

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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JOHN S. KAMINSKI : Civ. No. 3:21CV01347 (SALM)
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v. :
:
DR. BYRON KENNEDY, DR. JOHNNY :
WRIGHT, DR. CORY FRESTON, and :
APRN JEAN CAPLON : July 18, 2022
:
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ORDER

Self-represented plaintiff John S. Kaminski ("plaintiff"), a sentenced inmate¹ at MacDougall-Walker Correctional Institution, brought this action relating to events occurring during his incarceration in the custody of the Department of Correction ("DOC"). Plaintiff filed a motion for leave to proceed in forma pauperis ("IFP"), see Doc. #2, which was ultimately granted. See Doc. #9. On April 29, 2022, the Court revoked plaintiff's IFP status, finding that "[b]ecause [he] has

¹ The Court may take judicial notice of matters of public record. See, e.g., Mangiafico v. Blumenthal, 471 F.3d 391, 398 (2d Cir. 2006); United States v. Rivera, 466 F. Supp. 3d 310, 313 (D. Conn. 2020) (taking judicial notice of BOP inmate location information); Ligon v. Doherty, 208 F. Supp. 2d 384, 386 (E.D.N.Y. 2002) (taking judicial notice of state prison website inmate location information). The Court takes judicial notice of the Connecticut DOC website, which reflects that plaintiff was sentenced on April 11, 2006, to a term of imprisonment that has not yet expired. See http://www.ctinmateinfo.state.ct.us/detailsupv.asp?id_inmt_num=241124 (last visited July 13, 2022).

had at least three actions dismissed for failure to state a claim without leave to amend, plaintiff is subject to the three-strikes rule.” Doc. #33 at 5. However, the Court construed plaintiff’s submissions as indicating that he sought “to proceed IFP pursuant to the ‘imminent danger’ exception to the three-strikes rule.” Doc. #33 at 5-6. The Court therefore provided defendants any opportunity to respond to that request, which they have done. See Doc. #37.

I. PROCEDURAL HISTORY

On October 12, 2021, plaintiff filed a motion for leave to proceed IFP that certified he was “unable to pay the filing fee” in this case. Doc. #2 at 1. On October 15, 2021, Judge Thomas O. Farrish issued a “Notice to petitioner re: Insufficiency” and ordered plaintiff to “submit a Ledger sheet showing the past six months transactions.” Doc. #7. On October 20, 2021, plaintiff submitted a “Trust Account Statement” for the time period of April 1, 2021, to October 20, 2021. Doc. #8 at 3. On November 1, 2021, Judge Farrish granted plaintiff’s motion for leave to proceed IFP. See Doc. #9.

On January 13, 2022, the Court conducted an initial review of plaintiff’s Complaint pursuant to 28 U.S.C. §1915A, and dismissed the Complaint in its entirety for failure to comply with Federal Rule of Civil Procedure 8. See Doc. #13 at 7-10. On January 28, 2022, plaintiff filed an Amended Complaint against

Dr. Byron Kennedy, Dr. Johnny Wright, Dr. Cory Freston, and APRN Jean Caplon, in their official capacities only, seeking injunctive relief. See Doc. #14 at 1-2. The Court conducted an initial review of the Amended Complaint, and construed it “as bringing a claim for deliberate indifference to serious medical needs, in violation of the Eighth Amendment[,]” and seeking the following injunctive relief: “that (1) his medical history be reviewed by an independent provider; (2) that any necessary neurosurgical procedures be performed by an independent provider; and (3) that the Court ‘assign an advocate to him[.]’” Doc. #15 (quoting Doc. #14 at 10). The Court permitted the Amended Complaint to “proceed to service on the named defendants, in their official capacities only.” Id.

