

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIAN TYSON : CIVIL ACTION
 :
v. :
 :
ATTORNEY KATHLEEN MARTIN :
PAUL BURGOYNE, ESQUIRE : NO. 03-4228

MEMORANDUM AND ORDER

Fullam, Sr. J. December , 2003

Plaintiff, a state prisoner who is not represented by counsel, has filed a complaint and various other documents, which are partially illegible, and which, to the extent that they can be deciphered, make very little sense. A reasonable interpretation is that plaintiff was convicted in state court, and filed an appeal with the Pennsylvania Superior Court. Apparently dissatisfied with the services of his then-counsel, to whom he had already paid a substantial fee for his work, plaintiff hired another lawyer, the defendant Kathleen Martin, with instructions to raise 39 specified issues on appeal. Her entry into the fray caused a delay in the appellate proceedings, and she did not raise all of the issues requested by plaintiff. Plaintiff feels that his rights have been violated. He filed a complaint against Ms. Martin with the disciplinary authorities, and received a lengthy letter from the defendant Paul Burgoyne, Esquire, Disciplinary Counsel, explaining why the disciplinary

authorities concluded that plaintiff had no valid grounds for complaint against Ms. Martin.

In the present complaint, plaintiff seems to feel that the Pennsylvania Appellate Courts have violated his rights by not processing his appeal expeditiously; that both Ms. Martin and his trial attorney breached their contracts and fraudulently induced him to part with a total of \$11,500 in counsel fees, and that Mr. Burgoyne has condoned their actions by not disciplining Ms. Martin. The papers filed by plaintiff are filled with vituperation and claims of conspiracy.

When the complaint was first filed, it was not accompanied by a filing fee or a motion for leave to proceed in forma pauperis. Plaintiff was furnished the appropriate forms, and advised of the necessity of filing them. He was also given a complete set of instructions. Plaintiff has now, in part, complied with the requirements (he has filed an affidavit of poverty, and has furnished at least some of the records of his inmate account); therefore, he will be permitted to proceed in forma pauperis.

The applicable statute provides, 28 U.S.C. §
1915(e)(2):

"Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that -

(B) the action or appeal -

- (i) is frivolous or malicious;
- (ii) fails to state a claim on which relief may be granted; or
- (iii) seeks monetary relief against a defendant who is immune from such relief.

The plaintiff has not set forth any valid claim for violation of his constitutional rights. The most that can be said is that he is dissatisfied with the performance of his lawyers, and the way they are handling his appeal. His attorneys were not acting under color of state law, they were merely private attorneys. Any claims against them for breach of contract or other improprieties must first be presented to the state courts, where they would presumably be remedied. It is true that, if his attorneys' performance at trial and on the criminal appeal were constitutionally deficient, plaintiff might then have a valid constitutional claim if his criminal conviction is upheld notwithstanding the deficient performance of his counsel. But, so far as the record discloses, his criminal appeal is still pending; he has not yet been injured by any alleged deficiency on the part of his lawyers. Finally, there is no diversity of citizenship between plaintiff and either of the defendants, so this Court does not have subject matter jurisdiction over any of plaintiff's claims at this juncture. It should also be mentioned that the defendant Burgoyne is immune from liability for damages.

To summarize, (1) no constitutional violation has yet

occurred; (2) all claims relating to the performance of plaintiff's trial and appellate counsel must first be presented to the state courts; (3) plaintiff's claims are, for the most part, entirely premature; and (4) this Court lacks subject matter jurisdiction over his breach of contract claims. For all of these reasons, the complaint will be dismissed, pursuant to the requirements of the statute quoted above.

An Order follows.

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ORDER

AND NOW, this day of December 2003, IT IS ORDERED:

1. Plaintiff's application for leave to proceed in forma pauperis is GRANTED.

2. This action is DISMISSED, pursuant to 28 U.S.C. § 1915(e)(2).

The Clerk is directed to close the file administratively.

John P. Fullam, Sr. J.