

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

MAR 22 2018

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

ANTONIO LEE MIXON,

Plaintiff-Appellant,

v.

STATE OF NEVADA; et al.,

Defendants-Appellees.

No. 17-17496

D.C. No. 2:16-cv-02014-RFB-GWF
District of Nevada, Las Vegas

ORDER

Before: LEAVY, M. SMITH, and CHRISTEN, Circuit Judges.

The district court certified that this appeal is not taken in good faith and revoked appellant's in forma pauperis status. *See* 28 U.S.C. § 1915(a). On January 2, 2018, the court ordered appellant to explain in writing why this appeal should not be dismissed as frivolous. *See* 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious).

Upon a review of the record, the response to the court's January 2, 2018 order, and the opening brief received on January 11, 2018, we conclude this appeal is frivolous. We therefore confirm that appellant is not entitled to proceed in forma pauperis in this appeal, and we dismiss the appeal pursuant to 28 U.S.C. § 1915(e)(2).

DISMISSED.

Appendix A

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

SEP 19 2018

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

ANTONIO LEE MIXON,

Plaintiff-Appellant,

v.

STATE OF NEVADA; et al.,

Defendants-Appellees.

No. 17-17496

D.C. No. 2:16-cv-02014-RFB-GWF
District of Nevada, Las Vegas

ORDER

Before: LEAVY, M. SMITH, and CHRISTEN, Circuit Judges.

We treat Mixon's petition for rehearing (Docket Entry No. 8) as a motion for reconsideration and motion for reconsideration en banc. Mixon's motion for reconsideration is denied, and Mixon's motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

Appendix D

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ANTONIO LEE MIXON,
Plaintiff,

v.

STATE OF NEVADA et al.,
Defendants.

Case No. 2:16-cv-02014-RFB-GWF
SCREENING ORDER

Plaintiff, who is a prisoner in the custody of the Nevada Department of Corrections ("NDOC"), has submitted a civil rights complaint pursuant to 42 U.S.C. § 1983 and has filed an application to proceed *in forma pauperis*, a motion for appointment of counsel, and a motion for an evidentiary hearing. (ECF No. 1-1, 10, 11, 12). The Court now screens Plaintiff's civil rights complaint pursuant to 28 U.S.C. § 1915A.

I. IN FORMA PAUPERIS APPLICATION

Before the Court is Plaintiff's application to proceed *in forma pauperis*. (ECF No. 10). Based on the information regarding Plaintiff's financial status, the Court finds that Plaintiff is not able to pay an initial installment payment toward the full filing fee pursuant to 28 U.S.C. § 1915. Plaintiff will, however, be required to make monthly payments toward the full \$350.00 filing fee when he has funds available.

II. SCREENING STANDARD

Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a

Appendix B

1 governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any
2 cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim
3 upon which relief may be granted or seek monetary relief from a defendant who is immune
4 from such relief. See 28 U.S.C. § 1915A(b)(1),(2). *Pro se* pleadings, however, must be
5 liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).
6 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:
7 (1) the violation of a right secured by the Constitution or laws of the United States, and
8 (2) that the alleged violation was committed by a person acting under color of state law.
9 See *West v. Atkins*, 487 U.S. 42, 48 (1988).

10 In addition to the screening requirements under § 1915A, pursuant to the Prison
11 Litigation Reform Act (PLRA), a federal court must dismiss a prisoner's claim, if "the
12 allegation of poverty is untrue," or if the action "is frivolous or malicious, fails to state a
13 claim on which relief may be granted, or seeks monetary relief against a defendant who
14 is immune from such relief." 28 U.S.C. § 1915(e)(2). Dismissal of a complaint for failure
15 to state a claim upon which relief can be granted is provided for in Federal Rule of Civil
16 Procedure 12(b)(6), and the court applies the same standard under § 1915 when
17 reviewing the adequacy of a complaint or an amended complaint. When a court
18 dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend the
19 complaint with directions as to curing its deficiencies, unless it is clear from the face of
20 the complaint that the deficiencies could not be cured by amendment. See *Cato v. United*
21 *States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

22 Review under Rule 12(b)(6) is essentially a ruling on a question of law. See
23 *Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure
24 to state a claim is proper only if it is clear that the plaintiff cannot prove any set of facts in
25 support of the claim that would entitle him or her to relief. See *Morley v. Walker*, 175 F.3d
26 756, 759 (9th Cir. 1999). In making this determination, the court takes as true all
27 allegations of material fact stated in the complaint, and the court construes them in the
28 light most favorable to the plaintiff. See *Warshaw v. Xoma Corp.*, 74 F.3d 955, 957 (9th

1 Cir. 1996). Allegations of a *pro se* complainant are held to less stringent standards than
2 formal pleadings drafted by lawyers. See *Hughes v. Rowe*, 449 U.S. 5, 9 (1980). While
3 the standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff
4 must provide more than mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*,
5 550 U.S. 544, 555 (2007). A formulaic recitation of the elements of a cause of action is
6 insufficient. *Id.*

7 Additionally, a reviewing court should “begin by identifying pleadings [allegations]
8 that, because they are no more than mere conclusions, are not entitled to the assumption
9 of truth.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). “While legal conclusions can
10 provide the framework of a complaint, they must be supported with factual allegations.”
11 *Id.* “When there are well-pleaded factual allegations, a court should assume their veracity
12 and then determine whether they plausibly give rise to an entitlement to relief.” *Id.*
13 “Determining whether a complaint states a plausible claim for relief . . . [is] a context-
14 specific task that requires the reviewing court to draw on its judicial experience and
15 common sense.” *Id.*

16 Finally, all or part of a complaint filed by a prisoner may therefore be dismissed
17 *sua sponte* if the prisoner’s claims lack an arguable basis either in law or in fact. This
18 includes claims based on legal conclusions that are untenable (e.g., claims against
19 defendants who are immune from suit or claims of infringement of a legal interest which
20 clearly does not exist), as well as claims based on fanciful factual allegations (e.g.,
21 fantastic or delusional scenarios). See *Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989);
22 see also *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

23 III. SCREENING OF COMPLAINT

24 In the complaint, Plaintiff sues multiple defendants for events that took place while
25 Plaintiff was incarcerated at High Desert State Prison (“HDSP”). (ECF No. 1-1 at 1).
26 Plaintiff sues Defendants State of Nevada, Nevada Department of Corrections (“NDOC”),
27 and Warden D.W. Neven. (*Id.* at 2). Plaintiff alleges one count and seeks \$7,000,000 in
28 monetary damages. (*Id.* at 4, 7).

1 The complaint alleges the following: Neven and his delegates took trade secrets,
 2 trade names, trademarks, logos, ideas, and lyrics from albums that Plaintiff sent home to
 3 **be copyrighted.** (*Id.* at 3). HDSP correctional officers grabbed two of Plaintiff's
 4 envelopes marked "don't open" from Plaintiff's door. (*Id.*) Prison officials mailed one
 5 envelope to Plaintiff's home but returned the other envelope to Plaintiff opened. (*Id.*)
 6 Prison officials never gave the opened envelope to the postmaster. (*Id.*) Prison officials
 7 had picked up the second envelope from Plaintiff's door and returned it to Plaintiff a day
 8 or two later. (*Id.* at 4). Plaintiff alleges violations of the right to privacy, the right to
 9 copyright protection infringement, and the right to protection against plagiarism. (*Id.*)

10 The Court finds that Plaintiff fails to allege any colorable claim based on the right
 11 to privacy, copyright protection infringement, or plagiarism. With respect to Plaintiff's
 12 privacy claim, the First Amendment permits prison officials to visually inspect outgoing
 13 mail to determine whether it contains contraband material which threatens prison security
 14 or material threatening the safety of the recipient. *Witherow v. Paff*, 52 F.3d 264, 266 (9th
 15 Cir. 1995). As such, prison officials did not violate Plaintiff's rights by opening Plaintiff's
 16 outgoing mail despite Plaintiff's written admonishment of "don't open." Additionally, there
 17 are no allegations in the complaint that support a copyright infringement or plagiarism
 18 claim, as the Plaintiff has not alleged the ownership of a copyrighted work or the copying
 19 of original elements of that work. See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S.
 20 340, 361 (1991). Accordingly, the Court dismisses the entire complaint, with prejudice, as
 21 an amendment would be futile, for failure to state a claim. The Court also denies Plaintiff's
 22 motion for evidentiary hearing. (ECF No. 12).

23 **IV. MOTION FOR APPOINTMENT OF COUNSEL**

24 Plaintiff has filed a motion for appointment of counsel. (ECF No. 11). A litigant
 25 does not have a constitutional right to appointed counsel in 42 U.S.C. § 1983 civil rights
 26 claims. *Storseth v. Spellman*, 654 F.2d 1349, 1353 (9th Cir. 1981). Pursuant to 28 U.S.C.
 27 § 1915(e)(1), "[t]he court may request an attorney to represent any person unable to
 28 afford counsel." However, the court will appoint counsel for indigent civil litigants only in

1 IT IS FURTHER ORDERED that the Complaint is dismissed in its entirety, with
2 prejudice, as amendment would be futile, for failure to state a claim.

3 IT IS FURTHER ORDERED that the motion for appointment of counsel (ECF No.
4 11) is denied.

5 IT IS FURTHER ORDERED that the motion for evidentiary hearing (ECF No. 12)
6 is denied.

7 IT IS FURTHER ORDERED that this Court certifies that any *in forma pauperis*
8 appeal from this order would **not** be taken "in good faith" pursuant to 28 U.S.C. §
9 1915(a)(3).

10 IT IS FURTHER ORDERED that the Clerk of the Court shall enter judgment
11 accordingly.

12
13 DATED this 30th day of September, 2017.

14
15 

16 RICHARD F. BOULWARE, II
17 UNITED STATES DISTRICT JUDGE
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ANTONIO LEE MIXON,

Plaintiff,

v.

STATE OF NEVADA et al.,

Defendants.

Case No. 2:16-cv-02014-RFB-GWF

ORDER

I. DISCUSSION

On September 30, 2017, this Court entered a screening order which dismissed the complaint in its entirety, with prejudice, as amendment would be futile, for failure to state a claim. (ECF No. 14 at 6). The Court also certified that any *in forma pauperis* appeal would not be taken in good faith. (*Id.*) In the screening order, the Court found that Plaintiff failed to allege any colorable claim based on the right to privacy, copyright protection infringement, or plagiarism against prison officials for reviewing Plaintiff's outgoing mail which stated, "don't open." (*Id.* at 4). Plaintiff now files two motions for reconsideration. (ECF No. 17, 18).

A motion to reconsider must set forth "some valid reason why the court should reconsider its prior decision" and set "forth facts or law of a strongly convincing nature to persuade the court to reverse its prior decision." *Frasure v. United States*, 256 F.Supp.2d 1180, 1183 (D. Nev. 2003). Reconsideration is appropriate if this Court "(1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was

Appendix C

1 manifestly unjust, or (3) if there is an intervening change in controlling law." *Sch. Dist.*
2 *No. 1J v. Acands, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). "A motion for reconsideration
3 is not an avenue to re-litigate the same issues and arguments upon which the court
4 already has ruled." *Brown v. Kinross Gold, U.S.A.*, 378 F.Supp.2d 1280, 1288 (D. Nev.
5 2005).

6 The Court has reviewed Plaintiff's motions. Both motions reiterate arguments
7 made in Plaintiff's complaint. (See generally ECF No. 17, 18). Additionally, nothing in
8 the motions lead this Court to find that it committed clear error in its initial decision. As
9 such, the Court denies the motions for reconsideration.

10 **II. CONCLUSION**

11 For the foregoing reasons, it is ordered that the motions for reconsideration (ECF
12 No. 17, 18) are denied.

13
14 DATED THIS 12th day of December 2017.

15
16 
17 _____
18 RICHARD F. BOULWARE, II
19 UNITED STATES DISTRICT JUDGE
20
21
22
23
24
25
26
27
28