

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-5087
Conference Calendar

STEPHEN PAUL COOPER,

Plaintiff-Appellant,

versus

RICKY TRAVER ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 92-CV-594
- - - - -
(October 28, 1993)

Before POLITZ, Chief Judge, and SMITH and WIENER, Circuit Judges.

BY THE COURT:

Stephen Paul Cooper seeks to proceed in forma pauperis in his appeal from the district court's judgment dismissing his pro se civil rights action without prejudice. Liberally construed, Cooper argues that the district court abused its discretion in dismissing the action under Fed. R. Civ. P. 41(b) for failure to comply with an order.

A district court may dismiss an action sua sponte under Rule 41(b) for failure to prosecute or to comply with an order of the court. McCullough v. Lynaugh, 835 F.2d 1126, 1127 (5th Cir. 1988). A dismissal without prejudice is no less severe than a dismissal with prejudice if further litigation is time-barred. Sturgeon v. Airborne Freight Corp., 778 F.2d 1154, 1160 (5th Cir.

1985). "[T]his Court has limited the district court's discretion in dismissing cases with prejudice." Berry v. Cigna/RSI-Cigna, 975 F.2d 1188, 1191 (5th Cir. 1992). The history of the case must demonstrate 1) a clear record of delay or contumacious conduct and 2) that a lesser sanction was not available or would prove futile. Id.

In this case, the district court did not note, and it is not readily discernible from the complaint, whether further litigation would be time-barred. The district court found that Cooper had failed "to file an amended complaint setting out a short and plain statement of his claim and . . . to show proof of exhaustion of administrative remedies."

Even under the lesser standard of review, we find that the district court abused its discretion. The record indicates that Cooper attempted to comply with the court's order by filing "Plaintiff's Amend. Compliance w/order 3/18/93 Mag. McKee." The district court may wish to use a questionnaire or refer the case to the magistrate judge to conduct an evidentiary hearing to determine the factual and legal bases for Cooper's claim. Spears v. McCotter, 766 F.2d 179, 181 (1985).

Accordingly, Cooper has presented a nonfrivolous issue for appeal. See Howard v. King, 707 F.2d 215, 220 (5th Cir. 1983). IT IS ORDERED that his motion to proceed in forma pauperis on appeal is GRANTED. IT IS FURTHER ORDERED that the judgment of the district court is VACATED and the case is REMANDED for further proceedings. See Clark v. Williams, 693 F.2d 381, 381-82

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(5th Cir. 1982). Cooper's motion, construed as an application for an injunction during the pendency of the appeal, is DENIED. See Fed. R. App. P. 8(a).