

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

O'BEA S. HAYES, #209748,
Oshkosh Correctional Institution,

Petitioner,

ORDER

v.

02-C-0538-C

JOHN CORDIO, Binning & Dickens
Insurance Capitol Indemnity Corporation,

Respondent.

This is a proposed civil action for monetary relief brought pursuant to 42 U.S.C. § 1981. Petitioner O'Bea S. Hayes, an inmate at the Oshkosh Correctional Institution in Oshkosh Falls, Wisconsin, alleges that respondent John Cordio (his landlord) violated his civil rights by failing to maintain a second-story porch railing properly. Petitioner has submitted the initial partial payment required under 28 U.S.C. § 1915(b)(1).

In addressing any pro se litigant's complaint, the court must construe the complaint liberally. See Haines v. Kerner, 404 U.S. 519, 521 (1972). However, the prisoner's complaint must be dismissed if, even under a liberal construction, it is legally frivolous, malicious, fails to state a claim upon which relief may be granted, or seeks money damages from a respondent who is immune from such relief. See 42 U.S.C. § 1915e.

Because this court lacks subject matter jurisdiction, petitioner's complaint will be dismissed. In his complaint and attachments, petitioner makes the following material allegations of fact.

ALLEGATIONS

Petitioner is an inmate at the Oshkosh Correctional Institution in Oshkosh, Wisconsin. Respondent John Cordio was petitioner's landlord at the time relevant to this lawsuit and he resides in Madison, Wisconsin.

On September 24, 1999, petitioner fell off his second-story porch because the railing was very old, rotted and not secured properly. Petitioner broke his left cheek bone, cracked his right collar bone and needed stitches in his head.

DISCUSSION

I understand petitioner to allege that his civil rights have been violated because respondent maintained his porch negligently and, as a result, the railing gave way and he fell off the porch. Although petitioner contends that his civil rights have been violated, his allegations do not implicate these rights.

Generally, federal courts have the power to hear two types of cases: (1) cases in which a plaintiff alleges a cognizable violation of his or her constitutional rights or rights established under federal law and (2) cases in which a citizen of one state alleges a violation

of his or her rights established under state law by a citizen of another state and the amount in controversy exceeds \$75,000. See 28 U.S.C. § 1331-32. Petitioner's claim does not fall into either category because it is at most a state law claim (for example, negligence) and the parties are not of diverse citizenship. Because this court lacks subject matter jurisdiction over petitioner's claim, I must deny his request for leave to proceed in form pauperis and dismiss this case.

ORDER

IT IS ORDERED that

1. Petitioner O'Bea S. Hayes's request for leave to proceed in forma pauperis is DENIED and this case is DISMISSED for lack of subject matter jurisdiction;
2. Petitioner will not receive a strike because dismissal for lack of subject matter jurisdiction is not a reason enumerated in 28 U.S.C. § 1915(g) that requires issuing a strike; and
3. The unpaid balance of petitioner's filing fee is \$127.33; petitioner is obligated to pay this amount according to 28 U.S.C. § 1915(b)(2).

Entered this 16th day of October, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge