



SCHEER v. ALLEGHENY COUNTY et al

2023 | Cited 0 times | W.D. Pennsylvania | September 29, 2023

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

JUSTIN SCHEER,) Civil Action No. 2:21-cv-1514 Plaintiff,) v.) District Judge Bissoon Magistrate
Judge Lenihan ALLEGHENY COUNTY, et al.) Defendants.) ECF Nos. 75, 78, 81

REPORT AND RECOMMENDATION I. RECOMMENDATION

For the following reasons, it is respectfully recommended that this civil action be dismissed for failure to prosecute and for failure to follow court orders. II. PROCEDURAL HISTORY

Motion for Leave to Proceed in forma pauperis on October 22, 2021. ECF No. 1. The Motion was granted on October 25, 2021 (ECF No. 4) and the Complaint was docketed that same day (ECF No. 5). Plaintiff filed a First Amended Complaint on December 1, 2021 (ECF No. 10) adding claims against additional Defendants. A Motion to Dismiss was filed by the Corrections Defendants on August 3, 2022. ECF No. 34. Plaintiff was ordered to file his response to the motion by September 6, 2022. ECF No. 36. Thereafter, Allegheny Health Network filed a Motion to Dismiss (ECF No. 39). Plaintiff was ordered to file a response to that motion by October 11, 2022 (ECF No. 43). Plaintiff failed to file his responses to the motions by the deadlines set by the Court. On October 20, 2022, the Court entered an Order to Show Cause why th failed to comply with the Court Orders of August 3, 2022 (ECF No. 36) and September 12, 2022

(ECF No. 43). ECF No. 44. Plaintiff then filed a Motion for Extension of Time in which to Respond to the Motions. ECF No. 45. The motion was granted (ECF No. 46) and Plaintiff timely filed his response on November 21, 2022. On May 4, 2023, the Court granted Plaintiff an extension of time to file a Second Amended Complaint when Plaintiff missed the deadline originally set by the Court. ECF No. 57. The Second Amended Complaint was docketed that same day. ECF No. 58. The various Defendants filed motions to dismiss on June 2, 2023, June 28, 2023, and July 24, 2023. ECF Nos. 75, 78, & 81. Plaintiff was ordered to file his responses to the respective motions by July 13, 2023, July 31, 2023, and August 24, 2023. ECF Nos. 77, 80, & 83. On August 31, 2023, after Plaintiff failed to file his responses, the Court entered an Order to Show Orders dated June 13, 2023, June 29, 2023, and July 25, 2023. The Plaintiff missed all three

deadlines, but the Court gave Plaintiff one last opportunity to file responses to the pending motions. The new deadline was set for September 15, 2023. The Court further warned Plaintiff that if he failed



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to meet this deadline, his case could be dismissed for failure to prosecute. The Order to Show Cause was sent to Plaintiff at his address of record, via certified mail, on August 31, 2023. On September 28, 2023, the Order to Show Cause entered on August 31, 2023, that was sent to Plaintiff via certified mail, was returned to the Court. ECF No. 86. As of the date of this Report and Recommendation, Plaintiff has failed to respond to the Motions to Dismiss. Nor has Plaintiff filed a motion for extension of time to file his responses. III. DISCUSSION

Rule 41(b) of the Federal Rules of Civil Procedure addresses the involuntary dismissal of an action or a claim. It 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 action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule - except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19 - operates as an adjudication on the merits. A. Sua sponte dismissal sua sponte if a Qadr v. Overmyer, No. 15-3090, 642 (per curiam) (citing Fed. R. Civ. P. 41(b)); see also Adams v. Trustees of N.J. Brewery Emps. Pension Trust Fund, 29 F.3d 863, 871 (3d Cir. 1994) Supreme Court affirmed, stating that a court could dismiss sua sponte

The Third Circuit Court of Appeals sua sponte Qadr v. Overmyer , 103 (quoting Briscoe v. Klaus, 538 F.3d 252, 258 (3d Cir. 2008)). Before engaging in a sua sponte dismissal, Id. (quoting Briscoe, 538 F.3d at 258).

Here, Plaintiff has been advised that absent affirmative indication of his desire to proceed with this civil action on or before September 15, 2023, the Court would recommend that the case be dismissed with prejudice for failure to prosecute. See August 31, 2023, Order to Show Cause. The Show Cause Order On September 28, 2023, the Order to Show Cause was returned to the Court. ECF No. 86. Having been given ample opportunity, Plaintiff has failed to provide any response or information that would account for his failure to move this litigation forward.

B. The Poulis Factors In Poulis v. States Farm Fire & Cas. Co., 747 F.2d 863 (3d Cir. 1984), the Third Circuit Court of Appeals set forth the following six factors to be weighed in considering whether dismissal is proper under Rule 41(b):

(1) adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense. Id. at 868 (emphasis omitted). In balancing the Poulis factors, no single factor is dispositive, nor do all factors need to be satisfied to result in dismissal of the complaint. Briscoe v. Klaus, 538 F.3d 252, 263 (3d Cir. 2008). However, in determining whether a dismissal is warranted, the Hildebrand v. Allegheny Cnty., 923 F.3d 128, 132 (3d Cir. 2019). The Third Circuit has



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Poulis, 747 F.2d

at 867-68, 869 (citing Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 643 (1976) Hildebrand, 923 F.3d at 132.

C. Application of the Poulis Factors

1.

Adams v. Trs. of the N.J. Brewery Emps. Pension Tr. Fund, 29 F.3d 863, 873 (3d Cir. 1994). In determining personal

Hildebrand, 923 F.3d at 133 (citing Poulis, 747 F.2d at 868). A Id. Any doubt as to personal Id. at 138 (quoting Emerson v. Thiel Coll., 296 F.3d 184, 190 (3d Cir. 2002)). Here, Plaintiff has been proceeding pro se, and therefore, bears personal responsibility for his failure to prosecute this civil action. The first factor weighs in favor of dismissal.

2. Prejudice to the adversary Prejudice to the adversary is a substantial factor in the Poulis analysis; but like any other factor, it is not dispositive. Hildebrand, 923 F.3d. at 134 Id. (quoting Scarborough v. Eubanks, 747 F.2d 871, 876 (3d Cir. 1984)). A party

Id. (quoting Ware v. Rodale Press, Inc., 322 F.3d 218, 222 (3d Cir. 2003)). If the opposition is

dismissal. Id. (citation omitted). Here, the numerous Defendants named in the Second Amended Complaint will be severely prejudiced if the case is permitted to linger in the absence of activity by the Plaintiff. e indifference to medical needs, First Amendment retaliation and state law negligence claims. The memory of witnesses will most surely fade with the lapse of time and evidence may also be lost. The Defendants cannot defend claims that are not being pursued by Plaintiff. Moreover, because Plaintiff has failed to update his address of record, Defendants are unable to serve him with court filings. Therefore, the second factor favors dismissal.

3. A history of dilatoriness A history of dilatoriness is general Adams, 29 F.3d at 874. While once or twice is normally insufficient, this factor weighs in favor

of dismissal where the plaintiff has a history of repeated delay. Hildebrand, 923 F.3d at 135 (citation o dilatoriness. Adams, 29 F.3d at 874 . It is quite sufficient if Id. at

875 (citation omitted).

Hildebrand, 923 F.3d at 135 (quoting Adams, 29 F.3d at 875). Thus, where a plaintiff has not been previously delinquent the weight given even a long delay should be mitigated. Id. Plaintiff has



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demonstrated a history of dilatoriness throughout the prosecution of this civil action. He has repeatedly requested extensions of time, which the Court has liberally granted. See ECF Nos. 45, 46, 55, 57. Those numerous extensions granted by the Court, however, have not. These failures have been met with Court Orders to show cause why Plaintiff failed to meet new deadlines. See ECF Nos. 44, & Order to Show Cause entered 8/31/2023. As noted above, the most recent show cause Order was sent to Plaintiff at his address of record via certified mail and returned to the Court as undeliverable. Plaintiff has failed to comply with his obligation to keep the Court apprised of his current address. His failure to comply with this obligation has further delayed the prosecution of this civil action. Therefore, the third factor weighs in favor of dismissal.

4.

demanding numerous extensions, ignoring admonitions by the court, and making false promises *Id.* (citing *Scarborough*, 747 F.2d at 875 involves intentional or self- *Adams*, 29 F.3d at 875

id. at 876, . . . that behavior alone does not rise to *Hildebrand*, 923 F.3d at 135.

