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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ALTON E. DEAN,

Plaintiff,

No. CIV S-10-0566 DAD P

vs.

DENNIS B. JONES, et al.,

Defendants.

ORDER AND

FINDINGS & RECOMMENDATIONS

_____/

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with a civil rights action pursuant to 42 U.S.C. § 1983. By order filed April 27, 2010, the court dismissed plaintiff's amended complaint and granted him leave to file a second amended complaint. On May 12, 2010, plaintiff filed a second amended complaint. However, before the court screened his second amended complaint, plaintiff filed a third amended complaint on May 17, 2010. As a general rule, an amended complaint supercedes a prior complaint. Loux v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Accordingly, the court will disregard plaintiff's second amended complaint and consider his third amended complaint for screening purposes.

SCREENING REQUIREMENT

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or an officer or employee of a governmental entity. See 28 U.S.C.

1 § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised
2 claims that are legally “frivolous or malicious,” that fail to state a claim upon which relief may be
3 granted, or that seek monetary relief from a defendant who is immune from such relief. See 28
4 U.S.C. § 1915A(b)(1) & (2).

5 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.
6 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28
7 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
8 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
9 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
10 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th
11 Cir. 1989); Franklin, 745 F.2d at 1227.

12 Rule 8(a)(2) of the Federal Rules of Civil Procedure “requires only ‘a short and
13 plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the
14 defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” Bell Atlantic
15 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47
16 (1957)). However, in order to survive dismissal for failure to state a claim a complaint must
17 contain more than “a formulaic recitation of the elements of a cause of action;” it must contain
18 factual allegations sufficient “to raise a right to relief above the speculative level.” Bell Atlantic,
19 550 U.S. at 555. In reviewing a complaint under this standard, the court must accept as true the
20 allegations of the complaint in question, Hospital Bldg. Co. v. Rex Hospital Trustees, 425 U.S.
21 738, 740 (1976), construe the pleading in the light most favorable to the plaintiff, and resolve all
22 doubts in the plaintiff’s favor. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

23 The Civil Rights Act under which this action was filed provides as follows:

24 Every person who, under color of [state law] . . . subjects, or causes
25 to be subjected, any citizen of the United States . . . to the
26 deprivation of any rights, privileges, or immunities secured by the
Constitution . . . shall be liable to the party injured in an action at
law, suit in equity, or other proper proceeding for redress.

1 **DISCUSSION**

2 In his third amended complaint, plaintiff appears to allege that defendants Jones
3 and Francis have fraudulently deprived him of his trust account funds in violation of the Due
4 Process Clause of the Fourteenth Amendment. In this regard, the United States Supreme Court
5 has held that “an unauthorized intentional deprivation of property by a state employee does not
6 constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth
7 Amendment if a meaningful post-deprivation remedy for the loss is available.” Hudson v.
8 Palmer, 468 U.S. 517, 533 (1984). Thus, where the state provides a meaningful post-deprivation
9 remedy, only authorized and intentional deprivations constitute actionable violations of the Due
10 Process Clause. A deprivation is “authorized” if it is carried out pursuant to established state
11 procedures, regulations or statutes. Piatt v. McDougall, 773 F.2d 1032, 1036 (9th Cir. 1985).

12 Here, plaintiff does not allege facts indicating that defendants have committed an
13 “authorized” deprivation of his trust account property. Rather, plaintiff contends that defendants
14 used a “fraudulent writ of execution” and a fictitious identity to withdraw funds from his trust
15 account. (TAC at 5.) Such fraudulent activity is not conduct that defendants are authorized to
16 engage in pursuant to established state procedures, regulations or statutes. Thus, plaintiff’s claim
17 is not actionable under the Due Process Clause of the Fourteenth Amendment, unless there is no
18 meaningful post-deprivation remedy for his loss. See Hudson, 468 U.S. at 533; Piatt, 773 F.2d at
19 1036.

20 California Government Code, §§ 900, et seq provides plaintiff with a meaningful
21 post-deprivation remedy for his loss. Under these state provisions, the California Legislature has
22 provided plaintiff with an avenue to seek redress for his tort claims, such as fraud, against public
23 officials. Plaintiff must therefore first attempt to seek redress in the state system before suing in
24 federal court. Accordingly, plaintiff’s third amended complaint fails to state a cognizable claim
25 for relief.

26 ////

1 **CONCLUSION**

2 IT IS HEREBY ORDERED that the Clerk of the Court is directed to randomly
3 assign this case to a District Judge.

4 Also, for the reasons stated above, IT IS HEREBY RECOMMENDED that:

5 1. Plaintiff's May 17, 2010 third amended complaint (Doc. No. 13) be dismissed
6 with prejudice for plaintiff's failure to state a claim upon which relief may be granted.

7 2. This case be closed.

8 These findings and recommendations are submitted to the United States District
9 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
10 one days after being served with these findings and recommendations, plaintiff may file written
11 objections with the court. The document should be captioned "Objections to Magistrate Judge's
12 Findings and Recommendations." Plaintiff is advised that failure to file objections within the
13 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
14 F.2d 1153 (9th Cir. 1991).

15 DATED: June 22, 2010.

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18 _____
19 DALE A. DROZD
20 UNITED STATES MAGISTRATE JUDGE

21 DAD:sj
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