UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

CHARLES RANDALL, Plaintiff,	:	
v.	:	C.A. No. 18-69WES
DINO BROSCO, Defendant.	:	

REPORT AND RECOMMENDATION

PATRICIA A. SULLIVAN, United States Magistrate Judge.

On February 16, 2018, Plaintiff Charles Randall, a prisoner held at the Adult Correctional Institutions ("ACI"), filed a *pro se* complaint against his former attorney whom he alleges refused to provide him with the settlement proceeds of his personal injury case, which he planned to use to hire a private attorney for other legal matters.[1] With his complaint, Plaintiff filed a motion for leave to proceed *in forma pauperis* ("IFP"), ECF No. 2, which has been referred to me for determination.[2] I recommend that the IFP motion be denied because, under the Prison Litigation Reform Act ("PLRA"), 28 U.S.C. § 1915(g), IFP status is not available to a prisoner who has brought three or more cases that were dismissed as frivolous, malicious or for failure to state a claim upon which relief may be granted. Coleman v. Tollefson, 135 S. Ct. 1759, 1763 (May 18, 2015). More substantively, guided by 28 U.S.C. § 1915A, which requires that the Court screen any complaint accompanied by an IFP motion, I recommend that the

[1] Not addressed in this report and recommendation is how Plaintiff can be sufficiently indigent for *in forma pauperis* status if he owns the right to settlement proceeds that he plans to use to hire an attorney to pay for other legal matters and issues. If the Court is inclined to grant Plaintiff's motion, I urge that he be directed to provide additional information about the amount of the settlement proceeds and the nature of his other claims, so that the Court can evaluate why the public should finance this case.

[2] Because I find that the IFP application should be denied, I address it by report and recommendation. See Janneh v. Johnson & Wales Univ., No. CA 11-352 ML, 2011 WL 4597510, at *1 (D.R.I. Sept. 12, 2011) (denial of a motion to proceed IFP is the functional equivalent of an involuntary dismissal and magistrate judge should issue report and recommendation for final decision by district court).

complaint be dismissed because the Court lacks jurisdiction to consider a state law claim asserted by one citizen of Rhode Island against another.

Plaintiff qualifies as a three-striker based on the following cases that were terminated by dismissal for failure to state a claim:

> **Strike One**: Randall v. Krollman, No. CA 13-717 ML, 2014 WL 2480109, at *2-3 (D.R.I. June 3, 2014) (case dismissed without prejudice for failure to state a claim because repetitive and "overall confusing" complaint did not comply with Fed. R. Civ. P. 8(a));[3]
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> **Strike Two**: Randall v. Wall, C.A. No. 15-384JJM, slip op. at 2-5 (D.R.I. Oct. 21, 2015) (complaint summarily dismissed for failure to state a claim because no cognizable constitutional violations stated; court declined to exercise jurisdiction over remaining supplemental state law claims) (adopted Dec. 8, 2015);
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> **Strike Three**: Randall v. Wall, C.A. No. 15-442JJM, slip op. at 2-3 (D.R.I. Nov. 2, 2015) (case summarily dismissed for failure to state a claim because complaint is a duplicate of C.A. No. 15-384JJM complaint; plaintiff warned that both cases count as strikes under PLRA's three-strike rule) (adopted Nov. 23, 2015).

While the PLRA includes an exception to the three-strike rule for cases alleging that the prisoner is in imminent danger of serious physical injury, 28 U.S.C. § 1915(g), Plaintiff's complaint does not fall within the exception because it neither alleges imminent danger of physical harm nor seeks the alleviation of a threat of physical harm. Judd v. United States, C.A. No. 06-10172-PBS, 2010 WL 1904869, at *3 (D. Mass. May 5, 2010) (citing Judd v. Fed. Election Comm'n, 311 F. App'x 730, 731 (5th Cir. 2009)). Accordingly, the IFP motion should be denied.

