

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES ANTHONY DAVIS (SON),

Plaintiff,

-against-

HOSIE DAVIS JR. (FATHER); BEULAH
DAVIS (MOTHER),

Defendants.

1:20-CV-8125 (LLS)

ORDER

LOUIS L. STANTON, United States District Judge:

By order dated November 20, 2020, the Court denied Plaintiff's application to proceed in this court *in forma pauperis* ("IFP") and dismissed this action without prejudice because Plaintiff, who appears *pro se*, is barred under the three-strikes provision of the Prison Litigation Reform Act ("PLRA"), 28 U.S.C. § 1915(g), from filing federal civil actions IFP as a prisoner.¹ (ECF 3.). But the Court granted Plaintiff 30 days from the date of that order to pay the relevant fees to bring this action. *Id.* Because Plaintiff failed to pay those fees within the time allowed, on January 29, 2021, the Court entered judgment dismissing this action without prejudice under § 1915(g). (ECF 4.)

On February 17, 2021, the Court received from Plaintiff a notice of appeal, a motion for leave to proceed IFP on appeal, as well as a motion for an extension of time to file a notice of appeal under Rule 4(a)(5) of the Federal Rules of Appellate Procedure. (ECF 5, 6, & 7.) For the reasons discussed below, the Court denies Plaintiff's motion for an extension of time and grants Plaintiff's motion for leave to proceed IFP on appeal.

¹ Plaintiff is presently incarcerated in the Southern Desert Correctional Center, in Indian Springs, Nevada,

DISCUSSION

A. Motion for an extension of time to file a notice of appeal

A litigant has 30 days from the entry date of the order or judgment he wishes to challenge to file a notice of appeal. Fed. R. App. P. 4(a)(1)(A). The judgment that dismissed this action was entered on January 29, 2021. (ECF 4.) Thus, Plaintiff had 30 days from that date, or until March 1, 2021, to file a timely notice of appeal.² The Court received Plaintiff's notice of appeal on February 17, 2021. Accordingly, because Plaintiff's notice of appeal is timely, the Court denies Plaintiff's motion for an extension of time to file a notice of appeal as unnecessary.

B. Motion for leave to proceed IFP on appeal

Under the three-strikes provision of the PLRA:

[i]n no event shall a prisoner bring a civil action *or appeal a judgment in a civil action or proceeding* [IFP] if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g) (emphasis added).

The Court dismissed this action because the Court recognized that Plaintiff has earned at least three "strikes" under § 1915(g), and failed to show that he was under imminent danger of serious physical injury at the time that he filed his complaint. (ECF 3.) Plaintiff now appeals the dismissal of this action, and asks this Court to grant him leave to proceed IFP on appeal. (ECF 5 & 6.)

With a copy of his notice of appeal, Plaintiff submitted on this application the July 15, 2020 Findings of Fact, Conclusions of Law, and Order of Judge Boulware of the United States

² Because the last day of that 30-day period actually fell on Sunday, February 28, 2021, the expiration date of that period was extended to the next court business day, Monday, March 1, 2021. *See* Fed. R. App. P. 26(a)(1)(C).

District Court for the District of Nevada. (ECF 6, at 11-33); *Davis v. Neven*, No. 2:15-CV-1574, 2020 WL 4032265 (D. Nev. July 15, 2020). That meticulous opinion, based on an evidentiary hearing, for the first time brought to this Court's attention that Plaintiff had been legally incompetent since the age of fourteen. It found that, without appointment of counsel, that court had erroneously dismissed a half-dozen of Plaintiff's filings since 2009, thus also creating erroneous "strikes."

Those careful findings cast serious doubt on all courts' dismissals (when Plaintiff was uncounselled) of his various applications (which are many) during the past decade, including those relied upon as prior "strikes" in this Court's November 20, 2020 decision, the subject of his present appeal. That ruling must be set aside, even though the case would in any event have been unable to proceed for lack of counsel. *See Berrios v. New York City Hous. Auth.*, 564 F.3d 130 (2d Cir. 2009).

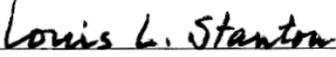
However, this Court lacks the power to do so, a timely notice of appeal having been filed. Under these circumstances, Plaintiff is granted IFP status for the purpose of pursuing his appeal. *See Berrios*, 564 F.3d at 135.

CONCLUSION

The Court directs the Clerk of Court to mail a copy of this order to Plaintiff and note service on the docket. The Court denies Plaintiff's motion for an extension of time to file a notice of appeal (ECF 7) as unnecessary because Plaintiff's notice of appeal (ECF 6) is timely. The Court grants Plaintiff's motion for leave to proceed IFP on appeal. (ECF 5.)

SO ORDERED.

Dated: March 19, 2021
New York, New York



Louis L. Stanton
U.S.D.J.