On March 24, 2022, defendants moved to revoke plaintiff’s IFP status, asserting that plaintiff should not be permitted to proceed IFP because he is barred by the “three-strikes rule” pursuant to 28 U.S.C. §1915(g). See Doc. #22 at 1-2. Plaintiff filed a response to defendants’ motion, see Docs. #27, #29,² and an addendum to his response. See Doc. #28. On April 29, 2022, the Court granted defendants’ motion, thereby revoking plaintiff’s IFP status. See Doc. #33 at 6-7. The Court instructed defendants to “file any response to plaintiff’s

² Doc. #29 is a duplicate of Doc. #27.

assertion that he qualifies for the 'imminent danger exception permitting so-called three-strike litigants to proceed IFP[,]' "Pettus v. Morgenthau, 554 F.3d 293, 296 (2d Cir. 2009), on or before May 20, 2022[,]" and provided plaintiff until June 3, 2022, to file a reply. Doc. #33 (emphasis removed).

On May 5, 2022, plaintiff filed a motion for permission to file a supplemental response. See Doc. #35. On that same date, the Court denied plaintiff's motion, and reminded him that he could "file a reply to defendants' response" regarding the "imminent danger" exception "on or before June 3, 2022[,]" and "may raise any arguments he seeks to assert in that reply." Doc. #36 (citations and quotation marks omitted) (emphasis removed).

On May 17, 2022, defendants filed their response, see Doc. #37, and on May 24, 2022, plaintiff filed his reply. See Doc. #40.

II. DISCUSSION

"To help staunch a 'flood of nonmeritorious' prisoner litigation, the Prison Litigation Reform Act of 1995 (PLRA) established what has become known as the three-strikes rule." Lomax v. Ortiz-Marquez, 140 S. Ct. 1721, 1723 (2020) (citing Jones v. Bock, 549 U.S. 199, 203 (2007)). The PLRA amended 28 U.S.C. §1915 by adding the following subsection:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior

occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. §1915(g). Thus, a prisoner may not bring an action without prepayment of the filing fee if he has filed three or more cases that have been dismissed as "frivolous, malicious, or [for] fail[ure] to state a claim upon which relief may be granted," unless he establishes that he is under "imminent danger of serious physical injury." Id.; see also Akassy v. Hardy, 887 F.3d 91, 93-96 (2d Cir. 2018).

A plaintiff that is subject to the three-strikes rule may "obtain IFP status" if he "seek[s] to redress an imminent danger of serious physical injury" that is "fairly traceable to a violation of law alleged in the complaint." Pettus, 554 F.3d at 297. A prisoner may "escape the three strikes rule only if" he "is under imminent danger of serious physical injury[]" that "exist[s] at the time the complaint is filed." Malik v. McGinnis, 293 F.3d 559, 562-63 (2d Cir. 2002) (citation and quotation marks omitted). The imminent danger exception may only be invoked to "to prevent impending harms, not those harms that had already occurred." Id. at 563 (citation and quotation marks omitted).

In evaluating an imminent danger claim, the Court is permitted to "conduct limited inquiries into whether a litigant's fear of imminent danger under Section 1915(g) is plausible[.]" including "by considering materials outside the complaint[.]" Shepherd v. Annucci, 921 F.3d 89, 92 (2d Cir. 2019).

Plaintiff's Amended Complaint does not suggest that he is under any imminent danger of unwanted surgery. Rather, plaintiff states: "It is also clear that the Petitioner has formally refused to allow UCHC to perform any further neurosurgeries on him[.]" Doc. #14 at 9 (sic). Plaintiff does not assert that he is in danger of unwanted surgery; he seeks a second opinion regarding the recommended surgery. See id. at 7 ("A 2d opinion is more than warranted. Adequate humane care has not been provided and it must be assured going forward." (sic)); id. at 10 ("The defendants have it within their control to arrange a review of his medical history (pertaining to multiple previously neurosurgical interventions at UCHC) by an outside medical facility -- a 2d opinion. The Petitioner asks for outside review[.]" (sic)).

