

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

JOSEPH VAN PATTEN,

Plaintiff,

v.

ORDER

06-C-374-C

D.O.C., MATTHEW FRANK,
WARDEN DEPPISCH,
JOSEPH LADWIG and DR. LUY,

Defendants.

This action commenced on October 19, 2006, when I granted plaintiff Joseph Van Patten leave to proceed in forma pauperis on his claims that defendants Luy, Deppisch and Frank exhibited deliberate indifference to his serious medical needs by ignoring his need for appropriate treatment of his broken leg and that defendant Ladwig exhibited deliberate indifference to his serious medical needs when Ladwig forced him to walk unassisted for half a mile in order to obtain medical treatment for his broken leg. Subsequently, defendants answered the complaint and a preliminary pretrial conference was held for the purpose of providing the parties with a trial date and deadlines for completing discovery and filing dispositive motions.

On February 8, 2007, plaintiff filed a document titled "Request to Close File

Without Prejudice for Petitioner to P[ursue] Case at a Later Date,” which I construed as a motion for voluntary dismissal of the case. In an order dated February 12, 2007, I told plaintiff that because defendants had been required to defend this action, I would not dismiss the case without prejudice unless defendants agreed to such a dismissal. Subsequently, defendants advised the court and plaintiff that they would not agree to a dismissal without prejudice.

Now plaintiff has filed two documents. First, he requests leave to withdraw his notice of voluntary dismissal. In a second document titled “Notice to Appeal Judge Crabb’s Decision Made on February 12, 2007,” he states that he is “notifying the court that he will be appealing [this court’s] decision made on February 12, 2007.” Because plaintiff’s notice of appeal is not accompanied by the \$455 fee for filing an appeal, I construe the notice to include a request for leave to proceed in forma pauperis on appeal.

I accept plaintiff’s request to withdraw his notice of voluntary dismissal. The parties remain bound by the deadlines established in the magistrate judge’s preliminary pretrial conference order for moving this case to resolution.

Unfortunately, plaintiff’s apparently impulsive submission of a notice of appeal from the February 12 decision is both costly and futile. As plaintiff should be aware, because he is a prisoner, he must pay the full cost of filing a notice of appeal. He owes the money whether his appeal is meritorious, procedurally defective, or lacking in legal merit. If he qualifies for indigent status, he is allowed to pay the fee in monthly installments, beginning

with an initial partial payment. If his appeal is certified as not having been taken in good faith, he may not proceed in forma pauperis. Instead, he must pay the full amount of the fee immediately, with one exception which I will explain below.

I must certify that plaintiff's appeal is not taken in good faith. As I told plaintiff in the February 12 order, a case cannot be dismissed at the plaintiff's instance after an answer or motion for summary judgment has been filed except upon order of the court and then only upon terms and conditions the court deems proper. Fed. R. Civ. P. 41(a)(2). In this case, the condition I deemed proper in light of defendants' investment of time and expense to defend the case, was that the dismissal be "with prejudice." Plaintiff may disagree with that determination, but he cannot appeal it, because the order is not a "final decision" and therefore, is not appealable.

In rare instances, a party may appeal a non-final decision. 28 U.S.C. § 1292 states in relevant part,

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

I purposely did not include in the February 12 order a finding that an interlocutory appeal would be proper. The order does not involve a controlling question of law as to which there is substantial ground for difference of opinion, and a prompt appeal from the

order will not materially advance the ultimate termination of this litigation. Indeed, it will serve only to delay it. Because plaintiff has advanced no legally meritorious reason for taking an appeal from the February 12, 2007 order, I will certify that the appeal is not taken in good faith.

Because I am certifying petitioner's appeal as not having been taken in good faith, plaintiff cannot proceed with his appeal without prepaying the \$455 filing fee unless the court of appeals gives him permission to do so. Pursuant to Fed. R. App. P. 24, plaintiff has 30 days from the date of this order in which to ask the court of appeals to review this court's denial of leave to proceed in forma pauperis on appeal. His motion must be accompanied by an affidavit as described in the first paragraph of Fed. R. App. P. 24(a) and a copy of this order. Plaintiff should be aware that if the court of appeals agrees with this court that the appeal is not taken in good faith, it will send him an order requiring him to pay all of the filing fee by a set deadline. If plaintiff fails to pay the fee within the deadline set, the court of appeals ordinarily will dismiss the appeal and order this court to arrange for collection of the fee from plaintiff's prison account.

ORDER

IT IS ORDERED that

1. I accept plaintiff's request for leave to withdraw his notice of voluntary dismissal.
2. Plaintiff's request for leave to proceed in forma pauperis on appeal is DENIED and

I certify that plaintiff's appeal is not taken in good faith.

3. The clerk of court is requested to insure that plaintiff's obligation to pay the \$455 fee for filing his appeal is reflected in this court's financial records.

Entered this 22d day of February, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge