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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MARIO ANTON LEE,
Plaintiff,
v.
MATEVOUSIAN,
Defendant.

Case No. 1:18-cv-00141-SKO (PC)
FINDINGS AND RECOMMENDATIONS TO DENY PLAINTIFF’S MOTION TO PROCEED *IN FORMA PAUPERIS* AND DISMISS WITHOUT PREJUDICE BECAUSE OF UNTRUE POVERTY ALLEGATION
(Docs. 5, 6)
TWENTY-ONE (21) DAY DEADLINE
CLERK TO ASSIGN A DISTRICT JUDGE

BACKGROUND

Plaintiff, Mario Anton Lee, is a federal prisoner proceeding *pro se* in this civil rights action pursuant to 28 U.S.C. § 1331; *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), which he filed on January 26, 2018. (Doc. 1.) Subsequently, Plaintiff filed a motion to proceed *in forma pauperis*. (Doc. 5.) Upon review, Plaintiff’s trust account reflects an average monthly balance of roughly \$300.00, with an average of \$183.35 in monthly deposits for the five months prior to the date he filed this action.

On February 21, 2018, an order issued for Plaintiff to show cause (“OSC”) within twenty-one (21) days why this action should not be dismissed based on his untrue poverty allegation in his application to proceed *in forma pauperis*. (Doc. 9.) Despite lapse of more than the allowed time, Plaintiff has failed to respond to the OSC.¹

¹ It is noted that the OSC was returned on March 12, 2018, as undeliverable to Plaintiff at USP Atwater. Despite

1 DISCUSSION

2 **I. Legal Standard**

3 An indigent party may be granted permission to proceed *in forma pauperis* upon
4 submission of an affidavit showing inability to pay the required fees. 28 USC § 1915(a). The
5 determination as to whether a plaintiff is indigent and therefore unable to pay the filing fee falls
6 within the court’s sound discretion. *California Men’s Colony v. Rowland*, 939 F.2d 854, 858 (9th
7 Cir. 1991) (reversed on other grounds).

8 “The trial court must be careful to avoid construing the statute so narrowly that a litigant
9 is presented with a Hobson’s choice between eschewing a potentially meritorious claim or
10 foregoing life’s plain necessities.” *Temple v. Ellerthorpe*, 586 F. Supp. 848, 850 (D.R.I. 1984),
11 citing *Potnick v. Eastern State Hospital*, 701 F.2d 243, 244 (2d Cir. 1983) (*per curiam*); *Carson v.*
12 *Polley*, 689 F.2d 562, 586 (5th Cir. 1982). “But, the same even-handed care must be employed to
13 assure that federal funds are not squandered to underwrite, at public expense, either frivolous
14 claims or the remonstrances of a suitor who is financially able, in whole or in material part, to
15 pull his own oar.” *Temple*, 586 F. Supp. at 850, citing *Brewster v. North American Van Lines,*
16 *Inc.*, 461 F.2d 649, 651 (7th Cir. 1972).

17 Proceeding “*in forma pauperis* is a privilege not a right.” *Smart v. Heinze*, 347 F.2d 114,
18 116 (9th Cir. 1965). A party need not be completely destitute to proceed *in forma pauperis*.
19 *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 339-40 (1948). However, “[i]f an
20 applicant has the wherewithal to pay court costs, or some part thereof, without depriving himself
21 and his dependents (if any there be) of the necessities of life, then he should be required, in the
22 First Circuit’s phrase, to ‘put his money where his mouth is.’” *Williams v. Latins*, 877 F.2d 65
23 (9th Cir. 1989) (affirming district court denial of *in forma pauperis* where in past 12 months,
24 plaintiff received a sum of \$5,000 settling a civil action and no indication it was unavailable to
25 plaintiff) (citing, *Temple*, 586 F.Supp. at 851(quoting *In re Stump*, 449 F.2d 1297, 1298 (1st Cir.
26 1971) (*per curiam*)).

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28 being instructed on the requirement to keep his address of record current, (Doc. 2), Plaintiff has not done so.

1 In sum, to proceed *in forma pauperis*, a plaintiff need not demonstrate that he is
2 completely destitute, but his poverty must prevent him from paying the filing fee and providing
3 his dependents with the necessities of life. See *Adkins v. E.I. DuPont de Nemours & Co.*, 335
4 U.S. 331, 339-40 (1948). A ““showing of something more than mere hardship must be made.””
5 *Nastrom v. New Century Mortg. Corp.*, No. 11-cv-1998, 2011 WL 7031499, at *1 (E.D. Cal. Dec.
6 7, 2011) (quoting *Martin v. Gulf States Utilities Co.*, 221 F.Supp. 757, 759 (W.D. La.1963)),
7 report and recommendation adopted by, 2012 WL 116563 (E.D. Cal. Jan.12, 2012). Plaintiff has
8 not shown that he has any dependents who would have been deprived of the necessities of life if
9 he paid the filing fee in full and, since Plaintiff is currently incarcerated, the federal government
10 is paying for his necessities of daily life. *Williams*, 877 F.2d 65.

11 The Court is entitled to consider the economic priority Plaintiff placed on the use of
12 monies in his inmate trust account. See *Olivares v. Marshall*, 59 F.3d 109, 112 (9th Cir. 1995)
13 (citing *Alexander v. Carson Adult High School*, 9 F.3d 1448, 1449 (9th Cir. 1993). A district
14 court is entitled to honor an inmate’s decision of other use of available funds which the inmate
15 considered more worthwhile than payment of a federal court’s filing fee. See *Olivares*, at 112,
16 (quoting *Lumbert v. Illinois Department of Corrections*, 827 F.2d 257, 260 (7th Cir. 1987)
17 (Noting peanut and candy “comforts” purchased in the prison commissary; “If the inmate thinks a
18 more worthwhile use of his funds would be to buy peanuts and candy ... than to file a civil rights
19 suit, he has demonstrated an implied evaluation of the suit that the district court is entitled to
20 honor.”).) Here, in the months leading up to Plaintiff’s initiation of this action, Plaintiff clearly
21 prioritized a number of purchases and transactions over his obligation to pay the filing fee.

22 The determination whether a party can proceed *in forma pauperis* is a “matter within the
23 discretion of the trial court and in civil actions for damages should be allowed only in exceptional
24 circumstances.” *Weller v. Dickinson*, 314 F.2d 598, 600 (9th Cir. 1963); see also *Franklin v.*
25 *Murphy*, 745 F.2d 1221, 1231 (9th Cir. 1984) (“court permission to proceed in forma pauperis is
26 itself a matter of privilege and not right; denial of in forma pauperis status does not violate the
27 applicant’s right to due process”). It is immaterial whether Plaintiff chose to spend the thousands
28 of dollars that filtered in and out of his trust account in the months prior to filing this action

