FILED
United States Court of Appeals
Tenth Circuit

April 12, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

BOBBY E. HENARD,

Plaintiff - Appellant,

v.

JEFFERSON CTY JAIL; NURSE LAVINIA; DEPUTY VALENTINE; DEPUTY CLIFTON; CHLLPIN QUINN; L. SAYERS; LAKE WOOD JOHN/JANE DOES; POLICE DEPT.; JOHN DOE PROPERTY OWNER OF SQUIRE PLAZA; PROPERTY MANAGER DEBERA JANE DOE OF SQUIRE PLAZA; OWNER OF WEST COLFAX BUILDING; JOHN DOE PROPERTY MANAGER TEDDY; JOHN DOE, 1; OWNER,

Defendants - Appellees.

No. 21-1344
(D.C. No. 1:21-CV-02032-LTB)
(D. Colo.)

ORDER AND JUDGMENT*

Before **HOLMES**, **KELLY**, and **McHUGH**, Circuit Judges.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1(a) and 10th Circuit Rule 32.1(A). After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* FED. R. APP. P. 34(a)(2); 10TH CIR. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Plaintiff-Appellant Bobby Henard, proceeding pro se,[1] appeals from the district court's dismissal of his civil action due to Mr. Henard's repeated failure to cure procedural deficiencies identified by the magistrate judge. Exercising jurisdiction pursuant to 28 U.S.C. § 1291,[2] we **affirm** the district court's judgment.

I

Mr. Henard is a pretrial detainee at Jefferson County Jail in Golden, Colorado. Mr. Henard filed a pro se Prisoner Complaint in the District of Colorado.[3] He presented a long list of grievances: illegal eviction during the pandemic, excessive force, cruel and unusual punishment, denial of adequate medical care, denial of access to the courts, racial discrimination, theft of property, illegal seizure, and denial of Islamic meals in violation of the Equal Protection Clause and the First Amendment. Mr. Henard also filed a "Motion for

[1] Because Mr. Henard appears pro se, we construe his filings liberally, but do not act as his advocate. *See United States v. Parker,* 720 F.3d 781, 784 n.1 (10th Cir. 2013).

[2] A dismissal without prejudice is appealable where, as here, a district court order "expressly and unambiguously dismisses a plaintiff's entire action." *Moya v. Schollenbarger*, 465 F.3d 444, 450 (10th Cir. 2006).

[3] Mr. Henard named as Defendants: Jefferson County Jail deputies, doctors, nurses, and the chaplain; the Lakewood Police Department; and John and Jane Doe, property owners of Squire Plaza.

Immediate Preliminary Injunction" seeking accommodations for various medical conditions.

The next day, a magistrate judge ordered Mr. Henard to cure certain deficiencies in his pleadings. Specifically, Mr. Henard was directed to file his complaint on a court-approved Prisoner Complaint form, and to either pay the $402 filing fee or file a motion to proceed *in forma pauperis* ("IFP") on the court-approved form. Additionally, Mr. Henard was instructed to provide addresses for each Defendant in a specific section of the Prisoner Complaint form. The magistrate judge cautioned that the action would be dismissed without further notice if Mr. Henard failed to cure the designated deficiencies within thirty days.

In response, Mr. Henard filed a Notice Identifying Defendants and Addresses, which provided all known addresses of Defendants. Shortly thereafter, Mr. Henard filed his IFP motion. However, he failed to cure all of the deficiencies previously identified by the magistrate judge. Consequently, the magistrate judge issued a second order again directing Mr. Henard to file his complaint and provide addresses for Defendants using the court-approved Prisoner Complaint form. Additionally, the magistrate judge advised that the names on the caption of Mr. Henard's IFP motion did not match the names on the caption of the Prisoner Complaint. Finally, the magistrate judge again warned

Mr. Henard that the action would be dismissed without further notice if the deficiencies were not cured within thirty days.

In response, Mr. Henard submitted a revised IFP motion and a "Motion to Cure Deficiencies for Civil Claim" ("Motion to Cure"). The district court concluded that these filings did not remedy all of the deficiencies that the magistrate judge had identified. In particular, the court determined that, contrary to the magistrate judge's order "to file a *complete* Prisoner Complaint on the court-approved form," Mr. Henard's Motion to Cure "intersperse[d] some but not all of the pages of the court-approved Prisoner Complaint form." R. at 79 (Order of Dismissal, dated Sept. 30, 2021) (emphasis added).

Consequently, the court entered an order dismissing the complaint without prejudice pursuant to Federal Rule of Civil Procedure 41(b), noting that Mr. Henard had "been provided two opportunities to cure specified deficiencies in his filings, but . . . failed to cure the specified deficiencies within the time allowed." *Id.* The court also denied Mr. Henard leave to proceed IFP on appeal, certifying pursuant to 28 U.S.C. § 1915(a)(3) that any appeal would not be taken in good faith. Mr. Henard filed a timely notice of appeal and a motion to proceed IFP.

II

Rule 41(b) of the Federal Rules of Civil Procedure authorizes dismissal of an action "[i]f the plaintiff fails to prosecute or to comply with [the Federal Rules

of Civil Procedure] or a court order."[4] FED. R. CIV. P. 41(b). This authority is in full force even when courts are considering actions brought by pro se litigants: we have "repeatedly insisted" that such litigants must "follow the same rules of procedure that govern other litigants." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005) (quoting *Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994)).

We review a dismissal under Rule 41(b) for abuse of discretion. *See Nasious v. Two Unknown B.I.C.E. Agents*, 492 F.3d 1158, 1161 (10th Cir. 2007). That discretion is broad where, as here, the action is dismissed without prejudice, leaving the litigant free to re-file his complaint. *See id.* at 1162 (noting that, because dismissal without prejudice under Rule 41(b) allows a plaintiff to re-litigate their claim, "a district court may, without abusing its discretion, enter such an order without attention to any particular procedures"); 8 James Wm. Moore et al., MOORE'S FEDERAL PRACTICE – CIVIL § 41.53, LEXIS (database updated Mar. 2022) ("When the dismissal is without prejudice, an abuse of discretion will generally not be found, because the plaintiff may simply refile the

[4] "Although the language of Rule 41(b) requires that the defendant file a motion to dismiss, the Rule has long been interpreted to permit courts [as here] to dismiss actions sua sponte for a plaintiff's failure to . . . comply with the rules of civil procedure or court's orders." *Nasious v. Two Unknown B.I.C.E. Agents*, 492 F.3d 1158, 1161 n.2 (10th Cir. 2007) (alteration in original) (quoting *Olsen v. Mapes*, 333 F.3d 1199, 1204 n.3 (10th Cir. 2003)).

suit."); *see also Wingfield v. Patrick J. Sullivan Det. Facility*, 266 F. App'x 747, 748 (10th Cir. 2008) (unpublished) *(*"A district court may exercise broad discretion in determining whether to dismiss a civil action without prejudice for failing to comply with court orders.").

We cannot conclude that the district court here abused its discretion in dismissing Mr. Henard's action without prejudice. As noted, Mr. Henard is not exempt from the rules and court orders that govern all litigation. *See Garrett*, 425 F.3d at 840; *Green v. Dorrell*, 969 F.2d 915, 917 (10th Cir. 1992). And Mr. Henard was given ample notice on more than one occasion of the deficiencies in his materials, what he was required to do to cure them, and the consequences if he did not do so by a specified deadline. Yet he still failed to remedy those deficiencies. A dismissal without prejudice under these circumstances is not an abuse of discretion. *See United States ex rel. Jimenez v. Health Net, Inc.*, 400 F.3d 853, 855 (10th Cir. 2005) ("[D]ismissal is an appropriate disposition against a party who disregards court orders and fails to proceed as required by court rules."); *see also Durham v. Lappin*, 346 F. App'x 330, 333 (10th Cir. 2009) (unpublished) (affirming dismissal without prejudice where plaintiff repeatedly refused to comply with the district court and magistrate judge's orders to file an amended complaint on the court-approved form); *Georgacarakos v. Watts*, 368 F. App'x 917, 918–19 (10th Cir. 2010) (unpublished) (affirming dismissal without

prejudice where plaintiff failed to comply with magistrate judge's order to file complaint on the court-approved form); *Williams v. Scott*, 161 F.3d 19, 1998 WL 648070, at *1 (10th Cir. 1998) (unpublished table decision) ("From our review of the record, we cannot say that the district court erred in dismissing Plaintiff's action for failure to cure the deficiencies necessary to proceed with his civil rights claim and to proceed IFP."); *Taurus v. U.S. Dep't of Soc. Sec.*, 469 F. App'x 706, 707 (10th Cir. 2012) (unpublished) (affirming dismissal without prejudice where plaintiff failed to cure procedural deficiency after magistrate judge warned that failure to cure would result in dismissal of the action without further notice).

