

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

DERRICK L. SMITH,

Plaintiff,

v.

Case No: 2:18-cv-707-FtM-29MRM

DEPARTMENT OF CORRECTIONS,
PATRICK MURPHY and DEPARTMENT
OF CORRECTIONS LIABILITY
INSURERS,

Defendants.

REPORT AND RECOMMENDATION

This cause is before the Court on the January 23, 2019 Order to Show Cause. (Doc. 12). In the Order to Show Cause, the Court required Plaintiff, *inter alia*, to show good cause on or before February 8, 2019, as to why this case should not be dismissed for failure comply with a Court Order and failure to promptly notify the Court of any change in address. (Doc. 12 at 1-2). Plaintiff Derrick L. Smith failed to comply with the Order to Show Cause and, thus, the Undersigned recommends that this action be dismissed for failure to prosecute.

A brief procedural background of the case is instructive. On October 24, 2018, Plaintiff commenced this action by filing a Complaint, alleging claims against the Department of Corrections and Warden Patrick Murphy for gross negligence and wrongful death. (Doc. 1 at 1-6). Plaintiff also filed an Application to Proceed in District Court Without Prepaying Fees or Costs (Doc. 2). On October 31, 2018, the presiding trial judge entered an Order dismissing the Complaint without prejudice for lack of subject matter jurisdiction. (Doc. 6 at 1-4). In that Order, Plaintiff was given leave to file an Amended Complaint and did so on November 9, 2018. (Doc. 6 at 4; Doc. 8).

Thereafter, on December 6, 2018, Plaintiff filed a Motion to Amend. (Doc. 9). The Court granted Plaintiff leave to file a Second Amended Complaint and required Plaintiff to file the Second Amended Complaint within twenty-one (21) days from the date of the December 20, 2018 Order. (Doc. 11 at 3). This Order was mailed to Plaintiff on December 20, 2018 and, pursuant to a docket entry on January 14, 2019, it appears that the Order was returned to the Clerk's Office as undeliverable.

The Court then entered the Order to Show Cause on January 23, 2019, at issue here. (Doc. 12). In the Order to Show Cause, the Court required Plaintiff by February 8, 2019 to: (1) show good cause in writing why this case should not be dismissed for failure to comply with the December 20, 2018 Order and for failure to promptly notify the Court of any change of address; (2) file a Second Amended Complaint that complies with the December 20, 2018 Order; and (3) file a Notice of Change of Address. (Doc. 12 at 2). The Court cautioned Plaintiff that if the Order to Show Cause was returned as undeliverable by the post office, the Court would recommend that this action be dismissed for failure to prosecute and for failure to comply with the Court's December 20, 2018 Order and the Order to Show Cause. (*Id.*). Further, the Court cautioned Plaintiff that if he failed to: show good cause; file a Second Amended Complaint; or provide a current address, "the Court will recommend that this action be dismissed." (*Id.*).

On February 11, 2019, the Clerk's Office noted on the docket that Plaintiff's mail – which included the Order to Show Cause and the Order on Motion to Amend – was returned as undeliverable.

Here, Plaintiff failed to comply with the December 20, 2018 Order and the January 23 Order to Show Cause. Further, Plaintiff failed to keep the Court apprised of his current address. Pursuant to Local Rule 3.10, "[w]henver it appears that any case is not being diligently

prosecuted the Court may, on motion of any party or on its own motion, enter an order to show cause why the case should not be dismissed, and if no satisfactory cause is shown, the case may be dismissed by the Court for want of prosecution.” M.D. Fla. R. 3.10. The Undersigned finds that Plaintiff is not diligently prosecuting this matter and this action should be dismissed without prejudice for want of prosecution.

For the foregoing reasons, the Undersigned **RESPECTFULLY RECOMMENDEDS** that the Application to Proceed in District Court Without Prepaying Fees or Costs (Doc. 2) be **DENIED** and this action be dismissed without prejudice for want of prosecution and for failure to comply with Court Orders.

Respectfully recommended in Chambers in Ft. Myers, Florida on February 14, 2019.



MAC R. MCCOY
UNITED STATES MAGISTRATE JUDGE

NOTICE TO PARTIES

A party has fourteen days from this date to file written objections to the Report and Recommendation’s factual findings and legal conclusions. A party’s failure to file written objections waives that party’s right to challenge on appeal any unobjected-to factual finding or legal conclusion the district judge adopts from the Report and Recommendation. *See* 11th Cir. R. 3-1.

Copies furnished to:
Counsel of Record
Unrepresented Parties