leaving the Philadelphia Prison System and has not updated his address with the clerk of court. Nonetheless, the court would find that dismissal is appropriate even if the court considered the *Poullis* factors.

With regard to the plaintiff’s failure to notify the court of his address change, the court, upon receiving notice from the defendants that they were unable to serve the plaintiff because he was no longer incarcerated in the Philadelphia Prison System, conducted a review of the publicly-available information to attempt to confirm whether he was still incarcerated. In this regard, the court attempted to locate the plaintiff by using the City of Philadelphia Prison System’s online inmate locator, but could not locate him.⁶ The court also attempted to locate the plaintiff through the Commonwealth of Pennsylvania, Department of Corrections’ online inmate locator and could not locate him.⁷ As a final measure, the court attempted to discover the status of the plaintiff’s criminal matter in the Court of Common Pleas of Philadelphia County. While this is by no means an indisputable finding because the court is unaware of the plaintiff’s date of birth, it appears that there was only one individual with the plaintiff’s name who had a criminal

⁶ The Philadelphia Prison System’s online inmate locator is available at: <http://www.phila.gov/prisons/inmatelocator/inmatelocator.aspx> (last visited March 31, 2017).

⁷ The Commonwealth of Pennsylvania, Department of Corrections’ online inmate locator is available at: <http://inmatelocator.cor.pa.gov> (last visited March 31, 2017).

matter pending in the Court of Common Pleas of Philadelphia County during the time period of the plaintiff's incarceration set forth in the complaint.⁸ This criminal action was docketed at No. CP-51-CR-8869-2012. It appears that this matter concluded with a jury trial in which the jury found the defendant not guilty of all charges on January 24, 2017.⁹

As it appears that the plaintiff is no longer incarcerated and has changed his address, he was obligated to file a notice of change of address with the court. *See* E.D. Pa. Loc. Civ. R. 5.1(b) ("Any party who appears pro se shall file with the party's appearance or with the party's initial pleading, an address where notices and papers can be served. Said party shall notify the Clerk within fourteen (14) days of any change of address."). The plaintiff was apparently aware of this requirement because he filed a notice of change of address in March 2016 after his transfer between prisons. Doc. No. 3.

Ordinarily, district courts in the Third Circuit must analyze motions to dismiss for lack of prosecution by evaluating the six factors set forth in *Poullis*. *See Spain v. Gallegos*, 26 F.3d 439, 454-55 (3d Cir. 1994) ("Ordinarily, when a court is determining *sua sponte* or upon motion of a defendant whether to dismiss because of a plaintiff's failure to prosecute" the court must consider the *Poullis* factors); *see also McLaren v. New Jersey Dep't of Educ.*, 462 F. App'x 148, 149 (3d Cir. 2012) (per curiam) ("Typically, district courts are required to evaluate the factors set forth by [*Poullis*] to determine whether dismissal is appropriate."). "However, when a litigant's conduct makes adjudication of the case impossible, such balancing under *Poullis* is unnecessary." *McLaren*, 462 F. App'x at 149 (citing *Guyer v. Beard*, 907 F.2d 1424, 1429-30 (3d Cir. 1990) and *Spain*, 26 F.3d at 454-55).

⁸ The defendant's name was noted as "Michael Ray Crews" on the criminal docket.

⁹ The docket information for this criminal matter is available at:

<http://ujspportal.pacourts.us/DocketSheets/CPReport.ashx?docketNumber=CP-51-CR-0008869-2012> (last visited March 31, 2017).

An example of a litigant's conduct making a case impossible to adjudicate occurs when a plaintiff does not provide the court with an up-to-date mailing address. *Id.* In these circumstances,

although courts are normally required to consider whether a lesser sanction would be appropriate (when applying *Poullis*), “[t]he district court could not contact [the plaintiff] to threaten [her] with some lesser sanction. An order to show cause why dismissal was not warranted or an order imposing sanctions would only find itself taking a round trip tour through the United States mail.”

Id. (quoting *Carey v. King*, 856 F.2d 1439, 1441 (9th Cir. 1988)) (alterations in original).

