

United States District Court
For the Northern District of California

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

TIMOTHY LOMAX, BRENDA G.
LOMAX, CHRISTOPHER J. LOMAX,
AND BRIANA N. LOMAX,

No. C 11-02858 CRB

ORDER DISMISSING CASE

Plaintiffs,

v.

CITY OF ANTIOCH POLICE OFFICERS,
SGT. STEVE BIAS, JAMES STENGER,
DESMOND BITTNER, et al.,

Defendants.

Thomas Lomax filed this action on behalf of his son and the Lomax family on June 10, 2011. Dkt. 1. He appears to be bringing claims under 42 U.S.C. § 1983 regarding an arrest, search, and seizure undertaken by the City of Antioch Police Department. Defendants moved to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6) and several local rules. Dkt. 4-5. The Court finds this matter suitable for resolution without oral argument pursuant to Civil Local Rule 7-1(b).

I. FACTUAL BACKGROUND

Lomax relates an incident between Timothy and Christopher Lomax and the Antioch Police Department. Lomax alleges that on December 20, 2010 the Antioch Police Department entered the home of Timothy Lomax at 2:30 A.M. wishing to speak with Timothy’s son Christopher, stating they were investigating the shooting of Arnold

1 Muckleroy. Compl. (dkt. 1) at 4. They also seem to have believed Christopher may have
2 been involved in drug dealing, though no charges to that effect appear to have been brought.
3 Id. He alleges that when Timothy inquired of the officers if his son Christopher was under
4 arrest, they said no. Id. He alleges that when Timothy replied, “He will not talk without a
5 lawyer,” one of the officers responded by saying, “You shut up, he can speak for himself.”
6 Id. He alleges that Christopher stated, “Like my dad said, I will talk to you with a lawyer.”
7 Id. He then alleges Sgt. Steve Bias and another officer attacked Timothy and Christopher,
8 placed them in hand cuffs, and took them to jail. Id.

9 Lomax also alleges other Antioch Police Officers held Brenda and Briana Lomax
10 hostage in the home while they searched the home and yard. Id. He alleges the officers did
11 not find any evidence of contraband. Id. He alleges that then Detectives James Stenger and
12 Desmond Bittner lied in an affidavit to convince Judge Baysinger to sign a search warrant.
13 Id. The officers then seized Timothy Lomax’s gun collection, pursuant to the warrant. Id.
14 Lomax alleges no charges were ever filed against Timothy or Christopher, but that the
15 incident has had a negative effect on Christopher’s interactions with U.S. Army Recruiters.
16 Id. at 5.

17 The documents included in Lomax’s Complaint also include information related to
18 Thomas Lomax’s tax history. See Compl. at 25-27, 47-54. Lomax does not appear to bring
19 any claims at this time based on these documents, though it is not completely clear.
20 Moreover, these claims have all been brought and adjudicated in prior cases 3:02-cv-3429
21 and 3:05-cv-01557. Thus, the Court may not re-examine these claims.¹ Owens v. Kaiser
22 Foundation Health Plan, Inc., 244 F.3d 708, 714 (9th Cir. 2001).

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25 ¹ Res Judicata has three elements: (1) identity of claims, (2) final judgment on the merits, and
26 (3) identity or privity between the parties. Owens v. Kaiser Foundation Health Plan, Inc., 244 F.3d
27 708, 714 (9th Cir. 2001). Here, there is identity of claims because the allegations relating to Thomas
28 Lomax in this case “arise out of the same transactional nucleus of facts” as the earlier cases. Frank v.
United Airlines, Inc., 216 F.3d 845, 851 (9th Cir. 2000). There was a final judgment on the merits in
those cases. See F.R.C.P. 41(b) (dismissal under the rule “operates as an adjudication on the merits”) in 3:05-cv-01557; dismissal for failure to amend after granting motion for more definite statement in 3:02-cv-3429 passes on the substance of the particular claim before the court. Semtek Intern. Inc. v. Lockheed Martin Corp., 531 U.S. 497, 501-02 (2001). There is also identity between the parties.

1 **II. LEGAL STANDARD**

2 Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a cause
3 of action that fails to state a claim upon which relief can be granted. All well-pleaded
4 allegations of material fact are taken as true and construed in the light most favorable to the
5 non-moving party. Wyler-Summit'ship v. Turner Broadcasting Sys., Inc., 135 F.3d 658, 661
6 (9th Cir. 1998). To survive a Rule 12(b)(6) motion to dismiss, the complaint must state a
7 claim to relief that is plausible on its face. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).
8 A claim has facial plausibility when the pleaded factual allegations allow the court to draw
9 the reasonable inference that the defendant is liable for the misconduct alleged. Id. In
10 addition, threadbare recitals of the elements of a cause of action, supported by mere
11 conclusory statements, do not suffice. Id. Despite the requirement that factual allegations in
12 the complaint be taken as true, a legal conclusion couched as a factual allegation need not be
13 accepted. Id.

14 Where plaintiff is a pro se litigant, the plaintiff's complaint is "to be liberally
15 construed" and, "however inartfully pleaded, must be held to less stringent standards than
16 formal pleadings drafted by lawyers." Erickson v. Pardus, 551 U.S. 89, 94 (2007) (internal
17 quotation marks and citations omitted).

18 **III. DISCUSSION**

19 Defendants argue the Complaint should be dismissed because Thomas Lomax lacks
20 standing to bring the action, and that he fails to state a claim upon which relief can be
21 granted. As the Court determines Plaintiff lacks standing to bring this action, it is not
22 necessary to reach the remaining issues.

23 **A. Standing**

24 The question of standing is "an essential and unchanging part of the case-or-
25 controversy requirement of Article III [of the U.S. Constitution]." Lujan v. Defenders of
26 Wildlife, 504 U.S. 555, 560 (1992). Fundamentally, questions of standing turn on "whether
27 the particular plaintiff is entitled to an adjudication of the particular claim asserted." Allen v.
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1 Wright, 468 U.S. 737, 752 (1984). Standing comprises both prudential and constitutional
2 considerations. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979).

3 For prudential standing, a “plaintiff generally must assert his own legal rights and
4 interests, and cannot rest his claim to relief on the legal rights or interests of third parties.”
5 Warth v. Seldin, 422 U.S. 490, 499 (1975). Here Plaintiff seeks to assert the constitutional
6 rights of his son and grandson, along with other family members. Compl. at 2-3. Thus, he is
7 not seeking in the Complaint to assert his own legal rights.

8 To meet an exception to this prudential standing requirement, a plaintiff need
9 demonstrate (1) he has suffered an injury-in-fact that gives him sufficiently concrete interest
10 in the outcome of the suit, (2) a sufficiently close relationship with the third parties, and (3)
11 that it is difficult or impossible for the third parties to assert their own rights. Powers v.
12 Ohio, 499 U.S. 400, 410-11 (1991).

13 For constitutional standing, a plaintiff must also demonstrate three elements: (1) actual
14 and concrete injury-in-fact, (2) a causal connection between defendants’ conduct and the
15 injury-in-fact, and (3) likelihood that favorable decision will redress the injury-in-fact.
16 Lujan, 504 U.S. at 560-61.

17 The prudential and constitutional standing inquiries both turn on whether the Plaintiff
18 can allege any “injury-in-fact” that he has suffered as a result of the alleged illegal conduct.
19 As Plaintiff’s Complaint solely asserts the rights of third parties and includes no allegations
20 of personal injury that the Court may consider, he fails to meet this requirement. As Plaintiff
21 cannot demonstrate an injury-in-fact, the Court need not turn to the other requirements of
22 prudential and constitutional standing.

23 1. Injury-in-Fact

24 Injury-in-fact requires more than just a general injury to a cognizable societal interest;
25 it requires that the party suing be directly injured. Lujan, 504 U.S. at 562 (quoting Sierra
26 Club v. Morton, 405 U.S. 727, 734-35 (1972)). This injury must be the “invasion of a legally
27 protected interest” that is “concrete and particularized” and “actual or imminent, not
28 conjectural or hypothetical.” Id. at 559-60. Particularly in suits against government entities,

1 such as here, “the concrete injury requirement must remain.” Id. at 578. The only parties
2 alleged in the Complaint to have been injured are Timothy, Christopher, Brenda, and Briana
3 Lomax. While Plaintiff’s allegations of injury in the Complaint are serious, these alleged
4 injuries are to others, not to Plaintiff. The fact that Plaintiff is related to those alleged to have
5 suffered injury is not sufficient without a concrete injury-in-fact to himself.

6 For example, in Powers v. Ohio, 499 U.S. 400, 402-03 (1992), the Court found a
7 white criminal defendant could assert a claim that the prosecution used its peremptory
8 challenges to exclude black jurors. The Court found that despite existence of a close
9 relationship between the defendant and the jurors based on “a common interest in eliminating
10 racial discrimination from the courtroom,” id. at 411, 413, the injury-in-fact requirement still
11 stood. Id. at 411. The Court found the criminal defendant had suffered a personal injury-in-
12 fact with a causal connection to the alleged harm because the possibility of racial
13 discrimination pervaded the entire trial and threatened its neutrality, which injured him
14 directly as the defendant. Id. at 412. Plaintiff here cannot allege such a connection, and thus
15 cannot meet the requirements of injury-in-fact. Plaintiff alleges no injury to himself
16 personally from the complained of actions. Since Plaintiff cannot demonstrate an injury-in-
17 fact he cannot meet the requirements of either prudential or constitutional standing.

18 2. Power of Attorney Not Sufficient

19 Timothy Lomax has executed a durable power of attorney, appointing Thomas
20 Lomax. Compl. at 8-12. This does not remedy the standing issue, nor allow Thomas to bring
21 this action.

22 California prohibits the unauthorized practice of law in order “to afford protection
23 against persons who are not qualified to practice the profession.” Gerhard v. Stephens, 68
24 Cal.2d 864, 918 (1968). California Business and Professions Code section 6125 provides:
25 “No person shall practice law in California unless the person is an active member of the State
26 Bar.” California’s Uniform Statutory Form Power of Attorney Act lists the various powers
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1 conferred in a statutory form power of attorney. See Cal. Probate Code § 4459.² This
2 language appears to include the right to bring a lawsuit on behalf of another. Id. Yet,
3 California courts have clearly rejected the proposition that the statute confers upon one
4 holding a power of attorney the authority to provide legal representation to others:

5 Long before passage of the Power of Attorney Act, the law
6 distinguished between an attorney in fact and an attorney at law and
7 emphasized that a power of attorney is not a vehicle which
8 authorizes an attorney in fact to act as an attorney at law. People ex
9 rel. Dept. of Public Works v. Malone, 232 Cal. App. 2d 531, 536-37
10 (1965). As explained in Malone, “If the rule were otherwise, the
11 State Bar Act could be relegated to contempt by any layman who
12 secured from his principal an ordinary power of attorney, for the
13 purpose of representing him in pending litigation.” Id.

14 Nothing in the Power of Attorney Act changes this rule. As
15 the California Law Revision Commission recognized, the authority

16 ² California Probate Code section 4459 provides:

17 In a statutory form power of attorney, the language with respect to claims and litigation
18 empowers the agent to do all of the following:

19 (a) Assert and prosecute before a court or administrative agency a claim, claim for relief,
20 cause of action, counterclaim, cross-complaint, or offset, and defend against an individual, a
21 legal entity, or government, including suits to recover property or other thing of value, to recover
22 damages sustained by the principal, to eliminate or modify tax liability, or to seek an injunction,
23 specific performance, or other relief.

24 (b) Bring an action to determine adverse claims, intervene in litigation, and act as amicus
25 curiae.

26 (c) In connection with litigation:

27 (1) Procure an attachment, garnishment, libel, order of arrest, or other preliminary,
28 provisional, or intermediate relief and use any available procedure to effect, enforce, or satisfy
a judgment, order, or decree.

(2) Perform any lawful act, including acceptance of tender, offer of judgment,
admission of facts, submission of a controversy on an agreed statement of facts, consent to
examination before trial, and binding the principal in litigation.

(d) Submit to arbitration, settle, and propose or accept a compromise with respect to a
claim or litigation.

(e) Waive the issuance and service of process upon the principal, accept service of
process, appear for the principal, designate persons upon whom process directed to the principal
may be served, execute and file or deliver stipulations on the principal's behalf, verify pleadings,
seek appellate review, procure and give surety and indemnity bonds, contract and pay for the
preparation and printing of records and briefs, receive and execute and file or deliver a consent,
waiver, release, confession of judgment, satisfaction of judgment, notice, agreement, or other
instrument in connection with the prosecution, settlement, or defense of a claim or litigation.

(f) Act for the principal with respect to bankruptcy or insolvency proceedings, whether
voluntary or involuntary, concerning the principal or some other person, or with respect to a
reorganization proceeding, or with respect to an assignment for the benefit of creditors,
receivership, or application for the appointment of a receiver or trustee which affects an interest
of the principal in property or other thing of value.

(g) Pay a judgment against the principal or a settlement made in connection with litigation
and receive and conserve money or other thing of value paid in settlement of or as proceeds of
a claim or litigation.

1 of attorneys in fact under section 2494 [now California Probate Code
2 section 4459] is restricted-it is “subject to conditions of fact and law
3 that exist outside this chapter.” Recommendation Relating to
4 Uniform Statutory Form Power of Attorney Act (Dec.1989) 20 Cal.
Law Revision Com. Rep. at 401 (1990). One such law existing
outside the chapter is the State Bar Act’s prohibition against the
practice of law by nonlawyers.

5 Drake v. Superior Court, 21 Cal. App. 4th 1826, 1831 (1994).

6 Thus, “[d]espite broad statutory language of the power of attorney with respect to
7 claims and litigation, the attorney in fact may not act as an attorney in law on behalf of his
8 principal, even though the principal could appear in propria persona.” In re Marriage of
9 Caballero, 27 Cal. App. 4th 1139, 1151 (1994) (citation omitted); see also Ziegler v. Nickel,
10 64 Cal. App. 4th 545, 548 (1998) (“[O]ne holding a special power of attorney cannot act as
11 an attorney for another by virtue of the power of attorney”) (citation omitted); Tracy v.
12 United States, 243 F.R.D. 662 (D. Nev. 2007) (holding plaintiff who had purported power of
13 attorney from taxpayer lacked standing to bring wrongful levy claim arising from levy on
14 taxpayer’s pension plan, social security fund, and wages, where plaintiff had no possessory
15 interest in taxpayer’s pension plan, social security fund, and wages).

16 In addition, the legislative history of the 2002 amendment to California Business and
17 Professions Code section 6126 adding the phrase “otherwise authorized pursuant to statute or
18 court rule to practice law in this state at the time of doing so” indicates that the Legislature
19 was concerned with the ability of out-of-state attorneys to appear pro hac vice in California
20 courts. See California Bill Analysis, S.B. 1459, Assembly Committee on the Judiciary, June
21 25, 2002. The Court has found nothing in the legislative history indicating the Legislature
22 meant to abrogate California’s long-standing rule that a power of attorney confers no
23 authority upon a person to practice law without a State Bar license.

24 Thus, California’s Statutory Form Power of Attorney Act does not give Plaintiff the
25 power to bring this claim on behalf of his son and other family members.

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1 **IV. CONCLUSION**

2 For the foregoing reasons the Defendants' Motion to Dismiss is GRANTED and the
3 hearing on the Motion scheduled for Friday September 16, 2011 is hereby VACATED.

4 **IT IS SO ORDERED.**

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7 Dated: September 14, 2011

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CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE