

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUN 29 2021

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

AUDREY L. KIMNER,

No. 21-15487

Plaintiff-Appellant,

D.C. No. 5:20-cv-07563-EJD

v.

BERKELEY COUNTY, SC,

MEMORANDUM*

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of California
Edward J. Davila, District Judge, Presiding

Submitted June 21, 2021**

Before: SILVERMAN, WATFORD, and BENNETT, Circuit Judges.

Audrey L. Kimner appeals pro se from the district court's judgment dismissing her action alleging federal and state law claims arising from South Carolina state court proceedings. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal for lack of personal jurisdiction. *CollegeSource*,

* 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). Kimner's request for a hearing, set forth in her filing at Docket Entry No. 9, is denied.

Inc. v. AcademyOne, Inc., 653 F.3d 1066, 1073 (9th Cir. 2011). We affirm.

The district court properly dismissed Kimner's action because Kimner failed to allege facts sufficient to make a *prima facie* showing that the district court had personal jurisdiction over defendant Berkeley County. *See id.* at 1074, 1076-77 (discussing requirements for general and specific personal jurisdiction); *see also* *Walden v. Fiore*, 571 U.S. 277, 291 (2014) ("[I]t is the defendant, not the plaintiff or third parties, who must create contacts with the forum State.").

The district court did not abuse its discretion by denying Kimner's motion for recusal because Kimner failed to demonstrate extrajudicial bias or prejudice. *See United States v. Johnson*, 610 F.3d 1138, 1147 (9th Cir. 2010) (setting forth standard of review and objective test to determine whether recusal is required).

We reject as unsupported by the record Kimner's contentions that the district court was biased against her, engaged in unlawful or unethical behavior, or erred by failing to hold a hearing.

All pending motions and requests are denied.

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

AUDREY L. KIMNER,
Plaintiffs,

4

BERKELEY COUNTY SOUTH
CAROLINA,

Defendants.

Case No. 5:20-cv-07563-EJD

JUDGMENT

Re: Dkt. No. 19

On March 4, 2021, the Court granted Defendant Berkeley County's motion to dismiss. Pursuant to Federal Rule of Civil Procedure 58, the Court hereby ENTERS judgment in favor of Berkeley County, South Carolina and against Audrey L. Kimner. The Clerk of Court shall close the file in this matter.

IT IS SO ORDERED.

Dated: March 4, 2021


EDWARD J. DAVILA
United States District Judge

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8 AUDREY L. KIMNER,
9 Plaintiff,

10 v.

11 BERKELEY COUNTY SOUTH
12 CAROLINA,
13 Defendant.

Case No. 5:20-cv-07563-EJD

**ORDER GRANTING MOTION TO
DISMISS**

Re: Dkt. No. 19

14 Before the Court is Defendant Berkeley County, South Carolina's ("Berkeley County")
15 motion to dismiss a complaint brought by pro se Plaintiff Audrey Kimner ("Kimner") for failure to
16 state a claim under Rule 12(b)(6), lack of personal jurisdiction under Rule 12(b)(2), and improper
17 venue under Rule 12(b)(3). Def.'s Mot. to Dismiss, Dkt. No. 19 ("Motion"). The Court took the
18 matter under submission for decision without oral argument pursuant to Civil Local Rule 7-1(b).
19 For the reasons below, the Court **GRANTS** Berkeley County's Motion.

20 **I. Background**

21 Defendant Berkeley County is located in South Carolina and is a political subdivision of
22 the state of South Carolina. Compl. at 2, Dkt. No. 1; Motion at 3. Ms. Kimner is a citizen of
23 California residing in Carmel, California. Compl. at 1. Ms. Kimner has filed suit in this Court
24 demanding \$5,000,000 in damages from Berkeley County due to allegations that Berkeley County
25 was responsible for improperly possessing Ms. Kimner's real property and funds in South
26 Carolina and for improperly jailing Ms. Kimner. *Id.* at 4–5. Ms. Kimner's allegations against
27 Berkeley County stem from various orders issued by Berkeley County Family Court in a divorce

28 Case No.: 5:20-cv-07563-EJD
ORDER GRANTING MOTION TO DISMISS

1 proceeding. Compl. at 4–5, 15, 17–20, 27–31, 56, 59–61; Motion at 5; *see also Kimner v. Kimner*,
2 2008-DR-08-02160.

3 **II. Discussion**

4 **A. Failure to State a Claim under Rule 12(b)(6)**

5 In deciding a motion to dismiss under Rule 12(b)(6), courts must accept as true all “well-
6 pleaded factual allegations” in a complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Further,
7 courts must draw all reasonable inferences in the light most favorable to the non-moving
8 party. *See Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010). However, “courts
9 ‘are not bound to accept as true a legal conclusion couched as a factual allegation.’” *Bell Atl.*
10 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Papasan v. Allain*, 478 U.S. 265, 286
11 (1986)). The complaint must contain “sufficient factual matter, accepted as true, to ‘state a claim
12 to relief that is plausible on its face.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).
13 “A claim has facial plausibility when the pleaded factual content allows the court to draw the
14 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (citing *Twombly*,
15 550 U.S. at 556). Although a complaint “does not need detailed factual allegations,” the “[f]actual
16 allegations must be enough to raise a right to relief above the speculative level.” *Twombly*, 550
17 U.S. at 555. As such, a complaint must (1) “contain sufficient allegations of underlying facts to
18 give fair notice and to enable the opposing party to defend itself effectively[,]” and (2) “plausibly
19 suggest an entitlement to relief, such that it is not unfair to require the opposing party to be
20 subjected to the expense of discovery and continued litigation.” *Starr v. Baca*, 652 F.3d 1202,
21 1216 (9th Cir. 2011).

22 In her pleadings, Ms. Kimner describes a series of alleged harms she has suffered,
23 including the “illegal possession of [her] home” and “jailing [her] illegally.” Compl. at 4. Attached
24 to her complaint, Ms. Kimner provided voluminous documentation and previous court records
25 from South Carolina state court proceedings. Insofar as Ms. Kimner is seeking to appeal a South
26 Carolina state court decision that caused her to lose her home and other assets, such claims cannot
27

28 Case No.: 5:20-cv-07563-EJD
ORDER GRANTING MOTION TO DISMISS

1 be heard by this Court as federal courts cannot hear appeals from state court judgments. See
2 *Cooper v. Ramos*, 704 F.3d 772, 777 (9th Cir. 2012). While recognizing that “[p]ro se pleadings
3 must be liberally construed,” *Williams v. California Dep’t of Mental Health*, 2008 WL 590503, at
4 *1 (N.D. Cal. Feb. 29, 2008) (quoting *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th
5 Cir.1990)), other than her apparent dissatisfaction with the South Carolina proceedings, Ms.
6 Kimner does not provide any further factual background from which the Court can deduce a
7 specific claim or cause of action. Thus, even liberally construing Ms. Kimner’s pleadings, the
8 Court does not find a plausible claim or cause of action in the set of facts alleged by Ms. Kimner.
9 This alone warrants dismissal.

10 **B. Lack of Personal Jurisdiction under Rule 12(b)(2)**

11 Rule 12(b)(2) permits a party to raise lack of personal jurisdiction as a defense by
12 motion. See Fed. R. Civ. P. (12)(b)(2). “Although the defendant is the moving party on
13 a motion to dismiss [for lack of personal jurisdiction], the plaintiff bears the burden of establishing
14 that jurisdiction exists.” *Rio Props., Inc. v. Rio Int’l Interlink*, 284 F.3d 1007, 1019 (9th Cir.
15 2002). “[I]n the absence of an evidentiary hearing, the plaintiff need only make ‘a prima facie
16 showing of jurisdictional facts to withstand the motion to dismiss.’” *Brayton Purcell LLP v.*
17 *Recordon & Recordon*, 606 F.3d 1124, 1127 (9th Cir. 2010) (quoting *Pebble Beach Co. v. Caddy*,
18 453 F.3d 1151, 1154 (9th Cir. 2006)). Generally, a court may consider the pleadings in addition to
19 any declarations submitted by the parties when deciding a motion to dismiss for lack of personal
20 jurisdiction. See *Data Disc. Inc. v. Systems Tech. Assocs., Inc.*, 557 F.2d 1280, 1285 (9th Cir.
21 1977). The “uncontroverted allegations in [the plaintiff’s] complaint must be taken as true, and
22 conflicts between the facts contained in the parties’ affidavits must be resolved in [the plaintiff’s]
23 favor.” *Rio Props.*, 284 F.3d at 1019. In other words, “for the purpose of this [prima facie]
24 demonstration, the court resolves all disputed facts in favor of the plaintiff.” *Pebble Beach*, 453
25 F.3d at 1154.

26 When determining the presence “of personal jurisdiction over a nonresident defendant,
27

28 Case No.: 5:20-cv-07563-EJD
ORDER GRANTING MOTION TO DISMISS

1 [courts] ordinarily examine whether such jurisdiction satisfies the ‘requirements of the applicable
2 state long-arm statute’ and ‘comport[s] with federal due process.’” *Bauman v. DaimlerChrysler*
3 *Corp.*, 644 F.3d 909, 919 (9th Cir. 2011) (quoting *Chan v. Soc ‘y Expeditions, Inc.*, 39 F.3d 1398,
4 1404-05 (9th Cir. 1994)). “Because California permits the exercise of personal jurisdiction to the
5 full extent permitted by due process, [courts] need only determine whether jurisdiction over [a
6 defendant] comports with due process.” *Id.* (internal quotations omitted); *see* Cal. Civ. Proc. Code
7 § 410.10 (“A court of this state may exercise jurisdiction on any basis not inconsistent with the
8 Constitution of this state or of the United States.”). Thus, “[f]or due process to be satisfied, a
9 defendant, if not present in the forum, must have ‘minimum contacts’ with the forum state such
10 that the assertion of jurisdiction ‘does not offend traditional notions of fair play and substantial
11 justice.’” *Pebble Beach*, 453 F.3d at 1155 (quoting *Int’l Shoe Co. v. State of Wash., Office of*
12 *Unemp’t Comp. & Placement*, 326 U.S. 310, 316 (1945)).

13 The Ninth Circuit has established three requirements for a district court to exercise specific
14 personal jurisdiction over a nonresident defendant: “(1) the defendant must either ‘purposefully
15 direct his activities’ toward the forum or ‘purposefully avail[] himself of the privileges of
16 conducting activities in the forum;’ (2) the claim must be one which arises out of or relates to the
17 defendant’s forum-related activities; and (3) the exercise of jurisdiction must comport with fair
18 play and substantial justice, i.e. it must be reasonable.” *Axiom Foods, Inc. v. Acerchem Int’l, Inc.*,
19 874 F.3d 1064, 1068 (9th Cir. 2017) (quoting *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1111
20 (9th Cir. 2002)). “The plaintiff bears the burden of satisfying the first two prongs of the
21 test.” *Id.* “If the plaintiff succeeds in satisfying both of the first two prongs, the burden then shifts
22 to the defendant to ‘present a compelling case’ that the exercise of jurisdiction would not be
23 reasonable.” *Id.* (quoting *Burger King*, 471 U.S. at 477).

24 Here, because both parties agree that Berkeley County is not domiciled in the Northern
25 District of California, Ms. Kimmer must establish specific personal jurisdiction. Motion at 3;
26 Opposition at 2; Dkt. No. 24. Berkeley County asserts that it “has no contacts with the Northern

27 Case No.: 5:20-cv-07563-EJD
28 ORDER GRANTING MOTION TO DISMISS

1 District of California.” Motion, p. 3. Ms. Kimner does not dispute Berkeley County’s assertion,
2 nor does she plead any facts demonstrating any such contacts by Berkeley County. As such, in the
3 absence of any minimum contacts by Berkeley County with California, personal jurisdiction over
4 Berkeley County by this Court cannot be exercised. This also warrants dismissal.

5 **C. Improper Venue under Rule 12(b)(3)**

6 Under Rule 12(b)(3), a defendant may move to dismiss a suit for improper venue. Fed. R.
7 Civ. P. 12(b)(3). Under the federal statute governing venue in civil actions, “[a] civil action may
8 be brought in: (1) a judicial district in which any defendant resides, if all defendants are residents
9 of the State in which the district is located; (2) a judicial district in which a substantial part of the
10 events or omissions giving rise to the claim occurred, or a substantial part of property that is the
11 subject of the action is situated; or (3) if there is no district in which an action may otherwise be
12 brought as provided in this section, any judicial district in which any defendant is subject to the
13 court’s personal jurisdiction with respect to such action.” 28 U.S.C. § 1331.

14 Here, Plaintiff has not alleged any facts establishing that this Court is the proper venue for
15 this action. First, as previously mentioned, Berkeley County resides in South Carolina, not in the
16 Northern District of California. *See* Compl. at 2. Second, from the facts in the record, it appears
17 that most, if not all, of the “events or omissions giving rise to” Ms. Kimner’s claim occurred
18 exclusively in South Carolina. 28 U.S.C. § 1331. Finally, as discussed above, Berkeley County is
19 not subject to personal jurisdiction in this judicial district. As such, venue with this Court is
20 improper.

21 **III. Conclusion**

22 For the reasons stated above, the Court GRANTS Berkeley County’s motion to dismiss.
23 Ms. Kimner has previously amended her complaint, received notice from this Court to cure many
24 of the same deficiencies that remain present here, and therefore the Court finds that further
25 amendment would be futile. The Court DISMISSES Ms. Kimner’s case against Berkeley County
26 WITH PREJUDICE.

27 Case No.: 5:20-cv-07563-EJD
28 ORDER GRANTING MOTION TO DISMISS

1 Also pending before the Court are Ms. Kimner's Motion for Default Judgment (Dkt. No.
2 24) and Motion for Clarification (Dkt. No. 27). Because the Court has found it appropriate to
3 dismiss Ms. Kimner's claims with prejudice, these pending motions are hereby TERMINATED
4 AS MOOT, and all other dates and deadlines are hereby VACATED.

5 **IT IS SO ORDERED.**

6 Dated: March 4, 2021



7
8 EDWARD J. DAVILA
9 United States District Judge

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Case No.: 5:20-cv-07563-EJD
ORDER GRANTING MOTION TO DISMISS

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