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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

YOUNG JO LEE
CDCR #v-32076,

Plaintiff,

vs.

D. PARAMO, et al.,

Defendants.

Civil No. 10cv0275 H (WVG)

ORDER:

**(1) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*
[Doc. No. 2]; AND**

**(2) DISMISSING COMPLAINT FOR
FAILURE TO STATE A CLAIM
PURSUANT TO 28 U.S.C.
§ 1915(e)(2)**

Young Jo Lee, a former state inmate, has submitted a civil action pursuant to 42 U.S.C. § 1983. Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead, he has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2].

I. Motion to Proceed IFP

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus must pay a filing fee of \$350. *See* 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff’s failure to prepay the entire fee

1 only if the plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See*
2 *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, “[u]nlike other indigent
3 litigants, prisoners proceeding IFP must pay the full amount of filing fees in civil actions and
4 appeals pursuant to the PLRA [Prison Litigation Reform Act].” *Agyeman v. INS*, 296 F.3d 871,
5 886 (9th Cir. 2002). As defined by the PLRA, a “prisoner” is “any person incarcerated or
6 detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent
7 for, violations of criminal law or the terms and conditions of parole, probation, pretrial release,
8 or diversionary program.” 28 U.S.C. § 1915(h). Here, while Plaintiff was an inmate at one time,
9 it appears that he was not incarcerated at the time he filed this action and he is no longer housed
10 within the California Department of Corrections and Rehabilitation.

11 Accordingly, the Court has reviewed Plaintiff’s affidavit of assets, just as it would for any
12 other non-prisoner litigant seeking IFP status, *see* S.D. CAL. CIVLR 3.2(d), finds it is sufficient
13 to show that Plaintiff is unable to pay the fees or post securities required to maintain this action,
14 and hereby **GRANTS** Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc.
15 No. 2].

16 **II. Sua Sponte Screening pursuant to 28 U.S.C. § 1915(e)(2)**

17 Any complaint filed by a person proceeding IFP is subject to sua sponte dismissal by the
18 Court to the extent it contains claims which are “frivolous, malicious, fail to state a claim upon
19 which relief may be granted, or seek monetary relief from a defendant immune from such relief.”
20 28 U.S.C. § 1915(e)(2)(B); *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir. 2001) (per curiam)
21 (holding that “the provisions of 28 U.S.C. § 1915(e)(2)(B) are not limited to prisoners.”); *Lopez*
22 *v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (“[S]ection 1915(e) not only permits,
23 but requires a district court to dismiss an in forma pauperis complaint that fails to state a
24 claim.”). “[W]hen determining whether a complaint states a claim, a court must accept as true
25 all allegations of material fact and must construe those facts in the light most favorable to the
26 plaintiff.” *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *see also Barren v. Harrington*,
27 152 F.3d 1193, 1194 (9th Cir. 1998) (§ 1915(e)(2) “parallels the language of Federal Rule of
28 Civil Procedure 12(b)(6).”).

1 **A. Fourteenth Amendment Due Process Claims**

2 In his Complaint, Plaintiff claims his Fourteenth Amendment due process rights were
3 violated when he was wrongfully charged with a disciplinary violation. “The requirements of
4 procedural due process apply only to the deprivation of interests encompassed by the Fourteenth
5 Amendment’s protection of liberty and property.” *Board of Regents v. Roth*, 408 U.S. 564, 569
6 (1972). State statutes and prison regulations may grant prisoners liberty interests sufficient to
7 invoke due process protections. *Meachum v. Fano*, 427 U.S. 215, 223-27 (1976). However,
8 the Supreme Court has significantly limited the instances in which due process can be invoked.
9 Pursuant to *Sandin v. Conner*, 515 U.S. 472, 483 (1995), a prisoner can show a liberty interest
10 under the Due Process Clause of the Fourteenth Amendment only if he alleges a change in
11 confinement that imposes an “atypical and significant hardship . . . in relation to the ordinary
12 incidents of prison life.” *Id.* at 484 (citations omitted); *Neal v. Shimoda*, 131 F.3d 818, 827-28
13 (9th Cir. 1997).

14 In this case, Plaintiff has failed to establish a liberty interest protected by the Constitution
15 because he has not alleged, as he must under *Sandin*, facts related to the conditions or
16 consequences of his disciplinary conviction which show “the type of atypical, significant
17 deprivation [that] might conceivably create a liberty interest.” *Id.* at 486. For example, in
18 *Sandin*, the Supreme Court considered three factors in determining whether the plaintiff
19 possessed a liberty interest in avoiding disciplinary segregation: (1) the disciplinary versus
20 discretionary nature of the segregation; (2) the restricted conditions of the prisoner’s
21 confinement and whether they amounted to a “major disruption in his environment” when
22 compared to those shared by prisoners in the general population; and (3) the possibility of
23 whether the prisoner’s sentence was lengthened by his restricted custody. *Id.* at 486-87.

24 Therefore, to establish a due process violation, Plaintiff must first show the deprivation
25 imposed an atypical and significant hardship on him in relation to the ordinary incidents of
26 prison life. *Sandin*, 515 U.S. at 483-84. Plaintiff has failed to allege any facts from which the
27 Court could find there were atypical and significant hardships imposed upon him as a result of
28 the Defendants’ actions. Plaintiff must allege “a dramatic departure from the basic conditions”

1 of his confinement that would give rise to a liberty interest before he can claim a violation of due
2 process. *Id.* at 485; *see also Keenan v. Hall*, 83 F.3d 1083, 1088-89 (9th Cir. 1996), *amended*
3 *by* 135 F.3d 1318 (9th Cir. 1998). He has not; therefore the Court finds that Plaintiff has failed
4 to allege a liberty interest, and thus, has failed to state a due process claim. *See May*, 109 F.3d
5 at 565; *Hewitt*, 459 U.S. at 466; *Sandin*, 515 U.S. at 486.

6 **B. Property Claims**

7 Plaintiff claims that Defendants violated his constitutional rights when they searched his
8 cell and removed his property. (*See Compl.* at 5.) Where a prisoner alleges the deprivation of
9 a liberty or property interest caused by the unauthorized negligent or intentional action of a
10 prison official, the prisoner cannot state a constitutional claim where the state provides an
11 adequate post-deprivation remedy. *See Zinermon v. Burch*, 494 U.S. 113, 129-32 (1990);
12 *Hudson v. Palmer*, 468 U.S. 517, 533 (1984). The California Tort Claims Act (“CTCA”)
13 provides an adequate post-deprivation state remedy for the random and unauthorized taking of
14 property. *Barnett v. Centoni*, 31 F.3d 813, 816-17 (9th Cir. 1994). Thus, Plaintiff has an
15 adequate state post-deprivation remedy and his claims relating to the taking of his property are
16 not cognizable in this § 1983 action, and must be dismissed pursuant to 28 U.S.C. §§ 1915(e)(2)
17 and 1915A(b)(1).

18 Accordingly, the Court must DISMISS Plaintiff’s Complaint for all the reasons set forth
19 above but will provide Plaintiff with the opportunity to amend his Complaint to correct the
20 deficiencies of pleading identified by the Court.

21 **III. Conclusion and Order**

22 Good cause appearing, **IT IS HEREBY ORDERED:**

23 1. Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2]
24 is **GRANTED**.

25 **IT IS FURTHER ORDERED** that:

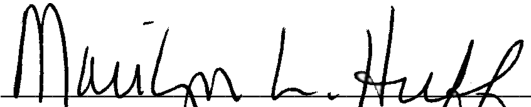
26 2. The case is **DISMISSED** without prejudice for failing to state a claim upon which
27 relief may be granted. *See* 28 U.S.C. § 1915(e)(2).

28 *///*

1 3. Plaintiff is granted sixty (60) days from the date this Order is “Filed” in which to
2 file an amended complaint which addresses each deficiency of pleading noted above. Plaintiff’s
3 Amended Complaint must be complete in itself without reference to the superseded pleading.
4 *See* S.D. CA. CIV.LR. 15.1. Defendants not named and all claims not re-alleged in the Amended
5 Complaint will be deemed to have been waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir.
6 1987).

7 IT IS SO ORDERED.

8 Dated: March 4, 2010

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10 MARILYN L. HUFF, District Judge
11 UNITED STATES DISTRICT COURT
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