DIVISION ONE
FILED: 4/11/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

JESSIE LEWIS, Plaintiff/Appellant, v. REBECCA L. FELMLY; REBECCA L. FELMLY, LLC, Defendants/Appellees.	)	1 CA-CV 12-0350 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2011-021651

The Honorable John C. Rea, Judge

AFFIRMED

Jessie Lewis, Plaintiff Appellant — Tucson
In Propria Persona

P O R T L E Y, Judge

¶1 Jessie Lewis appeals the denial of his motion to amend his complaint. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Lewis sued Rebecca Felmly, his attorney in a criminal matter, for legal malpractice. After being served, Felmly filed an Arizona Rule of Civil Procedure ("Rule") 12(b)(6) motion to dismiss. Lewis then sought to amend his complaint as a matter of right but did not attach a copy of the proposed amended pleading as an exhibit to the motion. He then filed a motion to correct his motion to amend, stating that he wanted to add claims based on 18 U.S.C. § 241 and 18 U.S.C. § 1581. Although he did not attach his proposed amended complaint to the motion, he did file it separately. The proposed amended complaint, however, asserted claims for violation of 42 U.S.C. § 1985 and 18 U.S.C. § 1581. The trial court denied Lewis's motion to amend without prejudice but gave him thirty days to file a renewed motion with a proposed amended complaint.

¶3 Lewis filed a timely motion to amend, which added claims for legal malpractice and violation of 42 U.S.C. § 1986, and a separate complaint. The court subsequently granted Felmy's motion to dismiss, found that the defects could not be cured by amendment and denied Lewis's motion to amend. The

court then dismissed the case with prejudice.[1] This appeal followed.[2]

DISCUSSION

¶4 Lewis challenges the denial of his motion to amend his complaint. Although leave to amend "should be freely given when justice requires," *ELM Retirement Ctr., LP v. Callaway*, 226 Ariz. 287, 292, ¶ 25, 246 P.3d 938, 943 (App. 2010) (internal quotation marks omitted) (quoting Rule 15(a)(1)(B)); *see also Pargman v. Vickers*, 208 Ariz. 573, 578, ¶ 23, 96 P.3d 571, 576 (App. 2004) ("Rule 15 permits amendments in order to give parties an opportunity to adjudicate the merits of a claim."), "a court does not abuse its discretion in denying a motion for leave to amend if the amendment would be futile." *ELM Retirement Ctr.*, 226 Ariz. at 292, ¶ 26, 246 P.3d at 943.

[1] The court noted that Lewis had filed a motion for summary judgment in January. We did not find such a motion in the record. We found a Rule 15(a) motion to amend complaint/opposition to defendant's motion to dismiss summary judgment that Lewis filed in February. The motion did not seek summary judgment pursuant to Rule 56; instead, it recited his efforts to amend the complaint and his opposition to the Rule 12(b)(6) motion.

[2] Felmly did not file an answering brief. Although we could regard the failure as a confession of error, we decline to do so, *Thompson v. Thompson*, 217 Ariz. 524, 526 n.1, ¶ 6, 176 P.3d 722, 724 n.1 (App. 2008), and will address the merits of the appeal. *Bugh v. Bugh*, 125 Ariz. 190, 191, 608 P.2d 329, 330 (App. 1980). Moreover, Lewis's opening brief does not contain citations to the record as required by Arizona Rules of Civil Appellate Procedure 13(a)(4). Although we could determine that he waived the issues on appeal, *see Delmastro & Eells v. Taco Bell Corp.*, 228 Ariz. 134, 137 n.2, ¶ 7, 263 P.3d 683, 686 n.2 (App. 2011), we will address the merits of the appeal.

Consequently, we review the ruling for an abuse of discretion, *Czarnecki v. Volkswagen of Am.*, 172 Ariz. 408, 418, 837 P.2d 1143, 1153 (App. 1991), and presume the facts in the complaint are true. *Alosi v. Hewitt*, 229 Ariz. 449, 452, ¶ 13, 276 P.3d 518, 521 (App. 2012).

¶5 Here, the court correctly determined that the proposed amendments were futile. First, and foremost, Lewis's criminal case, Maricopa County Cause Number CR2011-144918, was ongoing at the time the court denied the motion to amend. As a result, any potential malpractice claim had not accrued and would not accrue unless and until Lewis was convicted and the conviction was set aside. *See Glaze v. Larsen*, 207 Ariz. 26, 32, ¶ 25, 83 P.3d 26, 32 (2004) (holding that "an element of the cause of action for legal malpractice is that the criminal conviction has been set aside, and the cause of action for malpractice does not accrue until that has occurred").[3]

¶6 Second, he sought to add a claim for violation of 18 U.S.C. § 241. The statute, which provides criminal penalties for conspiring "to injure, oppress, threaten, or intimidate any person . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States," 18 U.S.C. § 241 (West 2013), does not create a

[3] Lewis subsequently pled guilty on April 30, 2012 — some four months after Felmly had been allowed to withdraw as counsel.

civil cause of action. *See Durso v. Summer Brook Pres. Homeowners Ass'n*, 641 F. Supp. 2d 1256, 1267 (M.D. Fla. 2008) ("Title 18, Section 241 of the United States Code . . . provides for criminal penalties but 'does not authorize civil suits or give rise to civil liability.'").

¶7 Similarly, Lewis's claim under 18 U.S.C. § 1581 does not state a claim. Although the statute imposes criminal penalties on persons who "hold[] or return[] any person to a condition of peonage, or arrest[] any person with the intent of placing him in or returning him to a condition of peonage," 18 U.S.C. § 1581 (West 2013), it does not create a civil cause of action. *See Turner v. Unification Church*, 473 F. Supp. 367, 375 (D. R.I. 1978) ("The plaintiff's reliance upon this section is misplaced because it does not provide, explicitly or implicitly, a civil cause of action.").

¶8 Finally, Lewis's claims based on 42 U.S.C. §§ 1985 and 1986 do not state a claim. The § 1985(2) claim "requires a showing that defendants were motivated by racial or other class-based, invidiously discriminatory animus," which Lewis had not alleged in any of the proposed amended complaints. *See Sellner v. Panagoulis*, 565 F. Supp. 238, 246 (D. Md. 1982). Moreover, he had not alleged the existence of any conspiracy, the gravamen of a § 1985 claim. *See, e.g., id.* at 248 (finding that the plaintiff's "section 1985 claims fail because he has alleged the

existence of conspiracies in only the most conclusory way and has not supported his allegations of conspiracy by reference to material facts"). As a result, because Lewis has not stated a claim under § 1985, his claim for relief under § 1986 fails because "that section merely gives a remedy for misprision of a violation of 42 U.S.C. § 1985." *Id.* at 248-49.

¶9 Our review of the amended complaints reveals that none of them overcome the defects noted. Lewis, as a result, has not alleged that he is entitled to any relief caused by Felmly's failure to provide him with the non-emergency 9-1-1 transcript, if it existed. Consequently, the court did not abuse its discretion by denying Lewis's motion to amend.

CONCLUSION

¶10 For the foregoing reasons, we affirm.

/s/
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MAURICE PORTLEY, Judge

CONCURRING:

/s/
_____
MARGARET H. DOWNIE, Presiding Judge

/s/
_____
PHILIP HALL, Judge