Plaintiff's initial response to defendants' motion to revoke his IFP status asserted that he qualifies for the "imminent danger" exception to the three-strikes rule, because he is "in imminent danger" of being "cut ... once again[]" by

"UCONN Health Center surgical staff[,] " referring, it appears, to a risk that he will be forced to undergo unwanted surgery. Doc. #28 at 1 (quotation marks omitted). He further asserted that he is seeking only injunctive relief to prevent this alleged imminent harm from occurring. See id. Thus, plaintiff alleged that he is at risk of imminent danger, and that there is a nexus between the imminent danger and the claims he has asserted. See Pettus, 554 F.3d at 297-98.

However, in defendants' response, they assert "that Plaintiff is not under any 'danger,' let alone an 'imminent danger,' of being subject to unwanted surgery." Doc. #37 at 2. Defendants attach an affidavit of Dr. Cary Freston, M.D., who is "the Acting Regional Medical Director of DOC." Doc. #37-1 at 2. Dr. Freston reviewed plaintiff's "electronic health records[,] " which "revealed that he is not presently scheduled to undergo any kind of surgery[,] " and "has [not] been scheduled to undergo any kind of surgery during the time period beginning on October 1, 2021" through the date of the affidavit, May 13, 2022. Id. Dr. Freston further averred that "an orthopedic specialist previously recommended surgical intervention for Mr. Kaminski's cervical spine and lumbar spine," but that plaintiff "expressly declined and refused any such intervention[.]" Id. at 3. Dr. Freston confirmed that plaintiff will not "be forced or compelled to undergo the recommended surgical intervention for

his cervical spine or lumbar spine against his wishes[,]" and "would not receive such surgical intervention unless and until he expressed informed consent to undergo such procedure." Id.

In his reply, plaintiff does not address the evidence -- Dr. Freston's affidavit -- that refutes his claims of imminent danger of being forced to undergo unwanted surgery. Rather, plaintiff's reply focuses on the three-strikes rule, rather than the imminent danger exception. See, e.g., Doc. #40 at 1 (referencing the purpose of the three-strikes rule); id. at 3 (asserting that even though his "previous claims were rejected by the District Court for FAILURE TO STATE A CLAIM[,]" they "most assuredly brought the abuse out to the forefront[]" (sic)). Plaintiff asserts, generally, that he has been subject to abuse for the past ten years. See id. at 3. He states that he is "just a prisoner who has been repeatedly victimized by the medical system that provides medical care, through agreement with the state, with oversight provided by the DEFENDANTS." Id.

Plaintiff's reply and the Amended Complaint both focus on past alleged violations. The imminent danger exception is only available "to prevent impending harms, not those harms that had already occurred." Malik, 293 F.3d at 563 (citation and quotation marks omitted). The Court permitted the parties to make additional arguments regarding the "imminent danger" rule because plaintiff alleged, in his opposition to the motion to

revoke IFP status, that he was in imminent danger of receiving unwanted surgery. See Doc. #28 at 1; see also Doc. #33 at 6. However, the Amended Complaint alleges no imminent danger of surgery without plaintiff's consent, and the unrebutted evidence establishes that plaintiff is not presently in any danger of unwanted surgery. Plaintiff's "explanation for why he was in imminent danger" is "completely conclusory" and "without foundation." Shepherd, 921 F.3d at 97 (quotation marks omitted).

III. CONCLUSION

For the foregoing reasons, plaintiff does not qualify for the "imminent danger" exception to the "three strikes" rule. Pettus, 554 F.3d at 297. Accordingly, plaintiff is not eligible to proceed IFP. See id. at 296-97.

If plaintiff wishes to pursue this matter, he must pay the full filing fee of **\$402.00** by sending a bank check or money order made payable to the Clerk of Court to the Clerk's Office, 915 Lafayette Blvd., Bridgeport, CT, 06604. Failure to pay the filing fee by **August 18, 2022**, will result in dismissal of this action.

It is so ordered this 18th day of July, 2022, at Bridgeport, Connecticut.

/s/
HON. SARAH A. L. MERRIAM
UNITED STATES DISTRICT JUDGE