

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

DIANA GOODAVAGE,

Petitioner,

v.

DANE COUNTY SHERIFF'S DEPARTMENT
and ATTORNEY GENERAL OF WISCONSIN,

Respondents.

ORDER

04-C-444-C

This is a proposed civil action for injunctive relief brought pursuant to 42 U.S.C. § 1983. Petitioner seeks leave to proceed without prepayment of fees and costs or providing security for such fees and costs, pursuant to 28 U.S.C. § 1915. From the affidavit of indigency accompanying petitioner's proposed complaint, I conclude that petitioner is unable to prepay the fees and costs of instituting this lawsuit.

In addressing any pro se litigant's complaint, the court must construe the complaint liberally, Haines v. Kerner, 404 U.S. 519, 521 (1972), and grant leave to proceed if there is an arguable basis for a claim in fact or law. Neitzke v. Williams, 490 U.S. 319 (1989). However, if the action is frivolous or malicious, fails to state a claim upon which relief may

be granted or seeks monetary relief against a defendant who is immune from such relief, the case must be dismissed promptly pursuant to 28 U.S.C. § 1915(e)(2).

As an initial matter, petitioner adds Joseph G. Stearns as another petitioner to the complaint. However, petitioner Goodavage is the only one who signed the complaint and who filed an affidavit of indigency. Petitioner cannot sue someone for another person's injury; such action violates the basic concept of constitutional standing to bring a claim. A party must have sustained some sort of injury as a result of the alleged wrongdoing to have standing to bring a claim. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). As a result, if Stearns wishes to present his case before this court, he must file a separate complaint and an affidavit of indigency if he believes he qualifies to proceed in forma pauperis.

In her complaint, petitioner makes the following allegations of fact.

ALLEGATIONS OF FACT

Petitioner Diana Goodavage lived with her adult son and her minor son in a three-bedroom apartment. Petitioner moved into the apartment in January 1994. Her adult son moved in with her in August 1999. Petitioner has a mental disability. Her adult son is disabled.

Petitioner's landlord filed a complaint against petitioner for nonpayment of rent.

Petitioner paid rent for May 2001. Petitioner sought the legal services of Connie ER Deer, a lawyer from Legal Action of Wisconsin, Inc.

On July 6, 2001, petitioner's attorney encouraged her to sign an "Eviction Agreement" with the landlord. Under the agreement, petitioner and her son would vacate the apartment on or before noon of September 30, 2001. In addition, the agreement stated "[i]n the event the defendant(s) fail(s) to vacate by the date specified, the plaintiff shall be entitled to an ex parte judgment of eviction (without further notice to defendants or further court hearing), and an immediate issuance of the writ of restitution to the Sheriff for removal from the premises."

Petitioner signed the agreement but her attorney did not provide her with an opportunity to read it. Petitioner's adult son was not present and did not sign the agreement. Petitioner's attorney never advised her of the ex parte provision of the agreement. When petitioner asked her attorney about getting a reference from the landlord, the attorney responded that the landlord did not like petitioner and therefore would not provide a good reference. Dane County Circuit Court Judge Nowakowski signed the agreement. Petitioner's attorney did not send her a copy of the agreement until July 13, 2001.

Petitioner asked the Dane County Circuit Court to allow an evidentiary hearing on the merits of the landlord's complaint against her. The court commissioner denied

petitioner's request. Petitioner asked for a formal hearing before a judge but the circuit court would not release her from the July 6, 2001 stipulation and order. Petitioner filed a notice of appeal, requesting a stay of the order pending appeal and a stay based on hardship. While petitioner filed her notice of appeal she began to pack and move her things out of the apartment. Petitioner wanted to move out of the apartment but would not be able to move by the stipulated date.

The Wisconsin Court of Appeals affirmed the circuit court's decision, stating that petitioner had erroneously raised issues in her brief that were not in the circuit court's record. Petitioner disagreed with the court of appeals' decision and appealed to the Wisconsin Supreme Court. The Wisconsin Supreme Court refused to grant a writ of certiorari to hear petitioner's case.

Petitioner's attorney failed to reasonably accommodate petitioner's disability by failing to communicate with her before the trial date. However, petitioner communicated with the attorney by sending her documents and a letter. Furthermore, because Judge Nowakowski is a landlord, he should have recused himself or petitioner's attorney should have requested his recusal.

Petitioner was evicted in October 2001. Her adult son has been homeless ever since.

DISCUSSION

Petitioner alleges that she was evicted without due process because her attorney failed to provide adequate representation regarding the hearing and stipulation of July 6, 2001 and because there has never been an evidentiary hearing on her eviction in the trial court. The due process clause of the Fourteenth Amendment prohibits states from “depriv[ing] any person of life, liberty, or property without due process of law.”

Petitioner’s complaint has a number of problems. First, petitioner has sued the Dane County Sheriff’s Department and the Attorney General of Wisconsin, but her complaint fails to allege any facts showing how these two entities violated her due process rights. Therefore, petitioner’s complaint fails to provide respondents with enough notice of the wrongs they committed against petitioner so that they may file an answer. Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002) (complaint must give defendant sufficient notice of claim to enable him to file answer).

Second, petitioner’s real dispute appears to be with her attorney, against whom she did not file a lawsuit. Even if she had sued her attorney for inadequate representation, the attorney would not be subject to suit under the due process clause because she is not a government employee. Petitioner would be unable to sue her attorney in federal court for any state law violations unless the parties meet the requirements for diversity jurisdiction, 28 U.S.C. § 1332, that is, they are citizens of different states and more than \$75,000 is at stake.

Finally, it is questionable whether petitioner suffered an injury and therefore has standing to sue anyone for a due process violation. To create a “case or controversy” under Article III of the Constitution, a party seeking relief in federal court must show that she has suffered an “injury in fact,” which is “concrete,” “distinct and palpable,” and “actual or imminent,” as opposed to “conjectural” or “hypothetical.” E.g., McConnell v. Federal Election Commission, 124 S. Ct. 619, 707 (2003). In addition, the party must show that its injury is “fairly traceable” to the defendant’s conduct and that there is a “substantial likelihood” that the requested relief will redress the harm. Id. Without such a showing, the court cannot consider the party’s arguments on the merits. Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 778 (2000) (“Questions of jurisdiction, of course, should be given priority - - - since if there is no jurisdiction there is no authority to sit in judgment of anything else.”)

Petitioner admits that she wanted to move out of her apartment despite the eviction notice. Petitioner’s only request is that this court require the Dane County Circuit Court to hold a hearing on the merits of her case. Even if the circuit court held a hearing, it is unclear what petitioner’s remedy would be. Petitioner has made it clear that she would not want to move back into the apartment from which she was evicted. As a result, I cannot find that petitioner has suffered a real injury that provides her with standing to bring a lawsuit against any respondent. I will deny petitioner’s request for leave to proceed in forma

pauperis and dismiss her complaint as legally frivolous.

ORDER

IT IS ORDERED that petitioner's request for leave to proceed in forma pauperis is DENIED and her complaint is DISMISSED as legally frivolous.

Entered this 28th day of July, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge