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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DONALD RAY HOWARD,
Plaintiff,
v.
VINCENT CANALES and VINCENT
ROB CANALES,
Defendants.

No. 2:18-cv-2330 MCE DB PS

FINDINGS AND RECOMMENDATIONS

Plaintiff, Donald Howard, is proceeding in this action pro se. This matter was referred to the undersigned in accordance with Local Rule 302(c)(21) and 28 U.S.C. § 636(b)(1). Pending before the court are plaintiff’s complaint and motion to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. (ECF Nos. 1 & 2.) Therein, plaintiff complains about an alleged assault.

The court is required to screen complaints brought by parties proceeding in forma pauperis. See 28 U.S.C. § 1915(e)(2); see also Lopez v. Smith, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc). Here, plaintiff’s complaint is deficient. Accordingly, for the reasons stated below, the undersigned will recommend that plaintiff’s complaint be dismissed without prejudice.

I. Plaintiff’s Application to Proceed In Forma Pauperis

Plaintiff’s in forma pauperis application makes the financial showing required by 28 U.S.C. § 1915(a)(1). However, a determination that a plaintiff qualifies financially for in forma

1 pauperis status does not complete the inquiry required by the statute. ““A district court may deny
2 leave to proceed in forma pauperis at the outset if it appears from the face of the proposed
3 complaint that the action is frivolous or without merit.”” Minetti v. Port of Seattle, 152 F.3d
4 1113, 1115 (9th Cir. 1998) (quoting Tripati v. First Nat. Bank & Trust, 821 F.2d 1368, 1370 (9th
5 Cir. 1987)); see also McGee v. Department of Child Support Services, 584 Fed. Appx. 638 (9th
6 Cir. 2014) (“the district court did not abuse its discretion by denying McGee’s request to proceed
7 IFP because it appears from the face of the amended complaint that McGee’s action is frivolous
8 or without merit”); Smart v. Heinze, 347 F.2d 114, 116 (9th Cir. 1965) (“It is the duty of the
9 District Court to examine any application for leave to proceed in forma pauperis to determine
10 whether the proposed proceeding has merit and if it appears that the proceeding is without merit,
11 the court is bound to deny a motion seeking leave to proceed in forma pauperis.”).

12 Moreover, the court must dismiss an in forma pauperis case at any time if the allegation of
13 poverty is found to be untrue or if it is determined that the action is frivolous or malicious, fails to
14 state a claim on which relief may be granted, or seeks monetary relief against an immune
15 defendant. See 28 U.S.C. § 1915(e)(2). A complaint is legally frivolous when it lacks an
16 arguable basis in law or in fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v.
17 Murphy, 745 F.2d 1221, 1227-28 (9th Cir. 1984). Under this standard, a court must dismiss a
18 complaint as frivolous where it is based on an indisputably meritless legal theory or where the
19 factual contentions are clearly baseless. Neitzke, 490 U.S. at 327; 28 U.S.C. § 1915(e).

20 To state a claim on which relief may be granted, the plaintiff must allege “enough facts to
21 state a claim to relief that is plausible on its face.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544,
22 570 (2007). In considering whether a complaint states a cognizable claim, the court accepts as
23 true the material allegations in the complaint and construes the allegations in the light most
24 favorable to the plaintiff. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Hosp. Bldg. Co. v.
25 Trustees of Rex Hosp., 425 U.S. 738, 740 (1976); Love v. United States, 915 F.2d 1242, 1245
26 (9th Cir. 1989). Pro se pleadings are held to a less stringent standard than those drafted by
27 lawyers. Haines v. Kerner, 404 U.S. 519, 520 (1972). However, the court need not accept as true
28 conclusory allegations, unreasonable inferences, or unwarranted deductions of fact. Western

1 Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

2 The minimum requirements for a civil complaint in federal court, as explained by Rule 8
3 of the Federal Rules of Civil Procedure (“Rules”), are as follows:

4 A pleading which sets forth a claim for relief . . . shall contain (1) a
5 short and plain statement of the grounds upon which the court’s
6 jurisdiction depends . . . , (2) a short and plain statement of the claim
7 showing that the pleader is entitled to relief, and (3) a demand for
8 judgment for the relief the pleader seeks.

9 Fed. R. Civ. P. 8(a).

10 **II. Plaintiff’s Complaint**

11 Jurisdiction is a threshold inquiry that must precede the adjudication of any case before
12 the district court. Morongo Band of Mission Indians v. Cal. State Bd. of Equalization, 858 F.2d
13 1376, 1380 (9th Cir. 1988). Federal courts are courts of limited jurisdiction and may adjudicate
14 only those cases authorized by federal law. Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375,
15 377 (1994); Willy v. Coastal Corp., 503 U.S. 131, 136-37 (1992). “Federal courts are presumed
16 to lack jurisdiction, ‘unless the contrary appears affirmatively from the record.’” Casey v. Lewis,
17 4 F.3d 1516, 1519 (9th Cir. 1993) (quoting Bender v. Williamsport Area Sch. Dist., 475 U.S. 534,
18 546 (1986)).

19 Lack of subject matter jurisdiction may be raised by the court at any time during the
20 proceedings. Attorneys Trust v. Videotape Computer Prods., Inc., 93 F.3d 593, 594-95 (9th Cir.
21 1996). A federal court “ha[s] an independent obligation to address sua sponte whether [it] has
22 subject-matter jurisdiction.” Dittman v. California, 191 F.3d 1020, 1025 (9th Cir. 1999). It is the
23 obligation of the district court “to be alert to jurisdictional requirements.” Grupo Dataflux v.
24 Atlas Global Group, L.P., 541 U.S. 567, 593 (2004). Without jurisdiction, the district court
25 cannot decide the merits of a case or order any relief. See Morongo, 858 F.2d at 1380.

26 The basic federal jurisdiction statutes are 28 U.S.C. §§ 1331 and 1332, which confer
27 “federal question” and “diversity” jurisdiction, respectively. Federal jurisdiction may also be
28 conferred by federal statutes regulating specific subject matter. “[T]he existence of federal
jurisdiction depends solely on the plaintiff’s claims for relief and not on anticipated defenses to
those claims.” ARCO Env’tl. Remediation, LLC v. Dep’t of Health & Env’tl. Quality, 213 F.3d

1 1108, 1113 (9th Cir. 2000).

2 District courts have diversity jurisdiction only over “all civil actions where the matter in
3 controversy exceeds the sum or value of \$75,000, exclusive of interest and costs,” and the action
4 is between: “(1) citizens of different States; (2) citizens of a State and citizens or subjects of a
5 foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are
6 additional parties; and (4) a foreign state . . . as plaintiff and citizens of a State or of different
7 States.” 28 U.S.C. § 1332. “To demonstrate citizenship for diversity purposes a party must (a) be
8 a citizen of the United States, and (b) be domiciled in a state of the United States.” Lew v. Moss,
9 797 F.2d 747, 749 (9th Cir. 1986). “Diversity jurisdiction requires complete diversity between
10 the parties—each defendant must be a citizen of a different state from each plaintiff.” In re
11 Digimarc Corp. Derivative Litigation, 549 F.3d 1223, 1234 (9th Cir. 2008).

12 Plaintiff’s complaint asserts that the court has federal question jurisdiction over this
13 action.¹ (Compl. (ECF No. 1) at 3.) The allegations found in the complaint, however, concern an
14 assault. In this regard, the complaint alleges that on April 23, 2018, plaintiff “was drugged
15 (GHB)” and assaulted “outside ‘Backdoor’” in the City of Pomona, presumably by the
16 defendants. (Id. at 5.) “A claim of assault does not arise under the United States Constitution or
17 any federal statute and therefore fails to present a federal question.” Hubbard v. Folsom State
18 Prison, No. CIV S-07-2562 MCE DAD PS, 2008 WL 53233, at *2 (E.D. Cal. Jan. 2, 2008).

19 The complaint asserts that this alleged assault constituted a “civil rights violation.” A
20 litigant who complains of a violation of a constitutional right does not have a cause of action
21 directly under the United States Constitution. Livadas v. Bradshaw, 512 U.S. 107, 132 (1994)
22 (affirming that it is 42 U.S.C. § 1983 that provides a federal cause of action for the deprivation of
23 rights secured by the United States Constitution); Chapman v. Houston Welfare Rights Org., 441
24 U.S. 600, 617 (1979) (explaining that 42 U.S.C. § 1983 was enacted to create a private cause of
25 action for violations of the United States Constitution); Azul-Pacifico, Inc. v. City of Los
26 Angeles, 973 F.2d 704, 705 (9th Cir. 1992) (“Plaintiff has no cause of action directly under the

27
28 ¹ The complaint alleges that plaintiffs and defendants are all citizens of California. (Compl. (ECF No. 1) at 2.) Therefore, the court does not have diversity jurisdiction over this action.

1 United States Constitution.”).

2 42 U.S.C. § 1983 provides that,

3 [e]very person who, under color of [state law] ... subjects, or causes
4 to be subjected, any citizen of the United States ... to the deprivation
5 of any rights, privileges, or immunities secured by the Constitution
6 and laws, shall be liable to the party injured in an action at law, suit
7 in equity, or other proper proceeding for redress.

8 Here, the complaint does not, and it appears cannot, allege that the defendants were acting
9 under color of state law at the time of the alleged assault. “When, as here, the state has not
10 compelled a private act—when the impetus and the actors remain private—there is no state
11 action.” Beyer v. Village of Ashwaubenon, 444 Fed. Appx. 99, 101 (7th Cir. 2011).

12 Thus, plaintiff’s complaint fails to establish a basis for the court’s federal question
13 jurisdiction over this action.

14 **III. Leave to Amend**

15 For the reasons stated above, plaintiff’s complaint should be dismissed. The undersigned
16 has carefully considered whether plaintiff may amend the complaint to state a claim over which
17 the court would have subject matter jurisdiction. “Valid reasons for denying leave to amend
18 include undue delay, bad faith, prejudice, and futility.” California Architectural Bldg. Prod. v.
19 Franciscan Ceramics, 818 F.2d 1466, 1472 (9th Cir. 1988); see also Klamath-Lake Pharm. Ass’n
20 v. Klamath Med. Serv. Bureau, 701 F.2d 1276, 1293 (9th Cir. 1983) (holding that while leave to
21 amend shall be freely given, the court does not have to allow futile amendments).

22 Here, given the defects noted above, the undersigned finds that granting plaintiff leave to
23 amend would be futile.

24 **CONCLUSION**

25 Accordingly, for the reasons stated above, IT IS HEREBY RECOMMENDED that:


- 26 1. Plaintiff’s August 27, 2018 application to proceed in forma pauperis (ECF No. 2) be
27 denied;
- 28 2. Plaintiff’s August 27, 2018 complaint (ECF No. 1) be dismissed without prejudice; and
3. This action be dismissed.

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These findings and recommendations will be submitted to the United States District 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, plaintiff may file written objections with the court. A document containing objections should be titled “Objections to Magistrate Judge’s Findings and Recommendations.” Plaintiff is advised that failure to file objections within the specified time may, under certain circumstances, waive the right to appeal the District Court’s order. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: October 25, 2018



DEBORAH BARNES
UNITED STATES MAGISTRATE JUDGE

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