

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

DEC 20 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MARTIN JONASSEN,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; et al.,

Defendants-Appellees.

No. 17-17420

D.C. No.
4:13-cv-00792-DCB-PSOT
District of Arizona,
Tucson

ORDER

Before: TASHIMA, PAEZ, and IKUTA, Circuit Judges.

A review of the record demonstrates that this court lacks jurisdiction over this appeal because the order challenged in the appeal is not final or appealable.

See 28 U.S.C. § 1291. Appellant's Fourth Amended Complaint remains pending before the district court. Consequently, this appeal is dismissed for lack of jurisdiction.

DISMISSED.

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ORDER

Before: TASHIMA, PAEZ, and IKUTA, Circuit Judges.

The motion for reconsideration (Docket Entry Nos. 8, 9) is denied. *See* 9th Cir. R. 27-10.

All other pending motions are denied.

No further filings will be entertained in this closed case.

Appendix B

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Martin Jonassen,

No. CV 13-00792-TUC-DCB

Plaintiff,

ORDER

vs.

United States of America, et al.,

Defendants.

Plaintiff Martin Jonassen, who was then-confined in the United States Penitentiary-Tucson (USP-Tucson), commenced this case alleging claims under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The Court granted Plaintiff leave to proceed in forma pauperis (Doc. 35), but subsequently revoked forma pauperis status pursuant to 28 U.S.C. § 1915(g) (Doc. 54). At that time, Plaintiff's Third Amended Complaint (Doc. 43), which had been filed without leave of Court, was pending.¹ Plaintiff appealed the revocation of forma pauperis status and, on January 12, 2017, the Ninth Circuit Court of Appeals reversed and remanded to this

¹ Plaintiff subsequently filed an addendum (Doc. 44) and four supplements (Docs. 45, 46, 47, and 50) to the Third Amended Complaint. Rule 15(d) of the Federal Rules of Civil Procedure provides that “[o]n motion and reasonable notice, the court may, on just terms, permit a party to serve a [supplemental pleading] setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented.” Plaintiff failed to file a separate motion seeking leave to file any supplement and he did not appear to set out any transaction, occurrence, or event that happened after the date that his Third Amended Complaint was filed. Accordingly, those documents were ordered stricken.

1 Court (Doc. 97). The Ninth Circuit concluded that this Court had erred in revoking
2 Plaintiff's forma pauperis status because Plaintiff's Third Amended Complaint "made
3 plausible allegations that [Plaintiff] was under 'imminent danger of serious physical
4 injury' at the time he lodged the TAC." (Doc. 97-1 at 2.)

5 In an Order filed on August 2, 2017, the Court dismissed the Third Amended
6 Complaint for failure to state a claim and with leave to file a fourth amended complaint
7 (Doc. 113). In the same Order, the Court addressed most of Plaintiff's pending motions.
8 In an Order filed on August 9, 2017, the Court denied Plaintiff's remaining two motions.

9 On August 14, 2017, Plaintiff filed a motion for extension of time in which he also
10 asked for other forms of relief, including the appointment of counsel, and noted that he
11 had not received a copy of the Ninth Circuit docket, which was to be sent to him pursuant
12 to the August 2, 2017 Order (Doc. 115). The Clerk's Office has since sent Plaintiff a
13 copy of the Ninth Circuit docket. On August 21, 2017, Plaintiff filed another motion for
14 an extension of time in which he also requested other forms of relief, including a stay of
15 any transfer of him, an evidentiary hearing, and motion for appointment of counsel (Doc.
16 116).

17 In an Order filed on August 28, 2017, the Court granted Plaintiff a 30-day
18 extension of time to file a fourth amended complaint in response to Plaintiff's request
19 (Doc. 117). However, a copy of that Order sent to Plaintiff's address of record was
20 returned as undeliverable (Doc. 118). On September 15, 2017 Plaintiff filed a notice
21 (Doc. 119) and on September 18, 2017, he filed a declaration (Doc. 120) and a motion for
22 the entire record and docket sheets, and other relief (Doc. 121). On September 20, 2017,
23 a copy of the Court's August 2, 2017 Order sent to Plaintiff at his address of record was
24 returned to the Court as undeliverable (Doc. 122). On September 22, 2017, Plaintiff filed
25 a notice of appeal from the August 2, 2017 Order (Doc. 123), therefore, it appears that
26 Plaintiff received a copy of that Order. Not until September 29, 2017, did Plaintiff file a
27 notice of change of address reflecting that he has been transferred to the U.S. Penitentiary
28 in Marion, Illinois (Doc. 126).

1 Copies of the Court's August 2, 2017 and August 28, 2017 Orders will be sent to
 2 Plaintiff at his new address. Further, because Plaintiff did not timely receive a copy of
 3 the August 28, 2017 Order, albeit due in part to his failure to file a prompt notice of
 4 change of address, the Court will grant 30 days from the filing date of this Order in which
 5 to file a fourth amended complaint in compliance with the August 2, 2017 Order.

6 ^{DE 119} As noted above, on September 15, 2017, Plaintiff filed a document labeled as
 7 "Notice/Evidence Declaration of Facts of Further Substantial Constitutional Violations,
 8 Health Violations, Cruel and Unusual Punishment, Deliberate Indifference, Overcrowding,
 9 Human Rights Violations; Renewal of [8-25] 2017 Filing, etc." (hereafter "Notice").
 10 (Doc. 119). In this document, Plaintiff purports to adopt by reference all of his filings in
 11 appellate case 14-16377, this case, and another recently filed case, *Jonassen v. Shartle*,
 12 No. 17-00284-TUC-DCB (JR) (D. Ariz.). Plaintiff seeks to renew his previous motions
 13 for appointment of counsel; describes a notice about how flu is spread that was posted at
 14 USP-Marion; states that he is confined with two other inmates, which he contends
 15 violates a United Nations "mandate" concerning overcrowding; and generally appears to
 16 contend that his conditions of confinement pose a threat to his health. Otherwise,
 17 Plaintiff states that he has yet to receive his legal paperwork since his transfer to Marion.

18 As noted above, the Court will grant Plaintiff an extension of time to file a fourth
 19 amended complaint and the Clerk of Court will send copies of the Court's August 2 and
 20 28, 2017 Orders to Plaintiff at his current address. To the extent that Plaintiff seeks any
 21 other relief in his Notice, such relief will be denied. If Plaintiff wishes to challenge his
 22 ^{Not needed} conditions of confinement or medical care at USP-Marion, Plaintiff may commence a
 23 new action in the appropriate district court in Illinois.

24 Plaintiff has also filed a document labeled as "Further Tort List Evidenced
 25 Declaration re Tucson [USP] Staff/Marion Transfer/Subsequent Theft of Personal
 26 Property, Etc." (hereafter "Declaration"). (Doc. 120.) Plaintiff moves for renewal of "[9-
 27 8] filing"²; lists stolen items; and states "Further Religious Beliefs Obstruction Per 18

25 ² Only a notice of returned mail was filed in this case on September 8, 2017.

1 U.S.C. 241-18 U.S.C. 247, Etc." To the extent that Plaintiff seeks any relief in his
2 Declaration, such relief will be denied. If Plaintiff seeks relief, he must file a motion.

3 Finally, Plaintiff has filed a document labeled "Move for Entire Record and
4 Docket Sheet, Etc." (hereafter "Motion"). (Doc. 121.) In his Motion, Plaintiff moves for
5 "Renewal of [9-8], 2017 Filing." Because nothing was filed by Plaintiff in this case on
6 September 8, this request will be denied. *See* n.2, *infra*. Plaintiff claims that the
7 government has stolen all of Plaintiff's legal copies for this case and moves for the entire
8 record to be forwarded to him with a current docket. The Clerk of Court will send
9 Plaintiff a copy of the docket for this case, but Plaintiff's request is otherwise denied.
10 Plaintiff fails to allege any facts to support that any of his property has been stolen.
11 Rather, it appears likely that Plaintiff's property is in transit. Plaintiff again moves for
12 the appointment of counsel. As the Court has repeatedly informed Plaintiff, there is no
13 constitutional right to the appointment of counsel in a civil case. *See Ivey v. Bd. of*
14 *Regents of the Univ. of Alaska*, 673 F.2d 266, 269 (9th Cir. 1982). In proceedings in
15 *forma pauperis*, the court may request an attorney to represent any person unable to
16 afford one. 28 U.S.C. § 1915(e)(1). Appointment of counsel under 28 U.S.C.
17 § 1915(e)(1) is required only when "exceptional circumstances" are present. *Terrell v.*
18 *Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991). A determination with respect to
19 exceptional circumstances requires an evaluation of the likelihood of success on the
20 merits as well as the ability of Plaintiff to articulate his claims pro se in light of the
21 complexity of the legal issue involved. *Id.* "Neither of these factors is dispositive and
22 both must be viewed together before reaching a decision." *Id.* (quoting *Wilborn v.*
23 *Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)). Plaintiff sets forth no basis for
24 seeking the appointment of counsel and this request will be denied.

25 Finally, Plaintiff moves to join USP-Marion as a party to this action. This request
26 will be denied. Sovereign immunity prevents *Bivens*-type actions against the United
27 States, its agencies, or its employees in their official capacities. *Arnsberg v. United*
28 *States*, 757 F.2d 971, 980 (9th Cir. 1984); *Hellman v. Watt*, 708 F.2d 1399, 1401-02 (9th

1 Cir. 1983); *see also FDIC v. Meyer*, 510 U.S. 471, 486 (1994) (federal agencies are not
2 proper defendants in a *Bivens* action); *Myers v. U.S. Marshals Serv.*, No. CV10-2662,
3 2011 WL 671998, at *2 (S.D. Cal. Feb. 15, 2011).

4 **Warnings**

5 **A. Release**

6 If Plaintiff is released while this case remains pending, and the filing fee has not
7 been paid in full, Plaintiff must, within 30 days of his release, either (1) notify the Court
8 that he intends to pay the unpaid balance of his filing fee within 120 days of his release or
9 (2) file a non-prisoner application to proceed in forma pauperis. Failure to comply may
10 result in dismissal of this action.

11 **B. Address Changes**

12 Plaintiff must file and serve a notice of a change of address in accordance with
13 Rule 83.3(d) of the Local Rules of Civil Procedure. Plaintiff must not include a motion
14 for other relief with a notice of change of address. Failure to comply may result in
15 dismissal of this action.

16 **C. Copies**

17 Plaintiff must submit an additional copy of every filing for use by the Court. *See*
18 LRCiv 5.4. Failure to comply may result in the filing being stricken without further
19 notice to Plaintiff.

20 **D. Possible “Strike”**

21 Because the Third Amended Complaint has been dismissed for failure to state a
22 claim, if Plaintiff fails to file a fourth amended complaint correcting the deficiencies
23 identified in the August 2, 2017 Order, the dismissal may count as a “strike” under the
24 “3-strikes” provision of 28 U.S.C. § 1915(g). Under the 3-strikes provision, a prisoner
25 may not bring a civil action or appeal a civil judgment in forma pauperis under 28 U.S.C.
26 § 1915 “if the prisoner has, on 3 or more prior occasions, while incarcerated or detained
27 in any facility, brought an action or appeal in a court of the United States that was
28 dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon

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1 which relief may be granted, unless the prisoner is under imminent danger of serious
2 physical injury." 28 U.S.C. § 1915(g).

3 **E. Possible Dismissal**

4 If Plaintiff fails to timely comply with every provision of this Order, including
5 these warnings, the Court may dismiss this action without further notice. *See Ferdik*, 963
6 F.2d at 1260-61 (a district court may dismiss an action for failure to comply with any
7 order of the Court).

8 **IT IS ORDERED:**

9 (1) The Clerk of Court must send Plaintiff a copy of the Court's August 2,
10 2017 Order (Doc. 113) and the August 28, 2017 Order (Doc. 117).

11 (2) The Court grants Plaintiff **30 days** from the filing date of this Order to file a
12 fourth amended complaint in compliance with the Court's August 2, 2017 Order (Doc.
13 113).

14 (3) The Clerk of Court must mail Plaintiff a court-approved form for filing a
15 civil rights complaint by a prisoner.

16 (4) If Plaintiff fails to file a fourth amended complaint within the extension
17 granted herein, the Clerk of Court must, without further notice, enter a judgment of
18 dismissal of this action with prejudice that states that the dismissal may count as a
19 "strike" under 28 U.S.C. § 1915(g).

20 (5) Plaintiff's Notice (Doc. 119) and his Declaration (Doc. 120) are **denied** to
21 the extent that any relief is sought therein.

22 (6) Plaintiff's Motion (Doc. 121) is **granted** to the extent that the Clerk of
23 Court must send a copy of the docket for this case to Plaintiff and is otherwise **denied**.

24 Dated this 16th day of October, 2017.

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Honorable David C. Bury
United States District Judge

**Additional material
from this filing is
available in the
Clerk's Office.**