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

SAMUEL SMITH,

Plaintiff,

No. CIV S-10-3131 MCE DAD (TEMP) PS

vs.

GMAC MORTGAGE CO., et al.,

Defendants.

ORDER

_____ /

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).

Plaintiff has submitted the affidavit required by § 1915(a) showing that plaintiff is unable to prepay fees and costs or give security for them. Accordingly, the request to proceed in forma pauperis will be granted. 28 U.S.C. § 1915(a).

The federal in forma pauperis statute authorizes federal courts to dismiss a case if the action is legally “frivolous or malicious,” fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2).

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1 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.
2 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28
3 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
4 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
5 490 U.S. at 327.

6 In order to avoid dismissal for failure to state a claim a complaint must contain
7 more than “naked assertions,” “labels and conclusions” or “a formulaic recitation of the elements
8 of a cause of action.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-557 (2007). In other
9 words, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory
10 statements do not suffice.” Ashcroft v. Iqbal, ___ U.S. ___, ___, 129 S. Ct. 1937, 1949 (2009).
11 Furthermore, a claim upon which the court can grant relief has facial plausibility. Twombly, 550
12 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads factual content that allows
13 the court to draw the reasonable inference that the defendant is liable for the misconduct
14 alleged.” Iqbal, 129 S. Ct. at 1949. When considering whether a complaint states a claim upon
15 which relief can be granted, the court must accept the allegations as true, Erickson v. Pardus, 551
16 U.S. 89, 94 (2007), and construe the complaint in the light most favorable to the plaintiff, see
17 Scheuer v. Rhodes, 416 U.S. 232, 236 (1974).

18 The court finds the allegations in plaintiff’s complaint so vague and conclusory
19 that it is unable to determine whether the current action is frivolous or fails to state a claim for
20 relief. The court has determined that the complaint does not contain a short and plain statement
21 as required by Fed. R. Civ. P. 8(a)(2). Although the Federal Rules adopt a flexible pleading
22 policy, a complaint must give fair notice and state the elements of the claim plainly and
23 succinctly. Jones v. Community Redev. Agency, 733 F.2d 646, 649 (9th Cir. 1984). Plaintiff
24 must allege with at least some degree of particularity overt acts which defendants engaged in that
25 support plaintiff’s claim. Id. Because plaintiff has failed to comply with the requirements of Fed.
26 R. Civ. P. 8(a)(2), the complaint must be dismissed. The court will, however, grant plaintiff

1 leave to file an amended complaint.

2 It appears from plaintiff's filings that he is trying to bring a criminal action against
3 defendants. See Docket no. 1 (complaint is captioned "criminal intent"); Docket no. 2 (in forma
4 pauperis application captioned "criminal intent"); Docket no. 3 (summons captioned "federal
5 warrant-detention"). Plaintiff is advised that the United States Attorney prosecutes criminal
6 complaints in federal court; a private citizen cannot.

7 Moreover, plaintiff previously filed an action against defendant GMAC (Smith v.
8 GMAC, case no. 2:09-648 GEB GGH PS) which proceeded to final judgment in favor of
9 GMAC. In that action, plaintiff alleged claims pertaining to the same property at issue here.
10 Plaintiff is advised that many of his claims appear to be related, if not the same, as the claims
11 raised in the prior action and appear to be barred by the res judicata. Under the doctrine of claim
12 preclusion, a final judgment forecloses 'successive litigation of the very same claim, whether or
13 not relitigation of the claim raises the same issues as the earlier suit.'" Taylor v. Sturgell, 553
14 U.S. 880, 892 (2008) (quoting New Hampshire v. Maine, 532 U.S. 742, 748 (2001)). Stated
15 differently, "[c]laim preclusion, often referred to as res judicata, bars any subsequent suit on
16 claims that were raised or could have been raised in a prior action." Cell Therapeutics, Inc. v.
17 Lash Group, Inc., 586 F.3d 1204, 1212 (9th Cir. 2009). Accord Tahoe Sierra Preservation
18 Council, Inc. v. Tahoe Reg. Planning Agency, 322 F.3d 1064, 1078 (9th Cir. 2003) ("Newly
19 articulated claims based on the same nucleus of facts may still be subject to a res judicata finding
20 if the claims could have been brought in the earlier action."); Stewart v. U.S. Bancorp, 297 F.3d
21 953, 956 (9th Cir. 2002).

22 If plaintiff chooses to amend the complaint, he must set forth the jurisdictional
23 grounds upon which the court's jurisdiction depends. Federal Rule of Civil Procedure 8(a).
24 Further, plaintiff must allege facts demonstrating how the conduct complained of has resulted in
25 a deprivation of his federal rights. See Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980).

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1 In addition, plaintiff is informed that the court cannot refer to a prior pleading in
2 order to make plaintiff's amended complaint complete. Local Rule 15-220 requires that an
3 amended complaint be complete in itself without reference to any prior pleading. This is
4 because, as a general rule, an amended complaint supersedes the original complaint. See Loux v.
5 Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an amended complaint, the original
6 pleading no longer serves any function in the case. Therefore, in an amended complaint, as in an
7 original complaint, each claim and the involvement of each defendant must be sufficiently
8 alleged.

9 In accordance with the above, IT IS HEREBY ORDERED that:

- 10 1. Plaintiff's request to proceed in forma pauperis is granted;
- 11 2. Plaintiff's complaint is dismissed; and
- 12 3. Plaintiff is granted thirty days from the date of service of this order to file an
13 amended complaint that complies with the requirements of the Federal Rules of Civil Procedure,
14 and the Local Rules of Practice; the amended complaint must bear the docket number assigned
15 this case and must be labeled "Amended Complaint"; plaintiff must file an original and two
16 copies of the amended complaint; failure to file an amended complaint in accordance with this
17 order will result in a recommendation that this action be dismissed.

18 DATED: March 8, 2011.

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21 _____
22 DALE A. DROZD
23 UNITED STATES MAGISTRATE JUDGE

23 JMM
24 smith-gmac.ifp-lta