

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

ROY MITCHELL,

ORDER

Plaintiff,

v.

15-cv-108-wmc
Appeal No. 15-2763

KEVIN KALLAS, et al.

Defendants.

In this case, defendants Dr. Kevin Kallas and Dr. Dawn Laurent allegedly failed to treat plaintiff Roy Mitchell for Gender Identity Disorder (“GID”) during her incarceration in the Wisconsin Department of Corrections in violation of the Eighth Amendment. Mitchell has an interlocutory appeal pending in the Court of Appeals for the Seventh Circuit related to this court’s April 8, 2015, order denying her a preliminary injunction. Mitchell subsequently filed a second notice of appeal from this court’s order entered on August 6, 2015, which denied her Motions to Strike Answer, for Sanctions, for Assistance in Recruiting Counsel, for Change of Judge and to Amend Complaint. (Dkt. #54.) A preliminary pretrial conference is now scheduled with Magistrate Judge Stephen Crocker on August 27, 2015, at 1:30 p.m.

Because the court’s August 6 order is not a “final decision” appealable under 28 U.S.C. §1291, and, unlike the court’s earlier order denying a preliminary injunction, is also not appealable as of right under 28 U.S.C. §1292(a), the court construes Mitchell’s latest notice as a request for certification or leave to pursue an interlocutory appeal under 28 U.S.C. § 1292(b). That section provides in relevant part that:

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.

Unfortunately for purposes of Mitchell's second notice of appeal, this court's August 6 order involves "no apparent controlling question of law as to which there is substantial ground for difference of opinion," nor has Mitchell argued or shown otherwise. Likewise, there appears no reasonable basis to suggest that an immediate appeal from the August 6 order in this case might "materially advance the ultimate outcome of th[is] litigation." If anything, the opposite is true. Therefore, the court must deny Mitchell's request for leave to take an interlocutory appeal pursuant to § 1292(b).

Even so, Mitchell's second notice of interlocutory appeal has triggered certain obligations. Whether or not her appeal is dismissed, the Seventh Circuit directs that an appellate docketing fee (\$505) is due immediately upon the filing of a notice of appeal. *Newlin v. Helman*, 123 F.3d 429, 433-34 (7th Cir. 1997). While Mitchell has filed a motion for leave to proceed without prepayment of the appellate docketing fee, along with a recent inmate account statement, this court must not only find that she is indigent and, therefore, eligible to proceed *in forma pauperis*, but also that the appeal is taken in good faith for purposes of Fed. R. App. P. 24(a)(3). See 28 U.S.C. § 1915(a)(3) ("An appeal may not be taken *in forma pauperis* if the court certifies in writing that it is not taken in good faith."). Since Mitchell has failed to articulate a good faith basis to appeal from this otherwise unappealable, non-final order, the court will certify that her second appeal is not taken in

good faith. Accordingly, Mitchell's request for leave to proceed *in forma pauperis* on appeal must also be denied.

Moreover, given that this court has denied certification of the appeal, Mitchell cannot proceed with her appeal without prepaying the \$505 filing fee unless the court of appeals gives her permission to do so. Pursuant to Fed. R. App. P. 24(a)(4) and (5), Mitchell has 30 days from the date of this order in which to file a motion in the court of appeals to review this denial of leave to proceed *in forma pauperis* on appeal, should she wish to do so. Along with her motion and six-month trust fund account statement, Mitchell must include an affidavit as described in Fed. R. App. P. 24(a)(1), along with a statement of issues she intends to argue on appeal. Mitchell must also send along a copy of this order.

Mitchell should also be aware that she must file these documents in addition to the notice of appeal she has filed previously. If she does not file a motion requesting review of this order, despite this court's certification, the court of appeals may choose not to address the denial of leave to proceed *in forma pauperis*. Instead, it may require Mitchell to pay the entire \$505 filing fee before it considers her appeal. If she does not pay the fee within the 30 day deadline set forth above, it is also possible that the court of appeals will dismiss the appeal. Indeed, given that she appears to be attempting to appeal from a non-appealable, pre-judgment order, dismissal of her appeal is likely in any event.

ORDER

IT IS ORDERED that:

1. Plaintiff Roy Mitchell's request for leave to take an interlocutory appeal is DENIED.

2. The court CERTIFIES that Mitchell's appeal is not taken in good faith for purposes of Fed. R. App. P. 24(a)(3) and DENIES her motion for leave to proceed *in forma pauperis* (dkt. #55) in this case.
3. Although this court has certified that plaintiff's appeal is not taken in good faith under Fed. R. App. P. 24(a)(3), Mitchell is advised that she may challenge this finding pursuant to Fed. R. App. P. 24(a)(5) by filing a separate motion to proceed *in forma pauperis* on appeal with the Clerk of Court, United States Court of Appeals for the Seventh Circuit, **within thirty (30) days of the date of this order**. With that motion, she must include an affidavit as described in the first paragraph of Fed. R. App. P. 24(a), along with (1) a statement of issues she intends to argue on appeal and (2) a copy of this order. Plaintiff should be aware that she must file these documents *in addition* to the notice of appeal she has filed previously.

Entered this ___ day of August, 2015.

BY THE COURT:

WILLIAM M. CONLEY
District Judge