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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JOHN FREDERICK WHEELER,
Plaintiff,
v.
HEALTHY SMILES, et al.,
Defendants.

CASE NO. 1:09-cv-01772-OWW-SKO
ORDER DISMISSING AMENDED
COMPLAINT AND GRANTING LEAVE TO
AMEND
AMENDED COMPLAINT DUE WITHIN
THIRTY (30) DAYS

Plaintiff John Frederick Wheeler ("Plaintiff") is proceeding pro se with an action for damages and other relief concerning alleged civil rights violations pursuant to 42 U.S.C. § 1983 that he filed on October 8, 2009. On November 17, 2009, the Court screened the complaint pursuant to 28 U.S.C. § 1915(e)(2), and issued an order dismissing the complaint for failure to state a cognizable claim. The Court, however, granted Plaintiff thirty (30) days to amend his complaint. On December 10, 2009, Plaintiff filed an amended civil rights complaint.

DISCUSSION

A. Screening Standard

In cases where the plaintiff is proceeding in forma pauperis, the Court is required to screen each case, and shall dismiss the case at any time if the Court determines that the allegation of poverty is untrue, or the action or appeal is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief against a defendant who is immune from

1 such relief. 28 U.S.C. § 1915(e)(2). If the Court determines that the complaint fails to state a
2 claim, leave to amend may be granted to the extent that the deficiencies of the complaint can be
3 cured by amendment. *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (en banc).

4 **B. Failure to State a Claim**

5 A complaint, or portion thereof, should only be dismissed for failure to state a claim upon
6 which relief may be granted if it appears beyond doubt that plaintiff can prove no set of facts in
7 support of the claim or claims that would entitle him to relief. *See Hishon v. King & Spalding*,
8 467 U.S. 69, 73 (1984), *citing Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also Palmer v.*
9 *Roosevelt Lake Log Owners Ass'n, Inc.*, 651 F.2d 1289, 1294 (9th Cir. 1981). In reviewing a
10 complaint under this standard, the court must accept as true the allegations of the complaint in
11 question (*Hospital Bldg. Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 740 (1976)), construe the
12 pleading in the light most favorable to the plaintiff, and resolve all doubts in the plaintiff's favor.
13 *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969).

14 **C. Discussion**

15 **1. November 17, 2009, Screening Order**

16 In his original complaint, Plaintiff claimed that his dental providers violated his civil
17 rights by providing him with a poor set of dentures. In its November 17, 2009, screening order,
18 the Court explained that, in order to state a claim pursuant to Section 1983, Plaintiff must plead
19 that defendants acted under the color of state law at the time the act complained of was
20 committed, and that the defendants deprived the plaintiff of rights, privileges, or immunities
21 secured by the Constitution or laws of the United States. *Gibson v. United States*, 781 F.2d 1334,
22 1338 (9th Cir. 1986). The Court further explained that, generally, private parties are not acting
23 under color of state law. The Court concluded that Plaintiff failed to allege specific facts
24 warranting an inference that Defendants acted under color of state law in a way that resulted in a
25 deprivation of any federally protected rights. Finally, the Court noted that Plaintiff's claims
26 appeared to be common law state claims in contract and/or tort. In light of this, the Court
27 explained that Plaintiff had failed to state any basis for subject matter jurisdiction in this Court.
28 The Court granted Plaintiff thirty (30) days to amend his complaint. Plaintiff filed a First

1 Amended Complaint on December 10, 2009.

2 **2. Allegations of the First Amended Complaint**

3 In his First Amended Complaint ("FAC"), Plaintiff reasserts that Defendants, consisting
4 of entities or individuals engaged in the practice of dentistry or activities related to dentistry,
5 created a poor set of dentures for Plaintiff, caused Plaintiff physical pain and embarrassment, and
6 then charged Plaintiff additional money to repair the dentures. Among other things, Plaintiff
7 asserts that he is unable to speak well with the dentures fashioned by Defendants, and, therefore,
8 Defendants have impinged on his freedom of speech under the First Amendment, and have
9 deprived him of Due Process of law under the Fifth Amendment.

