UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

GARY RAY BETTENCOURT, Plaintiff, v. BRIAN McCABE, et al., Defendants.	Case No. 1:17-cv-00646-DAD-SAB ORDER DISMISSING COMPLAINT WITH LEAVE TO AMEND (ECF No. 1) THIRTY DAY DEADLINE

On April 27, 2017, Plaintiff Gary Ray Bettencourt, a state prisoner proceeding pro se and in forma pauperis, filed this action in the Sacramento Division of the United States District Court for the Eastern District of California pursuant to 42 U.S.C. § 1983. (ECF No. 1.) On May 9, 2017, this action was transferred from the Sacramento Division to the Fresno Division. (ECF No. 4.)

Plaintiff utilized the section 1983 complaint form for a civil rights action filed by incarcerated individuals. However, Plaintiff is attempting to challenge proceedings involving the probate of a will rather than conditions of confinement. Therefore, the Court re-designated this action as a regular civil action on June 12, 2017. (ECF No. 7.)

I.

SCREENING REQUIREMENT

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a).

The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally "frivolous or malicious," that "fail[] to state a claim on which relief may be granted," or that "seek[] monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B).

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief. . . ." Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not required, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Moreover, Plaintiff must demonstrate that each defendant personally participated in the deprivation of Plaintiff's rights. Jones v. Williams, 297 F.3d 930, 934 (9th Cir. 2002).

Prisoners proceeding pro se in civil rights actions are entitled to have their pleadings liberally construed and to have any doubt resolved in their favor. Wilhelm v. Rotman, 680 F.3d 1113, 1121 (9th Cir. 2012) (citations omitted). To survive screening, Plaintiff's claims must be facially plausible, which requires sufficient factual detail to allow the Court to reasonably infer that each named defendant is liable for the misconduct alleged. Iqbal, 556 U.S. at 678-79; Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). The "sheer possibility that a defendant has acted unlawfully" is not sufficient, and "facts that are 'merely consistent with' a defendant's liability" falls short of satisfying the plausibility standard. Iqbal, 556 U.S. at 678; Moss, 572 F.3d at 969.

II.

DISCUSSION

Plaintiff brings this action against Defendants Judge B. McCabe of the Merced County Superior Court; Judge J. Kirihara of the Merced County Superior Court; Steve Griffin, executor of John S. Bettencourt's will; and Vanise Bettencourt.[1] Plaintiff states that this Court has

[1] In the caption, Plaintiff also names the Estate of John Bettencourt and the executors and beneficiaries of the Estate and Merced Superior Court Civil and Probate Clerks. Plaintiff also states in the complaint that the estate attorney is disbarred and that Plaintiff has notified him of "breach of fiduciary or breach of trust past due." Plaintiff must clearly identify who are the defendants that he is bringing his claims against.

jurisdiction over this action pursuant to 28 U.S.C. § 1343(a), 42 U.S.C. § 1983, the Extraordinary Writ Rule, and Rule 4 of the Federal Rules of Civil Procedure, and because this is a trust fund collection case.

Plaintiff indicates that he is seeking an order to review and enforce the errors by the probate court for the will and testament of John S. Bettencourt. Plaintiff alleges that he is a beneficiary of the will of John S. Bettencourt and that Defendants discontinued the payments of trust funds established for Plaintiff. Plaintiff contends that the trust was for $20,000, but he only received $4,400.[2] Plaintiff alleges that the will was probated in Merced County Superior Court on May 10, 2011, and no motions were filed after May 10, 2011.

