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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

TYRONE JAMES,  
  
Plaintiff,  
  
v.  
  
RUBY DENT,  
  
Defendant.

No. 2:16-cv-1751-JAM-KJN PS

ORDER AND  
FINDINGS AND RECOMMENDATIONS

Plaintiff Tyrone James, who proceeds in this action without counsel, has requested leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915. (ECF No. 2.)<sup>1</sup> Pursuant to 28 U.S.C. § 1915, the court is directed to dismiss the case at any time if it determines that the allegation of poverty is untrue, or if the action is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against an immune defendant.

For the reasons discussed below, the court concludes that it lacks federal subject matter jurisdiction over the action. Accordingly, the court recommends that the action be dismissed without prejudice, and that plaintiff's application to proceed *in forma pauperis* in this court be denied as moot.

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<sup>1</sup> This case proceeds before the undersigned pursuant to E.D. Cal. L.R. 302(c)(21) and 28 U.S.C. § 636(b)(1).

1 A federal court has an independent duty to assess whether federal subject matter  
2 jurisdiction exists, whether or not the parties raise the issue. See United Investors Life Ins. Co. v.  
3 Waddell & Reed Inc., 360 F.3d 960, 967 (9th Cir. 2004) (stating that “the district court had a duty  
4 to establish subject matter jurisdiction over the removed action *sua sponte*, whether the parties  
5 raised the issue or not”); accord Rains v. Criterion Sys., Inc., 80 F.3d 339, 342 (9th Cir. 1996).  
6 The court must *sua sponte* dismiss the case if, at any time, it determines that it lacks subject  
7 matter jurisdiction. Fed. R. Civ. P. 12(h)(3). A federal district court generally has original  
8 jurisdiction over a civil action when: (1) a federal question is presented in an action “arising  
9 under the Constitution, laws, or treaties of the United States” or (2) there is complete diversity of  
10 citizenship and the amount in controversy exceeds \$75,000. See 28 U.S.C. §§ 1331, 1332(a).

11 Here, plaintiff alleges that defendant, another resident at the Bruceville Terrace Skilled  
12 Nursing Facility where plaintiff resides, assaulted and battered plaintiff on several occasions.  
13 Plaintiff contends that defendant is “a female Negro, a Negress, a violent conformist minority and  
14 a Black Uncle Tom of the worst sort,” and that defendant hates plaintiff because plaintiff is a civil  
15 rights activist. Plaintiff seeks relief pursuant to various California Penal Code provisions and  
16 other California statutes, as well as 42 U.S.C. § 1981.

17 In this case, the court plainly does not have federal question jurisdiction over the action.  
18 Liberally construed, plaintiff’s complaint essentially purports to assert state law claims for assault  
19 and/or battery. Although plaintiff’s complaint refers to 42 U.S.C. § 1981, plaintiff does not have  
20 a viable claim under that statute, because that statute “was meant, by its broad terms, to proscribe  
21 discrimination in the making or enforcement of contracts against, or in favor of, any race.” See  
22 McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 295 (1976). Instead, the types of  
23 claims presented here are in the nature of intentional torts. Additionally, even if plaintiff’s  
24 complaint could be construed as asserting a claim under 42 U.S.C. § 1983, such a claim is  
25 likewise not viable, because defendant is a private individual and not a state actor; nor does it  
26 appear that defendant meets any of the four tests articulated by the United States Supreme Court  
27 for determining whether a private party’s conduct constitutes state action. See Franklin v. Fox,  
28 312 F.3d 423, 445 (9th Cir. 2002) (private individual’s action can amount to state action under (1)

1 the public function test, (2) the joint action test, (3) the state compulsion test, or (4) the  
2 governmental nexus test).

3 Furthermore, there is no diversity of citizenship jurisdiction, because both plaintiff and  
4 defendant are citizens of California.

5 Therefore, the court recommends that the action be dismissed without prejudice for lack  
6 of federal subject matter jurisdiction.

7 Accordingly, IT IS HEREBY RECOMMENDED that:

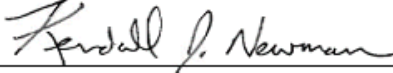
- 8 1. The action be dismissed without prejudice for lack of subject matter jurisdiction.
- 9 2. Plaintiff's motion to proceed *in forma pauperis* in this court (ECF No. 2) be denied as  
10 moot.
- 11 3. The Clerk of Court be directed to close this case.

12 In light of these recommendations, IT IS ALSO HEREBY ORDERED that all pleading,  
13 discovery, and motion practice in this action are stayed pending resolution of these findings and  
14 recommendations. Other than objections to the findings and recommendations or non-frivolous  
15 motions for emergency relief, the court will not entertain or respond to any pleadings or motions  
16 until the findings and recommendations are resolved.

17 These findings and recommendations are submitted to the United States District Judge  
18 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen (14)  
19 days after being served with these findings and recommendations, any party may file written  
20 objections with the court and serve a copy on all parties. Such a document should be captioned  
21 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections  
22 shall be served on all parties and filed with the court within fourteen (14) days after service of the  
23 objections. The parties are advised that failure to file objections within the specified time may  
24 waive the right to appeal the District Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th  
25 Cir. 1998); Martinez v. Ylst, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

26 IT IS SO ORDERED AND RECOMMENDED.

27 Dated: September 8, 2016

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3 KENDALL J. NEWMAN  
UNITED STATES MAGISTRATE JUDGE