

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

JUN 14 2017

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

A. K. ANDERSON,

Plaintiff-Appellant,

v.

SYSTEMS TECHNOLOGY, INC. and
DOES, 1-10, inclusive,

Defendants-Appellees.

No. 16-56478

D.C. No.

5:15-cv-01806-VAP-SP

Central District of California,
Riverside

ORDER

Before: THOMAS, Chief Judge, CANBY and MURGUIA, Circuit Judges.

The district court has denied appellant leave to proceed on appeal in forma pauperis. On January 23, 2017 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 and response to the court's January 23, 2017 order, we conclude this appeal is frivolous. We therefore deny appellant's motion to proceed in forma pauperis (Docket Entry No. 2) and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2).

DISMISSED.

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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 A.K. ANDERSON,

12 Plaintiff,

13 v.

14 SYSTEMS TECHNOLOGY, INC.,
15 et al.,

16 Defendants.
17

) Case No. ED CV 15-1806-VAP (SP)

) **REPORT AND**
) **RECOMMENDATION OF UNITED**
) **STATES MAGISTRATE JUDGE**

18 This Report and Recommendation is submitted to the Honorable Virginia A.
19 Phillips, United States District Judge, pursuant to the provisions of 28 U.S.C.
20 § 636 and General Order 05-07 of the United States District Court for the Central
21 District of California.

22 **I.**

23 **INTRODUCTION**

24 On September 3, 2015, plaintiff A.K. Anderson, proceeding pro se, filed a
25 complaint against his former employer, System Technology, Inc., alleging civil
26 rights violations pursuant to 42 U.S.C. § 1981, conspiracy to violate civil rights
27 pursuant to 42 U.S.C. § 1985, and discrimination pursuant to 42 U.S.C. §§ 2000,
28 et seq. The allegations stem from a workplace incident that occurred on or about

1 August 10, 2006, during which plaintiff believes he was struck on the head due to
2 his race and whistle blower activities.

3 On September 24, 2015, defendant filed a motion to dismiss (“MTD”)
4 raising three arguments: (1) plaintiff’s claims are time-barred; (2) plaintiff’s
5 complaint is barred by the doctrine of res judicata; and (3) plaintiff fails to state a
6 cognizable claim. On October 21, 2015, plaintiff filed an opposition, and on
7 November 3, 2015, defendant filed a reply.

8 For the reasons discussed below, the court finds all the claims of the
9 complaint are time-barred and leave to amend would be futile, as no set of facts
10 could be pled to cure the deficiencies. It is therefore recommended that the
11 complaint be dismissed with prejudice.

12 II.

13 PRIOR PROCEEDINGS

14 On January 29, 2013, plaintiff filed an action in this court against the same
15 defendant seeking relief for the same violations alleged in the instant complaint.¹
16 *See A.K. Anderson v. Systems Technologies, Inc., et al.*, No. ED CV 13-178-VAP
17 (SPx). After finding all the claims in the 2013 complaint were time-barred, the
18 court denied plaintiff leave to amend. The court ultimately dismissed the 2013
19 action without prejudice for failure to prosecute.

20 III.

21 ALLEGATIONS OF THE COMPLAINT

22 On or about August 10, 2006, plaintiff, an African-American, was struck on
23 the head while inspecting machine production blueprints at work for defendant.

24
25 ¹ The court takes judicial notice of the documents filed in case number ED
26 CV 13-178-VAP (SPx) in this court. Fed. R. Evid. 201(c); *See U.S. ex rel.*
27 *Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th
28 Cir.1992) (“[W]e may take notice of proceedings in other courts, both within and
without the federal judicial system, if those proceedings have a direct relation to
the matters at issue.”) (internal quotation marks omitted).

1 Compl. ¶ 9. Plaintiff suffered a lapse of consciousness between about 8:00 a.m.
2 and 10:30 a.m. that morning. *Id.* Plaintiff was assaulted and retaliated against
3 based on his race and whistle blower activities. *Id.*

4 Two days later, plaintiff awoke at the Loma Linda Hospital in Loma Linda,
5 California. *Id.* ¶ 10. During his period of unconsciousness, the hospital placed
6 staple-insert pins in his head and erroneously diagnosed him as suffering from
7 seizures. *Id.* ¶¶ 10, 14. At the same time, defendant conspired to, and did,
8 withhold evidence from CAL-OSHA for insurance purposes. *Id.* ¶¶ 11, 16, 20, 35-
9 36. The withheld evidence allegedly included a video tape of the assault, which
10 was destroyed. *Id.* ¶ 20. Plaintiff's doctor cleared him to return to work on
11 August 1, 2006. *Id.* ¶ 12. Plaintiff was later terminated from defendant's
12 employment. *Id.* ¶ 15. Plaintiff cites the "lack of oversight" related to this
13 workplace incident and the hospital's misdiagnosis as the causes behind
14 defendant's termination of his employment. *Id.* ¶¶ 12, 14, 15.

15 On or about January 10, 2007, plaintiff filed a complaint with the California
16 Department of Fair Employment and Housing ("DFEH"). *Id.* ¶ 55. On January
17 28, 2008, the Equal Employment Opportunity Commission ("EEOC") dismissed
18 the charges and notified plaintiff of his right to pursue relief in federal or state
19 court within 90 days of the notice. *Id.*, Ex. A.

20 Plaintiff contends he delayed filing this complaint against defendant
21 because: (1) his competency was diminished by the 2006 assault; (2) the hospital
22 misdiagnosed him, prescribed the wrong medications, and poisoned him, which
23 impaired his ability to reason or seek counsel; (3) San Bernardino Police Officers
24 assaulted and falsely arrested him on May 20, 2008; (4) he was unable to receive
25 adequate worker's compensation for four years; (5) CAL-OSHA, the California
26 Medical Board, the California Department of Labor, and other state agencies
27 failed to investigate his workplace incident; (6) evidence related to his workplace
28 incident was withheld from the investigation by defendant; (7) Representative Joe

1 Baca, Representative Jerry Lewis, Representative Elijah Cummings, Senator
2 Dianne Feinstein, and Senator Barbara Boxer failed to assist him; (8) he was
3 unable to retain counsel; and (9) he was not informed until 2012 that the video
4 tape evidence of his workplace incident had been destroyed. *Id.* ¶¶ 13, 18-20.

5 **IV.**

6 **LEGAL STANDARDS**

7 Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a defendant
8 may move to dismiss a complaint for “failure to state a claim upon which relief
9 can be granted.” A Rule 12(b)(6) motion to dismiss “tests the legal sufficiency of
10 a claim.” *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). A motion to
11 dismiss may be based on the statute of limitations where “the running of the
12 statute is apparent on the face of the complaint.” *Jablon v. Dean Witter & Co.*,
13 614 F.2d 677, 682 (9th Cir. 1980) (citations omitted). Such a motion “can be
14 granted only if the assertions of the complaint, read with the required liberality,
15 would not permit the plaintiff to prove that the statute was tolled.” *Id.* (citation
16 omitted).

17 Generally, the court must give a pro se litigant leave to amend his complaint
18 “unless it determines that the pleading could not possibly be cured by the
19 allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en
20 banc) (quotation marks and citations omitted). Thus, before a pro se civil rights
21 complaint may be dismissed, the court must provide the plaintiff with a statement
22 of the complaint’s deficiencies. *Karim-Panahi v. L.A. Police Dep’t*, 839 F.2d 621,
23 623-24 (9th Cir. 1988). But where amendment of a pro se litigant’s complaint
24 would be futile, denial of leave to amend is appropriate. *See James v. Giles*, 221
25 F.3d 1074, 1077 (9th Cir. 2000).

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V.

DISCUSSION**A. Statutes of Limitations Bar Plaintiff's Claims**

“[A] complaint may properly be dismissed on motion for failure to state a claim when the allegations in the complaint affirmatively show that the complaint is barred by the applicable statute of limitations.” *Suckow Borax Mines Consol. v. Borax Consol.*, 185 F.2d 196, 204 (9th Cir. 1950). But “the Court notes that since the statute of limitations is an affirmative defense, the Defendants bear the burden of proving that the Plaintiff filed beyond the [applicable] limitations period.” *U.S. E.E.O.C. v. Glob. Horizons, Inc.*, 860 F. Supp. 2d 1172, 1193 (D. Haw. 2012).

“[A] complaint cannot be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim.” *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 969 (9th Cir. 2010) (internal quotation marks omitted) (quoting *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1206 (9th Cir. 1995)).

Each of plaintiff's claims is governed by a distinct statute of limitations, but the facts underlying all three claims arose out of the same workplace incident that occurred in August 2006. Because plaintiff filed this action nine years after he was allegedly hit on the head at work, all of his claims are time-barred.

