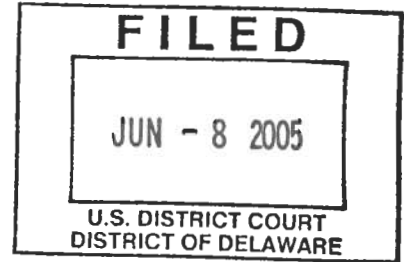


IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PETER CONGO, JR.,)
)
Plaintiff,)
)
v.) Civ. No. 03-215-GMS
)
SGT. BRETT FREE, SGT. DAVE)
PHILLIPS, and CPL. RICHARD)
CALVERT,)
)
Defendants.)



MEMORANDUM ORDER

Peter L. Congo ("Congo"), a pro se litigant, was incarcerated at the Sussex Correctional Institution ("SCI") located in Georgetown, Delaware. His SBI number was 198782. Congo filed this action pursuant to 42 U.S.C. § 1983 and requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915.

Congo was released from confinement sometime in 2003. He did not notify the court. The court was notified on January 21, 2005, that Congo was deceased when the court's January 12, 2005 Memorandum and accompanying Order in Congo v. George, Civ. No. 02-1671-GMS was returned to the court as undeliverable and marked "deceased."

Federal law does not provide for "the survival of civil rights actions under § 1983 upon the death of either the

plaintiff or the defendant.” Moor v. County of Alameda, 411 U.S. 693, 702 n.14 (1973). In Robertson v. Wegamann, 436 U.S. 584 (1978), the United States Supreme Court held that state survival statutes could fill in this gap via 42 U.S.C. § 1988: “Under § 1988, this state statutory law, modifying common law, ... provides the principle reference point in determining survival of civil rights actions, subject to the important proviso that state law may not be applied when it is ‘inconsistent with the Constitution and laws of the United States.’” Robertson v. Wegamann, 436 U.S. at 589-90 (quoting 42 U.S.C. § 1988(a)).

The Louisiana statute in Robertson did not allow the deceased’s personal representative to be substituted as plaintiff. Rather, the statute required that actions only survived in favor of a spouse, children, parents or siblings. Id. at 592. The deceased in Robertson was not survived by any of the required relatives listed in the Louisiana survival statute. Both the District Court and the Court of Appeals for the Fifth Circuit found that the Louisiana statute was inconsistent with federal law. Id. At 587-88. However, the Supreme Court reversed the lower courts finding that under the circumstances, the fact that the deceased “was not survived by one of several close relatives should not itself be sufficient to cause the Louisiana survivorship provisions to be deemed ‘inconsistent with the Constitution and laws of the United States.’” Id. at 593

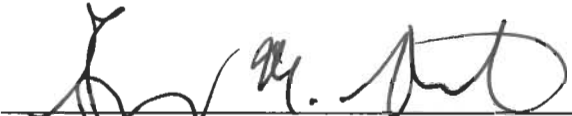
(quoting 42 U.S.C. § 1988 n.1).

Delaware has adopted a Survival statute. See 10 Del. C. ANN. § 3701 (“All causes of action, except actions for defamation, malicious prosecution, or upon penal statutes, shall survive to and against the executors or administrators of the person to, or against whom, the cause of action accrued.”). The Delaware statute allows the “personal representative of the deceased” to be substituted as plaintiff and to prosecute the suit to final judgment. See 10 Del. C. ANN. § 3704.

Furthermore, the Delaware courts have determined that only the personal representative has the right to continue an action brought by a deceased. See Coulson v. Shirks Motor Express Corp., 48 Del. 561, 564 (Del. 1954) (Death does not abate action, as “personal representative may be substituted as plaintiff and prosecute the suit to final judgment and satisfaction.”); In re Long, 833 A.2d 475, 478 (Del. Fam. 2003) (“By reason of the Delaware Survival statute, the personal representative of husband’s estate steps into the shoes of the decedent, having the same causes of action the deceased had prior to the decedent’s death.”). Consequently, only Congo’s “personal representative” is authorized under the Delaware survivor statute to continue this action. See 10 Del. C. ANN. § 3704.

The court has researched the Delaware Court of Chancery records and has not found any will being probated for Congo.

Therefore, the court shall dismiss this action. However, such dismissal shall be without prejudice, in the event that Congo does have a will and a personal representative who wishes to be substituted as plaintiff, and to prosecute this action to final judgement.



United States District Judge

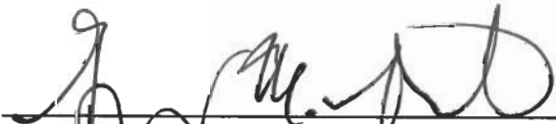
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PHILLIPS, and CPL. RICHARD)
CALVERT,)
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Defendants.)

ORDER

NOW THEREFORE, this 6th day of June, 2005, IT IS
HEREBY ORDERED that:

1. Congo's complaint is DISMISSED without prejudice. See
10 Del. C. ANN. § 3704; Robertson v. Wegamann, 436 U.S. 584
(1978).
2. The Clerk of the Court shall cause a copy of this
Memorandum and accompanying Order to be mailed to Congo's last
known address. The Clerk of the Court shall also attempt to
locate Congo's survivors, and if successful, mail a copy of this
Memorandum and accompanying Order to them.


UNITED STATES DISTRICT JUDGE