

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

NOV 16 2020

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALSGREGORY MOORE, individually, and on
behalf of J.M.,

Plaintiff-Appellant,

v.

COUNTY OF ORANGE; et al.,

Defendants-Appellees.

No. 18-55042

D.C. No. 8:13-cv-01346-JLS-AN

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Josephine L. Staton, District Judge, Presiding

Submitted November 9, 2020**

Before: THOMAS, Chief Judge, TASHIMA and W. FLETCHER, Circuit Judges.

Gregory Moore appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action arising from the placement of his child J.M. into foster care. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal on the basis of res judicata. *Mpoyo v. Litton Electro-Optical Sys.*, 430

* 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).*

F.3d 985, 987 (9th Cir. 2005). We affirm.

The district court properly dismissed Moore's action as barred by the doctrine of res judicata because Moore has previously litigated the same claim in a California state court proceeding against the same parties or their privies. *See Manufactured Home Cmtys. Inc. v. City of San Jose*, 420 F.3d 1022, 1031 (9th Cir. 2005) ("To determine the preclusive effect of a state court judgment federal courts look to state law. . . . California's res judicata doctrine is based on a primary rights theory." (citation omitted)); *In re Estate of Dito*, 130 Cal. Rptr. 3d 279, 286 (Ct. App. 2011) ("Under the doctrine of res judicata, all claims based on the same cause of action must be decided in a single suit; if not brought initially, they may not be raised at a later date." (citation and internal quotation marks omitted)).

Contrary to Moore's contention that res judicata does not apply because defendants obtained their state court judgment through extrinsic fraud, Moore failed to allege plausibly how he was prevented from presenting his claims in state court. *See Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1140 (9th Cir. 2004) (setting forth what constitutes extrinsic fraud).

The district court did not abuse its discretion in denying Moore leave to amend his complaint because any amendment would have been futile. *See Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011) (setting forth standard of review and stating that leave to amend may be denied

where amendment would be futile).

The district court did not abuse its discretion by denying Moore's post-judgment motion for reconsideration because Moore failed to demonstrate any basis for relief from the judgment. *See Sch. Dist. No. 1J, Multnomah Cty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1262-63 (9th Cir. 1993) (setting forth standard of review and grounds for relief under Federal Rule of Civil Procedure 60).

We reject as without merit Moore's contentions that the district court erred in denying Moore a continuance for oral argument regarding defendants' motion to dismiss and in lifting the stay on the district court's proceedings.

All pending motions are denied.

AFFIRMED.

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Central District of California,
Santa Ana

ORDER

Before: THOMAS, Chief Judge, TASHIMA and W. FLETCHER, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Moore's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 66) are denied.

No further filings will be entertained in this closed case.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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D.C. No. 8:13-cv-01346-JLS-AN
U.S. District Court for Central
California, Santa Ana

MANDATE

The judgment of this Court, entered November 16, 2020, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Jessica Flores
Deputy Clerk
Ninth Circuit Rule 27-7

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SACV 13-1346-JLS (ANx)

Date: October 13, 2017

Title: J.M. et al. v. County of Orange et al.

Present: **Honorable JOSEPHINE L. STATON, UNITED STATES DISTRICT JUDGE**

Terry Guerrero

Deputy Clerk

N/A

Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF: ATTORNEYS PRESENT FOR DEFENDANT:

Not Present

Not Present

**PROCEEDINGS: (IN CHAMBERS) ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS (Doc. 28)**

Before the Court is a motion to dismiss filed by Defendants County of Orange, Orange County Social Services Agency, Stacey Metcalf, Lauri Luchonok, Carole Butzke, and Dang Vu (“Defendants”). (Mot., Doc. 28.)¹ Plaintiffs J.M. and Gregory Moore (“Plaintiffs”) opposed the motion,² and Defendants replied. (Opp., Doc. 31; Reply, Doc. 33.) Having held a hearing³ and considered the papers, the Court GRANTS the Motion.

¹ According to Defendants, County of Orange was erroneously sued as Orange County Social Services Agency.

² Plaintiffs’ opposition brief was untimely filed without explanation or good cause. While this failure to follow the local rules is sufficient to constitute consent to the granting of the motion, the Court exercises its discretion to decide the motion on its merits.

³ Plaintiffs’ counsel did not appear at the hearing, nor had he provided a stipulation or request for a continuance prior to the hearing. The Court took the matter under submission and indicated that it would make its ruling based on the papers.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SACV 13-1346-JLS (ANx)

Date: October 13, 2017

Title: J.M. et al. v. County of Orange et al.

