APPENDIX A

Case: 17-55081 04/19/2018 DktEntry: 11

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES G. KINNEY
Plaintiff-Appellant,

v.

CLERK OF CALIFORNIA
COURT OF APPEAL,
FOURTH APPELLATE
DISTRICT, Division Three,
acting in an administrative
capacity; et al.,
Defendants-Appellees.

D.C. No. 8:16-cv-02197-CJC-KES
Central Dist. of Cal., Santa Ana

FILED
APR 19 2018
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ORDER

Before: WALLACE, SILVERMAN, and BYBEE, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. See Fed. R. App. P. 35.

Kinney's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 10) are denied.

No further filings will be entertained in this closed case.

APPENDIX B

Case: 17-55081 12/28/2017 DktEntry: 9

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES G. KINNEY
Plaintiff-Appellant,

v.

CLERK OF CALIFORNIA
COURT OF APPEAL,
FOURTH APPELLATE
DISTRICT, Division Three,
acting in an administrative
capacity; et al.,

D.C. No. 8:16-cv-02197-CJC-KES
Central Dist. of Cal., Santa Ana

FILED
DEC 28 2017
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MEMORANDUM *

Appeals from the United States District Court for the Central District of California Cormac J. Carney, District Judge, Presiding

Submitted December 18, 2017**

Before: WALLACE, SILVERMAN, and BYBEE, Circuit Judges.

Charles G. Kinney appeals pro se from the district court's order dismissing his action alleging constitutional claims arising from state court proceedings. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a sua sponte dismissal for failure to state a claim. *Barrett v. Belleque*, 544 F.3d 1060, 1061 (9th Cir. 2008). We affirm.

The district court properly dismissed Kinney's action on the basis of judicial immunity and quasi-judicial immunity. *See Duvall v. County of Kitsap*, 260 F.3d 1124, 1133 (9th Cir. 2001) (describing factors relevant to whether an act is judicial in nature and subject to judicial immunity); *Mullis v. U.S. Bankr. Court*, 828 F.2d 1385, 1390 (9th Cir. 1987) (court clerks have absolute quasi-judicial immunity from damages for civil rights violations when they perform tasks that are an integral part of the judicial process, including taking actions necessary to commence an action); *see also Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 637-38 (9th Cir. 1988) (court may sua sponte dismiss a complaint for failure to state a claim without notice or an opportunity to respond when plaintiff cannot possibly win relief).

To the extent that Kinney seeks an order directing defendants to docket his appeal, this court lacks jurisdiction to issue such an order. *See Demos v. U.S. Dist. Court For E. Dist. of Wash.*, 925 F.2d 1160, 1161-62 (9th Cir. 1991) (order) (federal courts lack jurisdiction to issue writs of mandamus to state courts).

The district court did not abuse its discretion by dismissing the complaint without leave to amend because amendment would be futile. *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011) (setting forth standard of review and explaining that dismissal without leave to amend is proper when amendment would be futile).

The district court did not abuse its discretion by denying Kinney's motion to vacate or reconsider because Kinney failed to demonstrate any basis for reconsideration. *See Sch. Dist. No. 1J, Multnomah Cty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1262-63 (9th Cir. 1993) (setting forth standard of review and grounds for reconsideration).

We reject as unsupported by the record Kinney's contention that the district judge was biased.

We do not consider arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes these cases are suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2). Kinney's request for oral argument, set forth in the opening brief, is denied.

No. ____

IN THE
SUPREME COURT OF THE
UNITED STATES

CHARLES G. KINNEY,
Petitioner,

v.

CLERK OF CALIFORNIA
COURT OF APPEAL, FOURTH
APPELLATE DISTRICT,
Division Three, acting in an
administrative capacity; et al.
Respondents,

On Petition For Writ Of
Certiorari To The
Ninth Circuit Court of Appeals
#17-55081 (4/19/18 denial) [8 of 8]

U.S. District Court, Central
District of Calif. (Santa Ana)
#8:16-cv-02197-CJC

SUPPLEMENTAL APPENDIX
FOR A WRIT OF CERTIORARI

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SUPPLEMENTAL APPENDIX SA

Case 8:16-cv-02197-CJC Dk 8 Filed 12/21/16

UNITED STATES DISTRICT COURT JS-6
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

CHARLES KINNEY,
Plaintiff,
v.
CLERK OF CALIFORNIA COURT OF APPEAL FOURTH APPELLATE DISTRICT ET AL.,
Defendants.
Case No.: SACV 16-02197-CJC(KESx)

ORDER *SUA SPONTE* DISMISSING CASE

Plaintiff Charles Kinney brings this action for declaratory relief against Defendants Clerk of California Court of Appeal, Fourth Appellate District, Division Three; Presiding Justice Kathleen O'Leary, Division Three; Administrative Presiding Justice Judith McConnell, Fourth Appellate District; and Does 1 through 10. (Dkt. 1.)

Kinney alleges that on February 17, 2012, he filed a notice of appeal before the California Court of Appeal, Fourth Appellate District, Division Three, concerning a case in Orange County Superior Court "regarding flooding, pollution, nuisance, and other problems that adversely impacted Kinney's property in Laguna

Beach, CA." (*Id.* ¶ 8.) Kinney was a defendant in that case; he appealed on his own behalf and also acted as an attorney for his co-defendant Marian Keegan as part of the appeal. (*Id.* ¶¶ 8–9.) According to the Complaint, Kinney "paid the required $100 Superior Court deposit through the e-filing method and received a receipt from his e-filing provider One Legal." (*Id.* ¶ 10.) After receiving acknowledgement of the appeal, Kinney alleges that the "next administrative step in the appeal process was for the Court of Appeal to assign a 'G' appellate number, and demand payment of the appeal fee if not yet paid." (*Id.* ¶ 12.) He claims that the Court of Appeal never did so, and instead "decided to stamp the paperwork from Orange County Superior Court as 'Received But Not Filed'" on February 23, 2012. (*Id.* ¶ 14.)

Kinney alleges that the Court of Appeal took such action "because that person(s), intentionally or negligently, misread the law as to 'defendants' Kinney and his client Keegan who filed an appeal, misread the law with respect to Keegan's status as a represented client, and/or misread the law with respect to Kinney's disputed status as a vexatious litigant." (*Id.* ¶ 14.) He further alleges that these actions were "intentionally and willfully concealed" from him for many years by "Justices, clerks, and/or administrative staff at the Court of Appeal." (*Id.* ¶ 15.) Kinney believes the Court of Appeal was retaliating against him "in an effort to assist Adm. Pres. Justice Boren in some manner," perhaps in connection with a decision that was "unfavorable" to him in *In re Kinney*. (*Id.* ¶¶ 23–24). *See In re Kinney*, 201 Cal. App. 4th 951, 960–961 (Cal.

2011) ("Charles G. Kinney is a vexatious litigant. This opinion will serve as a prefiling order prohibiting Kinney from filing any new litigation—either in his own name or in the name of Kimberly Jean Kempton—in the courts of this state without first obtaining leave of the presiding judge.")

Plaintiff has failed to state a claim upon which relief can be granted. A judge is immune from suit unless he or she is acting "in the 'clear absence of all jurisdiction,' or perform[ing] an act that is not 'judicial' in nature." *Weddell v. Cty. of Carson City*, 60 F. App'x 9, 10–11 (9th Cir. 2003) ("Plaintiffs argue that Judge Willis's refusal to allow the filing of Rolland Weddell's criminal complaint and his decision to permit Waters to take this document fell outside the scope of his jurisdiction and did not constitute judicial acts. While his conduct was possibly inappropriate (which we do not decide), Judge Willis would still be entitled to immunity under this expansive and liberally applied doctrine."). Court clerks, in turn, "have absolute quasi-judicial immunity from damages for civil rights violations when they perform tasks that are an integral part of the judicial process." *Mullis v. U.S. Bankr. Court for Dist. of Nevada*, 828 F.2d 1385, 1390 (9th Cir. 1987). According to the Ninth Circuit, the "commencement of an action by filing a complaint or petition is a basic and integral part of the judicial process . . . . The clerk of court and deputy clerks are the officials through whom such filing is done. Consequently, the clerks qualify for quasi-judicial immunity unless these acts were done in the clear absence of all jurisdiction."1 *Id.*

(affirming the district court's ruling that the court clerks had absolute immunity from damages where they accepted and filed an incomplete bankruptcy petition and then refused to accept an amended petition for filing because the chapter designated on the petition was incorrect); *see also Coulter v. Roddy*, 463 F. App'x 610, 611 (9th Cir. 2011) (affirming a district court's dismissal of a complaint against a court officer for allegedly "improperly and illegally deny filing" of outdated Judicial Council forms, because such actions "fall within the scope of the Clerk of the Court's duties that are an integral part of the judicial process"). Thus, Kinney is incorrect in asserting that the filing decisions by Defendants were simply "administrative, nonjudicial acts" in his effort to circumvent judicial immunity. (*See* Dkt. 1 ¶ 21.) The Complaint alleges that Defendants took actions which are an integral part of the judicial process and are well within their jurisdiction.

A trial Court may *sua sponte* dismiss a complaint for failure to state a claim without notice or an opportunity to respond where "the plaintiffs cannot possibly win relief." *Sparling v. Hoffman Const. Co.*, 864 F.2d 635, 638 (9th Cir. 1988). All Defendants have immunity, so Plaintiff cannot possibly prevail. Accordingly, the Court *sua sponte* DISMISSES this case.

DATED: December 21, 2016

_____s/_____

CORMAC J. CARNEY

UNITED STATES DISTRICT JUDGE

Fn 1 Such immunity "is not limited to immunity from damages, but extends to actions for declaratory, injunctive and other equitable relief." *Mullis*, 828 F.2d at 1394.

SUPPLEMENTAL APPENDIX SB

Case 8:16-cv-02197-CJC Dk 11 Filed 01/04/17

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

CHARLES KINNEY,
Plaintiff,
v.
CLERK OF CALIFORNIA COURT OF APPEAL FOURTH APPELLATE DISTRICT ET AL.,
Defendants.
Case No.: SACV 16-02197-CJC(KESx)

ORDER DENYING *EX PARTE* APPLICATION TO VACATE, ALTER, OR RECONSIDER ORDER DISMISSING COMPLAINT

On December 14, 2016, Plaintiff Charles Kinney filed this action for declaratory relief against Defendants Clerk of California Court of Appeal, Fourth Appellate District, Division Three; Presiding Justice Kathleen O'Leary, Division Three; Administrative Presiding Justice Judith McConnell, Fourth Appellate District; and Does 1 through 10; in connection with the handling of his appeal of a state court case. (*See generally* Dkt. 1.) He alleged that the Court of Appeal improperly failed to assign a 'G' appellate number to the case and instead stamped the case as "Received But Not Filed." (*Id.* ¶ 14.) On December 21, 2016, the

Court *sua sponte* dismissed the Complaint on the grounds that Plaintiff could not possibly obtain the relief sought because all Defendants had judicial immunity. (Dkt. 8.) Plaintiff then filed an *ex parte* application to vacate, alter, or reconsider the dismissal. (Dkt. 9.) For the following reasons, Plaintiff's *ex parte* application is DENIED.

Pursuant to Local Rule 7-18, "[a] motion for reconsideration of the decision on any motion may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision."

Plaintiff contends that the Court improperly determined that Defendants had judicial immunity because Defendants' alleged conduct was administrative rather than judicial. (Dkt. 9 ¶ 1 (citing *Forrester v. White*, 484 U.S. 219, 220–29 (1988)).) The Court disagrees. The conduct described as "administrative" in *Forrester* was the decision to dismiss a court employee. *Forrester*, 484 U.S. at 229. Other examples of "administrative" acts described in *Forrester* include the selection of trial jurors and promulgation of a code of conduct for attorneys. *Id.* at 228. These examples are not comparable the allegations of the Complaint, which focus on court filing procedures and are therefore an integral part of the judicial process. (*See generally* Dkt. 1;

see also Dkt. 8 at 3 (citing *Weddell v. Cty. of Carson City*, 60 F. App'x 9, 10–11 (9th Cir. 2003); *Mullis v. U.S. Bankr. Court for Dist. of Nevada*, 828 F.2d 1385, 1390 (9th Cir. 1987); *Coulter v. Roddy*, 463 F. App'x 610, 611 (9th Cir. 2011)).)

Plaintiff also argues that judicial immunity does not apply because "there was NO jurisdiction to NOT assign the state appellate court 'G' number after the lower court filed the Feb. 17, 2012 notice of appeal." (Dkt. 9 ¶ 7 (emphasis in original).) This argument misunderstands the exception to judicial immunity that applies where a judge acts "in the 'clear absence of all jurisdiction.'" *Weddell*, 60 F. App'x at 10–11. This exception means that the court acted despite a clear lack of subject matter jurisdiction, which is not what Plaintiff alleges. *Mullis*, 828 F.2d at 1389.

Finally, Plaintiff contends that even if Defendants have judicial immunity, such immunity does not bar the declaratory or injunctive relief he is seeking here. (Dkt. 9 ¶ 2 (citing *Pulliam v. Allen*, 466 U.S. 522, 541–542 (1984) (holding that judicial immunity did not bar declaratory or injunctive relief, as opposed to damages, for a claim under 42 U.S.C. § 1983 against a judicial officer acting in his judicial capacity.)).) Although the Complaint styles the requested relief as injunctive and declaratory relief, Plaintiff is actually asking the Court for a writ of mandamus directing the state court to accept his appeal. (*See* Dkt. 1 ¶ 32 ("Kinney desires a declaratory judgment as to the rights, duties and obligations regarding his 2012 appeal as noted herein."); *id.* ¶ 33 ("Kinney desires

injunctive relief *compelling the defendants and each of them to perform* administrative acts necessary to allow the 2012 appeal to proceed."). "The federal courts are without power to issue writs of mandamus to direct state courts or their judicial officers in the performance of their duties." *Clark v. State of Wash.*, 366 F.2d 678, 681 (9th Cir. 1966). For this reason, a petition seeking to compel a state court to accept a filing or to take or refrain from some other action is "frivolous as a matter of law." *Demos v. U.S. Dist. Court For E. Dist. of Washington*, 925 F.2d 1160, 1161–62 (9th Cir. 1991); *see also Wilder v. Stegner*, No. 3:12-CV-304-BLW, 2013 WL 1693665, at *2 (D. Idaho Apr. 17, 2013) ("Although Wilder states that he is seeking 'injunctive' relief, a request for injunctive or declaratory relief, which asks a federal court to order a state court or state judicial officer to perform certain duties, is not a request for injunctive or declaratory relief—it is a request for a writ of mandamus. . . . That is fatal to this lawsuit because "federal courts are without power to issue- writs of mandamus to direct state courts or their judicial officers in the performance of their duties."). Accordingly, Plaintiff's case may not proceed.

Simply put, there is no basis to vacate or alter the Court's prior order dismissing the case. For the foregoing reasons, Plaintiff's *ex parte* application is DENIED.

DATED: January 4, 2017

_____s/_____
CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE