

DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

ELISTON GEORGE,

Plaintiff,

v.

**RICK MULLGRAV, Director
of the Virgin Islands
Bureau of Corrections,
SHELLY DEWESE,**

Defendants.

1:13-cv-00047-WAL-EAH

**TO: Eliston George, *Pro Se*
Venetia H. Velazquez, Esq.**

REPORT AND RECOMMENDATION

THIS MATTER comes before the Court following the docketing of two Orders on April 25, 2023 and September 22, 2023. Dkt. Nos. 43, 50. The April 2023 Order directed Plaintiff Eliston George, a prisoner appearing pro se, to update his financial information by May 26, 2023 so that the Court could calculate his initial filing fee payment for this action, given that the Court had previously permitted him to proceed in forma pauperis ("IFP") but had never assessed an initial partial filing fee to be deducted from George's prison trust fund account to pay the fee. Because the April 2023 Order was delivered shortly before the May 26, 2023 deadline, the Court issued another order extending the deadline for George to update his financial information. Dkt. No. 50. George has filed no response to either Order and it appears that he may have been released from prison without updating his address. Accordingly, the Court recommends that this matter be dismissed for failure to pay the filing fee.

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BACKGROUND

George commenced this action in April 2013, asserting violations of his civil rights pursuant to 42 U.S.C. § 1983 against three St. Croix Bureau of Corrections officials. Dkt. No. 1. He also filed an application to proceed without prepayment of fees (i.e., to proceed in forma pauperis (“IFP”)). Dkt. No. 3. The Magistrate Judge at that time, Hon. George W. Cannon, Jr., granted George’s application to proceed IFP. Dkt. No. 6. However, Judge Cannon did not assess an initial filing fee payment, or order George’s correctional institution to assess monthly payments thereafter from his prison trust account until the filing fee was paid in full, as required by statute. *See* 28 U.S.C. § 1915(a), (b). Nevertheless, the case proceeded. Judge Cannon issued an Amended Report & Recommendation recommending dismissal of some claims and permitting other claims to proceed.¹ Dkt. No. 12. The District Judge adopted in part and rejected in part the Amended R&R in April 2021, and ordered George to complete service on the Governor of the Virgin Islands so as to pursue his claims against the Defendants in their individual capacities. Dkt. Nos. 38, 29. In May 2022, the case was reassigned to the undersigned Magistrate Judge. Dkt. No. 42.

In April 2023, following a review of cases in which in forma pauperis status had been granted, the Court observed that the previous Magistrate Judge had granted George permission to proceed IFP, but had not calculated an initial payment of the filing fee and had not indicated that George would be required to pay the balance of the fee in monthly

¹ George’s last filing in this case was an objection to the Report & Recommendation filed in April 2018. Dkt. No. 35.

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installments from his prisoner account. Dkt. No. 43. The Court therefore issued an Order on April 25, 2023 directing George to submit a certification form attached to the Order, signed by an appropriate prison official, that attested to George's average monthly account balance and average monthly deposits for the six-month period preceding the date of the Order. *Id.* The Order provided a May 26, 2023 deadline for George to submit the certification form. *Id.*

A hard copy of the Order was sent by certified mail, return receipt requested on April 26, 2023. Dkt. No. 45. The prison returned the envelope, stating that inmate legal mail had to be sent to a particular address at the prison. Dkt. No. 47 (docketed on May 11, 2023). The Court resent the envelope on May 12, 2023, Dkt. No. 48, and the return receipt indicated that it was signed for on May 22, 2023, Dkt. No. 49. George did not reply by the May 26, 2023 deadline provided in the April 25, 2023 Order or ask for an extension; he did not reply at all.

Because the return receipt indicated the April 2023 Order was received four days before the May 26, 2023 deadline in that Order, the Court—in an abundance of caution—issued a second Order on September 22, 2023 that provided another deadline—October 27, 2023—for George to submit a certified copy of his trust fund account for the six month period preceding the date of the Order so as to comply with 28 U.S.C. § 1915(a), (b). Dkt. No. 50. The Order was sent certified mail, return receipt requested. Dkt. No. 51. Although the Court docket does not indicate that it received the return receipt card, it docketed a copy of the tracking report that shows that the U.S. Postal Service attempted to deliver the Court's envelope containing the September 22, 2023 Order on October 2, 2023 but the recipient "moved, left no address." Dkt. No. 52. The envelope was "delivered to the original sender"

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(i.e., the Court) on St. Thomas on October 10, 2023 at 3:07 p.m. *Id.* To date, George has not responded to the April 2023 Order and has paid no portion of the filing fee for this matter.

DISCUSSION

An individual filing a civil complaint in district court must pay a filing fee of \$402.00. *See* 28 U.S.C. § 1914. That fee is comprised of a \$350.00 filing fee plus a \$52.00 administrative fee. A prisoner who is granted *in forma pauperis* status under 28 U.S.C. § 1915 will, instead, be assessed a filing fee of \$350.00 and will not be responsible for the \$52.00 administrative fee. *See* District Court of Virgin Islands, Schedule of Court fees (effective 6/14/21).

