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

JOHN L. McCARTY,

Plaintiff,

vs.

JACQUELINE MELLON,

Defendant.

CASE NO. CV F-05-1650 REC LJO

**ORDER TO DISMISS COMPLAINT WITH
LEAVE TO AMEND**

BACKGROUND

Plaintiff John L. McCarty (“plaintiff”) proceeds pro se and in forma pauperis in this action and appears to take issue with garnishment from his disability income policy. On December 30, 2005 plaintiff filed his complaint to name Jacqueline Mellon (“Ms. Mellon”) as defendant and to identify her as MetLife’s director of disability income claims. The complaint references federal statutes on restrictions on garnishment and appears to allege breach of contract and/or negligence and federal and state statutory violation claims arising from garnishment from plaintiff’s disability income payments. The complaint alleges: “MetLife et al paid [plaintiff] under the contractual Disability Income Policy \$800 per month from 9/5/70 through 5/1999 and then MetLife broke the agreement (contract) by honoring a Seminole County Florida Income Deduction Order that was obtained by fraud and giving 100% of his benefit to another.”

1 **DISCUSSION**

2 **Standards For Screening**

3 “A trial court may dismiss a claim sua sponte under Fed.R.Civ.P. 12(b)(6). . . Such dismissal
4 may be made without notice where the claimant cannot possibly win relief.” *Omar v. Sea-Land Service,*
5 *Inc.*, 813 F.2d 986, 991 (9th Cir. 1987); *see Wong v. Bell*, 642 F.2d 359, 361-362 (9th Cir. 1981). Sua
6 sponte dismissal may be made before process is served on defendants. *Neitzke v. Williams*, 490 U.S.
7 319, 324 (1989) (dismissals under 28 U.S.C. § 1915(d) are often made sua sponte); *Franklin v. Murphy*,
8 745 F.2d 1221, 1226 (9th Cir. 1984) (court may dismiss frivolous in forma pauperis action sua sponte
9 prior to service of process on defendants).

10 Since plaintiff proceeds in forma pauperis, this Court, notwithstanding any filing fee that may
11 have been paid, shall dismiss a case at any time if the Court determines the action is frivolous, malicious,
12 fails to state a claim on which relief may be granted, or seeks monetary relief against an immune
13 defendant. *See* 28 U.S.C. § 1915(e); 2 Schwarzer, Tashima & Wagstaffe, California Practice Guide:
14 Federal Civil Procedure Before Trial (2005) Attacking the Pleadings, para. 9:226.1, pp. 9-65. A court
15 need not accept as true factual allegations in in forma pauperis complaints and may reject “completely
16 baseless” allegations, including those which are “fanciful,” “fantastic” or “delusional.” *Denton v.*
17 *Hernandez*, 504 U.S. 25, 32, 112 S.Ct. 1728, 1733 (1992).

18 A claim is legally frivolous when it lacks an arguable basis either in law or fact. *Neitzke v.*
19 *Williams*, 490 U.S. 319, 325 (1989); *Franklin v. Murphy*, 745 F.2d 1221, 1227-1228 (9th Cir. 1984). A
20 frivolous claim is based on an inarguable legal conclusion or a fanciful factual allegation. *Neitzke*, 490
21 U.S. at 324. A federal court may dismiss a claim as frivolous where it is based on an indisputably
22 meritless legal theory or where the factual contentions are clearly baseless. *Neitzke*, 490 U.S. at 327.

23 The test for maliciousness is a subjective one and requires the court to “determine the . . . good
24 faith of the applicant.” *Kinney v. Plymouth Rock Squab Co.*, 236 U.S. 43, 46 (1915); *see Wright v.*
25 *Newsome*, 795 F.2d 964, 968, n. 1 (11th Cir. 1986). A lack of good faith is found most commonly in
26 repetitive suits filed by plaintiffs who have used the advantage of cost-free filing to file a multiplicity
27 of suits. A complaint is malicious if it suggests an intent to vex defendants or abuse the judicial process
28 by relitigating claims decided in prior cases. *Crisafi v. Holland*, 655 F.2d 1305, 1309 (D.C. Cir. 1981);

1 *Phillips v. Carey*, 638 F.2d 207, 209 (10th Cir. 1981); *Ballentine v. Crawford*, 563 F.Supp. 627, 628-629
2 (N.D. Ind. 1983); *cf. Glick v. Gutbrod*, 782 F.2d 754, 757 (7th Cir. 1986) (court has inherent power to
3 dismiss case demonstrating “clear pattern of abuse of judicial process”). A lack of good faith or malice
4 also can be inferred from a complaint containing untrue material allegations of fact or false statements
5 made with intent to deceive the court. *See Horsey v. Asher*, 741 F.2d 209, 212 (8th Cir. 1984).

