

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

EDWARD VINCENT RAY, JR.,  
Plaintiff,  
v.  
SAKAUYE CANTIL, et al.,  
Defendants.

Case No. 17-05398 EJD (PR)

**ORDER OF SERVICE; DIRECTING  
DEFENDANTS TO FILE  
DISPOSITIVE MOTION OR  
NOTICE REGARDING SUCH  
MOTION; INSTRUCTIONS TO  
CLERK**

Plaintiff, a California state prisoner, filed the instant pro se civil rights action pursuant to 42 U.S.C. § 1983 against Chief Justice Cantil-Sakauye of the Supreme Court of California, the California Supreme Court Clerk Robert R. Toy, and Judge Frank Roesch of the Alameda County Superior Court. Plaintiff’s motion for leave to proceed in forma pauperis shall be addressed in a separate order.

**DISCUSSION**

**A. Standard of Review**

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any

1 cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim  
2 upon which relief may be granted or seek monetary relief from a defendant who is immune  
3 from such relief. See id. § 1915A(b)(1),(2). Pro se pleadings must, however, be liberally  
4 construed. See Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1988).

5 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential  
6 elements: (1) that a right secured by the Constitution or laws of the United States was  
7 violated, and (2) that the alleged violation was committed by a person acting under the  
8 color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988).

9 **B. Plaintiff’s Claims**

10 Plaintiff claims on January 4, 2016, Judge Frank Roesch of the Alameda County  
11 Superior Court placed him on the “Vexatious Litigant List.” (Compl. at 3.) Plaintiff  
12 claims that he has filed at least 3 applications to be removed from the “List,” but the court  
13 refuses to hear the application. (Id.) Petitioner claims that on August 10, 2017, he  
14 attempted to file a petition for writ of mandamus in the California Supreme Court which  
15 was denied because Plaintiff was on the “List.” (Id.) Plaintiff claims that Defendant  
16 Robert R. Toy, a deputy clerk at the Supreme Court of California, denied him access to the  
17 courts by refusing to file Plaintiff’s petition for writ of mandamus in the state high court  
18 even though the petition is not a civil lawsuit and therefore outside the parameters of the  
19 vexatious litigant statute. (Id. at 3-4.) Plaintiff claims Justice Cantil-Sakauye of the  
20 Supreme Court of California returned the petition without citation, resulting in a due  
21 process violation. Plaintiff seeks prospective injunctive and declaratory relief “to be  
22 removed from the vexatious litigant list.” (Id. at 3.)

23 Although judges are absolutely immune from civil liability for damages for acts  
24 performed in their judicial capacity, see Pierson v. Ray, 386 U.S. 547, 553-55 (1967)  
25 (applying judicial immunity to actions under 42 U.S.C. § 1983), the doctrine of judicial  
26 immunity does not bar claims for injunctive relief in § 1983 actions against state judges.  
27 See Pulliam v. Allen, 466 U.S. 522, 541-42 (1984); Ashelman v. Pope, 793 F.2d 1072,

1 1075 (9th Cir. 1986) (en banc). However section 1983 itself provides that “in any action  
2 brought against a judicial officer for an act or omission taken in such officer’s judicial  
3 capacity, injunctive relief shall not be granted unless a declaratory decree was violated or  
4 declaratory relief was unavailable.” 42 U.S.C. § 1983. This bar is limited to injunctive  
5 relief for acts taken in a judicial capacity, and not for acts taken in any other capacity. See  
6 Wolfe v. Strankman, 392 F.3d 358, 366-67 (9th Cir. 2004) (dismissal not warranted under  
7 § 1983’s bar on injunctive relief against judicial officers where plaintiff sued California  
8 Chief Justice in his administrative capacity as Chair of the Judicial Council of California).  
9 Here, however, it is unclear whether judicial immunity bars this action for injunctive relief  
10 where the decision being challenged may not have been purely adjudicative. Id. at 365-66  
11 (role of a judge under California’s Vexatious Litigant Statute cannot be characterized  
12 simply because, among other things, the statute grants a judge the power to impose, on his  
13 or her own motion, a prefiling order prohibiting a vexatious litigant from filing new  
14 litigation without the court’s permission, and such an action may not be purely that of a  
15 neutral adjudicator). Accordingly, liberally construed, it appears that Plaintiff states a  
16 cognizable claim for the denial of his right to petition the government for redress of  
17 grievances and due process against Defendants.

18  
19 **CONCLUSION**

20 For the reasons state above, the Court orders as follows:

21 1. The Clerk of the Court shall mail a Notice of Lawsuit and Request for  
22 Waiver of Service of Summons, two copies of the Waiver of Service of Summons, a copy  
23 of the complaint, all attachments thereto, and a copy of this order upon **Defendants Judge**  
24 **Frank Roesch** at the **Alameda County Superior Court**, and **Deputy Clerk Robert R.**  
25 **Toy** and **Justice Cantil-Sakauye** at the **Supreme Court of California**. The Clerk shall  
26 also mail a copy of this Order to Plaintiff.

27 2. Defendants are cautioned that Rule 4 of the Federal Rules of Civil  
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1 Procedure requires them to cooperate in saving unnecessary costs of service of the  
2 summons and the complaint. Pursuant to Rule 4, if Defendants, after being notified of this  
3 action and asked by the Court, on behalf of Plaintiff, to waive service of the summons, fail  
4 to do so, they will be required to bear the cost of such service unless good cause shown for  
5 their failure to sign and return the waiver form. If service is waived, this action will  
6 proceed as if Defendants had been served on the date that the waiver is filed, except that  
7 pursuant to Rule 12(a)(1)(B), Defendants will not be required to serve and file an answer  
8 before **sixty (60) days** from the day on which the request for waiver was sent. (This  
9 allows a longer time to respond than would be required if formal service of summons is  
10 necessary.) Defendants are asked to read the statement set forth at the foot of the waiver  
11 form that more completely describes the duties of the parties with regard to waiver of  
12 service of the summons. If service is waived after the date provided in the Notice but  
13 before Defendants have been personally served, the Answer shall be due sixty (60) days  
14 from the date on which the request for waiver was sent or twenty (20) days from the date  
15 the waiver form is filed, whichever is later.

16 3. No later than **ninety-one (91) days** from the date of this order, Defendants  
17 shall file a motion for summary judgment or other dispositive motion with respect to the  
18 claims in the complaint found to be cognizable above.

19 a. Any motion for summary judgment shall be supported by adequate  
20 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of  
21 Civil Procedure. Defendants are advised that summary judgment cannot be granted, nor  
22 qualified immunity found, if material facts are in dispute. If any Defendant is of the  
23 opinion that this case cannot be resolved by summary judgment, he shall so inform the  
24 Court prior to the date the summary judgment motion is due.

25 b. **In the event Defendants file a motion for summary judgment, the**  
26 **Ninth Circuit has held that Plaintiff must be concurrently provided the appropriate**  
27 **warnings under Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See**

1 **Woods v. Carey, 684 F.3d 934, 940 (9th Cir. 2012).**

2 4. Plaintiff's opposition to the dispositive motion shall be filed with the Court  
3 and served on Defendants no later than **twenty-eight (28) days** from the date Defendants'  
4 motion is filed.

5 Plaintiff is also advised to read Rule 56 of the Federal Rules of Civil Procedure and  
6 Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (holding party opposing summary judgment  
7 must come forward with evidence showing triable issues of material fact on every essential  
8 element of his claim). Plaintiff is cautioned that failure to file an opposition to  
9 Defendants' motion for summary judgment may be deemed to be a consent by Plaintiff to  
10 the granting of the motion, and granting of judgment against Plaintiff without a trial. See  
11 Ghazali v. Moran, 46 F.3d 52, 53–54 (9th Cir. 1995) (per curiam); Brydges v. Lewis, 18  
12 F.3d 651, 653 (9th Cir. 1994).

13 5. Defendants shall file a reply brief no later than **fourteen (14) days** after  
14 Plaintiff's opposition is filed.

15 6. The motion shall be deemed submitted as of the date the reply brief is due.  
16 No hearing will be held on the motion unless the Court so orders at a later date.

17 7. All communications by the Plaintiff with the Court must be served on  
18 Defendants, or Defendants' counsel once counsel has been designated, by mailing a true  
19 copy of the document to Defendants or Defendants' counsel.

20 8. Discovery may be taken in accordance with the Federal Rules of Civil  
21 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local  
22 Rule 16-1 is required before the parties may conduct discovery.

23 9. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the  
24 court informed of any change of address and must comply with the court's orders in a  
25 timely fashion. Failure to do so may result in the dismissal of this action for failure to  
26 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

27 10. Extensions of time must be filed no later than the deadline sought to be  
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extended and must be accompanied by a showing of good cause.

**IT IS SO ORDERED.**

**Dated:** 2/7/2018



EDWARD J. DAVILA  
United States District Judge