In any event, Mr. Henard does not dispute, or even address, the district court's reason for dismissing his action—that is, his failure to comply with local rules and the court's orders. This omission in itself is fatal to Mr. Henard's cause. *See Nixon v. City & Cnty. of Denver*, 784 F.3d 1364, 1366 (10th Cir. 2015) ("The first task of an appellant is to explain to us why the district court's decision was wrong. Recitation of a tale of apparent injustice may assist in that task, but it cannot substitute for legal argument.").[5] In other words, because we

[5] Instead, Mr. Henard simply restates his substantive claim for lack of medical care. And he also asserts a new grievance regarding mail delays that he claims affected the court's receipt of a motion to amend and second preliminary injunction that he attempted to file. Specifically, while his appellate briefing is at times difficult to decipher, Mr. Henard appears to contend that he filed a timely motion seeking to amend the complaint along with a second preliminary

(continued...)

have not been presented by Mr. Henard with a basis for finding that the district court abused its discretion, we must uphold the court's dismissal of his action without prejudice. *See Reedy v. Werholtz*, 660 F.3d 1270, 1275 (10th Cir. 2011) (declining to consider an argument that "d[id] not challenge the [district] court's reasoning" in rejecting that argument); *see also Blackfeather v. Boulder Cnty. Combine Cts.*, 606 F. App'x 470, 471 (10th Cir. 2015) (unpublished) (affirming dismissal without prejudice where "[p]etitioner makes no attempt to excuse his failure to comply with the magistrate judge's order to cure the deficiencies or explain why it was impossible to do so"); *Thompson v. Robison*, 580 F. App'x 675, 677 (10th Cir. 2014) (unpublished) (affirming dismissal without prejudice where "[n]owhere in [plaintiff's] brief does he address the district court's order directing him to cure deficiencies in his initial filings, or the court's subsequent order dismissing his action for failure to do so").

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[5](...continued)
injunction. *See* Aplt.'s Br. at 2. He claims that those documents were delayed due to the possible malfeasance of prison officials and COVID-related hardships. However, even assuming the accuracy of Mr. Henard's delay assertions relating to his purported motion to amend, he does not indicate that the purpose of any proposed amendment was to file a complaint that would be compliant with the magistrate judge's order, and that is the only conceivable way such a motion might be relevant to our analysis. And we are "under no obligation to craft legal theories" or "supply factual allegations to support [Mr. Henard's] claim for relief." *Abdelsamed v. United States*, 13 F. App'x 883, 884 (10th Cir. 2001) (unpublished). In sum, Mr. Henard's briefing does nothing to challenge the basis for the district court's decision, and that failure in itself sounds the death knell for his appeal.

III

As for Mr. Henard's IFP motion, when a district court certifies an appeal is not taken in good faith the appealing party may still move for leave to proceed IFP. *See Rolland v. Primesource Staffing, L.L.C.*, 497 F.3d 1077, 1079 (10th Cir. 2007). To do so, however, the appellant must show not only "a financial inability to pay the required filing fees," but also "the existence of a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal." *DeBardeleben v. Quinlan*, 937 F.2d 502, 505 (10th Cir. 1991).

Mr. Henard's financial inability to pay the filing fee is clear; he has no significant assets or current income. But as discussed above, we conclude that Mr. Henard fails in this appeal to present a reasoned, nonfrivolous argument on the law and facts that would support setting aside the district court's judgment. We therefore deny Mr. Henard's IFP motion. *See, e.g.*, *Thompson*, 580 F. App'x at 677 (denying IFP motion where "[n]owhere in his brief does [plaintiff] address the district court's order directing him to cure deficiencies in his initial filings, or the court's subsequent order dismissing his action for failure to do so"). Mr. Henard is directed to immediately remit the full amount of the appellate filing fee.

IV

For the foregoing reasons, we **AFFIRM** the district court's judgment dismissing Mr. Henard's action without prejudice and **DENY** his motion to

proceed IFP on appeal.

ENTERED FOR THE COURT

Jerome A. Holmes
Circuit Judge