

United States District Court

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

KENNETH WAYNE JOHNSON,)	Case No.: 12-CV-01851-LHK
)	
Plaintiff,)	
v.)	ORDER GRANTING MOTION TO
)	DISMISS
LIBERTY MUTUAL INSURANCE,)	
)	
Defendant.)	
)	
)	

Plaintiff Kenneth W. Johnson (“Plaintiff”), proceeding pro se, brings this action against Liberty Mutual Insurance Company (“LMI”) alleging fraud, misrepresentation, and negligence. See Second Amended Complaint (“SAC”), ECF No. 12, at 3. Having considered the submissions of the parties and the relevant law, the Court hereby GRANTS LMI’s Motion to Dismiss Plaintiff’s SAC without leave to amend.

I. BACKGROUND

A. Factual Allegations

This diversity action arises from LMI’s alleged false statements that were contained in certain financial and medical documents provided to the Santa Clara County Superior Court in connection with a juvenile delinquency proceeding. See SAC at 5.

1 On February 18, 2010, Plaintiff's minor son was arrested at a local mall and charged with
2 assaulting a security guard, Shawn Johnson ("Johnson"), with a deadly weapon. SAC at 4. Due to
3 the attack, Johnson sustained injuries to his head and back, as well as damage to his iPhone. Id.
4 LMI—the insurance company for Johnson's employer—was responsible for providing Johnson
5 with worker's compensation, and therefore indemnifying Johnson for his losses. See id.; Motion to
6 Dismiss Pl.'s SAC ("Mot."), ECF No. 20, at 2 n.3.

7 On June 7, 2010, a Santa Clara County probation officer contacted Johnson to find out
8 whether he sought restitution for harm sustained as a result of the assault. SAC at 4. Johnson
9 expressed an interest in seeking restitution in the amount of \$3,061.72 for personal replacement of
10 his iPhone and iPhone case, as well as reimbursement for a medical bill and for two days of lost
11 wages. SAC at 4. That same day, Plaintiff learned that LMI intended to seek reimbursement for
12 Johnson's claims. Id.

13 During the months thereafter, the probation officer contacted LMI to determine how much
14 LMI paid for Johnson's medical expenses and other indemnity costs. See SAC at 4. LMI
15 subsequently faxed the probation officer documentation of medical payments, a list of physician's
16 names, and a schedule of indemnity payments, all of which LMI allegedly paid to Johnson. Id.
17 The purpose of providing this information was to enable the investigating probation officer to
18 "report accurate medical treatment and indemnity payments to the plaintiff and the court." SAC at
19 5.

20 Plaintiff alleges that LMI knowingly made false and misleading statements to the probation
21 officer regarding the amount of money LMI paid Johnson to cover his medical treatment and lost
22 wages. See SAC at 5. He contends that LMI's documentation was misleading because "there is no
23 verifiable description of treatments provided by those listed physicians to support the \$9,785.80
24 claims for medical payments. And the indemnity payments only shows [sic] schedule payments in
25 the amount paid to [Johnson]." Id. at 4. As a result of LMI's representations to the probation
26 officer and the Superior Court, Plaintiff allegedly suffered emotional distress, inconvenience, and
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1 lost wages. SAC a 5. Plaintiff now seeks \$1,500,000.00 in recovery losses, as well as
2 \$3,500,000.00 in punitive damages. Id.

3 **B. Procedural History**

4 Plaintiff filed this action against LMI in the Superior Court of California for the County of
5 Santa Clara on December 2, 2011. ECF No. 1. LMI removed the case to this Court on April 13,
6 2012, based on diversity jurisdiction. Id.

7 Plaintiff filed a First Amended Complaint (“FAC”) on July 10, 2012, see ECF No. 11, and a
8 Second Amended Complaint on July 11, 2012, see ECF No. 12.¹ On August 20, 2012, LMI moved
9 to dismiss Plaintiff’s SAC pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Mot.
10 at 1. Plaintiff did not file an opposition during the time provided under Rule 7-3 of the Northern
11 District of California’s Civil Local Rules. See N.D. Cal. Local R. 7-3 (stating that an “opposition
12 must be filed and served not more than 14 days after th[e] motion was filed.”). Consequently, on
13 September 14, 2012, LMI filed a notice of non-opposition and a reply in support of its Motion to
14 Dismiss. See ECF No. 24.

15 On October 1, 2012, Plaintiff filed an untimely opposition, see ECF No. 27, as well as a
16 “Factual Statement” that introduces a large amount of new facts that were not included in the SAC,
17 see Pl.’s Factual Statement Against Dismissal of SAC (“Factual Statement”), ECF No. 28. LMI
18 filed a reply on October 10, 2012. Df.’s Reply Supp. Mot. to Dismiss (“Reply”), ECF No. 30, at 1.
19 where it requested this Court to strike Plaintiff’s late-filed opposition or, in the alternative, to grant
20 LMI leave to file the reply to Plaintiff’s arguments. See Df.’s Reply Supp. Mot. to Dismiss
21 (“Reply”), ECF No. 30, at 1.

22 The untimeliness of Plaintiff’s Opposition justifies striking his motion in its entirety.
23 However, the Court recognizes that “Plaintiff is representing himself pro se, which ‘entitles him to
24 a certain degree of leniency so as to ensure that his case is justly resolved on its merits rather than
25 on the basis of procedural technicalities to the extent possible.’” *Peinado v. City and County of*
26 *San Francisco*, No. 11-1799, 2013 WL 163473, at *5 (N.D. Cal. Jan. 15, 2013) (quoting *Poulakis*

27 ¹ Plaintiff’s First Amended Complaint failed to satisfy several requirements of the Court.
28 To cure those defects, Plaintiff filed a Second Amended Complaint on the following day.

1 v. Amtrak, 139 F.R.D. 107, 109 (N.D. Ill.1991)). Moreover, because LMI requested “that this
2 Court strike Plaintiff’s late-filed Opposition in its entirety or, in the alternative, that the Court grant
3 Liberty Mutual leave to file this reply to Plaintiff’s arguments,” Reply at 1 (emphasis added), the
4 Court finds no prejudice to LMI so long as it grants LMI’s request for the Court to consider its
5 Reply. Therefore, in the interest of resolving this case on the merits rather than on a procedural
6 technicality, the Court DENIES LMI’s request to strike Plaintiff’s late-filed Opposition, but
7 GRANTS LMI’s request for leave to file its Reply to Plaintiff’s arguments. See Reply at 1.

8 For the purpose of resolving this Motion to Dismiss, the Court does not consider any of
9 Plaintiff’s new factual allegations contained in either Plaintiff’s Opposition or his Factual
10 Statement. See *Broam v. Bogan*, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003) (“In determining the
11 propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the complaint to a plaintiff’s
12 moving papers, such as a memorandum in opposition to a defendant’s motion to dismiss.”) (internal
13 quotation marks and citation omitted) (emphasis in original).

14 However, the Court will consider Plaintiff’s new factual allegations for the limited purpose
15 of determining whether Plaintiff would be able to cure the deficiencies in his SAC through
16 amendment. See *Broam*, 320 F.3d at 1026 n.2 (“Facts raised for the first time in plaintiff’s
17 opposition papers should be considered by the court in determining whether to grant leave to
18 amend or to dismiss the complaint with or without prejudice.”); see also *Orion Tire Corp. v.*
19 *Goodyear Tire & Rubber Co.*, 268 F.3d 1133, 1137-38 (9th Cir. 2001) (“Where counsel is able to
20 posit possible amendments that would be consistent with the operative complaint and could also
21 possibly state a claim for relief, the complaint should not be dismissed on its face with prejudice.”).

22 II. LEGAL STANDARDS

23 A. Rule 12(b)(6)

24 Pursuant to Federal Rule of Civil Procedure 12(b)(6), a defendant may move to dismiss an
25 action for failure to allege “enough facts to state a claim to relief that is plausible on its face.” *Bell*
26 *Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the
27 plaintiff pleads factual content that allows the court to draw the reasonable inference that the
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1 defendant is liable for the misconduct alleged. The plausibility standard is not akin to a
2 ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted
3 unlawfully.’ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citation omitted). For purposes
4 of ruling on a Rule 12(b)(6) motion, the Court “accept[s] factual allegations in the complaint as
5 true and construe[s] the pleadings in the light most favorable to the nonmoving party.” *Manzarek*
6 *v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).

7 Nonetheless, the Court need not accept as true allegations contradicted by judicially
8 noticeable facts, *Schwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000), and the “[C]ourt may
9 look beyond the plaintiff’s complaint to matters of public record” without converting the Rule
10 12(b)(6) motion into one for summary judgment, *Shaw v. Hahn*, 56 F.3d 1128, 1129 n.1 (9th Cir.
11 1995). Nor is the Court required to “assume the truth of legal conclusions merely because they are
12 cast in the form of factual allegations.” *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011)
13 (per curiam) (quoting *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981)). Mere
14 “conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to
15 dismiss.” *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004); accord *Iqbal*, 556 U.S. at 678
16 (stating that “a complaint [does not] suffice if it tenders ‘naked assertion[s]’ devoid of ‘further
17 factual enhancement.’”) (internal citation omitted). Furthermore, “a plaintiff may plead [him]self
18 out of court” if he “plead[s] facts which establish that he cannot prevail on his . . . claim.”
19 *Weisbuch v. Cnty. of L.A.*, 119 F.3d 778, 783 n.1 (9th Cir. 1997) (internal quotation marks and
20 citation omitted).

21 **B. Leave to Amend**

22 If the Court determines that the complaint should be dismissed, it must then decide whether
23 to grant leave to amend. Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend
24 should “be freely granted when justice so requires,” bearing in mind “the underlying purpose of
25 Rule 15 . . . [is] to facilitate decision on the merits, rather than on the pleadings or technicalities.”
26 *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (internal quotation marks and
27 citation omitted). Nonetheless, a court “may exercise its discretion to deny leave to amend due to
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1 ‘undue delay, bad faith or dilatory motive on part of the movant, repeated failure to cure
2 deficiencies by amendments previously allowed, undue prejudice to the opposing party. . . [and]
3 futility of amendment.’” *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 892–93 (9th Cir.
4 2010) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)) (alterations in original).

5 III. DISCUSSION

6 Plaintiff’s SAC alleges that LMI committed fraud, misrepresentation, and negligence when
7 it provided the probation officer with “misleading . . . facts” upon which the Superior Court relied
8 when considering whether to grant restitution. SAC at 3. LMI contends that Plaintiff’s SAC fails
9 to state a claim for which relief can be granted. Mot. at 1. Specifically, LMI argues that the
10 financial and medical documents it provided to the probation officer fall under California’s
11 “litigation privilege,” thereby protecting LMI from any tort liability in this case. Mot. at 4. In
12 addition, LMI identifies several deficiencies in Plaintiff’s claims, such as Plaintiff’s failure to
13 allege inducement, reliance, or damage for the fraud claim, as well as failure to allege breach of
14 duty for the negligence claim. Mot. at 5, 7-8; Reply at 3-5. Consequently, LMI requests that the
15 Court dismiss Plaintiff’s SAC with prejudice.

16 The Court finds that LMI’s alleged false communications are protected by California’s
17 litigation privilege. As LMI is immunized from each of Plaintiff’s claims, Plaintiff has failed to
18 state a claim for which relief may be granted. Moreover, the Court concludes that Plaintiff cannot
19 cure this defect by pleading additional facts. Accordingly, for the reasons stated below, the Court
20 GRANTS Defendant’s Motion to Dismiss with prejudice.

21 A. Litigation Privilege

22 California’s litigation privilege is codified in California Civil Code Section 47. Section 47
23 creates a privilege for a “publication or broadcast” made in “any . . . judicial proceeding.” Cal.
24 Civ.Code § 47(b).² In order to fall under the privilege, a communication must be: “(1) made in [a]

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26 ² There are certain exceptions to the litigation privilege, such as when a “communication
27 [is] made in furtherance of an act of intentional destruction or alteration of physical evidence
28 undertaken for the purpose of depriving a party to litigation of the use of that evidence,” or when a
communication is “knowingly concealing the existence of an insurance policy.” See Cal. Civ.

1 judicial or quasi-judicial proceeding[]; (2) by litigants or other participants authorized by law; (3)
2 to achieve the objects of the litigation; and (4) . . . have some connection or logical relation to the
3 action.” *Silberg v. Anderson*, 50 Cal. 3d 205, 212 (1990). If there is no dispute as to the operative
4 facts, the applicability of the litigation privilege is a question of law.” *Kashian v. Harriman*, 98
5 Cal. App. 4th 892, 913 (2002). “Any doubt about whether the privilege applies is resolved in favor
6 of applying it.” *Id.*

7 “The principal purpose of [the litigation privilege] is to afford litigants and witnesses the
8 utmost freedom of access to the courts without fear of being harassed subsequently by derivative
9 tort actions.” *Id.* at 213 (internal quotation marks and citation omitted) (emphasis added); see
10 generally *Briscoe v. LaHue*, 460 U.S. 325, 333 (1983) (echoing the policy considerations
11 underlying a common law litigation privilege by stating that, “the claims of the individual must
12 yield to the dictates of public policy, which requires that the paths which lead to the ascertainment
13 of truth should be left as free and unobstructed as possible”) (internal quotation marks and citation
14 omitted). “Since the ‘external threat of liability is destructive of th[e] fundamental right [of access
15 to the courts] and inconsistent with the effective administration of justice,’ courts have applied the
16 privilege to eliminate the threat of liability for communications made during all kinds of truth-
17 seeking proceedings: judicial, quasi-judicial, legislative and other official proceedings.” *Silberg*,
18 50 Cal. 3d at 213.

19 Furthermore, for communications made in relation to judicial and quasi-judicial
20 proceedings, the litigation privilege grants “absolute immunity” from “all torts other than malicious
21 prosecution, including fraud, negligence and negligent misrepresentation.” *Harris v. King*, 60 Cal.
22 App. 4th 1185, 1188 (1998) (emphasis added); *Mindys Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 599
23 (9th Cir. 2010). Moreover, the privilege applies “regardless [of] whether the communication was
24 made with malice or the intent to harm . . . it does not depend on the publisher’s motives, morals,
25 ethics or intent.” *Kashian v.*, 98 Cal. App. 4th at 913 (internal quotation marks and citations
26 omitted).

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28 Code §§ 47(b)(2) & (b)(3). However, none of the exceptions to the litigation privilege appear to
apply to this case.

1 Here, the facts alleged in Plaintiff’s SAC establish each and every element of the litigation
2 privilege. First, Defendant’s statements were made during an active judicial proceeding where
3 Plaintiff’s juvenile son was charged with assault with a deadly weapon. See *Silberg*, 50 Cal. 3d at
4 212; SAC at 4. Second, LMI was authorized by law to provide the financial documents and
5 medical bills to the probation officer in support of Johnson’s restitution claim. See *Silberg*, 50 Cal.
6 3d at 212; SAC at 3. Third, the statements were provided for the court to resolve a substantial
7 issue of the case, i.e., the amount of restitution that Johnson was entitled to as victim of the crime.
8 See *Silberg*, 50 Cal. 3d at 212; see also SAC at 5. Finally, LMI’s communication was clearly
9 connected to the underlying action. *Id.*

10 Plaintiff admits that LMI provided the financial and medical documents while participating
11 in an active judicial proceeding, and that LMI was authorized to do so. See SAC at 4-5 (stating
12 that LMI’s documentation “was relied upon so the investigating officers could report accurate
13 medical treatment and indemnity payments to the plaintiff and the court.”); see also Opp’n at 4
14 (“The financial statements and medical documents, at the time, were provided to the plaintiff as a
15 participant of an active restitution judicial proceeding.”).

16 However, to rebut the applicability of the litigation privilege, Plaintiff argues that the case
17 was vacated on November 17, 2011. Opp’n at 4. Plaintiff seems to suggest that the litigation
18 privilege ceases to exist once the relevant judicial proceeding is resolved. This is not so.

19 The litigation privilege protects litigants and witnesses beyond resolution of the relevant
20 proceeding. See, e.g., *Silberg*, 50 Cal. 3d at 214 (holding that the litigation privilege applied, even
21 after the finality of a marriage dissolution decree, to an attorney who made statements during a
22 marriage dissolution proceeding); *Moore v. Conliffe*, 7 Cal. 4th 634, 638-640 (1994) (litigation
23 privilege protects witness after arbitrators have rendered their final judgments in an arbitration
24 proceeding); *Cang Wang v. Heck*, 203 Cal. App. 4th 677 (2012) (litigation privilege applies to
25 evaluating neurologist after the relevant DMV proceeding has concluded); cf. *Action Apartment*
26 *Assn., Inc. v. City of Santa Monica*, 41 Cal.4th 1232, 1241 (2007) (“The [litigation] privilege is not
27 limited to statements made during a trial or other proceedings, but may extend to steps taken prior
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1 thereto, or afterwards.”). As the California Supreme Court noted in *Silberg*, “[t]o allow a litigant to
 2 attack the integrity of evidence after the proceedings have concluded . . . would impermissibly
 3 burden, if not inundate, our justice system.” *Silberg*, 50 Cal. 3d at 214. Therefore, the litigation
 4 privilege protects Defendant’s statements in the financial and medical documents provided to the
 5 probation officer. The fact that Plaintiff alleges in his Opposition that the underlying case was
 6 vacated “because there was no official proof that the [P]laintiff . . . owed restitution,” Opp’n at 2,
 7 does not change the result. *Silberg*, 50 Cal. 3d at 213; see *Rusheen v. Cohen*, 37 Cal.4th 1048,
 8 1057 (2006). LMI is thus immunized from any tort liability arising from these statements.

9 Accordingly, Plaintiff’s complaint alleging fraud, misrepresentation, and negligence—all of
 10 which are based upon LMI’s communication of allegedly “misleading . . . material facts”—fails,
 11 as a matter of law, to state a claim upon which relief can be granted. See *Harris*, 60 Cal. App. 4th
 12 at 1188; *Kashian*, 98 Cal. App. 4th at 913. Nothing Plaintiff states in his Opposition or Factual
 13 Statement cures this defect. The Court therefore GRANTS LMI’s Motion to Dismiss Plaintiff’s
 14 SAC with prejudice.³

15 IV. CONCLUSION

16 For the foregoing reasons, the Court GRANTS LMI’s Motion to Dismiss Plaintiff’s SAC
 17 without leave to amend. The Clerk shall close the file.

18 **IT IS SO ORDERED.**

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 20 Dated: January 31, 2013

Lucy H. Koh

LUCY H. KOH
 United States District Judge

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 27 ³ Given the Court’s finding as to the litigation privilege, the Court need not reach LMI’s
 28 other arguments regarding why Plaintiff’s SAC fails to state a claim for which relief may be
 granted.