

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

JOHN W. RALSTON, JR.,
Plaintiff,

CIVIL ACTION NO. 3:CV-01-0609

(JUDGE NEALON)

v.

SERGEANT AFTHERTON, et al.,
Defendants

FILED
SCRANTON
JAN 15 2004
PER Km
DEPUTY CLERK

ORDER

John Ralston, a state prisoner currently confined at the State Correctional Institution at Albion, Pennsylvania, initiated this civil rights action by filing a *pro se* complaint pursuant to 42 U.S.C. §1983 on April 9, 2001, (Doc. 1), together with an application to proceed *in forma pauperis*. (Doc. 2). The complaint alleged, *inter alia*, that the Plaintiff was assaulted and denied proper medical care while he was confined at SCI-Huntington. By Order dated April 20, 2001, the Plaintiff's motion to proceed *in forma pauperis* was construed as a motion to proceed without full prepayment of costs and fees, was granted and service of the complaint was directed. (Doc. 6). The Defendants responded to the complaint by filing motions to dismiss. (Docs. 10 and 17). By Order dated July 5, 2001, the Plaintiff was directed to demonstrate to the court that he had fully exhausted his administrative remedies. (Doc. 19). Plaintiff having failed to comply with that Order, the case was dismissed by Order dated July 20, 2001. (Doc. 22). Thereafter, the United States Court of Appeals for the Third Circuit issued an opinion in the case of *Ray v. Kertes*, 285 F.3d 287 (3rd Cir. 2002), which held that failure to exhaust is an affirmative defense to be pleaded by the defendant. Citing *Ray*, the

Court of Appeals found that there was a genuine issue of fact as to whether the Plaintiff herein exhausted his administrative remedies and, in an unpublished Opinion dated March 5, 2003, vacated this court's July 20, 2001 Order dismissing the case and remanded the matter for further proceedings. (Doc. 40).

By Order dated May 12, 2003, the Plaintiff's motion to file an amended complaint was granted, (Doc. 51), and, after having been granted extensions of time in which to do so, the Plaintiff filed an amended complaint on August 7, 2003. (Doc. 75). The Defendants filed motions to dismiss the amended complaint on August 29, 2003. (Docs. 76 and 77). Alleging that the Plaintiff's allegations of poverty were untrue in his application to proceed *in forma pauperis*, the Defendants filed a "motion to re-assess the Plaintiff's *in forma pauperis* status, to stay proceedings and dismiss the action." (Doc. 81). That motion has been fully briefed by the parties and, for the reasons that follow, will be granted.

Ralston filed his application for *in forma pauperis* on April 9, 2001, while he was incarcerated at the State Correctional Institution at Albion. (Doc. 2). In response to the question inquiring as to whether he was employed at the institution, Plaintiff checked the box indicating "no." (*Id.*). In response to Question 5 on the application which states: "Do you own any cash or other property; have a bank account; or receive money from any source?" the Plaintiff checked the box indicating "yes." (*Id.*). In response to the second part of Question 5, which states that "[i]f the answer is 'yes' to any of the above, describe each source and the amount involved," Ralston stated "Misc., Gifts Friends, No Set Amounts." (*Id.*). An Administrative Order was issued on April 9, 2001, directing SCI-Albion, *inter alia*, to

provide the court with information regarding the Plaintiff's inmate account for the past six months. (Doc. 4). The prison returned a form indicating that the Plaintiff maintained an average balance of \$35.45 in his account from October, 2000 through March, 2001, and had average monthly deposits to his account of \$130.35. (Doc. 7). The total deposits for that period were \$782.07. (*Id.*). The form returned by the prison, however, was only a short summary of the Plaintiff's institutional account and did not contain a complete statement of the transactions which occurred in the account during the relevant time period.

