

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

GARY E. CURL, :
 :
 Plaintiff, :
 :
 v. : Civil Action No. 09-933-JJF
 :
 INTERNAL REVENUE SERVICE, :
 :
 Defendant. :

Gary E. Curl, Pro Se Plaintiff. Wilmington, Delaware.

MEMORANDUM OPINION

March 30, 2010
Wilmington, Delaware


Farnan, District Judge

Plaintiff Gary E. Curl ("Plaintiff"), who proceeds pro se, filed this action pursuant to 26 U.S.C. § 7426. (D.I. 3, 5.) He has been given leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. This Court has jurisdiction pursuant to 28 U.S.C. § 1340.

I. BACKGROUND

Plaintiff alleges that Defendant Internal Revenue Service ("IRS") placed a levy upon his bank accounts without notice. He asks that Defendant follow the law and provide due notice. He also asks that the Court: (1) vacate any judgment that was summarily adjudicated without proper notice and enter an order requiring the IRS to release all encumbrances from the levy; (2) release the levy on Plaintiff's bank accounts; (3) order the IRS to refrain from any future activity until there is proper notice; (4) order the IRS to correct any indirect punitive actions; (5) order the IRS to conduct itself with fairness, good faith, due diligence, and no retaliation in its future dealings with Plaintiff; and (6) order the IRS to schedule and interact with Plaintiff to rectify the wrongful levy and resolve Plaintiff's ongoing situation of taxes owed.

II. STANDARD OF REVIEW

This Court must dismiss, at the earliest practicable time, certain in forma pauperis that are frivolous, malicious, fail to

state a claim, or seek monetary relief from a defendant who is immune from such relief. See 28 U.S.C. § 1915(e)(2). The Court must accept all factual allegations in a complaint as true and take them in the light most favorable to a pro se plaintiff. Phillips v. County of Allegheny, 515 F.3d 224, 229 (3d Cir. 2008); Erickson v. Pardus, 551 U.S. 89, 93 (2007). Because Plaintiff proceeds pro se, his pleading is liberally construed and his Complaint, "however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." Erickson v. Pardus, 551 U.S. at 94 (citations omitted).

An action is frivolous if it "lacks an arguable basis either in law or in fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989). Under 28 U.S.C. § 1915(e)(2)(B)(i), a court may dismiss a complaint as frivolous if it is "based on an indisputably meritless legal theory" or a "clearly baseless" or "fantastic or delusional" factual scenario. Neitzke v. Williams, 490 at 327-28; Wilson v. Rackmill, 878 F.2d 772, 774 (3d Cir. 1989); see, e.g., Deutsch v. United States, 67 F.3d 1080, 1091-92 (3d Cir. 1995) (holding frivolous a suit alleging that prison officials took an inmate's pen and refused to give it back).

The legal standard for dismissing a complaint for failure to state a claim pursuant to § 1915(e)(2)(B)(ii) is identical to the legal standard used when ruling on 12(b)(6) motions. Tourscher

v. McCullough, 184 F.3d 236, 240 (3d Cir. 1999) (applying Fed. R. Civ. P. 12(b)(6) standard to dismissal for failure to state a claim under § 1915(e)(2)(B)). However, before dismissing a complaint or claims for failure to state a claim upon which relief may be granted pursuant to the screening provisions of 28 U.S.C. § 1915, the Court must grant Plaintiff leave to amend his complaint unless amendment would be inequitable or futile. See Grayson v. Mayview State Hosp., 293 F.3d 103, 114 (3rd Cir. 2002).

A well-pleaded complaint must contain more than mere labels and conclusions. See Ashcroft v. Iqbal, -U.S.- , 129 S.Ct. 1937 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). When determining whether dismissal is appropriate, the Court conducts a two-part analysis. Fowler v. UPMC Shadyside, 578 F.3d 203, 210 (3d Cir. 2009). First, the factual and legal elements of a claim are separated. Id. The Court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions. Id. at 210-11. Second, the Court must determine whether the facts alleged in the complaint are sufficient to show that Plaintiff has a "plausible claim for relief." Id. at 211. In other words, the complaint must do more than allege Plaintiff's entitlement to relief; rather it must "show" such an entitlement with its facts. Id.

"To survive dismissal, a complaint must contain sufficient

factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Iqbal, 129 S.Ct. at 1949 (quoting Twombly, 550 U.S. at 570). A claim is facially plausible when its factual content allows the Court to draw a reasonable inference that the defendant is liable for the misconduct alleged. Id. The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." Id. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" Id. The assumption of truth is inapplicable to legal conclusions or to "[t]hreadbare recitals of the elements of a cause of action supported by mere conclusory statements." Id. "[W]here the well-pleaded facts do not permit the court to infer more than a mere possibility of misconduct, the complaint has alleged - but it has not shown - that the pleader is entitled to relief." Id. (quoting Fed. R. Civ. P. 8(a)(2)).

III. DISCUSSION

Initially, the Court notes that the named defendant is the IRS. The nature of Plaintiff's action, however, is one against the United States. For a federal agency to be amenable to suit, Congress must authorize suit against it by name. See Blackmar v. Guerre, 342 U.S. 512, 514 (1952). Congress has not authorized suit against the IRS with respect to suits of the type Plaintiff

has filed. Therefore, the IRS is not a proper party to this action. See In re Dye, Civ. No. 99-139-SLR, 2000 WL 1202109 (D. Del. 2000), aff'd, 262 F.3d 403 (3d Cir. 2001). Additionally, 26 U.S.C. § 7426 provides that the United States should be substituted as a defendant when an action is improperly brought against any officer or employee of the United States. Inasmuch as Plaintiff proceeds pro se, the Court finds that the Complaint intends to sue the United States and that Plaintiff inadvertently named the IRS as the defendant party.

IV. CONCLUSION

Based upon the foregoing analysis, the Court will substitute the United States for the Internal Revenue Service as a party defendant and allow Plaintiff to proceed with his claim.

An appropriate Order will be entered.

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O R D E R

NOW THEREFORE, IT IS HEREBY ORDERED that:

1. The Clerk of Court shall cause a copy of this Order to be mailed to Plaintiff.

2. The United States of America is **SUBSTITUTED** for the Internal Revenue Service as the party defendant.

3. The Court has identified non-frivolous and what appears to be a cognizable claim against the United States. Plaintiff may proceed with the claim.

IT IS FURTHER ORDERED that:

1. Pursuant to Fed. R. Civ. P. 4(c)(3) and (i), Plaintiff shall provide "U.S. Marshal-285" forms for **the United States Attorney for the District of Delaware**, The Nemours Building, 1007 Orange Street, Suite 700, P. O. Box 2046, Wilmington, DE 19899-2046 and **the Attorney General of the United States**, U.S. Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001 and **two (2) copies of the Complaint (D.I. 3) and**

Emergency Complaint (D.I. 5) for service upon the United States Attorney for the District of Delaware and the Attorney General of the United States. Failure to provide the required number of copies of the USM-285 forms and the Complaint and Emergency Complaint within 120 days of the date of this Order may result in the case being dismissed or Defendant being dismissed pursuant to Fed. R. Civ. P. 4(m).

2. Upon receipt of the completed "U.S. Marshal 285" form(s), the United States Marshal shall serve a copy of the Complaint, Emergency Complaint, and this Order upon Defendant as directed by Plaintiff. All costs of service shall be advanced by the United States.

3. No communication, including pleadings, briefs, statement of position, etc., will be considered by the Court in this civil action unless the documents reflect proof of service upon the parties or their counsel.

March 30, 2010
DATE

Joseph J. Farnsworth
UNITED STATES DISTRICT JUDGE