

[Cite as *Carter v. Elliott*, 2009-Ohio-7039.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

DEE EMMETT CARTER	:	
Plaintiff-Appellant	:	C.A. CASE NO. 2008 CA 107
v.	:	T.C. NO. 08 CV 1353
OFFICER ELLIOTT, et al.	:	(Civil appeal from Common Pleas Court)
Defendants-Appellees	:	

**OPINION**

Rendered on the 30th day of December, 2009.

DEE EMMETT CARTER, #575-275, P. O. Box 5500, 15802 State Route 104 North,  
Chillicothe, Ohio 45601  
Plaintiff-Appellant

OFFICER ELLIOTT and LT. BRADLEY, 120 N. Fountain Street, Springfield, Ohio 45502  
Defendants-Appellees

DONOVAN, P.J.

{¶ 1} This matter is before the Court on the pro se Notice of Appeal of Dee Emmett Carter, filed November 13, 2008. Carter appeals from a judgment of the Clark County Court of Common Pleas which dismissed his action for failure to pay a filing fee. The

defendants herein did not file a brief in response.

{¶ 2} On October 14, 2008, Carter filed a pro se complaint against “Police Officer Elliott” and “Lt. Bradley” of the Springfield Police Department, alleging police brutality. Carter also filed a motion to waive the filing fee associated with the matter, and he filed a notarized affidavit of indigency. Carter did not pay a filing fee or provide security for costs. On November 6, 2008, the trial court overruled Carter’s motion without explanation and dismissed the case.

{¶ 3} R.C. 2323.31 allows courts of common pleas to require an advance deposit for the filing of any civil action. Local Rule 15 of the Clark County Court of Common Pleas provides, “No civil action or proceeding shall be accepted for filing by the clerk unless the party offering the same for filing shall first deposit a sum to secure the payment of the costs that may accrue in such action or proceeding except as otherwise provided by law. Such advance deposit shall be in accordance with the statutes and the schedule on file in the clerk’s office.”

{¶ 4} Under R.C. 2323.31, if the plaintiff “makes an affidavit of inability either to prepay or give security for costs, the clerk of the court shall receive and file the petition. Such affidavit shall be filed with the petition, and treated as are similar papers in such cases.” As we have previously determined, “[t]he determination of indigence for purposes of whether a plaintiff should be required to pay filing fees and court costs ‘is typically granted liberally in order to preserve the due process rights of litigants and guarantee an access to judicial process and representation.’ *Evans v. Evans*, Franklin App. Nos. 04AP-816 & 04AP-1208, 2005-Ohio-5090, ¶ 23.

{¶ 5} “While courts traditionally waive filing fees and costs for indigent persons in order to promote the interests of justice, it is within the court’s discretion whether indigency status is proper in a particular case. The trial judge may consider whether a litigant has caused the court’s limited resources to be expended needlessly in the past by filing numerous, repetitious, or frivolous complaints, whether the affidavit of indigency includes sufficient information concerning the litigant’s financial condition, whether additional information is required, and whether the affidavit of indigency appears to be reasonable under conditions then existing.’ (Citation omitted). *Wilson v. Dept. of Rehab. & Corr.* (2000), 138 Ohio App.3d 239, 243, \* \* \*.” *Guisinger v. Spier*, 166 Ohio App.3d 728, 2006-Ohio-1810, ¶ 6.

{¶ 6} Carter’s affidavit of indigency provides:

{¶ 7} “1. The Affiant is a State Prisoner incarcerated in a Correctional Institution with the State of Ohio, stationed in the City of Chillicothe, County of Ross, and that I am without the necessary funds with which to pay for the cost of this action;

{¶ 8} “2. That Affiant is without possession of real or personal property and assets of sufficient value with which to offer as security for such costs;

{¶ 9} “3. That Affiant is true indigent and pauper within the meaning of the law.”

{¶ 10} As in *Guisinger*, where the appellant’s affidavit provided that she had no income or assets to pay fees or court costs, nothing in Carter’s affidavit “provides any basis for the court to conclude that [Carter] was able to pay the requisite filing fee and other court costs.

{¶ 11} “Moreover, although the court was permitted to review the affidavit of

indigence at any time, it was required to provide [Carter] an opportunity to pay the filing fee or to provide additional information in support of [his] affidavit prior to dismissal of [his] action. Civ.R. 41(B)(1) allows a court to dismiss an action sua sponte when the plaintiff fails to ‘comply with these rules or any court order.’ However, the court is required to provide notice to the plaintiff prior to dismissal. Id.” *Guisinger*, at ¶ 8-9.

{¶ 12} Since the trial court failed to provide notice to Carter of its intent to dismiss her action for failure to pay the filing fee, in accordance with Civ.R. 41(B)(1), the trial court abused its discretion in overruling Carter’s motion and dismissing the action.

{¶ 13} The judgment of the trial court is reversed.

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BROGAN, J. and FROELICH, J., concur.

Copies mailed to:

Dee Emmett Carter  
Officer Elliott  
Lt. Bradley  
Hon. Douglas M. Rastatter