IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MICHAEL R. RAY,

ORDER

Petitioner,

07-C-331-C

v.

SEVENTH AVENUE COMPANY;
MIDNIGHT VELVET, INC.;
FUN CHARGE, and GINNY'S INC.,

Respondents.

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In an order dated June 22, 2007, I denied petitioner's request for leave to proceed in forma pauperis in this action, after concluding that petitioner was ineligible for in forma pauperis status under 28 U.S.C. § 1915(g). I told petitioner that if, by July 13, 2007, he failed to pay the $350 fee for filing this action, I would direct the clerk of court to close the case. Now petitioner has paid the $350 filing fee. However, he has filed a motion for reconsideration of the June 22 order, asking that this court refrain from counting as a strike the June 21, 2004 dismissal of a case he filed in the District of South Carolina, Ray v. Chicago Title Ins. Co., 04-CV-509. I am persuaded that there is merit to petitioner's argument that case no. 04-CV-509 should not count as a strike. Therefore, I will not count

as a strike petitioner's case no. 04-CV-509 and I will amend the June 22 order to rescind the finding that petitioner is ineligible to proceed in forma pauperis because of his three-strike status. Nevertheless, because petitioner has paid the $350 for filing this action, the amendment will have no immediate effect on his ability to proceed in this action. Petitioner's complaint will be taken under advisement for screening on its merits under 28 U.S.C. § 1915A.

In support of his motion for reconsideration, petitioner has submitted the report and recommendation of United States Magistrate Thomas E. Rogers, III, recommending dismissal of petitioner's complaint no. 04-C-509. In the report at p.4, the magistrate judge advises petitioner that the Prison Litigation Reform Act's screening provision under 28 U.S.C. § 1915A is "particularly relevant in this case, because Ray fails to state a claim upon which relief may be granted." Nevertheless, the magistrate judge recommended dismissal "without prejudice." Initially, petitioner objected to the magistrate judge's report and recommendation. However, before the district court could rule on the recommendation, petitioner filed a "notice to strike" his objections and requested voluntary dismissal of the action. The district court agreed to a voluntary dismissal without adopting the magistrate judge's report and recommendation.

If the question in this case were whether a prisoner can avoid a strike by withdrawing a lawsuit following a magistrate judge's recommendation for dismissal on the ground that

a prisoner's complaint is legally meritless or fails to state a claim upon which relief may be granted, I may well answer it "no." But it is not petitioner's voluntary dismissal that persuades me he is not deserving of a strike for filing case no. 04-C-509. Rather, it is because a close review of the magistrate judge's recommendation reveals that although he termed the recommended dismissal as one for failure to state a claim, his analysis focused exclusively on the question whether the district court lacked jurisdiction to hear petitioner's claim. Indeed, the magistrate judge titled the portion of his opinion discussing the content of petitioner's complaint, "Lack of Jurisdiction." In this section, he found expressly that jurisdiction for petitioner's claim "concerning real estate in Horry County, South Carolina" did not lie under the diversity jurisdiction statute, 28 U.S.C. § 1332, because plaintiff and most of the defendants were citizens of South Carolina. Alternatively, he noted that plaintiff's complaint was devoid of any facts indicating why plaintiff would have standing to sue the defendants on claims the magistrate judge characterized as "questions of quieting title to real estate." Standing is a question of subject matter jurisdiction. Discovery House, Inc. v. Consolidated City of Indianapolis, 319 F.3d 277, 279 (7th Cir. 2003). Finally, the magistrate judge recommended dismissal "without prejudice," which suggests that he believed petitioner's claims had potential legal merit for which he could obtain relief in some other court. It is settled law that a complaint should not be dismissed for failure to state a claim on which relief may be granted unless it appears beyond doubt that the plaintiff

could prove no set of facts in support of his claim that would entitle him to relief. Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993). In any event, because the magistrate judge's discussion of the shortcomings of petitioner's complaint had nothing to do with the complaint's underlying legal merit, I am convinced that the magistrate judge did not intend to recommend dismissal of plaintiff's complaint for failure to state a claim upon which relief may be granted.

Some courts have held that dismissal of a prisoner's complaint for lack of jurisdiction should count as a strike under § 1915(g) because "a case or appeal that is devoid of jurisdiction is plainly frivolous." See, e.g., Anderson v. Sundquist, 1 F. Supp.2d 828, 830 (W.D. Tenn. 1998). Other courts, including this one, have not read § 1915(g) so expansively. In the context of an appeal, the Court of Appeals for the Seventh Circuit has defined the word "frivolous" as "one prosecuted with no reasonable expectation of altering the district court's judgment and for purposes of delay or harassment or out of sheer obstinacy," Stringel v. Methodist Hosp. of Indiana, Inc., 89 F.3d 415 (7th Cir. 1996). In an even earlier case, the court of appeals held that an in forma pauperis claim may be dismissed as "factually frivolous" where the allegations are "'clearly baseless,' a category encompassing allegations that are fanciful, fantastic, and delusional." Denton v. Hernandez, 504 U.S. 25 (1992). Jurisdictional defects do not fit into either category.

Accordingly, plaintiff's motion for reconsideration of this court's June 22, 2007 order

will be granted. The court's records will be amended to reflect that petitioner has two strikes only.

ORDER

IT IS ORDERED that petitioner's motion for reconsideration of this court's conclusion in its June 22, 2007 order that petitioner incurred a strike in Ray v. Chicago Title Ins. Co., 04-CV-509 (D.S.C.) is GRANTED.

Further, it is ordered that this court's June 22, 2007 order is AMENDED to rescind the finding that petitioner is ineligible to proceed in forma pauperis because of his three-strike status. The court's records are to be amended immediately to reflect that petitioner has two strikes only.

Finally, IT IS ORDERED that petitioner's complaint is taken under advisement for screening pursuant to 28 U.S.C. § 1915A. Petitioner will be notified promptly when the screening has been completed.

Entered this 11th day of July, 2007.

BY THE COURT:

Barbara B. Crabb

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BARBARA B. CRABB
District Judge