IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-11083
Summary Calendar

RESHUNN DEWAYNE CHAMBERS,

Plaintiff-Appellant,

VERSUS

DAVID W. WILLIAMS, Sheriff, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(4:94-CV-586-Y)

(February 16, 1995)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:[*]

Reshunn Chambers appeals the dismissal, for failure to prosecute, of his state prisoner's civil rights suit brought pursuant to 42 U.S.C. § 1983. Finding dismissal improvident, we reverse and remand.

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[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

On September 1, 1994, Chambers filed this action alleging, inter alia, denial of access to legal material, denial of certain job assignments, and involuntary exposure to hazardous levels of environmental tobacco smoke. In his application to proceed in forma pauperis, Chambers stated that he had a total of approximately $60 in various credit union and other accounts and an additional $25 in his prisoner account.

On September 7, the district court ordered Chambers to (1) "[f]ile an amended complaint setting fort his allegations with specific facts," and (2) "[t]ender a partial filing fee in the amount of $65 . . . or show cause why said filing fee should not be paid" on or before September 28. The district court also warned Chambers that "[f]ailure to so comply with the terms of this order will result in dismissal of the case without further notice."

On September 22, Chambers attempted to file a document entitled "Notice of Inability to Pay Costs," which the district court rejected for failure to comply with the local rules. On October 24, Chambers filed an amended complaint.

On October 31, the district court dismissed the case for want of prosecution (without stating whether the dismissal was with or without prejudice) because Chambers had not complied with the September 7 order, noting that approximately one month had passed since the court returned the unfiled inability-to-pay notice and Chambers had not paid the partial filing fee, sought additional time to do so, or refiled the document properly. The court noted

that "[a]s an alternative basis for dismissal, the court finds that [Chambers] has not amended his complaint to provide specific facts in support of his civil rights claim, as the Court required in its September 7 order."

On November 3, Chambers refiled the inability-to-pay notice. On November 28, Chambers noticed his appeal.

II.

Chambers argues the allegations set forth in his complaint and does not address the fact that his suit was dismissed for failure to prosecute. Nevertheless, dismissal for failure to prosecute is the only issue "arguably presented to [this Court] for review." Searcy v. Houston Lighting & Power Co., 907 F.2d 562, 564 (5th Cir.) (per curiam), cert. denied, 498 U.S. 970 (1990).

A district court may sua sponte dismiss an action for failure to prosecute or to comply with any court order. FED. R. CIV. P. 41(b); McCullough v. Lynaugh, 835 F.2d 1126, 1127 (5th Cir. 1988). This court reviews a rule 41(b) dismissal for abuse of discretion. Id. A sua sponte dismissal under rule 41(b) must be upheld on appeal unless we determine that the district court abused its discretion in choosing that sanction. McNeal v. Papasan, 842 F.2d 787, 789-90 (5th Cir. 1988). The general rule is that a dismissal is with prejudice unless otherwise specified. Graves v. Hampton, 1 F.3d 315, 318 (5th Cir. 1993).

This court will affirm a dismissal with prejudice

> for failure to prosecute only when (1) there is a clear record of delay or contumacious conduct by the plaintiff,

> and (2) the district court has expressly determined that lesser sanctions would not prompt diligent prosecution, or the record shows that the district court employed lesser sanctions that proved to be futile.

Berry v. Cigna/RSI-Cigna, 975 F.2d 1188, 1191 (5th Cir. 1992). In most cases in which we have affirmed a dismissal with prejudice, one of three aggravating factors is also found: "(1) delay caused by the plaintiff himself and not his attorney; (2) actual prejudice to the defendant; or (3) delay caused by intentional conduct." Id. (internal quotation and citation omitted).

Because the district court's judgment is silent, its dismissal is treated as one with prejudice. We find abuse of discretion and vacate the dismissal because (1) the record shows that Chambers attempted to comply timely by filing the inability-to-pay notice on September 22, but his filing was rejected for failure to comply with the local rules; (2) the court has not expressly determined that lesser sanctions would be futile; and (3) none of the aggravating factors exists. See id. at 1191 n.6.

Chambers also has moved the court to issue written rulings of its decisions. We deny that motion as unnecessary.

The judgment is REVERSED and REMANDED. We express no view on the ultimate merits of this case.