Plaintiff alleges that the judges violated Plaintiff's civil and constitutional rights for fiduciary fraud and that a judge violated the oath of affirmation. He alleges that the attorney of record for the estate, the executor, or the Merced County Superior Court has put new dates on the motions and fabricated or falsified the language of the motions. It appears that Plaintiff is alleging that his petitions and pleadings were returned unfiled by the Superior Court Judges and Clerks for two years. Plaintiff states that he only received 74 or 76 pages of the record from the Superior Court Clerk, but she claimed she sent 82 pages. Plaintiff states that an unknown clerk changed the "Superior Court Civil/Probate, Collection case number" and did not file motions for telephonic appearances before Judge Kirihara. Plaintiff alleges that subpoenas were not served by the Merced Superior Court to attend the ordered probate civil/collection hearing. Plaintiff seeks to invoke the Federal Tort Claim Act and the Federal Jurisdiction Act over the state court's gross negligence.

The only relief that Plaintiff seeks is damages. Plaintiff seeks to be reimbursed for the trust fund payments of $100 per month that he alleges he is entitled to for a total of $16,400. He also seeks payment for gross tort negligence of $1,164,000.

Plaintiff's complaint fails to set forth any facts to state a cognizable federal claim. Plaintiff sets forth the names of several individuals who it appears were involved in the probate

[2] In another section of the complaint, Plaintiff states that he received the last payment from the trust on July 3, 2014, and that he is owed $16,400 from the trust.

of John Bettencourt's will, but it is unclear what claims Plaintiff is attempting to pursue in this action. It is unclear if Plaintiff is challenging the state court's decision in the probate proceeding or if he is bringing claims against individuals for what they did or failed to do related to the probate proceeding. The Court shall grant Plaintiff an opportunity to file an amended complaint to correct the deficiencies identified in this order and he should clearly state the claims that he is bringing and the defendants that he is bringing his claims against.

If Plaintiff cannot identify the Defendants by name, he must number the Doe Defendants in the complaint, e.g., "John/Jane Doe 1," John/Jane Doe 2," and allege specific acts attributed to each of the Doe Defendants, e.g., "John Doe 1 did X" and "John Doe 2 and 3 did Y," so that each numbered John Doe refers to a different specific person and their role in the alleged violations is clear. In addition, the Court cannot order service of a Doe Defendant because the United States Marshal cannot serve a Doe Defendant. Therefore, before the Court orders the United States Marshal to serve a Doe Defendant, Plaintiff will be required to identify him or her with enough information to locate the Defendant for service of process.

A. Jurisdiction

Federal courts are courts of limited jurisdiction and their power to adjudicate is limited to that granted by Congress. U.S. v. Sumner, 226 F.3d 1005, 1009 (9th Cir. 2000). Pursuant to 28 U.S.C. § 1331, federal courts have original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." "A case 'arises under' federal law either where federal law creates the cause of action or where the vindication of a right under state law necessarily turns on some construction of federal law." Republican Party of Guam v. Gutierrez, 277 F.3d 1086, 1088 (9th Cir. 2002) (internal punctuation omitted) (quoting Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 8-9 (1983) (citations omitted)). "[T]he presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." Republican Party of Guam, 277 F.3d at 1089 (citations omitted).

For this action to arise under federal law, Plaintiff must establish that "federal law creates

the cause of action" or his "asserted right to relief depends on the resolution of a substantial question of federal law." K2 America Corp. v. Roland Oil & Gas, LLC, 653 F.3d 1024, 1029 (9th Cir. 2011).[3]

It is unclear what claims Plaintiff is bringing in this action and the bases for those claims. If Plaintiff is seeking to bring his suit on basis of federal question jurisdiction, he must allege facts to demonstrate that this action arises under federal law.