- serving behavior, and because of our policy of favoring decisions on the merits, [in the absence of evidence] that the delay was not effectuated willfully or in bad faith, [this factor] should *Id.* at 136. Here, Plaintiff has willfully disobeyed Court orders. The docket sheet reflects that Plaintiff is no longer incarcerated and is in fact, a registered ECF e-filer. He is no longer encumbered by the regulations of prison life that may delay the timeliness of his responses to the three pending motions to dismiss. He has offered no explanation as to why he has not responded to the motions pending since June and July 2023. Nor has he sought another extension of time in which to respond to the motions. The Court can only assume that Plaintiff no longer wishes to pursue this civil action, especially because of his failure to notify the Court of his current address. Therefore, the fourth factor weighs in favor of dismissal.

5. Effectiveness of sanctions other than dismissal *Id.* (citing *Briscoe*, 538 F.3d at 262). The court should also provide an analysis

of favoring decisions on the *Id.* *Poulis*, 747 F.2d at 866 [A]lternative sanctions need only be effective toward mitigating *Hildebrand*, 923 F.3d at 136. They *Id.*

Here, in the absence of any action taken by the Plaintiff, no alternative sanctions could remedy. Therefore, the fifth factor weighs in favor of dismissal.

6. Meritoriousness of claim or defense *Adams*, 29 F.3d at 876. The standard for a Rule 12(b)(6) motion to dismiss for failure to state a

claim, and not a summary judgment standard, is applicable in a *Poulis* analysis. *Id.* at 869-70.



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The United States Court of Appeals for the Third Circuit summarized the standard to be applied in deciding motions to dismiss filed pursuant to Rule 12(b)(6):

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) the court to draw the reasonable inference that the defendant is liable for the misconduct all Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) reasonable expectation that discovery will reveal evidence of the necessary Fowler [v. UPMC Shadyside, 578 F.3d 203, 213 (3d Cir. 2009) (citation omitted)]; see also , 710 F.3d 114, 117-18, (3d Cir. 2013). Thompson v. Real Estate Mortg. Network, 748 F.3d 142, 147 (3d Cir. 2014). When considering pro se pleadings, a court must employ less stringent standards than when judging the work product of an attorney. Haines v. Kerner, 404 U.S. 519, 520 (1972). When presented with a pro se complaint, the court should construe the complaint liberally and draw fair inferences from what is not alleged as well as from what is alleged. Dluhos v. Strasberg, 321 F.3d 365, 369 (3d Cir. 2003). Notwithstanding this liberality, pro se litigants are not relieved of their obligation to allege sufficient facts to support a cognizable legal claim. See, e.g., Taylor v. Books A Million, Inc., 296 F.3d 376, 378 (5th Cir. 2002); Riddle v. Mondragon, 83 F.3d 1197, 1202 (10th Cir. 1996). Here, Plaintiff alleges that Defendants knew that he had asthma and yet would not assign him to a single cell, even after repeated requests. He was placed in a cell with a Covid-19 positive inmate and contracted the virus. Thereafter, he alleges that his asthma worsened, and that he experienced more frequent episodes of asthma attacks, shortness of breath, memory issues, and anxiety. He further states that when he complained, filed grievances and a civil action, he was met with retaliation. Therefore, liberally construed, he alleges a Fourteenth Amendment claim for deliberate indifference to medical needs, a First Amendment retaliation claim and state court claims for negligence. The final Poulis factor does not weigh in favor of dismissal.

D. Summation of Poulis Factors Here, all but the final Poulis factor weigh in favor of dismissal. IV. CONCLUSION

For the above reasons, it is respectfully recommended that this case be dismissed for failure to prosecute and for failure to follow court orders.

28 U.S.C. §636(b)(1)(B) and (C), and Rule 72.D.2 of the Local Rules of Court, the parties are allowed fourteen (14) days from the date of service of this Report and Recommendation to file written objections thereto. Any party opposing such objections shall have fourteen (14) days from the date of service of objections to respond thereto. Failure to file timely objections will constitute a waiver of any appellate rights.

Dated: September 29, 2023

BY THE COURT

_____ LISA PUPO LENIHAN



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United States Magistrate Judge

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