I. Background

A. Present Action

In this action, Plaintiffs assert a single claim for violation of civil rights under 42 U.S.C. § 1983. (Compl., Doc. 1.) Specifically, Plaintiffs allege that on or about January 10, 2010, Plaintiff J.M.’s mother took J.M. to a hospital and claimed that Plaintiff Moore, J.M.’s father, had abused J.M. (*Id.* ¶ 12.) A doctor at the hospital contacted Orange County Social Services Agency (“Social Services”), which took the child into custody and initiated dependency proceedings. (*Id.* ¶ 14.) Moore requested J.M. be kept in his custody. (*Id.* ¶ 17.) Social Services objected to the request, and on May 5, 2010, the trial court maintained J.M. in foster care. (*Id.*) Moore successfully appealed the ruling, and on August 30, 2011, Moore was awarded sole custody of J.M. (*Id.*) Moore alleges that his and his son’s constitutional rights were violated because J.M. was placed in foster custody for eighteen months. (*Id.*)

On January 8, 2014, the Court abstained from hearing this action and stayed the matter pending resolution of the state action discussed below. (*See* Stay Order, Doc. 18.) Following receipt of the parties’ supplemental joint status report informing the Court that the state court action had concluded in favor of Defendants, the Court issued an Order to Show Cause why this case should not be dismissed. (Status Report, Doc. 24; Order to Show Cause, Doc. 25.) The Court noted the “substantial similarity between the instant action and the recently concluded state court action.” (Order to Show Cause, Doc. 25.) Following an opposition filed by Plaintiffs to the Order to Show Cause, the Court discharged the Order, lifted the stay, and directed Defendants to either file a renewed motion to dismiss or otherwise respond to the complaint. (Opp., Doc. 26; Order Lifting Stay, Doc. 27.) This briefing followed.

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B. State Action

On May 20, 2011, Plaintiffs filed an action in state court (“State Action”) against Defendants and against Karen Cianfari, Law Offices of Harold La Flamme, and Teena Honstetter, for (1) “*Monell* Related Claims” that allege a violation of Plaintiffs’ Fourteenth Amendment rights, (2) violation of Plaintiffs’ civil rights under the California Constitution, and (3) intentional infliction of emotional distress. (Def. Second RJN Ex. A (“State Action Docket”), Doc. 16); *Gregory Moore v. County of Orange*, Orange County Superior Court No. 30-201100476941, Docket No. 1 (“State Action Complaint”).⁴ The “*Monell* Related Claim” does not mention section 1983 and is brought against County of Orange and Social Services only.

On July 3, 2013, following motions to compel, motions to strike, a motion for summary judgment, dismissal of some parties, and several continuances of the trial date, Plaintiffs filed a motion for leave to amend their complaint. (State Action Docket No. 194.) Plaintiffs requested leave to add a claim under section 1983 for violation of the Fourteenth Amendment and include individual defendants Stacey Metcalf, Lauri Luchonok, Carol Butzke and Dang Vu in the claim, on the basis that their “*Monell* Related Claim[]” against County of Orange and Social Services for violation of the Fourteenth Amendment was insufficient. (*See id.*)⁵ The defendants in the State Action opposed the motion on procedural grounds, arguing that Plaintiffs failed to show good cause as to why the complaint should be amended so far into the proceedings, and that the amendment would prejudice the individual defendants in the State Action. (*See State*

⁴ The Court takes judicial notice of the State Action docket and the cited filings from the State Action. Some of the additional parties not named in this action have since been dismissed from the State Action.

⁵ The operative pleading does not formally allege a cause of action under 42 U.S.C. § 1983. (RJN Ex. B, Doc. 29-1 at 32.) However, Plaintiffs have asserted in pleadings before this Court that the “*Monell* Related Claim[]” in the State Action is actually brought under 42 U.S.C. § 1983. (Opp to Mot. to Dismiss, Doc. 14 at 3.)

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Action Docket No. 197 at 6.) On July 29, 2013, the state court denied the motion after hearing oral argument. (*See* State Action Docket No. 199.)

On August 30, 2013, Plaintiffs lodged their Complaint in this action. (Doc. 1-1.) The Complaint contains only one cause of action, for violation of Plaintiffs' Fourteenth Amendment rights pursuant to 28 U.S.C. § 1983. The claim is made against County of Orange, Social Services, and the individual defendants that were included in Plaintiffs' motion for leave to amend in the State Action. The allegations in the Complaint are identical or nearly identical to many of those in State Action Complaint. (*Compare* Complaint ¶¶ 12-24 *with* State Action Complaint ¶¶ 26-37, 41-42.)⁶

Following a jury trial, the jury found in favor of Defendants and against Plaintiffs. (*See* RJN Ex. C, Doc. 29-1 at 38.) Plaintiffs appealed to the California Court of Appeal, which affirmed the trial court judgment. (*Id.* Ex E, Doc. 29-1 at 51.) The Appeals Court noted that at trial, "[t]he jury found that the social workers had not acted outrageously, . . . the county had no official custom of allowing its social workers to provide either perjured evidence to the juvenile court or of failing to provide exculpatory evidence, . . . [and] the county had an adequate training program to prevent such abuses." (*Id.* at 53.) Plaintiffs' petition for review by the Supreme Court of California was denied. (*Id.* at 68.) Plaintiffs assert that they have filed a writ of certiorari with the United States Supreme Court. (Opp. at 25.)

⁶ The Section 1983 claim in the Complaint contains additional allegations with respect to the individual Defendants that are not present in the State Court Action Complaint. The State Court Action alleges that the County Defendants had a policy, procedure, custom, or practice that led to the deprivation of Plaintiffs' constitutional rights and that they acted with deliberate indifference in failing to train their agents. State civil rights claims were brought against the individual Defendants based on the same set of facts that form the basis of Plaintiffs' federal claims. The Complaint alleges that the County Defendants are vicariously liable for the allegedly unlawful actions taken by the individual Defendants.

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II. Legal Standard

In deciding a motion to dismiss under Rule 12(b)(6), courts must accept as true all “well-pleaded factual allegations” in a complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Furthermore, courts must draw all reasonable inferences in the light most favorable to the non-moving party. See *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010). However, “courts ‘are not bound to accept as true a legal conclusion couched as a factual allegation.’” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

III. Discussion

Defendants move to dismiss the Complaint on several grounds. (Mot. 7-16.) For the following reasons, the Court finds that res judicata bars this action and therefore does not reach Defendants’ other asserted grounds for dismissal.⁷

“A federal court is required under 28 U.S.C. § 1738 to look to the preclusion law of the state court that rendered the earlier judgment or judgments to determine whether subsequent federal litigation is precluded.” *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1143 (9th Cir. 2004). Under California law, “[r]es judicata or claim preclusion precludes the relitigation of a cause of action that previously was adjudicated in another proceeding between the same parties or parties in privity with them.” *Fed’n of Hillside and Canyon Assocs. v. City of L.A.*, 126 Cal. App. 4th 1180, 1202 (2004). “Res judicata applies if (1) the decision in the prior proceeding is final and on the merits; (2) the present proceeding is on the same cause of action as the prior proceeding; and (3) the parties in the present proceeding or parties in privity with them were parties to the prior

⁷ Although Plaintiffs’ Complaint does not plead an injury based on the state court judgment, their Opposition papers allude to such injuries (see, e.g., Opp. at 6-10). The Court notes that such alleged injuries, even if set forth in the Complaint, would not be cognizable under the *Rooker-Feldman* doctrine.

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proceeding.” *Id.* “Res judicata bars the litigation not only of issues that were actually litigated but also issues that could have been litigated.” *Id.*

First, the decision in the state proceeding is final and on the merits. California law states “that the finality required to invoke the preclusive bar of res judicata is not achieved until an appeal from the trial court judgment has been exhausted.” *Merritt v. City of Sunnyvale*, 2016 WL 8716247 at (N.D Cal. Sept. 16, 2016) (quoting *Franklin & Franklin v. 7-Eleven Owners for Fair Franchising*, 85 Cal. App. 4th 1168, 1174 (2000)). Plaintiffs have exhausted their state appeals, and their claims were decided following a multi-week jury trial. (RJN Ex C, Doc. 29-1 at 53.) Therefore, the first element of res judicata is met.

Second, the present proceeding involves the same cause of action as the state proceeding. Under California law, “[t]wo proceedings are on the same cause of action if they are based on the same ‘primary right.’” *Fed’n of Hillside and Canyon Assocs.*, 126 Cal. App. 4th at 1202 (citation omitted). “The plaintiff’s primary right is the right to be free from a particular injury, regardless of the legal theory on which liability for the injury is based.” *Id.* (citation omitted). “The scope of the primary right therefore depends on how the injury is defined. A cause of action comprises the plaintiff’s primary right, the defendant’s corresponding primary duty, and the defendant’s wrongful act in breach of that duty.” *Id.* “An injury is defined in part by reference to the set of facts, or transaction, from which the injury arose.” *Id.* at 1203. “The most salient characteristic of a primary right is that it is indivisible: the violation of but a single primary right gives rise to a single cause of action.” *Crowley v. Katleman*, 8 Cal. 4th 666, 681 (1994) (quoting *Slater v. Blackwood*, 15 Cal. 3d 791, 795 (1975)). Thus, even if the “plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery” in a subsequent action, “the same primary right is [still] at stake” as long as the “two actions involve the same injury to the plaintiff and the same wrong by the defendant.” *San Diego Police Officers Ass’n v. San Diego City Employees Retirement Sys.*, 568 F.3d 725, 734 (9th Cir. 2009) (quoting *Eichman v. Fotomat Corp.*, 147 Cal. App. 3d 1170, 1174 (1983)).

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As the Court has noted, the claims in Plaintiffs’ federal complaint are identical or nearly identical to those brought and adjudicated in state court. In both complaints, Plaintiffs assert violations of their Fourteenth Amendment rights to privacy and familial association. (Complaint ¶¶ 21, 29-30; State Action Complaint ¶¶ 36, 43.) Further, the two complaints recite identical or nearly identical versions of the facts. Plaintiffs plead their injuries as follows:

- Defendants “took every action to deprive GREGORY of the care, custody, and control of JM” (Compl. ¶ 16; State Action Compl. ¶ 30);
- Defendants “violate[d] the civil rights of the Plaintiffs . . . by, but not limited to removing, detaining, and continuing to detain, Plaintiff J.M. from the care, custody and control of their father, Plaintiff GREGORY, without proper or just cause and/or authority . . . maliciously falsifying evidence, manipulating evidence, and presented fabricated evidence to the court, and maliciously refusing to provide exculpatory evidence during the pendency of the dependency proceedings,” (Compl. ¶ 28); the individual Defendants engaged in conduct including “unlawfully removing, detaining, and continuing to detain JM from his father’s home; maliciously failing to provide exculpatory evidence; maliciously failing to properly monitor JM while he resided in foster care; and falsely and maliciously alleged and reporting GREGORY’s failure to abide by the terms and conditions of court orders and service plans” (State Action Compl. ¶ 55);
- Defendants caused Plaintiffs to “suffer . . . physical, mental, and emotional injury” (Compl. ¶ 30); “Plaintiffs suffer extreme emotional and physical distress.” (State Action Compl. ¶ 59)

Thus, “the same primary right is at stake” in both actions, and they involve the same injury to the plaintiff—his son being removed from his custody—and the same wrongs by the defendant. *See San Diego Police Officers Ass’n*, 568 F.3d at 734.

Plaintiffs argue that the state trial court’s denial of leave to file an amended complaint means that claims in the Complaint were not fully litigated, as their section

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1983 claims against individual Defendants were not included in the state proceeding. (Opp. at 6.) However, the Supreme Court has expressly rejected an attempt to distinguish claim and issue preclusion for section 1983 suits, and has held that the general rule that claims are also precluded when they “could have been litigated in [a] state-court proceeding” but were not. *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 83 (1984). Moreover, California courts have barred section 1983 claims brought in federal court based on litigation of non-section 1983 claims in state court, so long as the same primary right is involved. *See, e.g., Takahashi v. Board of Trustees of Livingston Union School Dist.*, 783 F.2d 848, 851 (9th Cir.); *City of Los Angeles v. Superior Court*, 85 Cal. App. 3d 143, 155 (1978). The Court’s inquiry for this prong of the test, therefore, is not whether the section 1983 claims against the Defendants were fully litigated, but whether the same primary right was at stake. Having concluded that the same primary right was at issue in both proceedings, the Court finds that the second prong of the res judicata test is met.

Finally, it is undisputed that the parties in the present proceeding were parties to the prior state court proceeding. Although section 1983 claims were not brought against the individual Defendants, the underlying allegations pleaded as section 1983 claims in this complaint were included in the state action as proof of violations of California civil rights law and of intentional infliction of emotional distress. (State Action Compl. ¶¶ 45-60.) The same primary right was implicated as to the injury caused by the individual Defendants, and those allegations were litigated on the merits. Thus, the Court concludes that the third requirement for res judicata is met as to all defendants.

Accordingly, Plaintiffs’ claims are barred by res judicata. The Court therefore finds that amendment would be futile as to these claims. *See Huggins v. Hynes*, 117 Fed. App’x 517, 518 (9th Cir. 2004) (finding that “[t]he district court properly denied . . . leave to amend because [the] proposed amendment was futile due to res judicata.” (citing *Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004))).

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IV. Conclusion

For the reasons stated above, the Court GRANTS Defendants' Motion to Dismiss, and, the complaint is DISMISSED WITH PREJUDICE.

Initials of preparer: tg