1. Plaintiff's § 1981 Civil Rights Claim Expired in August 2010

Plaintiff alleges defendant violated his civil rights during the events surrounding his 2006 workplace injury. Compl. ¶¶ 7-17. Plaintiff brings this first claim under 42 U.S.C. § 1981. *Id.* ¶ 17. The statute of limitations on a § 1981 claim is four-years. *See* 28 U.S.C. § 1658(a); *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382-83, 124 S. Ct. 1836, 158 L. Ed. 2d 645 (2004). The alleged injurious conduct occurred in August 2006. Therefore the four-year statute of limitations expired in August 2010. Since the instant complaint was filed in

1 September 2015 – more than five years later – plaintiff’s § 1981 claim is
 2 time-barred, unless the limitation period is subject to adequate tolling.

3 **2. Plaintiff’s § 1985 Conspiracy Claim Expired in January 2010**
 4 **at the Latest**

5 Plaintiff’s second claim is brought under 42 U.S.C. § 1985(3). Compl. ¶ 35.
 6 Plaintiff alleges that, in committing or permitting his head injury and then
 7 concealing or destroying evidence, defendant conspired to violate plaintiff’s civil
 8 rights. *Id.* ¶¶ 24-36. “In considering claims brought under 42 U.S.C. . . . [§] 1985,
 9 the federal courts must look to the applicable state statute of limitations as in all
 10 cases in which congress has not provided a federal limitation period.” *Mathis v.*
 11 *Indem. Ins. Co. of N. Am.*, 588 F. Supp. 489, 490-91 (S.D. Miss. 1983) (citing
 12 *O’Sullivan v. Felix*, 233 U.S. 318, 34 S. Ct. 596, 58 L. Ed. 980 (1914), *Jackson v.*
 13 *Duke*, 259 F.2d 3 (5th Cir. 1958)). “California’s . . . statute of limitations for
 14 personal injury actions governs claims brought pursuant to 42 U.S.C. . . .
 15 [§] 1985.” *Taylor v. Regents of Univ. of California*, 993 F.2d 710, 711 (9th Cir.
 16 1993) (citations omitted); *see Johnson v. California*, 207 F.3d 650, 653 (9th Cir.
 17 2000) (applying California’s statute of limitations for personal injury to § 1985
 18 claim). In California, the applicable statute of limitations is two years for claims
 19 that accrued on or after January 1, 2003. Cal. Civ. Proc. Code § 335.1; *see*
 20 *Maldonado v. Harris*, 370 F.3d 945, 954-55 (9th Cir. 2004). Plaintiff’s § 1985
 21 conspiracy claim is thus subject to a two-year statute of limitations.

22 State “law determines the *length* of the limitations period, [but] federal law
 23 determines when a civil rights claim *accrues*.” *Lukovsky v. City & Cty. of San*
 24 *Francisco*, 535 F.3d 1044, 1048 (9th Cir. 2008) (citations omitted). In conspiracy
 25 cases, the “statute of limitations starts to run on the date of the last overt act
 26 alleged to have caused the complainant injury.” *Bergschneider v. Denver*, 446
 27 F.2d 569, 569 (9th Cir. 1971) (citations omitted). “Under this doctrine, ‘[i]njury
 28 and damage in a civil conspiracy action flow from the overt acts, not from “the

mere continuance of a conspiracy.”” *Gibson v. U.S.*, 781 F.2d 1334, 1340 (9th Cir. 1986) (citations omitted).

Defendant argues all the alleged overt acts occurred in 2006 during plaintiff’s workplace incident. MTD at 7. Plaintiff appears to allege overt acts occurred during the investigation of plaintiff’s DFEH complaint. *See* Compl. ¶¶ 16, 20, 29, 31, Ex. A. But even assuming defendant did further a conspiracy by withholding evidence, plaintiff’s DFEH complaint was dismissed on January 28, 2008. As plaintiff alleges no later overt act by defendant or any coconspirator, the limitations period would have expired in January 2010 at the latest, several years before plaintiff filed the instant complaint. Plaintiff’s § 1985 claim is thus time-barred, unless the limitation period is subject to tolling.

3. Plaintiff’s Title VII Discrimination Claim Expired in April 2008

Plaintiff’s third and final claim is brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000, et seq. Compl. ¶ 54. To file a claim pursuant to Title VII, a plaintiff must first file a charge of discrimination with the EEOC. *Nelmida v. Shelly Eurocars, Inc.*, 112 F.3d 380, 383 (9th Cir. 1997). If the EEOC dismisses the charge, a plaintiff has ninety days to file a civil claim. *Id.* This ninety-day period is a statute of limitations under Title VII. *Id.*

Plaintiff filed an EEOC complaint with the DFEH on January 10, 2007. Compl. ¶ 55. After the complaint was dismissed, on January 28, 2008 the EEOC issued plaintiff a Notice of Right to Sue. *Id.*, Ex. A. Plaintiff had ninety days from the delivery of that notice to file his civil claim. *See Nelmida*, 112 F.3d at 384. Plaintiff did not file this complaint until more than seven years later. Accordingly, Plaintiff’s Title VII claim is time-barred, unless the limitation period is subject to tolling.

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1 **4. There Is No Basis to Toll the Limitation Period for Plaintiff's**
 2 **Claims Sufficiently to Make Them Timely**

3 A motion to dismiss on statute of limitations grounds may be granted “only
 4 if the assertions of the complaint, read with the required liberality, would not
 5 permit the plaintiff to prove that the statute was tolled.” *Morales v. City of Los*
 6 *Angeles*, 214 F.3d 1151, 1153 (9th Cir. 2000) (citations and internal quotation
 7 marks omitted). The court accepts all factual allegations of the complaint as true
 8 and draws all reasonable inferences in favor of the non-moving party. *Livid*
 9 *Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005).
 10 Plaintiff contends he was delayed in filing for several reasons beyond his control,
 11 including: his loss of competency due to the workplace assault and ensuing
 12 misdiagnosis; the assault and false arrest perpetrated by the San Bernardino Police
 13 in May 2008; his inability to receive adequate worker’s compensation for four
 14 years; CAL-OSHA, the California Medical Board, the California Department of
 15 Labor, and other state agencies’ failure to investigate the matter; defendant’s
 16 withholding of evidence from the investigation and the delay until 2012 before he
 17 learned of the concealment or destruction of said evidence; and plaintiff’s inability
 18 to secure counsel or assistance to pursue this action. Compl. ¶¶ 13, 18-20; see
 19 Opp. at 1-2 (additionally listing periods of homelessness, injuries inflicted by
 20 others, and the assertion of false facts as reasons for his delayed filing).

21 “Under federal law, ‘the limitations period accrues when a party knows or
 22 has reason to know of the injury’ which is the basis of the cause of action.” *Kimes*
 23 *v. Stone*, 84 F.3d 1121, 1128 (9th Cir. 1996) (quoting *Golden Gate Hotel Ass’n v.*
 24 *San Francisco*, 18 F.3d 1482, 1486 (9th Cir.1994). In some circumstances accrual
 25 of a cause of action may be delayed until the plaintiff discovers the facts
 26 constituting the cause of action, or until a reasonable person should have known
 27 that the injury was caused by tortious wrongdoing. See *Yumul v. Smart Balance,*
 28 *Inc.*, 733 F. Supp. 2d 1134, 1143 (C.D. Cal. 2010); *Fox v. Ethicon Endo-Surgery,*

1 Inc., 35 Cal. 4th 797, 807 (2005). But the Ninth Circuit has made clear “the
2 ‘discovery rule,’ which postpones the beginning of the limitations period from the
3 date the plaintiff is actually injured to the date when he discovers (or reasonably
4 should discover) he has been injured . . . is already incorporated into federal
5 accrual law.” *Lukovsky*, 535 F.3d at 1089 (citations omitted). “[A] claim accrues
6 in a federal cause of action upon awareness of the actual injury, not upon
7 awareness that this injury constitutes a legal wrong.” *Id.* at 1049 (quoting
8 *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380 (3d Cir. 1994)).
9 Plaintiff had such notice, sufficient to initiate the running of the statute of
10 limitations on all of his claims, in August 2006 when the underlying injurious
11 conduct occurred.

12 As discussed above, arguably the statute of limitations on plaintiff’s § 1985
13 conspiracy claim did not accrue until January 2008, the latest date an overt act
14 may have occurred. Likewise, the ninety-day limitation period to file a Title VII
15 claim did not start running until January 28, 2008. But these triggering events are
16 separate from when plaintiff learned of his injury and the factual basis for his
17 claims. That occurred in August 2006. Plaintiff’s excuses for his delay in filing
18 all go to his knowledge of his claims and his ability to file.

