

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

SEP 20 2023

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

KENNETH GIBBS,

Plaintiff-Appellant,

v.

A. HERRERA; B. McCRARY; E.
ENRIQUEZ; R. NAPPEN,

Defendants-Appellees.

No. 22-16698

D.C. No. 2:21-cv-02188-TLN-AC

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Troy L. Nunley, District Judge, Presiding

Submitted September 12, 2023**

Before: CANBY, CALLAHAN, and OWENS, Circuit Judges.

California state prisoner Kenneth Gibbs appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging constitutional violations. We have jurisdiction under 28 U.S.C. § 1291. We review for an abuse of discretion a dismissal for failure to pay the filing fee. *Taylor v. Delatoore*, 281

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

F.3d 844, 847 (9th Cir. 2002). We vacate and remand.

The district court dismissed Gibbs's action for failure to pay the filing fee. However, Gibbs contends that he sent the requisite payment in the form of two checks that were cashed by the district court on May 5, 2022. Although there is no record of this payment on the district court docket, in response to the magistrate judge's May 10, 2022 order to pay the filing fee, Gibbs submitted a note from the prison trust office confirming that his checks to the district court were sent and subsequently cashed on May 5, 2022. Further, Gibbs attached to his objections to the findings and recommendations an additional statement from the prison trust office confirming that the district court cashed both checks on May 5, 2022. These documents support Gibbs's contention that he complied with the district court's order to pay the filing fee. Because neither the magistrate judge in its findings and recommendations nor the district judge in its order of dismissal addressed these documents, we vacate the judgment and remand for the district court to consider these documents in the first instance.

All pending requests are denied.

VACATED and REMANDED.