UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

DANIEL FIAMENGO	:	
	:	PRISONER
v.	:	Case No. 3:04CV569 (SRU)
	:	
MICHAEL WADSWORTH, et al.	:	

RULING AND ORDER

Daniel Fiamengo, an inmate confined at the MacDougall-Walker Correctional Institution in Suffield, Connecticut, brings this civil rights action pro se and in forma pauperis pursuant to 28 U.S.C. § 1915. Fiamengo asserts that his claim arises under 42 U.S.C. § 1983. He names as defendants Michael Wadsworth, Dorene M. Grenier, Great American Insurance Company, Marshall Berger, Stephen Duffy and Michael Donahue. Fiamengo alleges that the defendants violated the Connecticut Unfair Insurance Practices Act and that his prior lawsuit against several of the defendants seeking compensation for a motor vehicle accident was dismissed improperly. Fiamengo seeks an award of $20,000, the liability limits on the insurance policy. For the reasons that follow, the complaint is dismissed with prejudice against Marshall Berger and without prejudice against the other defendants.

I. Standard of Review

Fiamengo has met the requirements of 28 U.S.C. § 1915(a) and has been granted leave to proceed in forma pauperis in this action. Pursuant to 28 U.S.C. § 1915(e)(2)(B), "the court shall dismiss the case at any time if the court determines that . . . the action . . . is frivolous or malicious; . . . fails to state a claim on which relief may be granted; or . . . seeks monetary relief against a defendant

who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B)(i) - (iii). Thus, the dismissal of a complaint by a district court under any of the three enumerated sections in 28 U.S.C. § 1915(e)(2)(B) is mandatory rather than discretionary. See Cruz v. Gomez, 202 F.3d 593, 596 (2d Cir. 2000).

"When an in forma pauperis plaintiff raises a cognizable claim, his complaint may not be dismissed sua sponte for frivolousness under § 1915(e)(2)(B)(i) even if the complaint fails to 'flesh out all the required details.'" Livingston v. Adirondack Beverage Co., 141 F.3d 434, 437 (2d Cir. 1998) (quoting Benitez, 907 F.2d at 1295).

> An action is "frivolous" when either: (1) "the 'factual contentions are clearly baseless,' such as when allegations are the product of delusion or fantasy;" or (2) "the claim is 'based on an indisputably meritless legal theory.'" Nance v. Kelly, 912 F.2d 605, 606 (2d Cir. 1990) (per curiam) (quoting Neitzke v. Williams, 490 U.S. 319, 327, 109 S. Ct. 1827, 1833, 104 L. Ed. 2d 338 (1989)). A claim is based on an "indisputably meritless legal theory" when either the claim lacks an arguable basis in law, Benitez v. Wolff, 907 F.2d 1293, 1295 (2d Cir. 1990) (per curiam), or a dispositive defense clearly exists on the face of the complaint. See Pino v. Ryan, 49 F.3d 51, 53 (2d Cir. 1995).

Livingston, 141 F.3d at 437. The court exercises caution in dismissing a case under section 1915(e) because a claim that the court perceives as likely to be unsuccessful is not necessarily frivolous. See Neitzke v. Williams, 490 U.S. 319, 329 (1989).

A district court must also dismiss a complaint if it fails to state a claim upon which relief may be granted. See 28 U.S.C. § 1915(e)(2)(B)(ii) ("court shall dismiss the case at any time if the court determines that . . . (B) the action or appeal . . . (ii) fails to state a claim upon which relief may be granted"); Gomez, 202 F.3d at 596 ("Prison Litigation Reform Act . . . which redesignated § 1915(d) as § 1915(e) [] provided that dismissal for failure to state a claim is mandatory"). In reviewing the

complaint, the court "accept[s] as true all factual allegations in the complaint" and draws inferences from these allegations in the light most favorable to the plaintiff. Gomez, 202 F.3d at 596 (citing King v. Simpson, 189 F.3d 284, 287 (2d Cir. 1999)). Dismissal of the complaint under 28 U.S.C. § 1915(e)(2)(B)(ii) is only appropriate if "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Id. at 597 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

In addition, "unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would succeed in stating a claim," the court should permit a pro se plaintiff who is proceeding in forma pauperis to file an amended complaint that states a claim upon which relief may be granted. Gomez v. USAA Federal Savings Bank, 171 F.3d 794, 796 (2d Cir. 1999).

In order to state a claim for relief under section 1983 of the Civil Rights Act, the plaintiff must satisfy a two-part test. First, the plaintiff must allege facts demonstrating that the defendant acted under color of state law. Second, he must allege facts demonstrating that he has been deprived of a constitutionally or federally protected right. See Lugar v. Edmondson Oil Co., 457 U.S. 922, 930 (1982); Washington v. James, 782 F.2d 1134, 1138 (2d Cir. 1986).

