

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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

ROBERT BENNING BALTHROPE, II,

Plaintiff,

No. CIV S-09-1874 FCD KJM PS

vs.

SACRAMENTO COUNTY DEP'T OF
HEALTH, et al.,

Defendants.

ORDER AND

FINDINGS AND RECOMMENDATIONS

_____ /

Plaintiff is proceeding in this action pro se. Plaintiff has requested authority pursuant to 28 U.S.C. § 1915 to proceed in forma pauperis. This proceeding was referred to this court by Local Rule 72-302(c)(21).

In the application to proceed in forma pauperis, plaintiff avers under penalty of perjury that he has no income because all his income is tied up in bankruptcy. This statement is plainly contradicted by the statement of current monthly income filed in plaintiff's bankruptcy action. See Case no. 07-25631, Bankruptcy Court, E. D. Cal., docket no. 38 (amended plan). Under 28 U.S.C. § 1915(2)(A), this action should be dismissed.

Plaintiff has not listed his present causes of action as an asset in the bankruptcy petition. See Case no. 07-25631, Bankruptcy Court, E. D. Cal., docket no. 1 (petition and

1 schedules) & docket no. 40 (amended schedules). As plaintiff has not yet been discharged from
2 bankruptcy, plaintiff's present claims are the property of the bankrupt estate and, absent an
3 abandonment, may only be prosecuted by the trustee in bankruptcy. There is no indication on
4 the bankruptcy docket that these claims have been abandoned.

5 Plaintiff has taken inconsistent positions in his bankruptcy action and in the
6 present action. The court thus finds plaintiff is barred by the doctrine of judicial estoppel from
7 pursuing his present claims against defendants. See generally Hamilton v. State Farm Fire &
8 Casualty Company, 270 F.3d 778, 784-85 (9th Cir. 2001).

9 For the foregoing reasons, this action should be dismissed.

10 Accordingly, IT IS HEREBY ORDERED that the Clerk of Court shall serve a
11 copy of these findings and recommendations on the Clerk of the Bankruptcy Court for the
12 Eastern District of California for filing in case no. 07-25631 and shall serve a copy on the trustee
13 in bankruptcy, Lawrence J. Loheit, P.O. Box 1858, Sacramento, CA 95812-1858; and

14 IT IS HEREBY RECOMMENDED that this action be dismissed with prejudice.

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

23 DATED: July 24, 2009.

24 
25 U.S. MAGISTRATE JUDGE
26

006
balthrope.57