6 A complaint, or portion thereof, may be dismissed for failure to state a claim if it appears beyond
7 doubt that plaintiff can prove no set of facts in support of the claim or claims that would entitle him to
8 relief. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) (citing *Conley v. Gibson*, 355 U.S. 41,
9 45-46 (1957)); *see also Palmer v. Roosevelt Lake Log Owners Ass’n*, 651 F.2d 1289, 1294 (9th Cir.
10 1981). “[W]hen a federal court reviews the sufficiency of a complaint, before the reception of any
11 evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether
12 a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support
13 claims.” *Scheurer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 1688 (1974); *Gilligan v. Jamco Development*
14 *Corp.*, 108 F.3d 246, 249 (9th Cir. 1997).

15 The face of the complaint reflects deficiencies and limitations defenses to prevent plaintiff from
16 offering evidence to support claims raised in the complaint.

17 **General Deficiencies**

18 F.R.Civ.P. 8 establishes general pleading rules and provides in pertinent part:

19 (a) Claims for Relief. A pleading which sets forth a claim for relief . . . shall
20 contain (1) a short and plain statement of the grounds upon which the court’s jurisdiction
21 depends, unless the court already has jurisdiction and the claim needs no new grounds
22 of jurisdiction to support it, (2) a short plain statement of the claim showing that the
23 pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader
24 seeks.

25 . . .

26 (e) Pleading to be Concise and Direct; Consistency.

27 (1) Each averment of a pleading shall be simple, concise and direct.

28 A pleading may not simply allege a wrong has been committed and demand relief. The
underlying requirement is that a pleading give “fair notice” of the claim being asserted and the “grounds
upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47-48, 78 S.Ct. 99, 103 (1957); *Yamaguchi v.*

1 *United States Department of Air Force*, 109 F.3d 1475, 1481 (9th Cir. 1997). Although a complaint need
2 not outline all elements of a claim, “[i]t must be possible . . . for an inference to be drawn that these
3 elements exist.” *Walker v. South Central Bell Telephone Co.*, 904 F.2d 275, 277 (5th Cir. 1990); *Lewis*
4 *v. ACB Business Service, Inc.*, 135 F.3d 389, 405-406 (6th Cir. 1998). Despite the flexible pleading
5 policy of the Federal Rules of Civil Procedure, a complaint must give fair notice and state the elements
6 of the claim plainly and succinctly. *Jones v. Community Redev. Agency*, 733 F.2d 646, 649 (9th Cir.
7 1984). A plaintiff must allege with at least some degree of particularity overt facts which defendant
8 engaged in to support plaintiff’s claim. *Jones*, 733 F.2d at 649.

9 F.R.Civ.P. 8(a) requires a short plain statement of plaintiff’s claim. The complaint does not
10 adequately identify grounds for relief against Ms. Mellon or any other particular defendant to satisfy
11 F.R.Civ.P. 8(a)(2). The complaint fails to provide any defendant fair notice and to state elements of a
12 claim of plaintiff plainly and succinctly. The complaint fails to demonstrate that plaintiff may pursue
13 a cause of action based on cited federal and state statutes. The pleading deficiencies prevent this Court
14 from proceeding on plaintiff’s complaint. Nonetheless, this Court grants plaintiff an opportunity to
15 attempt to cure the complaint’s deficiencies.

16 **Statutes Of Limitation**

17 The complaint appears susceptible to limitations defenses. The complaint appears to allege
18 breach of contract claims. California Code of Civil Procedure section 337(1) sets a four year limitations
19 period for an “action upon any contract, obligation or liability founded upon an instrument in writing.”
20 The complaint appears to allege May 1999 breach of a written contract, that is, a disability income
21 policy. The complaint vaguely refers to accrual of actions but fails to address failure to file a breach of
22 contract action within four years of a May 1999 breach.

23 To the extent the complaint attempts to allege negligence, it is susceptible to the one-year
24 limitations period of California Civil Code section 340(3), which was effective as of May 1999. To the
25 extent the complaint attempts to allege liability created by statute, it is susceptible to the three-year
26 limitations of period of California Civil Code section 338(a). Plaintiff’s claims are time barred based
27 on the face of the complaint.

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Malice

This Court is concerned that plaintiff has brought this action in absence of good faith and attempts to take advantage of cost-free filing to vex Ms. Mellon or others. Such attempt to vex Ms. Mellon or others provides further grounds to dismiss plaintiff's complaint.

Attempt At Amendment

Plaintiff is admonished that this Court's Local Rule 15-220 requires an amended complaint to be complete in itself without reference to any prior pleading. As a general rule, an amended complaint supersedes the original complaint. *See Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). After the filing of an amended complaint, the original pleadings serves no further function. Thus, in an amended complaint, each claim and involvement of each defendant must be sufficiently alleged.

CONCLUSION AND ORDER

For the reasons discussed above, this Court:

1. DISMISSES plaintiffs' complaint, filed December 30, 2005, with leave to amend; and
2. ORDERS plaintiffs, no later than January 27, 2006, to file an amended complaint in compliance with this order.

This Court admonishes plaintiff that failure to file an amended complaint in compliance with this order will result in recommendation to dismiss this action for failure to obey a court order.

IT IS SO ORDERED.

Dated: January 12, 2006
66h44d

/s/ Lawrence J. O'Neill
UNITED STATES MAGISTRATE JUDGE