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

ADAM LEE BURKE,

Plaintiff,

No. 2:11-cv-02502 GEB KJN PS

v.

DAVID WILSON; DAVID A.
LAWSON LAW OFFICE,

Defendants.

FINDINGS AND RECOMMENDATIONS

Plaintiff is proceeding without counsel and is currently incarcerated at the Shasta County Jail.¹ In an order entered September 30, 2011, the undersigned granted plaintiff's application to proceed in forma pauperis, screened plaintiff's complaint, dismissed the complaint without prejudice, and provided plaintiff with leave to file a first amended complaint. (See Order, Sept. 30, 2011, Dkt. No. 3.) On October 28, 2011, plaintiff timely filed a First Amended Complaint (Dkt. No. 4). After screening plaintiff's First Amended Complaint pursuant to 28 U.S.C. § 1915(e)(2)(B), the undersigned recommends that plaintiff's claim brought pursuant to 42 U.S.C. § 1983 be dismissed without leave to amend, that the court decline to exercise supplemental jurisdiction over plaintiff's state law claim of professional negligence, and this case

¹ This case proceeds before the undersigned pursuant to Eastern District of California Local Rule 302(c)(21) and 28 U.S.C. § 636(b)(1).

1 be closed.

2 The court is required to screen complaints brought by parties proceeding in forma
3 pauperis. See 28 U.S.C. § 1915(e)(2); see also Lopez v. Smith, 203 F.3d 1122, 1129 (9th Cir.
4 2000) (en banc). Pursuant to 28 U.S.C. § 1915(e)(2), the court is directed to dismiss a case filed
5 pursuant to the in forma pauperis statute if, at any time, it determines that the allegation of
6 poverty is untrue, the action is frivolous or malicious, the complaint fails to state a claim on
7 which relief may be granted, or the action seeks monetary relief against an immune defendant.

8 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.
9 Neitzke v. Williams, 490 U.S. 319, 325 (1989); see also Franklin v. Murphy, 745 F.2d 1221,
10 1227-28 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous if that claim is
11 based on an indisputably meritless legal theory or if the factual contentions are clearly baseless.
12 Neitzke, 490 U.S. at 327.

13 In assessing whether a plaintiff’s complaint fails to state a claim on which relief
14 may be granted, the court adheres to the “notice pleading” standards. Under the notice pleading
15 standards of the Federal Rules of Civil Procedure, a plaintiff’s complaint must provide, in part, a
16 “short and plain statement” of plaintiff’s claims showing entitlement to relief. Fed. R. Civ.
17 P. 8(a)(2); see also Paulsen v. CNF, Inc., 559 F.3d 1061, 1071 (9th Cir. 2009), cert. denied, 130
18 S. Ct. 1053 (2010). A complaint should be dismissed for failure to state a claim if, taking all
19 well-pleaded factual allegations as true, it does not contain “enough facts to state a claim to
20 relief that is plausible on its face.” See Coto Settlement v. Eisenberg, 593 F.3d 1031, 1034 (9th
21 Cir. 2010) (quoting Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009)). “A claim has facial
22 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable
23 inference that the defendant is liable for the misconduct alleged.” Caviness v. Horizon Cmty.
24 Learning Ctr., Inc., 590 F.3d 806, 812 (9th Cir. 2010) (quoting Iqbal, 129 S. Ct. at 1949). The
25 court accepts all of the facts alleged in the complaint as true and construes them in the light most
26 favorable to the plaintiff. Corrie v. Caterpillar, 503 F.3d 974, 977 (9th Cir. 2007). The court is

1 “not, however, required to accept as true conclusory allegations that are contradicted by
2 documents referred to in the complaint, and [the court does] not necessarily assume the truth of
3 legal conclusions merely because they are cast in the form of factual allegations.” Paulsen, 559
4 F.3d at 1071 (citations and quotation marks omitted). The court must construe a pro se pleading
5 liberally to determine if it states a claim and, prior to dismissal, tell a plaintiff of deficiencies in
6 the complaint and give the plaintiff an opportunity to cure them if it appears at all possible that
7 the plaintiff can correct the defect. See Lopez, 203 F.3d at 1130-31.

8 As discussed in greater detail in the order entered September 30, 2011, plaintiff is
9 suing his former criminal defense attorney on the basis of alleged “legal malpractice and civil
10 rights violations” committed in connection with a criminal proceeding between June 2010 and
11 November 2010. (First Am. Compl. at 5.) Plaintiff continues to allege that Mr. Wilson’s alleged
12 malpractice “cost [plaintiff] further time spent in incarceration which in turn has resulted in
13 monetary and emotional damages to [plaintiff] and [plaintiff’s] family.”² (Id.) Plaintiff again
14 alleges two claims for relief against Mr. Wilson and his law office: (1) a claim for a violation of
15 plaintiff’s constitutional rights pursuant to 42 U.S.C. § 1983; and (2) a claim for professional
16 negligence or legal malpractice under California law. (See id. at 5-6.)

17 The undersigned previously dismissed plaintiff’s section 1983 claim on grounds
18 including that plaintiff had not alleged that Mr. Wilson or his law office acted under color of
19 state law for the purpose of a claim brought pursuant to 42 U.S.C. § 1983 (see Order, Sept. 30,
20 2011, at 4-6).³ See, e.g., Long v. County of L.A., 442 F.3d 1178, 1185 (9th Cir. 2006) (“To state
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22 ² The undersigned again advises plaintiff that to the extent that plaintiff believes that he is
23 entitled to release or a new trial on the basis of constitutionally ineffective assistance of counsel, he
24 must seek such relief through a petition for a writ of habeas corpus (Order, Sept. 30, 2011, at 4 n.2).
See 28 U.S.C. § 2254; see generally Harrington v. Richter, 131 S. Ct. 770 (2011).

25 ³ The undersigned also dismissed plaintiff’s section 1983 claims on the ground that plaintiff
26 had not alleged which of his constitutional rights had been violated. (Order, Sept. 30, 2011, at 5.)
Plaintiff’s First Amended Complaint baldly alleges violations of his rights secured by the First,
Sixth, Eighth, Thirteenth, and Fourteenth Amendments to the U.S. Constitution. (First Am. Compl.

1 a claim under § 1983, a plaintiff must allege two essential elements: (1) that a right secured by
2 the Constitution or laws of the United States was violated, and (2) that the alleged violation was
3 committed by a person acting under the color of State law.” (citing West v. Atkins, 487 U.S. 42,
4 48 (1988)). Plaintiff has not cured this deficiency in his First Amended Complaint. Plaintiff
5 alleges that Mr. Wilson, a lawyer in private practice, was a state actor because he was appointed
6 to represent plaintiff as a “state appointed conflict attorney.” (See First Am. Compl. at 8.) As
7 the undersigned already explained in the September 30, 2011 order, mere appointment as counsel
8 is insufficient to satisfy the “state actor” requirement of 42 U.S.C. § 1983. (See Order, Sept. 30,
9 2011, at 5-6.) Plaintiff now also alleges in conclusory fashion that Mr. Wilson was part of a vast
10 conspiracy, involving the entire criminal justice system (e.g., judges, district attorney’s, public
11 and private defense attorneys, court-appointed attorneys, etc.), to unlawfully prosecute and
12 convict him of a crime. (See First Am. Compl. at 7-8.) Such conclusory allegations of a
13 conspiracy do not satisfactorily allege a section 1983 claim. See, e.g., Simmons v. Sacramento
14 County Superior Court, 318 F.3d 1156, 1161 (9th Cir. 2003) (affirming dismissal of plaintiff’s
15 second amended complaint as a result of plaintiff’s “conclusory allegations” of a conspiracy to
16 deprive him of his constitutional rights in violation of Section 1983). Because plaintiff failed to
17 cure a fatal deficiency in his section 1983 claim, and nothing in plaintiff’s First Amended
18 Complaint suggests that plaintiff can cure this deficiency if given leave to amend, the
19 undersigned recommends that plaintiff’s claim brought pursuant to 42 U.S.C. § 1983 be
20 dismissed without leave to amend.⁴

21 Plaintiff’s remaining claim is his claim of professional negligence or legal

22 _____
23 at 5.)

24 ⁴ Plaintiff’s First Amended Complaint also appears to seek relief relative to the conditions
25 of his confinement. Specifically, plaintiff alleges that his access to the jail’s law library has been
26 unconstitutionally restricted. (See First Am. Compl. at 7-8.) The presently named defendants are
not proper defendants in regards to such a claim. To the extent that plaintiff wishes to pursue a claim
premised on his restricted access to the jail’s law library, he should file a separate action that names
the proper defendant or defendants for such a claim.

1 malpractice alleged under California law. The undersigned recommends that the court not
2 exercise supplemental jurisdiction over this state law claim pursuant to 28 U.S.C. § 1367(c)(3).
3 If plaintiff wishes to pursue this claim, he should pursue that claim in an appropriate California
4 Superior Court.

5 III. CONCLUSION

6 For the foregoing reasons, IT IS HEREBY RECOMMENDED that:

- 7 1. Plaintiff's claim brought pursuant to 42 U.S.C. § 1983 be dismissed
8 without leave to amend.
- 9 2. The court decline to exercise supplemental jurisdiction over plaintiff's
10 state law professional negligence claim. See 28 U.S.C. § 1367(c)(3).
- 11 3. The Clerk of Court be directed to close this case.

12 These findings and recommendations are submitted to the United States District
13 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
14 days after being served with these findings and recommendations, any party may file written
15 objections with the court and serve a copy on all parties. Id.; see also E. Dist. Local Rule 304(b).
16 Such a document should be captioned "Objections to Magistrate Judge's Findings and
17 Recommendations." Any response to the objections shall be filed with the court and served on
18 all parties within fourteen days after service of the objections. E. Dist. Local Rule 304(d).
19 Failure to file objections within the specified time may waive the right to appeal the District
20 Court's order. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d
21 1153, 1156-57 (9th Cir. 1991).

22 IT IS SO RECOMMENDED.

23 DATED: November 8, 2011

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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE