

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION**

MICHAEL E. SPREADBURY,

CV 11-64-M-DWM-JCL

Plaintiff,

vs.

ORDER

BITTERROOT PUBLIC LIBRARY,
CITY OF HAMILTON,
LEE ENTERPRISES, INC.,
BOONE KARLBERG, P.C.,
DR. ROBERT BROPHY, TRISTA SMITH,
NANSU RODDY, JERRY STEELE,
STEVE SNAVELY, STEVEN BRUNER-MURPHY,
RYAN OSTER, KENNETH S. BELL, and JENNIFER LINT,

Defendants.

Before the Court is Plaintiff Michael Spreadbury's request for leave to file his second amended complaint. For the reasons stated below, Spreadbury's motion is granted in part as to two specific claims, but is otherwise denied.

I. BACKGROUND

Detailed descriptions of the background facts giving rise to this action are set forth in the Court's findings and recommendations entered July 21 and 28, 2011. Dkt. #s 67 and 75. For present purposes, a limited summary of those facts will suffice.

Spreadbury became embroiled in a dispute with Defendant Nansu Roddy, the assistant director of the Bitterroot Public Library in Hamilton, Montana. As a result of that dispute, Spreadbury's library privileges were terminated, and he was banned from the library.

Undeterred, Spreadbury returned to the library, and continued to confront Roddy. Ultimately, Roddy obtained a court order of protection against Spreadbury, and Defendant Kenneth Bell, the Hamilton City Attorney, filed a criminal complaint charging Spreadbury with criminal trespass for returning to the library. Spreadbury was also later charged with felony intimidation for conduct directed toward Roddy.

Spreadbury was running as a candidate for mayor in Hamilton when some of the events giving rise to this action transpired. Defendant Lee Enterprises, Inc. — owner of the local newspaper, the Ravalli Republic — published articles about Spreadbury. Spreadbury has generally asserted that the conduct of, and statements or publications made by some of the Defendants interfered with his candidacy for mayor.

In 2010, Spreadbury filed civil lawsuits against Roddy and Bell in the Montana Twenty-First Judicial District Court, Ravalli County, suing each of them

for emotional distress damages. Both actions were later dismissed by the state district court.

Defendant Boone Karlberg, P.C. is a private law firm that represented Roddy and Bell in the referenced civil actions. Boone Karlberg also represented Roddy relative to the order of protection she obtained against Spreadbury, and it represents several Defendants named by Spreadbury in this action, including Defendant Bitterroot Public Library.

Spreadbury advances numerous claims for relief against the various Defendants. His pleading sets forth claims under 42 U.S.C. § 1983 for violations of his rights under the United States Constitution. He also asserts claims under Montana law, including claims for defamation.

II. DISCUSSION

Spreadbury seeks to file an amended complaint to assert additional claims against the Defendants. In considering whether the court should grant a party leave to amend a pleading, Fed. R. Civ. P. 15(a)(2) provides that “[t]he court should freely give leave when justice so requires.” A district court, however, has discretion to deny leave to amend “due to ‘undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue

of allowance of the amendment, [and] futility of amendment.’ ” *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1007 (9th Cir. 2009) (citations omitted).

Here, Defendants oppose Spreadbury’s request for leave to amend on the ground that his proposed amendments are futile. A proposed amended complaint is futile if it would be immediately “subject to dismissal.” *Nordyke v. King*, ___ F.3d ___, 2011 WL 1632063, *8 n.12 (9th Cir. 2011) (citation omitted). The proper test for futility is “identical to the one used when considering the sufficiency of a pleading challenged under Rule 12(b)(6).” *Id.* (quoting *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988)).

Under Fed. R. Civ. P. 12(b)(6), allegations of a pleading are subject to dismissal where they “fail[] to state a claim upon which relief can be granted.” A cause of action may be dismissed under Rule 12(b)(6) either when it asserts a legal theory that is not cognizable as a matter of law, or if it fails to allege sufficient facts to support an otherwise cognizable legal claim. *SmileCare Dental Group v. Delta Dental Plan of California, Inc.*, 88 F.3d 780, 783 (9th Cir. 1996). In addressing a Rule 12(b)(6) challenge the court accepts all factual allegations in the complaint as true (*Hospital Bldg. Co. v. Trustees of the Rex Hospital*, 425 U.S. 738, 740 (1976)), and construes the pleading in the light most favorable to the nonmoving party. *Tanner v. Heise*, 879 F.2d 572, 576 (9th Cir. 1989). But, the

court is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged. *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

To survive dismissal under Rule 12(b)(6), “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1949 (2009).

A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Id. Plausibility does not equate with “probability,” and it requires “more than a sheer possibility that a defendant has acted unlawfully.” *Id.* Factual allegations “that are ‘merely consistent with’ a defendant’s liability” do not cross the line between possibility and plausibility. *Id.* A plaintiff must set forth “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.]” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Finally, in considering whether an amended pleading is futile, the court looks only to the facts pled in the proposed amended pleading. *Nordyke v. King*, ___ F.3d ___, 2011 WL 1632063, *8 n.12 (9th Cir. 2011) (citing *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1949-50 (2009)). A court may deny a request for leave

to amend based on futility if the pleading “would not be saved by any amendment.” *Carvalho v. Equifax Information Services, LLC*, 629 F.3d 876, 893 (9th Cir. 2010) (citation and quotation omitted).

The claims Spreadbury seeks to add include a claim for “public fraud,” and new allegations of defamation, each of which would be cognizable only under Montana law. Because Spreadbury has properly invoked the federal question jurisdiction of this Court under 28 U.S.C. § 1331 by advancing a claim under 42 U.S.C. § 1983, jurisdiction over Spreadbury’s claims that are based on Montana law is founded upon the Court’s supplemental jurisdiction under 28 U.S.C. § 1367(a). “[A] federal court exercising supplemental jurisdiction over state law claims is bound to apply the law of the forum state to the same extent as if it were exercising its diversity jurisdiction.” *Bass v. First Pacific Networks, Inc.*, 219 F.3d 1052, 1055 n.2 (9th Cir. 2000). Therefore, the Court will apply Montana law in considering the viability of each of Spreadbury’s two proposed new claims.

A. Public Fraud

Spreadbury claims Defendants Bitterroot Public Library and Boone Karlberg have engaged in a “public fraud.” This claim is based on the following bare assertion: “*Public fraud* is being committed by Defendant Bitterroot Public Library by accepting ineligible funds as a municipality in this cause of action,

Defendant Boone Karlberg PC is accepting these funds as counsel.” Dkt. # 21 at 1 (emphasis in original).

Spreadbury later filed a supplement to his proposed amended complaint asserting his claim of fraud involves the Montana Municipal Interlocal Authority (MMIA). *See* Dkt. # 29.¹ Spreadbury alleges the MMIA is a publicly funded corporate entity that provides litigation defense services and liability protection to some Montana municipalities.

Spreadbury contends MMIA is providing funding to pay Boone Karlberg to serve as legal counsel to defend the Bitterroot Public Library in this action. And he alleges the MMIA also provided this same funding and assistance to Roddy and Bell with respect to: (1) the prior state court actions Spreadbury commenced against those individuals, and (2) the court proceedings through which Roddy obtained a court order of protection against Spreadbury.

The thrust of Spreadbury’s claim is that because the Bitterroot Public Library is not a municipality that is eligible for participation in the MMIA, the

¹The MMIA was formerly known as the Montana Municipal Insurance Authority, and is a self-insurance plan created by numerous Montana cities and towns under the Interlocal Cooperation Act, Mont. Code Ann. §§ 7-11-101 through 108. *See City of Dillon v. Montana Municipal Insurance Authority*, 220 P.3d 623, 624 (Mont. 2009).

library and Boone Karlberg have engaged in a public fraud through the misappropriation of public funds.

Defendants oppose Spreadbury's claim of public fraud on multiple grounds. First, they argue Spreadbury has failed to identify any actual injury he has sustained, or any actual case or controversy arising from the circumstances of the alleged public fraud. Therefore, Defendants argue Spreadbury lacks standing under both Article III of the U.S. Constitution, and Montana law. Defendants recognize that under certain circumstances a plaintiff could establish the requisite standing based on the plaintiff's particular status as a taxpayer. But, Defendants contend that under the circumstances of this case Spreadbury's potential interest as a taxpayer is no greater than any other member of the public at large, and would be too generalized and attenuated to give rise to standing under Article III.

Second, Defendants argue Spreadbury has failed to allege that the circumstances of the public fraud violate his rights under either federal law or the U.S. Constitution. Therefore, they contend Spreadbury's allegations fail to state a claim for relief under 42 U.S.C. § 1983.

Third, Defendants assert that Spreadbury's allegations fail to identify any act or omission committed by the Bitterroot Public Library which directly caused harm to Spreadbury and which could form the basis for any claim for relief.

Finally, Defendants argue Spreadbury's pleading does not satisfy the particularity requirement of Fed. R. Civ. P. 9(b) because it fails to set forth sufficient facts essential to state a claim for fraud.

Spreadbury has not responded to most of Defendants' arguments of futility. He does not argue he has the requisite standing to assert a claim, that the alleged fraud violates any right protected under the United States Constitution, or that the Bitterroot Public Library itself engaged in any conduct that would, on its own, give rise to liability. Instead, Spreadbury argues only that his allegations of fraud sufficiently satisfy the nine elements of fraud as required under Montana law. The Court thus views Spreadbury's proposed amendment as one seeking to advance a common law claim of fraud.

To sustain a claim of fraud under Montana law, a claimant must prove the following elements:

(1) a representation; (2) the falsity of that representation; (3) the materiality of the representation; (4) the speaker's knowledge of the representation's falsity or ignorance of its truth; (5) the speaker's intent that the representation should be acted upon by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of the representation's falsity; (7) the hearer's reliance upon the truth of the representation; (8) the hearer's right to rely upon the representation; and (9) the hearer's consequent and proximate injury or damages caused by their reliance on the representation.

Town of Geraldine v. Montana Municipal Insurance Authority, 198 P.3d 796, 801 (Mont. 2008); *In re Estate of Kindsfather*, 108 P.3d 487, 490-91 (Mont. 2005).

The Court finds that Spreadbury's allegations of fraud do not establish that his claim is plausible. The fundamental defect in his claim is that he does not identify any representation made to him by any Defendant. For purposes of fraud, a "representation" is a statement of facts, or information affirmatively provided by one person to another. *See e.g. In re Estate of Kindsfather*, 108 P.3d 487, 491 (Mont. 2005). Although Spreadbury contends the Bitterroot Public Library and Boone Karlberg are unlawfully benefitting from resources provided by MMIA, he does not identify any representation that any Defendant made to Spreadbury regarding those circumstances. Specifically, Spreadbury does not identify any statement falsely representing to Spreadbury that the Bitterroot Public Library met the eligibility requirements for obtaining MMIA's assistance. Additionally, Spreadbury does not allege that he relied upon any representation to his own detriment. Consequently, Spreadbury's allegations do not plausibly suggest any Defendant is liable to Spreadbury under his allegations of "public fraud." The claim is futile since it is subject to dismissal.

B. Defamation

Spreadbury proposes to add several new allegations of defamation. Under Montana law, defamation occurs through either libel or slander. Mont. Code Ann. § 27-1-801. In general, liability for libel and slander can arise from a false and unprivileged publication or statement made about a person which causes harm to that person. Mont. Code Ann. §§ 27-1-802 and 803. Specifically,

[l]ibel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation that exposes any person to hatred, contempt, ridicule, or obloquy or causes a person to be shunned or avoided or that has a tendency to injure a person in the person's occupation.

Mont. Code Ann. § 27-1-802.

In turn, slander is defined, in part, as follows:

Slander is a false and unprivileged publication other than libel that:

- (1) charges any person with crime or with having been indicted, convicted, or punished for crime;
- (2) imputes in a person the present existence of an infectious, contagious, or loathsome disease;
- (3) tends directly to injure a person in respect to the person's office, profession, trade, or business, either by imputing to the person general disqualification in those respects that the office or other occupation peculiarly requires or by imputing something with reference to the person's office, profession, trade, or business that has a natural tendency to lessen its profit;

[... or]

(5) by natural consequence causes actual damage.

Mont. Code Ann. § 27-1-803.

Spreadbury alleges Defendant “Mayor Jerry Steele, within office of executive of Hamilton, MT did convey that he had knowledge that Plaintiff is Schizophrenic, a slanderous statement.” Dkt. 21 at 19. Spreadbury states he has never been diagnosed with Schizophrenia. Liberally construed in view of Spreadbury’s candidacy for mayor, the Court finds that his allegations at least state a cognizable claim for slander against Defendant Steele.

Spreadbury next alleges Defendant Lee Enterprises, Inc. published an article on August 9, 2010, and a “correction” publication on August 24, 2010, regarding Spreadbury’s activities in the Hamilton community. Specifically, Spreadbury alleges as follows:

In a Ravalli Republic article dated August 9, 2010 false statements are made about criminal behavior, prior lawsuits filed, and comments made by Plaintiff in oral arguments before Judge Larson, in the 21st Judicial district court.

Dkt. # 21 at 19 (emphasis added). He also alleges Lee Enterprises’ August 24, 2010 correction states “that Supreme Court order ‘upheld’ Ban by Defendant Bitterroot Public Library, actual denial of out of time appeal[.]” *Id.*

As discussed in the Court’s July 28, 2011 findings and recommendations addressing Lee Enterprises’ earlier motion to dismiss, certain publications or

statements are privileged and, therefore, do not constitute defamation. Montana law provides that a “privileged publication” includes one made “by a fair and true report without malice of a judicial, legislative, or other public official proceeding or of anything said in the course thereof.” Mont. Code Ann. § 27-1-804(4).

For the reasons discussed in the referenced July 28, 2011 ruling, Spreadbury’s allegations as to Lee Enterprises’ August 24, 2010 correction regarding the Supreme Court’s decision simply describe a publication about Spreadbury’s judicial proceedings. *See* Dkt. # 75 at 8-9. Thus, the publication is privileged and does not expose Lee Enterprises to liability. Those allegations are futile because they are subject to dismissal.

Spreadbury’s allegations regarding Lee Enterprises’ August 9, 2010 article, however, are sufficient to at least state a claim for relief. Although Mont. Code Ann. § 27-1-804(4) immunizes a defendant with respect to “fair and true report[s]” about judicial proceedings, Spreadbury specifically alleges the August 9, 2010 article contains false statements. Therefore, the Court concludes the allegations at least plausibly state a claim upon which relief could be granted.

Finally, Spreadbury alleges Boone Karlberg is liable for defamation based on statements it made in pleadings filed in this action. Dkt. # 21 at 19-20. As discussed in the Court’s July 21, 2011 findings and recommendations addressing

Boone Karlberg's earlier motion to dismiss, any statement or publication made by Boone Karlberg in this judicial proceeding is a "privileged publication" under Mont. Code Ann. § 27-1-804(2), and does not subject it to liability for defamation. Dkt. # 67 at 9-10. Therefore, Spreadbury's new defamation claims against Boone Karlberg are futile.

III. CONCLUSION

Based on the foregoing, IT IS HEREBY ORDERED that Spreadbury's request to amend his pleading is GRANTED with respect to: (1) his claim of defamation against Defendant Jerry Steele, and (2) his claim against Lee Enterprises stemming from its August 9, 2010 article. Spreadbury's motion, however, is DENIED in all other respects.

Pursuant to L.R. 15.1(b), the Clerk of Court is directed to re-file Spreadbury's pleading (Dkt. # 21) as his Second Amended Complaint, filed as of the date of this Order. The amended pleading is subject to the terms of this Order.

DATED this 10th day of August, 2011.

/s/ Jeremiah C. Lynch
Jeremiah C. Lynch
United States Magistrate Judge