II. Facts

Fiamengo alleges that, in January 1995, he was involved in a motor vehicle accident with defendant Wadsworth, who was insured by defendant Great American Insurance Company. Defendant Duffy, Fiamengo's attorney, filed an action in state court against defendant Wadsworth. In March 2002, defendant Berger, a state court judge, granted a judgment of nonsuit against Fiamengo. Defendants Grenier and Donahue allegedly conspired with employees of Great American Insurance

Company and defendant Duffy to defraud Fiamengo "out of any settlement for the personal injuries sustained to plaintiff of the accident on January 26, 1995, by not having any settlement been made."

III. Discussion

The defendants in this case are an insurance company, several private individuals and a state court judge. After careful review, the court concludes that the complaint must be dismissed.

As a state court judge, defendant Berger is protected from suit for damages by judicial immunity. "[J]udicial immunity is an immunity from suit, not just from ultimate assessment of damages." Mireles v. Waco, 502 U.S. 9, 11 (1991). "The absolute immunity of a judge applies however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff." Young v. Selsky, 41 F.3d 47, 51 (2d Cir. 1994) (internal quotes and citations omitted). Judicial immunity is overcome in only two situations. "First, a judge is not immune from liability for nonjudicial actions, i.e., actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction." Mireles, 502 U.S. at 11 (citations omitted).

Fiamengo alleges that defendant Berger granted a judgment of nonsuit against him in his state court case. This action was taken in defendant Berger's judicial capacity and was within his jurisdiction. Thus, neither exception applies and the actions of defendant Berger are protected by absolute judicial immunity. The court concludes that amendment of the complaint would not succeed in stating a claim against defendant Berger. Thus, all claims against defendant Berger are dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and (iii).

The remaining defendants are private individuals and an insurance company. Private parties are

not generally liable under section 1983. In Lugar, the Supreme Court set forth a two-part test to determine when the actions of a private party may be attributed to the state so as to make the private party subject to liability under section 1983. First, "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." Lugar, 457 U.S. at 937. "Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." Id.; see also Dahlberg v. Becker, 748 F.2d 85, 89 (2d Cir. 1984) ("to establish deprivation of a federally protected right there must be both 'state action' and a 'state actor'"), cert. denied, 470 U.S. 1084 (1985).

Defendant Wadsworth is a private citizen who was involved in an automobile accident with Fiamengo. Defendant Duffy is Fiemengo's retained attorney. Defendants Grenier and Donahue may be agents or employees of defendant Great American Insurance Company. Fiemengo does not state that the actions of any defendant occurred as a result of a state-created right or rule of conduct or allege any facts that would suggest that the actions were even remotely attributable to the state or any state actor. See id. at 92 (explaining that private person may be considered state actor "[w]hen the complained of conduct results from a state agent's encouragement or command, the state and private actor jointly participate in depriving plaintiff of his rights, the granting of benefits to a private actor by the state inseparably links them together, or the private actor undertakes to perform activities ordinarily exclusively engaged in by government"); see also Slotnick v. Garfinkle, 632 F.2d 163, 166 (1st Cir.1980) ("participation by a private party in litigation, without more, does not constitute state action").

Here, Fiamengo alleges only that defendants were involved in his state court litigation and denied him an insurance settlement as a result of the motor vehicle accident. The court concludes that the complaint lacks allegations suggesting that any of these defendants is a state actor and fails to satisfy the first part of the test to state a section 1983 claim.

In addition, the court concludes that Fiamengo cannot satisfy the requirements to invoke this court's diversity jurisdiction. "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000.00, exclusive of interest and costs, and is between (1) citizens of different states . . . ." 28 U.S.C. § 1332(a). A person's citizenship for purposes of diversity jurisdiction is his domicile, which is defined as the state in which a person is both present and intends to remain for the indefinite future. See Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 48 (1989). In determining the domicile of a prisoner, courts have held that the domicile of a prisoner before he was imprisoned is presumed to remain his domicile while he is in prison. See Sullivan v. Freeman, 944 F.2d 334, 337 (7th Cir. 1991) (citations omitted), cert. denied, 513 U.S. 1060 (1994). See also Tiuman v. Canant, No. 92 Civ. 5813 (JFK), 1994 WL 471517 (S.D.N.Y. Sept. 1, 1994) (an inmate's domicile prior to incarceration remains his domicile for diversity purposes). The presumption that a prisoner retains his pre-incarceration domicile for purposes of diversity, however, is rebuttable.

Here, the plaintiff states in his complaint that he is a citizen of Connecticut. There is no information in the complaint to suggest that the plaintiff's domicile is any place other than Connecticut. The plaintiff states that the defendants also are citizens of Connecticut. In addition, the amount in controversy is only $20,000. Thus, the complaint fails to meet the requirements to invoke this court's

diversity jurisdiction.

IV. Conclusion

The complaint is **DISMISSED** pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) and (iii). The dismissal of Marshall Berger is with prejudice; the dismissal of the complaint against the remaining defendants is without prejudice. The Clerk is directed to enter judgment and close this case. In light of this dismissal, Fiamengo's motion for appointment of counsel [**doc. #4**] is **DENIED** as moot.

SO ORDERED this 13th day of July 2004, at Bridgeport, Connecticut.

/s/ Stefan R. Underhill
Stefan R. Underhill
United States District Judge