19 Even if plaintiff’s excuses were sufficient to delay the accrual of his claims,
20 such a period of delay would have terminated with plaintiff’s filing of his DFEH
21 complaint on January 10, 2007. Upon initiating that filing, plaintiff had
22 sufficiently discovered the facts constituting his claims in the instant complaint.
23 However, “[i]t has long been settled in this and other jurisdictions that whenever
24 the exhaustion of administrative remedies is a prerequisite to the initiation of a
25 civil action, the running of the limitations period is tolled during the time
26 consumed by the administrative proceeding.” *Elkins v. Derby*, 12 Cal. 3d 410,
27 414, 525 P.2d 81, 84 (1974); see *Davison v. Columbia/HCA Healthcare Corp.*,
28 241 F.3d 1131, 1136-37 (9th Cir. 2001). Accordingly, the statute of limitations

1 did not begin to run in this case until January 28, 2008. By that date the DFEH
2 had closed its investigation, and the EEOC dismissed the claim and notified
3 plaintiff of his right to sue. Compl. ¶ 55, Ex. A. But even running the longest,
4 four-year limitation period from January 28, 2008, plaintiff's instant complaint
5 was filed well after the applicable statutes of limitations expired. Thus, all of the
6 claims are barred unless plaintiff is entitled to further equitable tolling.

7 "Equitable tolling is a judge-made doctrine [which] . . . suspend[s] or
8 extend[s] a statute of limitations as necessary to ensure fundamental practicality
9 and fairness." *Lantzy v. Centex Homes*, 31 Cal. 4th 363, 370 (2003); *see Daviton*,
10 241 F.3d 1131, 1136 (9th Cir. 2001) (discussing California's equitable tolling).
11 As noted above, plaintiff's complaint supports tolling the limitation periods
12 through completion of plaintiff's EEOC complaint investigation. Defendant
13 argues plaintiff is not entitled to any additional tolling of the applicable limitation
14 periods. *See St. Andre v. Henderson*, 2000 WL 1677967, at *2 (N.D. Cal. Nov. 6,
15 2000), *aff'd*, 35 F. App'x 445 (9th Cir. 2002) (citing plaintiff's ability to engage
16 the EEOC as a factor that "militates against equitable tolling"). Plaintiff argues he
17 is entitled to tolling through the time he learned of defendant's alleged concealment
18 or destruction of evidence in 2012. Compl. ¶ 20, 39, 48, 58; Opp. at 1-2.

19 Statutes of limitations may be tolled under a theory of equitable estoppel,
20 also known as fraudulent concealment. *See Hennegan v. Pacifico Creative Serv.,*
21 *Inc.*, 787 F.2d 1299, 1302 (9th Cir. 1986). But a showing of fraudulent
22 concealment "necessarily requires active conduct by a defendant, above and
23 beyond the wrongdoing upon which the plaintiff's claim is filed, to prevent the
24 plaintiff from suing in time." *Johnson v. Henderson*, 314 F.3d 409, 414 (9th Cir.
25 2002) (citation omitted). In order to invoke this doctrine successfully, a plaintiff
26 must "plead with particularity the circumstances surrounding the concealment and
27 state facts showing his due diligence in trying to uncover the facts." *Gibson*, 781
28 F.2d at 1344; *see Fed. R. Civ. P. 9(b)* (heightening the pleading standard for

1 fraud). Plaintiff has not pled with particularity – or at all – how his delayed
2 learning the EEOC was aware of a video recording depicting the workplace
3 incident, or the alleged destruction of this recording, delayed his ability to file an
4 action against defendant. Put simply, that there allegedly was once but is no
5 longer a piece of evidence that may have supported plaintiff's claims logically
6 can not change the fact plaintiff knew of these claims in August 2006. And
7 given plaintiff's first-hand knowledge of the incident, the court cannot conceive
8 of any facts that could be pled that would show plaintiff was unable to file the
9 instant complaint prior to learning there was a video recording of the incident that
10 was destroyed.

11 In fact, as discussed, plaintiff apparently had all the facts needed when he
12 filed an EEOC complaint against defendant on January 10, 2007. Yet it was not
13 until six years later that plaintiff filed his first action in this court against
14 defendant on January 29, 2013. *See* case no. ED CV 13-178-VAP (SPx). In 2013,
15 this court found all of plaintiff's claims then time-barred. Plaintiff has pled
16 nothing new in the instant action to suggest "defendant fraudulently concealed the
17 existence of the cause of action so that the plaintiff, acting as a reasonable person,
18 did not know of its existence." *Hennegan*, 787 F.2d at 1302 (citing *Rutledge v.*
19 *Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 249-50 (9th Cir. 1978)).

20 In sum, the statute of limitations periods for each of plaintiff's claims
21 expired long before plaintiff filed the instant complaint. There is no basis for
22 tolling the statutes of limitations beyond plaintiff's receipt of the EEOC's notice
23 of dismissal of his DFEH complaint against defendant. Nor could amendment of
24 the complaint cure this defect. As such, amendment would be futile, and all of
25 plaintiff's claims are time-barred.

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1 **B. Consideration of Res Judicata**

2 Whether plaintiff's action is also barred due to res judicata, or claim
 3 preclusion, is less clear. The doctrine of res judicata is applicable in a civil rights
 4 action. *Clark v. Yosemite Community College Dist.*, 785 F.2d 781, 788 n.9 (9th
 5 Cir. 1986). Res judicata "foreclos[es] relitigation of claims that were raised" in a
 6 previous complaint. *Frank v. United Airlines, Inc.*, 216 F.3d 845, 850 n.4 (9th Cir.
 7 2000) (citation omitted). "For claim preclusion to apply, there must be (1) an
 8 identity of claims in the two actions; (2) a final judgment on the merits in the first
 9 action; and (3) identity or privity between the parties in the two actions." *Id.*
 10 (citations omitted)

11 Here, identity of claims and parties is easily established, but whether this
 12 court's dismissal of plaintiff's first action constitutes a final judgment on the
 13 merits is less clear. Under "[t]he rules of finality, both statutory and judge made,"
 14 dismissal for failure to prosecute *with prejudice* constitutes a final "judgment on
 15 the merits," as does "a dismissal on statute-of-limitations grounds." *Plaut v.*
 16 *Spendthrift Farm, Inc.*, 514 U.S. 211, 228, 115 S. Ct. 1447, 131 L. Ed. 2d 328
 17 (1995). But a dismissal "*without prejudice* giv[es] the plaintiff an opportunity to
 18 return and prosecute his claims another day." *Ash v. Cvetkov*, 739 F.2d 493,
 19 496-97 (9th Cir. 1984) (emphasis added).

20 Defendant argues the court's dismissal without prejudice of plaintiff's 2013
 21 complaint for failure to prosecute should be viewed in combination with its denial
 22 of plaintiff's motion to vacate that judgment. Reply at 1-2. In its denial of
 23 plaintiff's motion to vacate, the court stated it found all of plaintiff's claims stale
 24 and barred under the statute of limitations. *See* case no. ED CV 13-178-VAP
 25 (SPx), docket no. 24 at 5. Defendant thus argues the court actually dismissed
 26 plaintiff's 2013 complaint on both statute of limitations grounds and failure to
 27 prosecute. MTD at 5.

1 The court need not further address whether res judicata applies because, for
2 the reasons discussed at length above and as the court found in 2013, plaintiff's
3 claims are clearly time-barred. For the same reason, the court does not consider
4 whether the complaint fails to state a cognizable claim.

5 **VI.**

6 **RECOMMENDATION**

7 IT IS THEREFORE RECOMMENDED that the District Court issue an
8 Order: (1) approving and accepting this Report and Recommendation; (2) granting
9 defendant's motion to dismiss; and (3) directing that Judgment be entered
10 dismissing this action with prejudice.

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13 DATED: August 2, 2016



14 SHERI PYM
15 United States Magistrate Judge
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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10

11 A.K. ANDERSON,

12 Plaintiff,

13 v.

14 SYSTEMS TECHNOLOGY,
15 INC., et al.,

16 Defendants.
17

Case No. ED CV 15-1806-VAP (SP)

**ORDER ACCEPTING FINDINGS AND
RECOMMENDATION OF UNITED
STATES MAGISTRATE JUDGE**

18 Pursuant to 28 U.S.C. § 636, the Court has reviewed the Complaint, records
19 on file, and the Report and Recommendation of the United States Magistrate Judge.
20 Further, the Court has engaged in a de novo review of those portions of the Report to
21 which plaintiff has objected. The Court accepts the findings and recommendation of
22 the Magistrate Judge.

23 IT IS THEREFORE ORDERED that defendant's Motion to Dismiss is
24 granted, and Judgment will be entered dismissing the Complaint and this action with
25 prejudice.

26
27 DATED: Sept 6, 2016
28


HONORABLE VIRGINIA A. PHILLIPS
UNITED STATES DISTRICT JUDGE

16a

FILED

UNITED STATES COURT OF APPEALS

JAN 23 2017

FOR THE NINTH CIRCUIT

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

A. K. ANDERSON,

Plaintiff-Appellant,

v.

SYSTEMS TECHNOLOGY, INC. and
DOES, 1-10, inclusive,

Defendants-Appellees.

No. 16-56478

D.C. No.

5:15-cv-01806-VAP-SP

Central District of California,
Riverside

ORDER

A review of the district court's docket reflects that the district court has denied appellant leave to proceed on appeal in forma pauperis. This court may dismiss a case at any time, if the court determines the case is frivolous. *See* 28 U.S.C. § 1915(e)(2).

Within 35 days after the date of this order, appellant must:

- (1) file a motion to dismiss this appeal, *see* Fed. R. App. P. 42(b), OR
- (2) file a statement explaining why the appeal is not frivolous and should go forward.

If appellant files a statement that the appeal should go forward, appellant also must:

- (1) file in this court a motion to proceed in forma pauperis, OR

(2) pay to the district court \$505.00 for the filing and docketing fees for this appeal AND file in this court proof that the \$505.00 was paid.

If appellant does not respond to this order, the Clerk will dismiss this appeal for failure to prosecute, without further notice. *See* 9th Cir. R. 42-1. If appellant files a motion to dismiss the appeal, the Clerk will dismiss this appeal, pursuant to Federal Rule of Appellate Procedure 42(b). If appellant submits any response to this order other than a motion to dismiss the appeal, the court may dismiss this appeal as frivolous, without further notice.

If appellant files a statement that the appeal should go forward, appellee may file a response within 10 days after service of appellant's statement.

The briefing schedule for this appeal is stayed.

The Clerk shall serve on appellant: (1) a form motion to voluntarily dismiss the appeal, (2) a form statement that the appeal should go forward, and (3) a Form 4 financial affidavit. Appellant may use the enclosed forms for any motion to dismiss the appeal, statement that the appeal should go forward, and/or motion to proceed in forma pauperis.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Emily L. Fedman
Deputy Clerk
Ninth Circuit Rule 27-7

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

OCT 19 2017

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

A. K. ANDERSON,

Plaintiff-Appellant,

v.

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DOES, 1-10, inclusive,

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D.C. No.

5:15-cv-01806-VAP-SP

Central District of California,
Riverside

ORDER

Before: THOMAS, Chief Judge, CANBY and MURGUIA, Circuit Judges.

The motion for reconsideration (Docket Entry No. 9) is denied. *See* 9th Cir.

R. 27-10. The 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.

42 U. S. C., §1981.

(a)STATEMENT OF EQUAL RIGHTS

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b)“MAKE AND ENFORCE CONTRACTS” DEFINED

For purposes of this section, the term “make and enforce contracts” includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c)PROTECTION AGAINST IMPAIRMENT

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U. S. C., §1985(3).

(3)DEPRIVING PERSONS OF RIGHTS OR PRIVILEGES

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U. S. C. §2000-5(f)

(f)CIVIL ACTION BY COMMISSION, ATTORNEY GENERAL, OR PERSON AGGRIEVED; PRECONDITIONS; PROCEDURE; APPOINTMENT OF ATTORNEY; PAYMENT OF FEES, COSTS, OR SECURITY; INTERVENTION; STAY OF FEDERAL PROCEEDINGS; ACTION FOR APPROPRIATE TEMPORARY OR PRELIMINARY RELIEF PENDING FINAL DISPOSITION OF CHARGE; JURISDICTION AND VENUE OF UNITED STATES COURTS; DESIGNATION OF JUDGE TO HEAR AND DETERMINE CASE; ASSIGNMENT OF CASE FOR HEARING; EXPEDITION OF CASE; APPOINTMENT OF MASTER

(1)

If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or

political subdivision. If a charge filed with the Commission pursuant to subsection (b), is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2)

Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3)

Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4)

It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5)

It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.