10 **3. Plaintiff Has Not Adequately Alleged that Defendants Were Acting**
11 **Under the Color of State Law to Support a Section 1983 Claim**

12 **a. Plaintiff's Section 1983 Claim is Insufficient**

13 To state a claim under Section 1983, a plaintiff must plead that the defendant acted under
14 color of state law. *Gibson*, 781 F.2d at 1338. Generally, private parties are not acting under
15 color of state law. *See Price v. Hawaii*, 939 F.2d 702, 707-08 (9th Cir. 1991). The Constitution
16 protects individual rights only from government action, and not from private conduct of which
17 Plaintiff complains violates his individual constitutional rights. *See Single Moms, Inc. v.*
18 *Montana Power Co.*, 331 F.3d 743, 746-47 (9th Cir. 2003). Thus, a Section 1983 plaintiff must
19 show that a defendant's actions are fairly attributable to the government, which generally
20 involves significant state involvement in the action in question. *Franklin v. Fox*, 312 F.3d 423,
21 444-45 (9th Cir. 2002).

22 It appears that Plaintiff attempted to cure the deficiencies of his original complaint by
23 including in his FAC the statement that "Plaintiff submits that he has plead [sic] that the
24 defendants acted under the color of state law." FAC at 6. However, even construing the
25 complaint in the light most favorable to Plaintiff, this statement standing alone does not supply
26 the Court with any facts from which it could infer how Defendants acted under the color of state
27 law when they allegedly failed to provide adequate dental treatment to Plaintiff. *Price*, 939 F.2d
28 at 708 ("conclusory allegations, unsupported by facts, [will be] rejected as insufficient to state a

1 claim under the Civil Rights Act" (internal quotation omitted).) Without any facts showing how
2 Defendants were acting under the color of state law, Plaintiff has failed to adequately state a
3 Section 1983 claim.

4 **b. As Plaintiff Has Failed to State a Section 1983 Claim, This Court**
5 **Has No Subject Matter Jurisdiction Over This Case**

6 Plaintiff has not adequately alleged a Section 1983 claim. Rather, the allegations in
7 Plaintiff's complaint appear to be rooted in common law claims in tort or contract. "Federal
8 courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S.
9 375, 377 (1994). "They possess only that power authorized by Constitution and statute, which is
10 not to be expanded by judicial decree." *Id.* (Internal citations omitted.) In federal courts, the
11 cases the courts are authorized to hear must arise from either "federal question jurisdiction" or
12 "diversity" of citizenship of the parties when the amount in controversy exceeds \$75,000.
13 *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). In the absence of an adequately alleged
14 Section 1983 claim, the Court has no subject matter jurisdiction over this case due to the lack of
15 an issue of federal law. Further, there is no apparent diversity of citizenship between Plaintiff
16 and Defendants. As all Plaintiff's allegations relate to potential state law tort or contract actions
17 against Defendants, Plaintiff has not adequately asserted how the Court has subject matter
18 jurisdiction over this case. Plaintiff will be given a final opportunity to file an amended
19 complaint, and to the extent that he is able, cure the deficiencies outlined above.

20 **D. Plaintiff's Amended Complaint Must Restate Each Claim and The Involvement of**
21 **Each Defendant**

22 Plaintiff is advised that Local Rule 220 requires that an amended complaint be complete
23 in itself without reference to any prior pleading. As a general rule, an amended complaint
24 supersedes the original complaint. *See Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). Once
25 Plaintiff files an amended complaint, the original pleading no longer serves any function in the
26 case. Therefore, in an amended complaint, as in an original complaint, each claim and the
27 involvement of each defendant must be sufficiently alleged.

28 Based on the foregoing, it is HEREBY ORDERED that:

1. Plaintiff's First Amended Complaint is DISMISSED WITH LEAVE TO

1 AMEND;

2 2. Plaintiff shall be given leave to file an amended complaint within **thirty (30) days**
3 of the date of service of this order;

4 3. If Plaintiff again fails to state a claim under 42 U.S.C. §1983, the Court will
5 recommend that the entire action be dismissed with prejudice; and

6 4. Failure to comply with this order will result in a recommendation that this action
7 be dismissed.

8
9 IT IS SO ORDERED.

10 **Dated: June 17, 2010**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE

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