

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JUN 13 2019

FOR THE NINTH CIRCUIT

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

DANILO MALLARI,

Plaintiff-Appellant,

v.

TRACY VESSIGAULT; et al.,

Defendants-Appellees.

No. 18-16486

D.C. No. 4:13-cv-04038-CW

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Submitted June 11, 2019**

Before: CANBY, GRABER, and MURGUIA, Circuit Judges.

Danilo Mallari appeals pro se from the district court's summary judgment in his 42 U.S.C. § 1983 action stemming from the revocation of a license to operate a home health agency. We have jurisdiction under 28 U.S.C. § 1291. We review de

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

novo summary judgment and questions of standing. *Carroll v. Nakatani*, 342 F.3d 934, 940 (9th Cir. 2003). We affirm.

The district court properly granted summary judgment on Mallari's First Amendment, equal protection, and due process claims on the basis that Mallari lacked standing to bring those claims because Mallari failed to raise a genuine dispute of material fact as to whether he was injured directly and independently of Medhealth Nursing, LLC. *See Shell Petroleum, N.V. v. Graves*, 709 F.2d 593, 595 (9th Cir. 1982) (to demonstrate standing, a business owner must show that he was "injured directly and independently of the corporation"); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-562 (1992) (the three elements of standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof").

The district court did not abuse its discretion in granting Mallari's attorney's motion to withdraw. *See LaGrand v. Stewart*, 133 F.3d 1253, 1269 (9th Cir. 1998) (setting forth standard of review); *see also Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009) ("Generally, a person has no right to counsel in civil actions.").

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.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DANILO MALLARI,
Plaintiff,

v.

TRACY VESSIGAULT, et al.,
Defendants.

Case No. 13-cv-04038-CW

ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

(Dkt. No. 73)

Defendants Tracy Vessigault, Diana Marana, Doris Jordan, and Collene Traynor move for summary judgment on Plaintiff Danilo Mallari's claims under 42 U.S.C. § 1983. Mallari opposes the motion. The Court issued an initial order on the summary judgment motion and requested supplemental briefing on these issues. Having considered the papers, the Court GRANTS the motion for summary judgment.

FACTUAL BACKGROUND

The Court does not repeat the extensive factual background provided in the Court's prior order on the motion for summary judgment, see Docket No. 81, which is incorporated by reference. The Court instead provides a brief summary of the events occurring after the Court's prior summary judgment order.

On December 4, 2017, Defendants brought a motion for summary judgment on Mallari's remaining § 1983 claim. On March 6, 2018, the Court issued an order noting that it was not clear whether Mallari demonstrated he has standing to pursue his claims and ordered supplemental briefing on the issue. Docket No. 81. Shortly thereafter, the Court also issued an order to show cause

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1 why Mallari's attorney should not be sanctioned because Mallari
2 had been filing documents in his own name, despite the fact that
3 his attorney had not moved to withdraw. Docket No. 84. On March
4 19, 2018, Defendants filed a supplemental brief. Docket No. 85.
5 On April 6, 2018, Mallari filed a supplemental brief, again in
6 his own name, which indicated that he had not received
7 Defendants' supplemental brief. Docket No. 91. The Court
8 ordered Defendants to serve Mallari personally going forward and
9 allowed the parties to file additional supplemental briefing.
10 Docket No. 93. The parties accordingly filed a second round of
11 supplemental briefs. Docket Nos. 98, 99. Around this time,
12 Mallari's attorney filed a motion to withdraw, which the Court
13 granted. See Docket Nos. 96, 99, 101, 103. The Court gave
14 Mallari an opportunity to find another lawyer in this case,
15 stating:

16 Mallari shall have twenty-one days to seek another
17 attorney to represent him in this case. If he is able
18 to do so, then Mallari's new attorney shall file a
19 notice of appearance and the Court will set a new
20 briefing schedule on the pending motion for summary
judgment. If no notice of appearance is filed within
pending summary judgment motion based on the papers
that have already been filed.

21 Docket No. 103 at 1-2. The twenty-one day period has elapsed and
22 neither Mallari, nor any attorney purporting to appear on behalf
23 of Mallari, has filed any document with the Court. Accordingly,
24 the Court proceeds to rule on the motion for summary judgment
25 based on the papers that have already been filed.

26 LEGAL STANDARD

27 Summary judgment is appropriate only where the moving party
28 demonstrates there is no genuine dispute as to any material fact

such that judgment as a matter of law is warranted. Fed. R. Civ. P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Material facts are those that might affect the outcome of the case, as defined by the framework of the underlying substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute is genuine if the evidence is such that a reasonable jury could return a verdict for either party. Id.

The moving party bears the initial burden of informing the district court of the basis for its motion and identifying those portions of the pleadings, discovery, and affidavits that demonstrate the absence of a disputed issue of material fact. Celotex, 477 U.S. at 323. In opposing the motion, the non-moving party may not rely merely on the allegations or denials in its pleadings, but must set forth "specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 248 (citing Fed. R. Civ. P. 56(e)). The court must construe the evidence in the light most favorable to the non-moving party, making all reasonable inferences that can be drawn. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991); Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1289 (9th Cir. 1987).

DISCUSSION

Defendants contend that Mallari lacks standing to bring his § 1983 claim because the alleged harm was suffered by Medhealth, not Mallari.¹ It was Mallari's company, Medhealth, which had its

¹ Medhealth is no longer a party to this action. See Docket Nos. 74, 82.

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1 license to operate a home health agency (HHA) revoked, and not
2 Mallari personally. As the Court recognized in its prior order,
3 however, Mallari can show that he has standing if he can
4 demonstrate that Defendants' conduct violated his personal
5 constitutional rights. RK Ventures, Inc. v. City of Seattle, 307
6 F.3d 1045, 1057 (9th Cir. 2002) ("A shareholder does have
7 standing, however, when he or she has been 'injured directly and
8 independently from the corporation.'"); Soranno's Gasco, Inc. v.
9 Morgan, 874 F.2d 1310, 1318 (9th Cir. 1989) (holding that
10 plaintiff had standing because he suffered "a direct and
11 independent personal wrong."). The Court noted that, construed
12 in the light most favorable to Mallari, his complaint suggested
13 that Defendants discriminated against him based on the basis of
14 "race, national origin, or alienage," which would constitute a
15 Fourteenth Amendment violation, or in retaliation after he got
16 into heated arguments with Defendants' staff, which could
17 constitute a First Amendment violation. Docket No. 81 at 8. As
18 previously noted, "if Mallari can prove that the above
19 allegations are true, then Mallari may have suffered a 'direct
20 and independent personal wrong,' giving him standing to pursue
21 his claims. Id. Thus, the Court directed the parties to address
22 these issues in their supplemental briefs. Id. at 8-9.

23 I. First Amendment Freedom of Speech

24 As noted, a potential basis for standing is a violation of
25 Mallari's First Amendment rights. "The First Amendment forbids
26 government officials from retaliating against individuals for
27 speaking out." Blair v. Bethel Sch. Dist., 608 F.3d 540, 543
28 (9th Cir. 2010). To recover for such a violation, a plaintiff

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1 must prove: [✓](1) he engaged in constitutionally protected
2 activity; (2) as a result, he was subjected to adverse action by
3 the defendant that would chill a person of ordinary firmness from
4 continuing to engage in the protected activity; and (3) there was
5 a substantial causal relationship between the constitutionally
6 protected activity and the adverse action." Id.

7 Defendants argue that Mallari has not provided any facts,
8 supporting the allegations of his complaint about the details of
9 his heated arguments with Defendants. Mallari has, however,
10 provided an affidavit with some details of his interactions with
11 Marana, Jordan, and Traynor. Docket No. 91 (Declaration of
12 Danilo Mallari in Support of First Supplemental Brief (Mallari
13 Supp. Decl.)).

14 Defendants also contend that Mallari cannot prove that his
15 arguments with Defendants substantially caused the revocation of
16 Medhealth's license. [✓]Mallari maintains that Defendants
17 retaliated against him because he argued with Defendants' staff
18 and told them that "there was an evident dereliction of duties on
19 their part," among other things. In his affidavit, Mallari
20 describes his arguments with Defendants' staff, but states that
21 the argument was "pacified only when [his wife] Carmelita
22 intervened and agreed to pay a renewal fee of US \$4,996.00 and US
23 \$25.00 change of location fee demanded by the defendants for the
24 issuance of a home health license after a renewal survey was
25 conducted." Id. ¶ 5. Mallari goes on to say that Traynor
26 conducted a renewal survey and Mallari submitted additional
27 documents in support of his application for an HHA license. Id.
28 ¶ 6. Mallari then states that, on August 7, 2012, he received a

1 letter revoking his HHA license. Id. ¶ 7. On August 28, 2012,
 2 he and his wife received a call from Marana ordering them to
 3 submit a statement of deficiencies and plan of correction. Id. ¶
 4 8. Mallari alleges that he submitted these documents on
 5 September 4, 2012, but has not heard anything from Defendants
 6 since then. Id. Defendants dispute this, stating that
 7 Medhealth's license was revoked for failure to meet the statutory
 8 and regulatory requirements for an HHA, but do not respond to
 9 Mallari's allegation that he submitted documents on September 4,
 10 2012.

11 Even construing the evidence in the light most favorable to
 12 Mallari, Mallari has not shown that there was a substantial
 13 causal relationship between his constitutionally protected speech
 14 and the eventual revocation of Medhealth's license. According to
 15 Mallari, the argument between him and Marana, Jordan, and Taylor
 16 was "pacified" after his wife paid the requisite fees. Mallari
 17 agrees that Defendants then continued to process Medhealth's
 18 application. Mallari argues that Defendants later solicited
 19 additional documents from him, but then did not continue to
 20 process his application. At best, this suggests that Defendants
 21 were negligent in processing Medhealth's application, but does
 22 not support a claim that Defendants retaliated against Mallari
 23 because of constitutionally protected speech.

24 II. Fourteenth Amendment Notice and Hearing

25 A second potential basis for standing is a violation of the
 26 Fourteenth Amendment based on race, national origin, or alienage.
 27 Defendants point out that Mallari has not provided any evidence
 28 that they discriminated against Mallari on this basis. The Court

1 agrees. The bare assertion that Defendants may have
2 discriminated against Mallari because he is from the Philippines
3 is insufficient at this stage. See Navarro v. Block, 72 F.3d
4 712, 716 (9th Cir. 1995) ("a long line of Supreme Court cases
5 make clear that the Equal Protection Clause requires proof of
6 discriminatory intent or motive" (emphasis original)).


7 ✓ Because Mallari does not submit any evidence establishing
8 that he has standing to pursue his claims, summary judgment is
9 warranted.

10 CONCLUSION

11 Defendants' motion for summary judgment (Docket No. 73) is
12 GRANTED. The Clerk shall enter judgment in favor of Defendants.
13 The parties shall bear their own costs.

14 IT IS SO ORDERED.

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16 Dated: July 24, 2018

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CLAUDIA WILKEN
United States District Judge

United States District Court
Northern District of California

UNITED STATES COURT OF APPEALS

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No. 18-16486

D.C. No. 4:13-cv-04038-CW
Northern District of California,
Oakland

ORDER

Before: CANBY, GRABER, and MURGUIA, Circuit Judges.

Mallari's petition for panel rehearing (Docket Entry No. 21) is denied.

No further filings will be entertained in this closed case.

Appendix "C"

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