[3] The First Circuit has not addressed whether a dismissal without prejudice constitutes a strike under the PLRA. Other Circuits that have addressed the issue hold that it does because 28 U.S.C. § 1915(g) does not distinguish between dismissals with prejudice and those without. See Campbell v. Nassau Cty. Sheriff Dep't of Corrs., 14-CV-6132 (CBA) (LB), 2017 WL 5513630, at *3 (E.D.N.Y. Nov. 15, 2017) (unpublished) (citing cases from Sixth, Seventh, Eighth and Ninth Circuits); but see McLean v. United States, 566 F.3d 391, 396 (4th Cir. 2009) ("dismissal without prejudice for failure to state a claim is not an adjudication on the merits" and therefore does not count as a strike under PLRA). In reliance on the interpretation adopted by the majority of Circuits, I urge the Court to hold that a dismissal without prejudice is a strike; if it does, it should find that this dismissal constitutes a strike pursuant to the PLRA.

Because of the IFP motion, the PLRA requires that the complaint be screened. 28 U.S.C. § 1915A. Having performed this review, I recommend that the pleading be summarily dismissed for want of subject matter jurisdiction. 28 U.S.C. § 1915(e)(2)(B); see Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). Federal district courts are limited to exercising jurisdiction over cases that arise "under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331, and over cases between citizens of different states where the amount in controversy exceeds $75,000, 28 U.S.C. § 1332(a). If grounded in diversity of citizenship, a viable complaint must also establish both the requisite amount in controversy and that diversity is complete, that is, the citizenship of each plaintiff must be shown to be diverse from that of each defendant. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373-74 (1978). If the court lacks subject matter jurisdiction, the complaint must be dismissed. Arbaugh v. Y&H Corp., 546 U.S. 500, 514 (2006) ("[W]hen a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety."); Flaquer v. Bevilacqua, No. C.A. 08-95ML, 2008 WL 2018182, at *3 (D.R.I. May 7, 2008) (prisoner's complaint dismissed for lack of subject matter jurisdiction because diversity jurisdiction requirements not met).

Despite Plaintiff's use of a form entitled "COMPLAINT FOR VIOLATION OF CIVIL RIGHTS," his pleading asserts a straightforward state law claim, probably for conversion, against the attorney who handled his personal injury case based on the allegation that the attorney "refuse[d] to advance my proceeds from this claim." ECF No. 1 at 5. Plaintiff mistakenly invokes the Court's jurisdiction by referring to 42 U.S.C. § 1983, explaining that the basis for jurisdiction is "[s]tatutory liability of liability insurer to injured party." ECF No. 1 at 3. Section 1983 creates a cause of action against persons acting under color of state law whose

actions deprive the claimant of rights secured by the United States Constitution and laws; it does not address the liability of insurance companies to injured parties. When the Court looks past the heading and the invocation of § 1983 to the substance of the allegations, it is plain that the pleading is devoid of any claim arising under any federal law, whether constitutional or otherwise; therefore, this matter cannot be heard in this Court pursuant to 28 U.S.C. § 1331.

Plaintiff's attempted invocation of the Court's diversity jurisdiction pursuant to 28 U.S.C. § 1332 is equally unavailing. While the civil cover sheet has a check next to "Diversity," ECF No. 1-2, it also recites that Plaintiff and Defendant are both citizens of Rhode Island; this allegation is confirmed by the content of the complaint. Id. (all parties identified as from Rhode Island). Accordingly, diversity jurisdiction is lacking. See Hall v. Curran, Civil No. 08-cv-350-JL, 2009 WL 112552, at *2-3 (D.N.H. Jan. 16, 2009), aff'd, 599 F.3d 70, 2010 WL 1052865 (1st Cir. 2010) (incarcerated plaintiff's complaint dismissed for lack of subject matter jurisdiction where "[d]iversity jurisdiction exists only when there is complete diversity, that is, when no plaintiff is a citizen of the same state as any defendant") (citation omitted). With neither federal question jurisdiction nor diversity jurisdiction, the Court is without the power to consider the case and it should be summarily dismissed. Arbaugh, 546 U.S. at 514.

In conclusion, I recommend that the Court find Plaintiff ineligible for IFP status as a three-striker under the PLRA and that the IFP application be denied. I also recommend that the matter be summarily dismissed for want of subject matter jurisdiction. 28 U.S.C. § 1915(e)(2)(B); Fed. R. Civ. P. 12(h)(3). Any objection to this report and recommendation must be specific and must be served and filed with the Clerk of the Court within fourteen (14) days after its service on the objecting party. See Fed. R. Civ. P. 72(b)(2); DRI LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the

district judge and the right to appeal the Court's decision. See United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
March 19, 2018