

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

LARRY LYDELL BELL, SR.,

Plaintiff,

v.

CHERYL J. FEUERSTEIN, Personal
Representative of Estate;
RAYLYNNA J. PETERSON; and
MERCHANTS BONDING COMPANY,

Defendants.

SIMON, Judge.

Plaintiff, an inmate at the Oregon State Correctional Institution, brings this civil rights action alleging claims under 42 U.S.C. § 1983, as well as supplemental state law claims. Plaintiff was previously granted leave to proceed *in forma pauperis*. For the reasons set forth below, Plaintiff's Complaint is dismissed.

Case No. 3:17-cv-00075-YY

ORDER TO DISMISS

BACKGROUND

Plaintiff names as Defendants Cheryl J. Feuerstein, who is the court-appointed personal representative of the Estate of Bennie Dell (the “Estate”); Raylynna J. Peterson, who is Ms. Feuerstein’s attorney; and Merchants Bonding Company. Plaintiff alleges Defendants violated Plaintiff’s Due Process rights under the United States Constitution in connection with the sale of real property which was part of the Estate. Plaintiff also alleges Defendants violated state law in connection with the sale. By way of remedy, Plaintiff seeks money damages.

STANDARDS

Where a party is granted leave to proceed *in forma pauperis*, the court shall dismiss the case at any time if the court determines that:

- (B) the action . . .
 - (i) is frivolous or malicious;
 - (ii) fails to state a claim on which relief may be granted; or
 - (iii) seeks monetary relief against a defendant who is immune from such relief.

28 U.S.C. § 1915(e)(2).

In order to state a claim, a plaintiff’s complaint must contain sufficient factual allegations which, when accepted as true, give rise to a plausible inference that the defendants violated the plaintiff’s constitutional rights. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 556-57 (2007). “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.” *Iqbal*, 556 U.S. at 678; *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

As the Ninth Circuit has instructed however, courts must “continue to construe *pro se* filings liberally.” *Hebbe v. Pliler*, 627 F.3d 338, 341 (9th Cir. 2010). A “complaint [filed by a *pro se* prisoner] ‘must be held to less stringent standards than formal pleadings drafted by lawyers.’” *Id.* (quoting *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam)).

Before dismissing a *pro se* civil rights complaint for failure to state a claim, this Court supplies the plaintiff with a statement of the complaint’s deficiencies. *Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 623-24 (9th Cir. 1988); *Eldridge v. Block*, 832 F.2d 1132, 1136 (9th Cir. 1987). A *pro se* litigant will be given leave to amend his or her complaint unless it is absolutely clear that the deficiencies of the complaint cannot be cured by amendment. *Karim-Panahi*, 839 F.2d at 623; *Lopez v. Smith*, 203 F.3d 1122, 1130-31 (9th Cir. 2000).

DISCUSSION

I. Civil Rights Claims Under 42 U.S.C. § 1983

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege facts plausibly showing that a defendant acted under color of state law when doing the challenged acts to violate the plaintiff’s constitutional rights. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986). “[P]rivate parties are not generally acting under color of state law.” *Price v. State of Hawaii*, 939 F.2d 702, 707-08 (9th Cir. 1991). A court must “start with the presumption that private conduct does not constitute governmental action.” *Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826, 835 (9th Cir. 1999) (citation omitted). To avoid dismissal, a plaintiff must plead facts sufficient to raise a reasonable inference that the defendants were state

actors. *Caviness v. Horizon Community Learning Center, Inc.*, 590 F.3d 806, 808, 818 (9th Cir. 2010).

The Ninth Circuit generally employs four tests in determining when a private party's actions amount to state action: (1) the public function test; (2) the state compulsion test; (3) the government nexus test; and (4) the joint action test. *Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th Cir. 2008); *Johnson v. Knowles*, 113 F.3d 1114, 1118 (9th Cir. 1997). The "public function" and "joint action" tests "largely subsume the state compulsion and government nexus tests because they address the degree to which the state is intertwined with the private actor or action." *Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 995 n. 13 (9th Cir. 2013).

A. Public Function Test

Under the public function test, state action may be present if a private party or entity exercises powers traditionally reserved exclusively to the state. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982) ("the question is whether the function performed has been 'traditionally the exclusive prerogative of the State'") (emphasis in original, citation omitted); *Kirtley*, 326 F.3d at 1093 ("[t]he public function test is satisfied only on a showing that the function at issue is 'both traditionally and exclusively governmental'") (citation omitted). Defendants' alleged actions with respect to the prosecution of probation proceedings and Estate-related sale of real property do not encompass the exercise of powers traditionally reserved exclusively to the state. *Brooks v. Atwood*, Case No. CV 15-7724-JFW(E), 2016 WL 226009, at *5 (C.D. Cal. Jan. 19, 2016).

