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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DERRICK JEROME LEWIS,
Plaintiff,
v.
NBC UNIVERSAL, et al,
Defendants.

No. 2:16-cv-3049-MCE-EFB PS

ORDER

Plaintiff seeks leave to proceed *in forma pauperis* pursuant to 28 U.S.C. 1915.¹ His declaration makes the showing required by 28 U.S.C. §1915(a)(1) and (2). *See* ECF No. 2. Accordingly, the request to proceed *in forma pauperis* is granted. 28 U.S.C. § 1915(a).

Determining that plaintiff may proceed *in forma pauperis* does not complete the required inquiry. Pursuant to § 1915(e)(2), the court must dismiss the case at any time if it determines the allegation of poverty is untrue, or if the action is frivolous or malicious, fails to state a claim on which relief may be granted, or seeks monetary relief against an immune defendant. As discussed below, plaintiff’s complaint must be dismissed for failure to state a claim.

Although pro se pleadings are liberally construed, *see Haines v. Kerner*, 404 U.S. 519, 520-21 (1972), a complaint, or portion thereof, should be dismissed for failure to state a claim if it

¹ This case, in which plaintiff is proceeding *in propria persona*, was referred to the undersigned under Local Rule 302(c)(21). *See* 28 U.S.C. § 636(b)(1).

1 fails to set forth “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl.*
2 *Corp. v. Twombly*, 550 U.S. 544, 554, 562-563 (2007) (citing *Conley v. Gibson*, 355 U.S. 41
3 (1957)); *see also* Fed. R. Civ. P. 12(b)(6). “[A] plaintiff’s obligation to provide the ‘grounds’ of
4 his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation of
5 a cause of action’s elements will not do. Factual allegations must be enough to raise a right to
6 relief above the speculative level on the assumption that all of the complaint’s allegations are
7 true.” *Id.* (citations omitted). Dismissal is appropriate based either on the lack of cognizable
8 legal theories or the lack of pleading sufficient facts to support cognizable legal theories.
9 *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

10 In reviewing a complaint under this standard, the court must accept as true the allegations
11 of the complaint in question, *Hospital Bldg. Co. v. Rex Hosp. Trustees*, 425 U.S. 738, 740 (1976),
12 construe the pleading in the light most favorable to the plaintiff, and resolve all doubts in the
13 plaintiff’s favor, *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). A pro se plaintiff must satisfy
14 the pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure. Rule 8(a)(2)
15 requires a complaint to include “a short and plain statement of the claim showing that the pleader
16 is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds
17 upon which it rests.” *Twombly*, 550 U.S. at 555 (citing *Conley v. Gibson*, 355 U.S. 41 (1957)).

18 Additionally, a federal court is a court of limited jurisdiction, and may adjudicate only
19 those cases authorized by the Constitution and by Congress. *Kokkonen v. Guardian Life Ins. Co.*,
20 511 U.S. 375, 377 (1994). The basic federal jurisdiction statutes, 28 U.S.C. §§ 1331 & 1332,
21 confer “federal question” and “diversity” jurisdiction, respectively. Federal question jurisdiction
22 requires that the complaint (1) arise under a federal law or the U. S. Constitution, (2) allege a
23 “case or controversy” within the meaning of Article III, § 2 of the U. S. Constitution, or (3) be
24 authorized by a federal statute that both regulates a specific subject matter and confers federal
25 jurisdiction. *Baker v. Carr*, 369 U.S. 186, 198 (1962). To invoke the court’s diversity
26 jurisdiction, a plaintiff must specifically allege the diverse citizenship of all parties, and that the
27 matter in controversy exceeds \$75,000. 28 U.S.C. § 1332(a); *Bautista v. Pan American World*
28 *Airlines, Inc.*, 828 F.2d 546, 552 (9th Cir. 1987). A case presumably lies outside the jurisdiction

1 of the federal courts unless demonstrated otherwise. *Kokkonen*, 511 U.S. at 376-78. Lack of
2 subject matter jurisdiction may be raised at any time by either party or by the court. *Attorneys*
3 *Trust v. Videotape Computer Products, Inc.*, 93 F.3d 593, 594-95 (9th Cir. 1996).

4 Plaintiff purports to bring this action for violation of his rights under the Fifth Amendment
5 to the United States Constitution, “as well as being denied liberty and just [sic] in a court of law.”
6 *Id.* at 4. The first amended complaint² contains the following factual allegations:

7 From 2014 to 2016, I Derrick Jerome Lewis was being filmed,
8 under the alias Derrick T. Lewis . . . while in Sacramento County
9 Main Jail. Various video footage was posted of me writing,
10 walking, being drugged, and sexually assaulted by different people
11 by way of mobile devices. The stated defendants were involved to
12 various degrees, but because I have been denied my due process of
13 law I never face my offenders in a court of law although they were
14 lawfully charged.”

15 *Id.*

16 As a threshold matter, the court is unable to discern which parties plaintiff intends to name
17 as defendants. The amended complaint’s caption page lists NBC Universal, Uber, and
18 Sacramento County Superior Court as defendants, but appended to the complaint is a list of
19 approximately fifty individuals, entities, and agencies that plaintiff also appears to claim were
20 responsible for causing him injury. *See id.* at 7-8. Thus, it is not clear which individuals and
21 entities plaintiff intends to bring this action against. Further, plaintiff fails to allege a claim for
22 violation of the Fifth Amendment as he fails to allege that any of the defendants are federal
23 actors. *Lee v. City of Los Angeles*, 250 F.3d 668, 687 (9th Cir. 2001) (To state a claim for
24 violation of plaintiff’s due process rights under the Fifth Amendment, a plaintiff must allege that
25 the defendants are federal actors).

26 Even assuming that plaintiff intended to assert a Fourteenth Amendment due process
27 claim under 42 U.S.C. § 1983, the claim nonetheless fails. To state a claim under § 1983, a
28 plaintiff must allege: (1) the violation of a federal constitutional or statutory right; and (2) that the

² Prior to screening of his original complaint, plaintiff filed a first amended complaint pursuant to Fed. R. Civ. P. 15(a) (Permitting an amendment once as a matter of course within 21 days after the filing of a responsive pleading). Therefore, the court screens the first amended complaint.

1 violation was committed by a person acting under the color of state law. *See West v. Atkins*, 487
2 U.S. 42, 48 (1988); *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002). An individual
3 defendant is not liable on a civil rights claim unless the facts establish the defendant's personal
4 involvement in the constitutional deprivation or a causal connection between the defendant's
5 wrongful conduct and the alleged constitutional deprivation. *See Hansen v. Black*, 885 F.2d 642,
6 646 (9th Cir. 1989); *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978).

7 A municipal entity or its departments (such as a county, a county jail, or a county
8 employee acting in an official capacity) is liable under section 1983 only if plaintiff shows that
9 his constitutional injury was caused by employees acting pursuant to the municipality's policy or
10 custom. *Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 280 (1977); *Monell v. New*
11 *York City Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978); *Villegas v. Gilroy Garlic Festival*
12 *Ass'n*, 541 F.3d 950, 964 (9th Cir. 2008). In addition, such local government entities may not be
13 held vicariously liable under section 1983 for the unconstitutional acts of its employees under a
14 theory of respondeat superior. *See Board of Cty. Comm'rs. v. Brown*, 520 U.S. 397, 403 (1997).
15 That is, a plaintiff may not sue any defendant on the theory that the defendant is automatically
16 liable for the alleged misconduct of subordinate officers. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948
17 (2009). The only listed defendants that appear to be state actors are municipal entities, such as
18 the Sacramento Police Department and City of Los Angeles, yet plaintiff fails to allege that his
19 constitutional rights were violated pursuant to any policy or custom. Accordingly, plaintiff fails
20 to state a section 1983 claim.

21 Plaintiff's complaint must therefore be dismissed for failure to state a claim. Plaintiff is
22 granted leave to file an amended complaint, if he can allege a cognizable legal theory against a
23 proper defendant and sufficient facts in support of that cognizable legal theory. *Lopez v. Smith*,
24 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (district courts must afford pro se litigants an
25 opportunity to amend to correct any deficiency in their complaints). Should plaintiff choose to
26 file an amended complaint, the amended complaint shall clearly set forth the allegations against
27 each defendant and shall specify a basis for this court's subject matter jurisdiction. Any amended
28 complaint shall plead plaintiff's claims in "numbered paragraphs, each limited as far as

1 practicable to a single set of circumstances,” as required by Federal Rule of Civil Procedure
2 10(b), and shall be in double-spaced text on paper that bears line numbers in the left margin, as
3 required by Eastern District of California Local Rules 130(b) and 130(c). Any amended
4 complaint shall also use clear headings to delineate each claim alleged and against which
5 defendant or defendants the claim is alleged, as required by Rule 10(b), and must plead clear facts
6 that support each claim under each header.

7 Additionally, plaintiff is informed that the court cannot refer to prior pleadings in order to
8 make an amended complaint complete. Local Rule 220 requires that an amended complaint be
9 complete in itself. This is because, as a general rule, an amended complaint supersedes the
10 original complaint. *See Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). Accordingly, once
11 plaintiff files an amended complaint, the original no longer serves any function in the case.
12 Therefore, “a plaintiff waives all causes of action alleged in the original complaint which are not
13 alleged in the amended complaint,” *London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th Cir.
14 1981), and defendants not named in an amended complaint are no longer defendants. *Ferdik v.*
15 *Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). Finally, the court cautions plaintiff that failure to
16 comply with the Federal Rules of Civil Procedure, this court’s Local Rules, or any court order
17 may result in a recommendation that this action be dismissed. *See E.D. Cal. L.R. 110.*

18 Accordingly, IT IS ORDERED that:

- 19 1. Plaintiff’s request for leave to proceed *in forma pauperis* (ECF No. 2) is granted.
- 20 2. Plaintiff’s first amended complaint is dismissed with leave to amend, as provided
21 herein.
- 22 3. Plaintiff is granted thirty days from the date of service of this order to file an amended
23 complaint. The amended complaint must bear the docket number assigned to this case and must
24 be labeled “Second Amended Complaint.” Failure to timely file an amended complaint in
25 accordance with this order will result in a recommendation this action be dismissed.

26 DATED: November 13, 2017.

27 
28 EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE