UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CURTIS HOWELL,

Plaintiff,

v. Civil Action No. 21-11979-ADB

MASSACHUSETTS ATTORNEYS GENERAL, et al.,

Defendants.

MEMORANDUM AND ORDER

BURROUGHS, D.J.

Now before the Court is the amended complaint and three motions filed by *pro se* litigant Curtis Howell. For the reasons set forth below, the Court will deny the motions and order that action be dismissed.

I. Background

Howell commenced this action on December 7, 2021, by filing a complaint, a motion for leave to proceed without prepayment of the filing fee (often referred to as a motion for leave to proceed *in forma pauperis*) and a motion for appointment of counsel. He has since filed an amended complaint [ECF No. 11], another motion for leave to proceed *in forma pauperis*, and numerous other motions. In an ordered dated April 6, 2022 [ECF No. 27], the Court granted Howell's *in forma pauperis* motions and, except for a motion to dismiss filed by the City of Boston [ECF No. 17], disposed of all pending motions. In its April 6, 2022 order, the Court prohibited Howell from filing additional motions in this case until the Court had "reviewed the amended complaint and issued an order concerning the issuance of summonses." [ECF No. 27,

¶ 11].[1] On April 8, 2022, the Court entered an electronic order denying Howell's motion for default judgment. [ECF No. 29].

Howell has filed notices of appeal of the Court's April 6 and April 8, 2022, orders. [ECF Nos. 39, 40]. The United States Court of Appeals for the First Circuit is addressing both matters in a single appeal. *See Howell v. Massachusetts Att'y Gen.*, Case No. 22-1475 (1st Cir.). On July 11, 2022, the First Circuit issued an order directing Howell to show cause no later than July 25, 2022, as to why his appeal should not be dismissed for lack of jurisdiction. *See id*. The First stated:

> It appears that this Court may lack jurisdiction because the orders are not final judgments or appealable orders, and appellant's claims remain pending in the district court. *See* 28 U.S.C. §§ 1291, 1292; *Ramirez v. Rivera-Dueno*, 861 F.2d 328, 333 (1st. Cir. 1988) (stating that, as a general matter, jurisdiction exists under 28 U.S.C. § 1291 where the appealed order terminates the case on the merits and only leaves the court to execute judgment).

Id.

The Court is of the view that it retains jurisdiction over this action notwithstanding Howell's pending appeal. In general, "the filing of a notice of appeal divests the district court of jurisdiction over matters related to the appeal." *Acevedo-Barcia v. Vera-Monroig*, 368 F.3d 49, 58 (1st Cir. 2004). However, "the district court can proceed, notwithstanding the filing of an appeal, if the notice of appeal is defective in some substantial and easily discernible way (if, for example, it is based on an unappealable order)." *Rivera-Torres v. Ortiz Velez*, 341 F.3d 86, 96 (1st Cir. 2003) (quoting *United States v. Brooks*, 145 F.3d 446, 456 (1st Cir. 1998)). In this case, Howell's notices of appeal are almost certainly based on unappealable orders and are therefore

[1] Notwithstanding, Howell has continued to file various motions. [ECF Nos. 32, 33, 34].

patently defective. Neither the April 6, 2022, nor the April 8, 2022, order was a final judgment, *see* 28 U.S.C. § 1291 ("The courts of appeals . . . shall have jurisdiction of appeals from all final decision of the district courts of the United States."[1]), and neither order was otherwise immediately appealable.[2,3]

II. Pending Motions

Pending before the Court are Howell's "Motion to objection to ruling, (motion to correct clerical errors" [ECF No. 32], "Motion For Relief Of Judgement" [ECF No. 33], and "Motion to Object/Motion for Default" [ECF No. 34]. The Court DENIES all three motions.

These motions are premised on Howell's misunderstanding regarding the meaning of "*in forma pauperis*," and the way in which a case proceeds where a plaintiff is proceeding without the prepayment of the filing fee.

In several of Howell's submissions, he has objected to the Court's use of the term "*in forma pauperis*" to his actions. Howell apparently thinks that the phrase applies only to prisoner cases. This is incorrect. Federal courts routinely apply the descriptor "*in forma pauperis*" to all

[1]"The statute actually uses the term 'final decision,' but a final decision is equivalent to a final 'judgment.'" *Diaz-Reyes v. Fuentes-Ortiz*, 471 F.3d 299, 300 n.3 (1st Cir. 2006).

[2] Under the so-called "collateral order doctrine," an interlocutory order may be appealed immediately if it "finally determine[s] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Asociación de Subscripción Conjunta Del Seguro De Responsabilidad Obligatorio v. Flores Galarza*, 479 F.3d 63, 75 (1st Cir. 2007) (quoting *Espinal-Dominguez v. Puerto Rico*, 352 F.3d 490, 495 (1st Cir. 2003)). Certain interlocutory orders are also immediately appealable under 28 U.S.C. § 1292(a)-(b). However, neither the "collateral order doctrine" nor 28 U.S.C. § 1292 is applicable to the orders that Howell is appealing.

[3] In the event the First Circuit finds this Court does not have jurisdiction of the action pending adjudication of Howell's appeal, this order serves as a notice to the appellate court of the Court's anticipated disposition of the action upon remand.

litigants (prisoner or non-prisoner) who are proceeding without prepayment of the filing fee. For non-prisoner plaintiffs who are allowed to proceed *in forma pauperis* (*i.e.*, without prepayment of the filing fee), the $350 statutory and $52 administrative filing fees, *see* 28 U.S.C. §§ 1914(a), (b) are waived. In contrast, plaintiff prisoners who are allowed to proceed *in forma pauperis* (*i.e.*, without prepayment of the filing fee), must pay the $350 statutory filing fee over time. *See* 28 U.S.C. § 1915(b).[4]

Where a plaintiff does not pay the filing fee at the commencement of the action, summonses do not issue until the filing fee is resolved. Where a litigant is permitted to proceed without prepayment of the filing fee, summonses do not issue until the Court conducts a preliminary review to determine whether the defendants should be required to respond to the complaint. *See* 28 U.S.C. § 1915(e)(2). If the Court finds that the complaint merits a response from the defendants, the Court orders that summonses issue. Unless and until summonses issue, a defendant does not have any obligation to waive service of summonses or to respond to the complaint. The service period proscribed by Fed. R. Civ. P. 4(m) is tolled until the Court screens a plaintiff's *in forma pauperis* complaint and authorizes service of process. *See Scott v. Maryland State Dep't of Labor*, 673 Fed. App'x 299, 304 (4th Cir. 2016) (per curiam). Further,

[4] It may be that Howell's misunderstanding of the scope of cases to which the term "*in forma pauperis*" applies stems from a clerical error in the relevant statute. Under federal law, a court may "authorize the commencement . . . of any suit . . . without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such *prisoner* possesses." 28 U.S.C. § 1915(a)(1) (emphasis added). Despite the statute's use of the phrase "such prisoner," the affidavit requirement applies to all persons requesting leave to proceed *in forma pauperis*. *See Martinez v. Kristi Kleaners, Inc.*, 364 F.3d 1305, 1306 n.1 (11th Cir. 2004) (per curiam); *Haynes v. Scott*, 116 F.3d 137, 139-40 (5th Cir. 1997). The use of the word "prisoner" in 28 U.S.C. 1915(a)(1) appears to be a typographical error. *See In re Perry v. Secretary of Hous. & Urban Dev.*, 223 B.R. 167, 169 n.2 (8th Cir. 1998); *Leonard v. Lacy*, 88 F.3d 181, 183 (2d Cir. 1996); 1 James Wm. Moore, et al., Moore's Federal Practice § 4.40[1] (3d ed. 2000).

even when summonses have issued, entry of default is not appropriate unless (1) a defendant was properly served with a summons or a defendant has waived service of the summons; and (2) the defendant has failed to respond to the complaint in the response period prescribed by the summons or the waiver.

III. Review of the Amended Complaint

Because the Court has granted Howell's motions for leave to proceed without prepayment of the filing fee (*i.e.*, his motions for leave to proceed *in forma pauperis*), his amended complaint is subject to review by the Court prior to any issuance of summonses. The Court has statutory authority to dismiss the complaint (or amended complaint) of any litigant proceeding *in forma pauperis* if the pleading is malicious, frivolous, fails to state a claim upon which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. *See* 28 U.S.C. § 1915(e)(2). In conducting this review, the Court liberally construes Howell's amended complaint because he is proceeding *pro se*. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

The overall themes in Howell's amended complaint are that the defendants thwarted his efforts to earn money from songs that he composed, that he was subject to illegal surveillance and hacking of electronic devices, that government agencies failed to investigate his complaints of wrongdoing, and that he did not receive adequate assistance to establish a business or find adequate housing. He seeks a total of $10,000,000 in damages. Upon review of the pleading, the Court concludes that the amended complaint fails to state a claim upon which relief can be granted and that it is without jurisdiction to adjudicate some claims.

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