The statute governing in forma pauperis proceedings provides, in pertinent part:

A prisoner seeking to bring a civil action . . . without prepayment of fees or security therefor, in addition to filing the [IFP] affidavit filed under paragraph (1), *shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.*

28 U.S.C. § 1915(a)(2) (emphasis added). If the prisoner is granted IFP status, he or she must pay the filing fee in instalments as follows. First, the prisoner must pay an initial partial filing fee which the Court calculates as 20% of the greater of the inmate's average monthly deposits to his account or the average monthly balance in the account for the six-month period immediately preceding the filing of the complaint. 28 U.S.C. § 1915(b)(1) (A), (B). After the initial partial filing fee is paid, the prisoner must thereafter make monthly payments of 20% of the preceding month's income credited to his account. The agency having custody of the prisoner shall forward such payments to the clerk of court each time the amount in the account exceeds \$10.00 until the filing fee is paid. § 1915(b)(2).

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A prisoner granted leave to proceed in forma pauperis is obligated to pay the entire filing fee regardless of the outcome of the proceeding and is not entitled to the return of any payments made toward the fee. *Brown v. Falvey*, No. 22-cv-5861, 2023 WL 2384461, at *3 (D.N.J. Mar. 6, 2023). Once a prisoner's fee obligations under § 1915(a) accrue, "subsequent release from prison did not relieve him of his obligation under the [Prison Litigation Reform Act] to pay the initial fee." *Drayer v. Att'y Gen. of State of Del.*, 81 F. App'x 429, 431 (3d Cir. 2003); *Hall v. Holman*, No. 04-cv-1328, 2007 WL 2049776, at *1 (D. Del. July 12, 2007) (noting that after prisoner had been released, the district court ordered him to either pay the balance of the filing fee owed or submit a new application to proceed IFP within 30 days or face dismissal).

Here, when the former Magistrate Judge granted George IFP status, he did not assess an initial partial filing fee based on George's financial affidavit and trust fund account statement, or inform George and his institution of George's obligation to pay monthly partial payments of the filing fee until the fee was paid, as required by the statute. Dkt. No. 6. When the Court discovered that error, it issued an Order on April 25, 2023 directing George to send updated financial information regarding his prison trust account by May 26, 2023 so that the Court could assess an initial filing fee. The Order warned that failure to comply might result in dismissal of the complaint. Dkt. No. 43. The Order, sent certified return receipt requested, was eventually signed for on May 22, 2023. Dkt. No. 48, 49. George did not respond, much less request an extension. But because the Order was signed for so close to the May 26, 2023 deadline, the Court, in an abundance of caution, issued a second order providing a new

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deadline for George to send updated financial information. Dkt. No. 50. The USPS tracking information indicates that, by the time of the attempted delivery on October 2, 2023 he had “moved” and “left no address.” Dkt. No. 52. The Court has no updated address for George.

It has now been over six months since the April 2023 Order was signed for, and George has not responded with the required information. His IFP application is thus incomplete. Nor has he updated his mailing address following the attempted delivery of the September 2023 Order. In addition, a search of the Federal Bureau of Prisons Inmate Locator indicates that he is “not in BOP custody.” See www.bop.gov/inmateloc/ (“Eliston George”), last visited December 4, 2023.

In *Rohn v. Johnston*, 415 F. App'x 353 (3d Cir. 2011), a panel of the Third Circuit summarily affirmed a District Court order that dismissed a complaint filed by a prisoner seeking to proceed IFP because the prisoner had not submitted a complete IFP application, such that the District Court could not “properly determine his initial filing fee. *Id.* at 355. Here, George has failed to pay the requisite filing fee of \$402.00 for civil complaints, and he has not filed a complete application and affidavit to proceed *in forma pauperis* under 28 U.S.C. § 1915 so as to allow the Court to determine his initial filing fee. Courts have dismissed complaints where a plaintiff did not file a complete IFP application, *id.*, and it is recommended that the District Judge do so here. The District Judge could direct the Clerk to reopen the matter should George submit a complete IFP application or pay the filing fee. See *Taylor v. Foy*, No. 23-cv-17754, 2023 WL 6049679, at *2 (D.N.J. Sept. 15, 2023).

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This recommendation is coupled with the fact that it appears that George has been released from prison and did not update the Court with his address. It was his responsibility to supply a new address if he wished to pursue this litigation, and he failed to do so. *Cf. Marin v. Biros*, 663 F. App'x 108, 110-11 (3d Cir. 2011).

CONCLUSION

Accordingly, the Court **RECOMMENDS** that Plaintiff Eliston George's Complaint be **DISMISSED without prejudice**.

Any objections to this Report and Recommendation must be filed in writing within fourteen (14) days of receipt of this notice, 28 U.S.C. § 636(b)(1), and must "specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis of such objection." LRCi 72.3. Failure to file objections within the specified time shall bar the aggrieved party from attacking such Report and Recommendation before the assigned District Court Judge. *See, e.g., Thomas v. Arn*, 474 U.S. 140 (1985).

The Clerk of Court shall send a copy of this R&R to George via certified mail, return receipt requested at the last address listed on the Court docket.

ENTER:

Dated: December 6, 2023

/s/ Emile A. Henderson III
EMILE A. HENDERSON III
U.S. MAGISTRATE JUDGE