

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

WAYNE DALE KELLBERG,

Plaintiff,

vs.

HBO PRODUCTIONS INC.,
CHRISTINA,

Defendant.

CV 20 –00152–M–DLC–KLD

ORDER

On October 13, 2020 United States Magistrate Judge Kathleen L. DeSoto entered her Findings and Recommendations (Doc. 3) recommending that Plaintiff Wayne Dale Kellberg’s motion for leave to proceed in forma pauperis (Doc. 1) be denied. Because Judge DeSoto was acting pursuant to the authority vested in her under 28 U.S.C. § 636(b)(3) in entering her Findings and Recommendations (Doc. 3), Mr. Kellberg is not afforded the opportunity to object. *Minetti v. Port of Seattle*, 152 F.3d 1113, 1114 (9th Cir. 1998).

This lack of an opportunity to object, however, necessitates de novo review. See *United States v. Peacock*, 761 F.2d 1313, 1318 (9th Cir. 1985) (holding that referral of matters to magistrates under 28 U.S.C. § 636(b)(3) “does not offend the Constitution so long as de novo review is available in the district court”). Ultimately, the Court finds that de novo review compels the same conclusion

reached by Judge DeSoto.

Federal law generally requires plaintiffs to pay a fee before their civil complaint will be filed. 28 U.S.C. § 1914(a). This Court may waive the filing fee for persons who cannot afford it by granting them in forma pauperis status. *Id.* § 1915(a); see also *Andrews v. Cervantes*, 493 F.3d 1047, 1051 n.1 (9th Cir. 2006) (noting that although this statute is textually limited to “prisoners” in places, it nonetheless “applies to all persons”). Importantly, proceeding in forma pauperis “is a privilege, not a right.” *Smart v. Heinze*, 347 F.2d 114, 116 (9th Cir. 1965).

As such, this Court must “examine any application for leave to proceed in forma pauperis to determine whether the proposed proceeding has merit and if it appears that the proceeding is without merit, the court is bound to deny a motion seeking leave to proceed in forma pauperis.” *Id.* Indeed, this Court “may deny leave to proceed in forma pauperis at the outset if it appears from the face of the proposed complaint that the action is frivolous or without merit.” *Minetti*, 152 F.3d at 1115. In light of Mr. Kellberg’s pro se status, this Court will liberally construe his proposed complaint applying “less stringent standards than formal pleadings drafted by lawyers” no matter how “inartfully pleaded.” *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Applying these principles, the Court finds that Mr. Kellberg’s proposed complaint is without merit.

Mr. Kellberg’s proposed complaint names HBO Productions Inc. and

Christina as defendants. (Doc. 2 at 1.) Besides the indication that Christina’s job or title is “camera crew,” no further information regarding this defendant’s identity is provided. (Id. at 2.) Mr. Kellberg’s proposed complaint contains little else, simply stating “pain & suffering, attempted setups, blackmail” as a basis for federal question jurisdiction. (Id. at 3.) Even affording Mr. Kellberg’s proposed pleading the liberal construction it deserves, the Court finds no basis upon which it can conclude any proceedings commenced by it would have merit. On the contrary, the utter lack of any supporting allegations forces this Court to conclude that the proposed complaint is without merit.

As Judge DeSoto noted, Mr. Kellberg is not unfamiliar with how to plead the allegations necessary to support a claim in federal court. (Doc. 3 at 2.) Mr. Kellberg has filed eight lawsuits in a two-year span. (Id.) In some of those suits he has satisfied the liberal pleading standard necessary to advance a claim and in others, as here, he has not. (Id. at 2–3.) Indeed, just over a month ago this Court refused to permit Mr. Kellberg to proceed in forma pauperis for lodging a proposed pleading strikingly similar in both form and insufficiency to the one at issue here. Order, *Kellberg v. HBO Prods. President (Channel 143)*, (D. Mont. Sept. 10, 2020) (CV 20-00142-M-DLC). In sum, the Court finds that the proceeding Mr. Kellberg seeks to initiate is without merit.

Accordingly, IT IS ORDERED that Judge DeSoto’s Findings and

Recommendations (Doc. 3) is ADOPTED in full.

IT IS FURTHER ORDERED that Mr. Kellberg's motion for leave to proceed in forma pauperis (Doc. 1) is DENIED.

IT IS FURTHER ORDERED that the Clerk of Court shall close this matter unless Mr. Kellberg pays the \$400.00 filing fee within 14 days of this Order.

DATED this 13th day of October, 2020.



Dana L. Christensen, District Judge
United States District Court