B. State Compulsion Test

State action may be found under the state compulsion test where the state has "exercised coercive power or has provided such significant encouragement, either overt or covert, that the

[private actor's] choice must in law be deemed to be that of the state.” *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); *Kirtley*, 326 F.3d at 1094. However, “[m]ere approval or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives.” *Blum*, 457 U.S. at 1004-05. In his Complaint, Plaintiff alleges, at most, the private misuse of state law, which is not an action attributable to the states. *See, e.g., Seattle Fishing Servs. LLC v. Bergen Industries and Fishing Co.*, 242 Fed. App’x 436, 438 (9th Cir. 2007) (obtaining writs of garnishment from court clerk did not render private parties state actors).

C. Government Nexus Test

Under the government nexus test, a court must consider whether there is a sufficiently close nexus between the state and the challenged actions such that the defendants’ actions may “be fairly treated as [those] of the State itself.” *Johnson*, 113 F.3d at 1120 (citation and internal quotations omitted). The court may consider whether state actors dominated decision making, whether the private party’s funds were supplied by state institutions, and whether the private party is acting in lieu of a traditional state actor. *Villegas v. Gilroy Garlic Festival Ass’n*, 541 F.3d 950, 955 (9th Cir. 2008) (en banc).

As noted above, the administering of state court probate and sale of estate property does not render the participants state actors. A probate transaction between private parties does not involve state action simply because the probate court under which the transaction is conducted is an organ of the state government. *Naoko Ohno*, 723 F.3d at 995. Plaintiff fails to allege any facts plausibly showing that the asserted actions of Defendants in connection with Estate business among private parties may fairly be treated as actions of the state under the government nexus test. Nor does the allegation that the state court appointed Defendant Feuerstein as personal representative. *Brooks*,

2016 WL 226009, at *6; *see also Witte v. Young*, Case No. 2:14-cv-2439-TLN-EFB PS, 2015 WL 5232681, at *4 (E.D. Cal. Sept. 8, 2015) (court-appointed personal representative of estate is not a state actor for purposes of § 1983, citing cases).

D. Joint Action Test

The joint action test focuses on “whether the state has so far insinuated itself into a position of interdependence with the private entity that it must be recognized as a joint participant in the challenged activity.” *Kirtley*, 326 F.3d at 1093 (citation and internal quotations omitted). “The lynchpin of a finding of ‘joint action’ is the existence of ‘a substantial degree of cooperative action.’” *Villegas*, 541 F.3d at 960 (citation omitted). “Thus, the joint action test will be satisfied when the actions of the state and the private party are intertwined or the parties have a symbiotic relationship.” *Id.* (citation omitted).

The joint action test is satisfied when a plaintiff plausibly shows an agreement or conspiracy between a government actor and a private party. *Id.* (citations omitted). “To be liable as a co-conspirator, a private defendant must share with the public entity the goal of violating a plaintiff’s constitutional rights.” *Franklin v. Fox*, 312 F.3d 423, 445 (9th Cir. 2002) (citations omitted). “Establishing liability for a conspiracy between a private party and a state actor is no different from establishing liability for a conspiracy between two state actors.” *Crowe v. County of San Diego*, 608 F.3d 406, 440 (9th Cir. 2010). “The plaintiff must show an agreement or meeting of the minds to violate constitutional rights, and to be liable, each participant in the conspiracy need not know the exact details of the plan, but each participant must at least share the common objective of the conspiracy.” *Id.* (citation, internal quotation, and brackets omitted). Conclusory allegations of

conspiracy with a state actor are insufficient. *Simmons v. Sacramento County Superior Court*, 318 F.3d 1156, 1161 (9th Cir. 2003).

Plaintiff does not allege plausible facts establishing a conspiracy among the named Defendants and some government actor. Accordingly, Plaintiff fails to satisfy the joint action test.

In sum, Plaintiff fails to state a claim that Defendants were acting under color of state law while engaging in the alleged wrongdoing. As such, Plaintiff has failed to state a claim upon which relief may be granted under 42 U.S.C. § 1983 as to any Defendant.

II. Supplemental State Law Claims

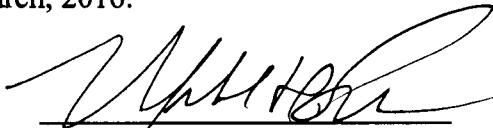
Plaintiff also alleges claim that Defendants violated his rights under state law. Although the court may exercise supplemental jurisdiction of state law claims, a plaintiff must first have a cognizable claim for relief under federal law. *See* 28 U.S.C. § 1367. Here, the court fails to find any cognizable federal claims in the Complaint. Accordingly, Plaintiff's state law claims fail.

CONCLUSION

Based on the foregoing, IT IS ORDERED that Plaintiff's complaint is DISMISSED. Plaintiff may file an Amended Complaint, curing the deficiencies noted above, within 30 days of the date of this order. Plaintiff is advised that failure to file an Amended Complaint shall result in the dismissal of this proceeding, with prejudice.

IT IS SO ORDERED.

DATED this 4th day of March, 2016.



Michael H. Simon
United States District Judge