In support of their motion to dismiss for making false allegations on his application, the Defendants have submitted copies of detailed breakdowns of the Plaintiff's SCI-Albion institutional account which reveal that an astonishing amount of dividends were received by the Plaintiff prior to and after he filed his application for IFP in April of 2001. (Doc. 83 and 89). The following is a partial list of the dividends that were deposited into Plaintiff's account while he was at SCI-Albion:

<u>Date</u>	<u>Source</u>	<u>Dollar Amount</u>
10/23/00	Southern Union Comp.	5.00
10/25/00	Southern Union Comp.	36.38
10/31/00	Verizon	6.55
11/14/00	Avaya Comm.	11.08
11/28/00	Criimi Mae	5.61
12/1/00	Mohawk Niageria	5.27
1/10/01	LG&E Energy Corp.	258.22
2/28/01	Prudential Securities	25.00
3/05/01	Entergy Corp.	13.54
3/14/01	Reliant Energy	75.00
3/14/01	Texaco Inc.	8.55
4/11/01	Southern Co. Services	16.95
5/9/01	Johnson Controls	105.07

5/10/01	International Paper	5.00
5/10/01	International Paper	2.50
6/6/01	Black hills Corp.	14.00
6/13/01	DTE Energy Co.	163.25

The above is just a sampling of the Plaintiff's holdings. His institutional account further reveals that he received dividends from holdings in Fleet National Bank, ATT Wireless, Dow Chemical and other large and well known publically traded companies. In addition, on October 15, 2001, he received \$1,037.20 from Lockheed Martin, three deposits from IDA Corp. in the amounts of \$534.23, \$1,034.28 and \$1,309.28 on April 10, 2002, \$654.10 from UNITIL Corp. on April 17, 2002, and \$980.52 from EMC Insurance Group on May 28, 2002. Ralston's institutional account records indicate that the majority of the money that he received was paid out to a Donna Schmura.¹ The Defendants have also submitted a forensic analysis of the account which concluded that the value of the securities that were paying dividends into the account at the time that the Plaintiff filed his application for IFP would be at least somewhere in the neighborhood of \$65,000. The court need not, however, rely on expert testimony to reach three simple conclusions based on the record before it. First, a substantial amount of investment income was paid into Plaintiff's institutional account immediately before, and after the time that he completed his application for IFP. Secondly, the dividend payments evidence the Plaintiff's ownership of stock and other

¹The following are examples of amounts that were paid out to Ms. Schmura: \$100 on March 19, 2001, \$50 on May 14, 2001, \$125 on June 18, 2001, \$50 on August 8, 2001, \$50 on September 24, 2001, \$1,125 in October 2001, \$250 in November 2001 and over \$3,500 in the first eight months of 2002.

investments during that time period and the amount of the dividends paid represent only a small fraction of the underlying equity investments. Lastly, the Plaintiff omitted the ownership of these investments on his application for IFP.

In his response to Defendants motion to dismiss, (Doc. 87), the Plaintiff admits that at the time the application for IFP was filed he owned stock and other investments and was receiving income thereon. He advances several arguments as to why his complaint should not be dismissed for failing to disclose these assets. First, he argues that the entire fee has been paid and therefore "there has not been any cost to the citizens of the Commonwealth."² (Doc. 87, p. 2). This assertion is of little relevance, however, because section 1915 states: "**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... the allegation of poverty is untrue.**" 28 U.S.C. §1915(e)(2)(emphasis added). The Plaintiff's next argument is that prior to coming to prison he was a millionaire but subsequently all his assets were either lost or stolen. (*Id.* at p. 4). He claims that he is of such poor physical and mental health that he does not know what he has left. (*Id.*). In his brief Ralston states: "The Plaintiff does receive miscellaneous income from stock dividends but he has no way of knowing how much or when he will receive anything." (*Id.*). He then references several of the dividends which

²In his brief the Plaintiff states that he filed this action in April of 2001 and paid the entire fee by May of the same year, he claims to have "paid the entire amount in less than 2 months." (Doc. 87, p. 5). A review of the docket in this matter clearly reveals that statement to be false. As of May 2001, the court had received only \$26.07 toward the filing fee. The docket indicates that instalment payments toward the filing fee were received from April 2001 through October 2001 at which time the entire fee was paid.

were deposited into his account, presumably to demonstrate the erratic nature of the receipts. (*Id.* at pp. 4-7). These arguments are also of little weight. Although the Plaintiff may have been confused as to the exact extent of his many holdings, he clearly admits to knowledge of the fact that he owned stock and that the stock paid dividends. Even if Plaintiff's downplaying of the value of the dividends was fully accepted, it still does not explain why he completely omitted the ownership of the actual stock, as opposed to any expected dividends, from his application for IFP. Lastly, the Plaintiff points to a letter to him from the Department of Veteran Affairs dated November 29, 1996, which indicates that as of that time he had indebtedness to the VA in the amount of \$87,713.93. (Doc. 87, attachment 1). The letter, however, further stated that Plaintiff's VA benefits would be withheld until the debt was liquidated. (*Id.*) There was no indication that the Plaintiff had any payment obligation other than the withholding of benefits. Indeed, the letter stated that if the total withholding of benefits created a financial hardship, the Plaintiff could apply for a "lesser withholding." (*Id.*) In any event, the fact that the Plaintiff also had liabilities does not excuse his total failure to disclose the extent of his assets on his application for IFP.

As noted, the *in forma pauperis* statute, 28 U.S.C. §1915, states, in part:

"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... the allegation of poverty is untrue." 28 U.S.C. §1915(e)(2). In *Thomas v. General Motors Acceptance Corp.*, 288 F.3d 305 (7th Cir. 2002), the Court of Appeals for the Seventh Circuit upheld the district court's dismissal of a complaint filed IFP where the Plaintiff failed to state that he requested to

receive lump sum retirement funds nine days prior to completing on application for IFP. The Court unequivocally stated: "Because the allegation of poverty was false, the suit had to be dismissed; the judge had no choice." *Id.* at 307 (citing 28 U.S.C. § 1915(e)(2)(A)). The only issue before the appellate court was "whether the judge abused his discretion in making the dismissal with prejudice." *Id.* In upholding the dismissal with prejudice, the Court reasoned:

Dismissal with prejudice may have been the only feasible sanction for this perjury designed to defraud the government. Dismissal without prejudice would have been no sanction at all, unless perchance the statute of limitations had run in the interim, which it must not have done or the plaintiff would not be complaining about the fact that his suit was dismissed with prejudice. And a monetary sanction would probably be difficult to collect from a litigant assiduous in concealing assets. Even dismissal with prejudice wouldn't be much of a sanction unless the plaintiff's suit was a winner, or at least had some settlement value, which it may not have had.

Id. at 307-8. See also *Mathis v. New York Life Ins. Co.*, 133 F.3d 546 (7th Cir. 1998)

(dismissal of action with prejudice appropriate where IFP applicant withheld information regarding his assets); *Balliviero v. Konrad*, 2002 WL 139911 (E.D.La. Jan. 31, 2002)(dismissal without prejudice); *Mathis v. Southwest Partners, Inc.*, 1998 WL 774827 (N.D.Ill Oct. 23, 1998) (dismissal with prejudice).

Here, the Plaintiff failed to disclose his many stock holdings on his application for IFP, he admitted as much in his response to Defendants' motion to dismiss and provided weak excuses for his withholding of that information. The Plaintiff's prison account transactions clearly indicate that he had the funds to pay the filing fee. The fact that he was permitted special treatment due to false allegations of poverty is no less than reprehensible especially given that litigants in far worse financial positions than the Plaintiff have paid the

requisite filing fee up-front. As stated in *Thomas v. General Motors Acceptance Corp.*, *supra*, the mandatory language of 28 U.S.C. § 1915(e)(2)(A) requires dismissal of this action. The only issue is whether the action should be dismissed with or without prejudice. Given that many of the Plaintiff's claims raised in his original complaint may be barred by the applicable statute of limitations, dismissal with or without prejudice would be a distinction without a difference. However, because the Plaintiff has alleged ongoing failure to provide him with adequate medical care, this action will be dismissed without prejudice so that, if necessary, he could pursue that claim.

**ACCORDINGLY, THIS 15th DAY OF JANUARY , 2004, IT IS HEREBY
ORDERED THAT:**

- (1) The Defendants' motion to dismiss, (Doc. 81), is GRANTED;
- (2) All outstanding motions are DENIED as moot;
- (3) The complaint is DISMISSED without prejudice;
- (4) The Clerk of Court is directed to close this case;
- (5) Any appeal from this Order will be deemed frivolous, lacking in probable cause and not in good faith.

s/ William J. Nealon
United States District Judge