

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

OCT 25 2019

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

JOSHUA NEIL HARRELL,

Plaintiff-Appellant,

v.

FAIRFIELD POLICE DEPARTMENT; et
al.,

Defendants-Appellees.

No. 19-16527

D.C. No.

2:15-cv-00693-MCE-AC

Eastern District of California,
Sacramento

ORDER

Before: SILVERMAN, W. FLETCHER, and RAWLINSON, Circuit Judges.

Appellant's "motion for reconsideration/enlargement of time to file notice of appeal" (Docket Entry No. 4) is construed in part as a response to this court's August 8, 2019 order to show cause. To the extent that the motion requests reconsideration of the August 8, 2019 order to show cause, the motion is denied (Docket Entry No. 4).

A review of the record and appellant's response to the August 8, 2019 order to show cause demonstrates that this court lacks jurisdiction over this appeal because the notice of appeal, served on July 29, 2019 and filed on August 1, 2019, was not filed or delivered to prison officials within 30 days after the district court's judgment entered on June 12, 2019. *See* 28 U.S.C. § 2107(a); *United States v. Sadler*, 480 F.3d 932, 937 (9th Cir. 2007) (requirement of timely notice of appeal

is jurisdictional); *see also Bowles v. Russell*, 551 U.S. 205 (2007) (court lacks authority to create equitable exceptions to jurisdictional requirement of timely notice of appeal).

The court declines to transfer appellant's "motion for reconsideration/enlargement of time to file notice of appeal" to the district court for consideration as a Federal Rule of Appellate Procedure 4(a)(5) motion because such a motion would be untimely. *See* Fed. R. App. P. 4(a)(5)(A)(i) (motion must be filed within 30 days after time to appeal expires). Consequently, this appeal is dismissed for lack of jurisdiction.

Appellant's motion to take judicial notice (Docket Entry No. 3) is denied as unnecessary.

DISMISSED.

UNITED STATES COURT OF APPEALS

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AUG 8 2019

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

JOSHUA NEIL HARRELL,

No. 19-16527

Plaintiff-Appellant,

D.C. No.

2:15-cv-00693-MCE-AC

v.

Eastern District of California,
Sacramento

FAIRFIELD POLICE DEPARTMENT; et

ORDER

Defendants-Appellees.

The district court's judgment was entered on the docket on June 12, 2019. Appellant's notice of appeal was delivered to prison officials on July 29, 2019, and received by the district court on August 1, 2019. Accordingly, the record suggests that this court may lack jurisdiction over this appeal because the notice of appeal was not filed or delivered to prison officials within 30 days after entry of the district court's judgment. *See* 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A), 4(c); *United States v. Sadler*, 480 F.3d 932, 937 (9th Cir. 2007) (requirement of timely notice of appeal is jurisdictional); *Houston v. Lack*, 487 U.S. 266, 270 (1988) (notice of appeal deemed filed when it was delivered to prison authorities for forwarding to the court).

Within 21 days after the date of this order, appellant shall move for voluntary dismissal of the appeal, or show cause why it should not be dismissed for lack of jurisdiction.

If appellant does not comply with this order, the Clerk shall dismiss this appeal pursuant to Ninth Circuit Rule 42-1.

Briefing is suspended pending further order of the court.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Joseph Williams
Deputy Clerk
Ninth Circuit Rule 27-7

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

JUDGMENT IN A CIVIL CASE

JOSHUA NEIL HARRELL,

CASE NO: 2:15-CV-00693-MCE-AC

v.

FAIRFIELD POLICE DEPT., ET AL.,

XX -- Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

**THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE
COURT'S ORDER FILED ON 6/12/2019**

Marianne Matherly
Clerk of Court

ENTERED: June 12, 2019

by: /s/ H. Kaminski
Deputy Clerk

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8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
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11 JOSHUA NEIL HARRELL,

12 Plaintiff,

13 v.

14 FAIRFIELD POLICE DEPT., et al.,

15 Defendants.
16

No. 2:15-cv-0693 MCE AC (PS)

ORDER

17 Plaintiff is proceeding in this action in pro per and in forma pauperis. The matter was
18 referred to a United States Magistrate Judge pursuant to Local Rule 302(c)(21).

19 On December 14, 2018, the Magistrate Judge filed Findings and Recommendations
20 ("F&Rs") herein which were served on Plaintiff and which contained notice to that any objections
21 to the F&Rs were to be filed within twenty-one days. ECF No. 32. Plaintiff has filed objections
22 to the F&Rs. ECF No. 35.

23 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this
24 Court has conducted a de novo review of this case. Having carefully reviewed the entire file, the
25 Court finds the F&Rs to be supported by the record and by proper analysis.

26 Accordingly, IT IS HEREBY ORDERED that:

- 27 1. The F&Rs filed December 14, 2018 (ECF No. 32), are ADOPTED in full;
28 2. Plaintiff's Second Amended Complaint (ECF No. 30) is DISMISSED with prejudice

1 because it fails to state a claim upon which relief can be granted and because further amendment
2 would be futile; and

3 3. The Clerk of the Court is directed to close this case.

4 IT IS SO ORDERED.

5 Dated: June 11, 2019

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7 MORRISON C. ENGLAND, JR.
8 UNITED STATES DISTRICT JUDGE
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8 UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
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11 JOSHUA NEIL HARRELL,
12 Plaintiff,

13 v.

14 FAIRFIELD POLICE DEPT., et al.,
15 Defendants.
16

No. 2:15-cv-00693 MCE AC PS

FINDINGS and RECOMMENDATIONS

17 Plaintiff is proceeding in this action pro se and in forma pauperis. Although plaintiff is
18 presently incarcerated, this action does not challenge his conditions of confinement. This
19 proceeding was accordingly referred to this court by E.D. Cal. R. ("Local Rule") 302(c)(21). The
20 Second Amended Complaint, ECF No. 21, is now before the court for screening.

21 I. SCREENING STANDARD

22 The federal IFP statute requires federal courts to dismiss a case if the action is legally
23 "frivolous or malicious," fails to state a claim upon which relief may be granted, or seeks
24 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2).
25 Plaintiff must assist the court in determining whether or not the complaint is frivolous, by drafting
26 the complaint so that it complies with the Federal Rules of Civil Procedure ("Fed. R. Civ. P.").
27 Under the Federal Rules of Civil Procedure, the complaint must contain (1) a "short and plain
28 statement" of the basis for federal jurisdiction (that is, the reason the case is filed in this court,

1 rather than in a state court), (2) a short and plain statement showing that plaintiff is entitled to
2 relief (that is, who harmed the plaintiff, and in what way), and (3) a demand for the relief sought.
3 Fed. R. Civ. P. ("Rule") 8(a). Plaintiff's claims must be set forth simply, concisely and directly.
4 Rule 8(d)(1).

5 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.
6 Neitzke v. Williams, 490 U.S. 319, 325 (1989). In reviewing a complaint under this standard, the
7 court will (1) accept as true all of the factual allegations contained in the complaint, unless they
8 are clearly baseless or fanciful, (2) construe those allegations in the light most favorable to the
9 plaintiff, and (3) resolve all doubts in the plaintiff's favor. See Neitzke, 490 U.S. at 327; Von
10 Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 960 (9th Cir. 2010), cert.
11 denied, 564 U.S. 1037 (2011).

12 The court applies the same rules of construction in determining whether the complaint
13 states a claim on which relief can be granted. Erickson v. Pardus, 551 U.S. 89, 94 (2007) (court
14 must accept the allegations as true); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) (court must
15 construe the complaint in the light most favorable to the plaintiff). Pro se pleadings are held to a
16 less stringent standard than those drafted by lawyers. Haines v. Kerner, 404 U.S. 519, 520
17 (1972). However, the court need not accept as true conclusory allegations, unreasonable
18 inferences, or unwarranted deductions of fact. Western Mining Council v. Watt, 643 F.2d 618,
19 624 (9th Cir. 1981). A formulaic recitation of the elements of a cause of action does not suffice
20 to state a claim. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-57 (2007); Ashcroft v. Iqbal,
21 556 U.S. 662, 678 (2009).

22 To state a claim on which relief may be granted, the plaintiff must allege enough facts "to
23 state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570. "A claim has
24 facial plausibility when the plaintiff pleads factual content that allows the court to draw the
25 reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at
26 678.

27 A pro se litigant is entitled to notice of the deficiencies in the complaint and an
28 opportunity to amend, unless the complaint's deficiencies could not be cured by amendment. See

1 Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1987).

2 II. SECOND AMENDED COMPLAINT

3 Plaintiff brings this action under 42 U.S.C. § 1983. The Second Amended Complaint
4 ("SAC"), ECF No. 30, names J. Bondoc as a defendant. In the SAC, plaintiff alleges that
5 Bondoc, an officer from the Fairfield Police Department, unreasonably seized plaintiff's trailer
6 from a public street without providing "any prior notice." ECF No. 30 at 3. In its two prior
7 screening orders, the undersigned informed plaintiff that his allegations regarding the seizure
8 failed to state a claim against Bondoc, in light of Ninth Circuit precedent that "due process does
9 not require that a pre-towing notice be given to the owner of a vehicle which has been
10 unregistered for more than one year from the date on which it is found parked on a public street
11 before the car can be towed under California Vehicle Code § 22651(o)." Scofield v.
12 Hillsborough, 862 F.2d 759, 764 (9th Cir. 1988); see also ECF No. 19 at 5; ECF No. 27 at 4. For
13 the third time, plaintiff presents facts that are insufficient as a matter of law to state a cognizable
14 claim against defendant Bondoc. The SAC provides less detail than the prior complaints, simply
15 asserting that plaintiff's vehicle was unlawfully towed. ECF No. 30 at 4. Plaintiff does not
16 provide facts that support this characterization, and the conclusory allegation of unlawful towing
17 is insufficient to state a claim upon which relief can be granted. Accordingly, plaintiff has failed
18 to state a claim against defendant J. Bondoc.

19 Plaintiff also makes claims against defendant GM Towing LLC and GM Towing and
20 Automotive, Inc., on grounds that he was unable to retrieve his vehicle after he paid to update its
21 registration at the DMV and paid for its release at the Fairfield police department. ECF No. 30 at
22 4. Plaintiff previously alleged in the first amended complaint that he was unable to retrieve the
23 vehicle because "there was an extremely excessive bill that exceeded \$3,2000.00," and he briefly
24 touches on this point again in his SAC. ECF No. 21 at 8; ECF No. 30 at 5. As with the prior
25 complaints, the SAC does not allege facts which would, if true, establish that these companies
26 acted under color of state law. Accordingly, plaintiff fails to state a claim against GM Towing
27 LLC or GM Towing and Automotive, Inc. upon which relief can be granted under § 1983.

28 For the first time, plaintiff has added the City of Fairfield as a defendant. ECF No. 30 at

1 1. However, the City apparently is only involved insofar as it is the employer of defendant J.
2 Bondoc. Id. at 3. Plaintiff argues that the City, as employer of Bondoc, sanctioned Bondoc's
3 conduct and is responsible for it. Id. As discussed above, plaintiff has failed to state a claim
4 against Bondoc; plaintiff therefore also fails to state a claim against the City on the basis of
5 Bondoc's conduct. Moreover, there is no respondeat superior liability under § 1983, and the City
6 cannot be held liable for the actions of its employee. See Monell v. Department of Soc. Servs.,
7 436 U.S. 658, 691 (1978).

8 Plaintiff's SAC is similar to his original complaint (ECF No. 1) and his First Amended
9 Complaint (ECF No. 21), both of which were dismissed with leave to amend because they did not
10 state a claim or satisfy the pleading standards required in federal court. ECF Nos. 19, 27.
11 Plaintiff's SAC does not cure the deficiencies found in his first two attempts, and in fact provides
12 less information. Because previous opportunities to amend have not resulted in the presentation
13 of a viable claim against any defendant, the undersigned concludes that further leave to amend
14 would be futile. See Noll, 809 F.2d at 1448.

15 III. PRO SE PLAINTIFF'S SUMMARY

16 Your Second Amended Complaint does not state a claim for relief. The constitutional
17 guarantee of due process is not violated by the towing of a vehicle without advance notice, so
18 your claim against Officer Bondoc fails. The City cannot be liable under 42 U.S.C. § 1983 for
19 Officer Bondoc's actions in any case. The towing company is not a proper defendant under §
20 1983. For all these reasons, your complaint must be dismissed. Because you have already been
21 given two opportunities to amend the complaint, the magistrate judge is recommending that the
22 district judge dismiss your lawsuit altogether. You have 21 days, as discussed below, to object to
23 these recommendations.

24 IV. CONCLUSION

25 Accordingly, the undersigned recommends that plaintiff's Second Amended Complaint
26 (ECF No. 30) be DISMISSED with prejudice because it fails to state a claim upon which relief
27 can be granted and because further amendment would be futile.

28 These findings and recommendations are submitted to the United States District Judge

1 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days
2 after being served with these findings and recommendations, plaintiff may file written objections
3 with the court and serve a copy on all parties. Id.; see also Local Rule 304(b). Such a document
4 should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Failure
5 to file objections within the specified time may waive the right to appeal the District Court's
6 order. Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153,
7 1156-57 (9th Cir. 1991).

8 DATED: December 13, 2018

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10 ALLISON CLAIRE
11 UNITED STATES MAGISTRATE JUDGE
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