In the instant case, the plaintiff appears to no longer be incarcerated at his address of record in the Philadelphia Prison System. Because the plaintiff has failed to update the court with a new address, dismissal of this action as a sanction for the failure to provide the court with an accurate mailing address would be appropriate. *See id.* (concluding that “the District Court did not abuse its discretion in dismissing the case as a sanction for [the plaintiff’s] failure to provide the Court with an accurate mailing address”); *Welch v. City of Philadelphia*, No. CIV. A. 11-4670, 2012 WL 1946831, at *4 (E.D. Pa. May 30, 2012) (“[W]hen neither the Court nor opposing counsel can reach the plaintiff because he has not furnished an up-to-date address . . . , and when plaintiff has not responded to his opponents’ allegations regarding his failure-to-prosecute . . . , we have no choice but to act on the information before us; Plaintiff has, in essence, made adjudication of the case impossible.”).

Although the court finds that the plaintiff’s failure to notify the court and the defendants of his change of address warrants dismissal of this action with prejudice, even if the court analyzed the motion to dismiss under the *Poullis* factors, the court would still grant the motion to dismiss this action.¹⁰ In *Poullis*, the Third Circuit set forth six factors for the court to consider in

¹⁰ The Third Circuit has also found that a plaintiff’s failure to file an amended complaint as directed by a district court’s order is the type of conduct that would render adjudication of the case impossible, thus warranting dismissal

determining whether to dismiss an action with prejudice for the failure to prosecute. The six *Poulis* factors are: (1) the extent of the party's personal responsibility; (2) the extent of prejudice to the adversary; (3) a history of dilatoriness; (4) whether the conduct of the party was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal including an analysis of those alternative sanctions; and (6) the meritoriousness of the claim or defense. 747 F.2d at 868. The court will address each of these factors.

A. The Party's Personal Responsibility

The first factor is the extent of the party's personal responsibility. Here, the plaintiff is personally responsible for his failure to prosecute and his failure to comply with the court's order requiring him to file an amended complaint. He is prosecuting this matter in a *pro se* capacity and has no one else to blame for his failure to take action in this case. *See Clarke v. Nicholson*, 153 F. App'x 69, 73 (3d Cir. 2005) (per curiam) (“[U]nlike a situation where dismissal is predicated upon an attorney's error, the plaintiff here was *pro se* and directly responsible for her actions and inaction in the litigation.”). There is no indication that a third party is responsible for the plaintiff's failure or that he has somehow not received notice of his obligation to file an amended complaint in this case. In this regard, the clerk of court did not receive a returned envelope from the United States Postal Service indicating that Judge Goldberg's November 30, 2016 order was undeliverable. Therefore, as the plaintiff is personally responsible for failing to prosecute this case or in failing to update his address, this first factor weighs heavily in favor of dismissal.

without consideration of the *Poulis* factors. *See, e.g., Allen v. American Fed. of Gov't Employees*, 317 F. App'x 180, 181 (3d Cir. 2009) (per curiam) (concluding that it was not “error that the District Court did not explicitly weigh the *Poulis* factors” when the plaintiff failed to file an amended complaint as ordered by the district court).

B. Extent of Prejudice to the Defendants

The second factor is the extent of prejudice to the defendants caused by the plaintiff's failure to file an amended complaint in accordance with Judge Goldberg's order. The defendants argue that they are prejudiced because "this case has become stale, discovery has not begun, and two of the three defendants (Mayor Nutter and Commissioner Resnick) no longer even work for the City of Philadelphia." Defs.' Mem. at 2. They believe that "the 'inevitable dimming of witnesses' memories' caused by such delay constitutes prejudice to the[m]." *Id.* (quoting *Riley v. Pennsylvania Dep't of Corr.*, 536 F. App'x 22, 225 (3d Cir. 2013) (per curiam)).

Contrary to the defendants' arguments, the court does not find that they are prejudiced by the plaintiff's conduct in this case. While the City of Philadelphia appears to no longer employ Mayor Nutter or Commissioner Resnick, the defendants do not articulate how this would actually (rather than theoretically) prejudice them in this case.¹¹ In addition, although this case is already more than a year old and the pleadings are not closed, there is no evidence that this length of time, in itself, has prejudiced the defendants. While the court recognizes that "the inevitable dimming of witnesses' memories" can constitute prejudice in certain circumstances, *see Scarborough v. Eubanks*, 747 F.2d 871, 876 (3d Cir. 1984), there is no evidence that any witnesses' memories have changed in this case.¹² The defendants have not had to take any action in the case such as filing an answer or engaging in discovery efforts. Therefore, as the defendants' arguments are either unsupported or speculative, the court does not find that this second factor weighs in favor of dismissal.

¹¹ Presumably, the same counsel currently representing the defendants could still continue to represent them if the case were to proceed. In addition, as named parties, their discovery responsibilities under the Federal Rules of Civil Procedure would remain the same whether or not they were still employed by the City of Philadelphia.

¹² While this case has been pending for a little more than a year, *Riley* involved circumstances where the case had been pending for more than three years. *See* 536 F. App'x at 226 ("[I]n light of Riley's failure to comply with her multiple orders directing him to respond to the motion to dismiss, there was at least some prejudice in this case, **particularly given that the case had already been pending for more than three years.**" (emphasis added)). Thus, the defendants' reliance on *Riley* does not support a finding of prejudice in this case.

C. The Plaintiff's History of Dilatoriness

The third factor is whether the plaintiff has a history of dilatoriness. A court can find a pattern of dilatoriness where there has been “extensive or repeated delay or delinquency . . . such as consistent non-response to interrogatories, or consistent tardiness in complying with court orders.” *Adams v. Trustees of N.J. Brewery Employees' Pension Trust Fund*, 29 F.3d 863, 873-74 (3d Cir. 1994). Here, after being seemingly active in the initial prosecution of this matter insofar as he promptly responded to the court's order requesting his six-month account statement and promptly provided the court with a change of address, he has been inactive in the case since at least July 2016 insofar as he did not file a response to the motion to dismiss and did not file an amended complaint in response to Judge Goldberg's November 30, 2016 order. As stated earlier, there is nothing in the record showing that the plaintiff did not receive a copy of the motion to dismiss or Judge Goldberg's order. Also, despite knowing about the requirement that he notify the court if he changes his address, it does not appear that he has done so despite no longer being incarcerated. Based on the above, the court finds that the plaintiff has demonstrated a history of dilatoriness in this case since July 2016 and this factor weighs at least slightly in favor of dismissal.

D. Whether the Plaintiff's Conduct Was Willful or in Bad Faith

The fourth factor is whether the plaintiff's conduct was willful or in bad faith. In evaluating this factor, the court must determine whether the conduct at issue reflects mere inadvertence or negligence, or conversely, whether it is “the type of willful or contumacious behavior which [can be] characterized as ‘flagrant bad faith.’” *Scarborough*, 747 F.2d 871, 875 (3d Cir. 1984) (citing *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976)). Here, the plaintiff failed to file a response to the motion to dismiss the original complaint despite the passage of a few months, and he failed to file an amended complaint in

response to Judge Goldberg’s order despite another passage of a few months. There is nothing in the record to indicate that these failures constitute mere inadvertence or negligence, but the court cannot similarly ascertain whether this conduct demonstrates flagrant bad faith. The plaintiff has been “silent, and . . . silence is ambiguous.” *El-Hewie v. Paterson Pub. Sch. Dist.*, No. CIV. A. 13-5820, 2015 WL 5306255, at *4 (D.N.J. Sept. 10, 2015). As such, the court finds that this factor is neutral and weighs neither against nor in favor of dismissal.

E. The Effectiveness of Sanctions Other Than Dismissal

The fifth factor is the effectiveness of sanctions other than dismissal. With respect to this factor, “sanctions less than dismissal [are] ineffective when a litigant . . . is proceeding *pro se* and in forma pauperis.” *Lopez v. Cousins*, 435 F. App’x 113, 116 (3d Cir. 2011) (per curiam). Here, the plaintiff is proceeding *in forma pauperis*, so the threat of monetary compliance (including fines, costs, or payment of attorney’s fees) is unlikely to prompt compliance. Also, when a *pro se* plaintiff fails to prosecute his action, any sanction other than dismissing the action would be inappropriate. *See Briscoe v. Klaus*, 538 F.3d 252, 262-63 (3d Cir. 2008).

The court recognizes that Judge Goldberg’s order dismissing the complaint and providing leave to amend does not warn the plaintiff that if he fails to file an amended complaint, the court may dismiss the action. Nonetheless, the court finds that a warning would be ineffective at this point in the litigation because the plaintiff is no longer at his address of record and has not notified the court of the change in address. In addition, while the court could reprimand him, such a reprimand would again be ineffective insofar as the court has no way to reach the plaintiff. Thus, the court finds that no alternative sanction is available in this case and, consequently, this fifth factor weighs in favor of dismissal.

F. The Meritoriousness of the Claim

The sixth and final factor is the meritorious of the claim or defense. When evaluating this factor, courts must apply the Rule 12(b)(6) standard for addressing motions to dismiss.¹³ In the first instance, Judge Goldberg thoroughly reviewed the allegations in the complaint and properly found them to be insufficient to state plausible causes of action against the defendants. At this point, because the plaintiff has not filed an amended complaint, the court cannot conclude that the plaintiff has any meritorious claims, particularly against these defendants. Therefore, this final factor also weighs in favor of dismissal.

G. Balancing the Factors

The court must now balance the aforementioned six factors. When balancing these factors, there is no “magic formula” or mathematical calculation used to direct a particular result. *Briscoe*, 538 F.3d at 263. In addition, the Third Circuit has provided additional guidance to district courts by admonishing that “no single *Poullis* factor is dispositive,” and that “not all of the *Poullis* factors need be satisfied in order to dismiss a complaint.” *Ware v. Rodale Press, Inc.*, 322 F.3d 218, 222 (3d Cir. 2003); *Mindek v. Rigatti*, 964 F.2d 1369, 1373 (3d Cir. 1992). As the court balances the factors here, the court is mindful that dismissal “is only appropriate in limited circumstances and doubts should be resolved in favor of reaching a decision on the merits.” *Liggon-Reading v. Estate of Sugarman*, 659 F.2d 258, 260 n.1 (3d Cir. 2011) (citations omitted). In this case, the first, third, fifth, and sixth factors weigh in favor of dismissal. Although the court recognizes that the defendants’ arguments about prejudice are speculative and unsupported, and the record is unclear whether the plaintiff has acted willfully or in bad faith, there are simply

¹³ To survive dismissal, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In addition, the plaintiff’s factual allegations “must be enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 556 (citation omitted). While conducting this review, the court must liberally construe the allegations in the operative complaint because the plaintiff is proceeding *pro se*. *Higgs v. Attorney Gen.*, 655 F.3d 333, 339-40 (3d Cir. 2011).

no alternative sanctions that would adequately punish the plaintiff and the case cannot proceed without an operative complaint. Since at least July 2016, there is nothing in the record indicating that the plaintiff intends to continue prosecuting this case. Even if the plaintiff had intended to continue with this case, neither the defendants nor the court can communicate with him because he is proceeding *pro se* and has failed to update the court with his address. Therefore, the court finds that upon balancing all of the *Poulis* factors dismissal with prejudice is warranted and appropriate in this case.

III. CONCLUSION

The plaintiff's failure to update the court with his address so that he can receive communications from the court and the defendants is, in itself, the type of act that renders adjudication of this case impossible and would warrant dismissal with prejudice without considering the *Poulis* factors. Moreover, even though it is possible that the plaintiff's failure to file an amended complaint would also, in itself, be a similar act that would render adjudication of the case impossible, the court's balancing of the *Poulis* factors demonstrates that dismissal of this action with prejudice is the appropriate sanction for the plaintiff's conduct in this case. Accordingly, the court will grant the defendants' motion and dismiss this action with prejudice.

A separate order follows.

BY THE COURT:

/s/ Edward G. Smith
EDWARD G. SMITH, J.