B. Liability Under Section 1983

Plaintiff is advised that to state a claim under section 1983, he is required to show that (1) each defendant acted under color of state law and (2) each defendant deprived him of rights secured by the Constitution or federal law. Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006). There is no respondeat superior liability under section 1983, and therefore, each defendant is only liable for his or her own misconduct. Iqbal, 556 U.S. at 677. To state a claim, Plaintiff must demonstrate that each defendant personally participated in the deprivation of his rights. Jones, 297 F.3d at 934. In other words, to state a cognizable claim, Plaintiff must identity the individual defendant and state the act or failure to act of that defendant that violated Plaintiff's federal rights. Plaintiff must specify the right secured by the Constitution or federal law. Plaintiff must allege that each defendant acted under color of state law. To the extent that Plaintiff is alleging that Judge McCabe and Judge Kirihara and the Court Clerks are liable under section 1983, they may be immune from suit because of judicial immunity and quasi-judicial immunity, as discussed below. Plaintiff has not alleged that Defendants Steve Griffin and Vanise Bettencourt are state actors.

C. Petition for Extraordinary Writ

Plaintiff refers to the Extraordinary Writ Rule, which the Court construes as the

[3] District courts also have original jurisdiction of all civil actions between citizens of different States in which "the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs." 28 U.S.C. § 1332(a). **Error! Main Document Only.**This requires complete diversity of citizenship and the presence "of a single plaintiff from the same State as a single defendant deprives the district court of original diversity jurisdiction over the entire action." Abrego Abrego v. The Dow Chemical Co., 443 F.3d 676, 679 (9th Cir. 2006) (citations omitted). Plaintiff is not bringing this action based on diversity jurisdiction. If Plaintiff is a citizen of the same state as even one defendant, there would be no diversity jurisdiction.

Procedure on a Petition for an Extraordinary Writ. See U.S. Supreme Court Rule 20. Rule 20 of the Rules of the Supreme Court of the United States provides that, "[T]he petition must show that the writ will be in aid of the [Supreme] Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the [Supreme] Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court." Plaintiff has filed this action in the United States District Court for the Eastern District of California, and therefore, Rule 20 of the Rules of the Supreme Court of the United States is inapplicable.

D. 28 U.S.C. § 1343

Plaintiff alleges jurisdiction pursuant to 28 U.S.C. § 1343(a), which provides that district courts have original jurisdiction of civil actions:

> (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;
> (2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

28 U.S.C. § 1343(a).

Plaintiff does not allege that his claims are under an Act of Congress providing for the protection of civil rights or under a State law, statute, ordinance, regulation custom, or usage of any right, privilege, or immunity secured by the Constitution or any Act of Congress providing for equal rights of citizens or persons within the jurisdiction of the United States. Plaintiff also does not set forth factual allegations of a conspiracy mentioned in section 1985 of Title 42. Plaintiff cannot make conclusory statements, but must provide factual allegations sufficient to state a claim.

To establish a claim for conspiracy under 42 U.S.C. § 1985, a plaintiff must demonstrate a conspiracy for the purpose of depriving another of the equal protection of the laws and an act in furtherance of that conspiracy, causing injury to a person or property or the deprivation of a legal

right. Federer v. Gephardt, 363 F.3d 754, 757-58 (8th Cir. 2004). "'The language requiring intent to deprive [another] of equal protection, or equal privileges and immunities, means that there must be some racial or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirator's actions.'" Id. at 758 n. 3 (quoting Griffin v. Breckenridge, 403 U.S. 88, 102 (1971)). "It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' . . . its adverse effects upon an identifiable group." Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 271-72 (1993).

E. Federal Tort Claims Act

Plaintiff states that he is bringing his claims under the Federal Tort Claims Act ("FTCA"). The district courts have jurisdiction of "civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). The FTCA waives the United States' sovereign immunity for tort claims caused by negligence on the part of government employees acting within the scope of their employment. Terbush v. United States, 516 F.3d 1125, 1128 (9th Cir. 2008). The FTCA, however, includes a number of exceptions to this otherwise broad waiver of sovereign immunity. Id. at 1129. Here, Plaintiff has not named the United States as a defendant and has not alleged any acts or omissions by federal government employees.

F. Rule 4 of the Federal Rules of Civil Procedure

Plaintiff states that this Court has jurisdiction pursuant to Rule 4 of the Federal Rules of Civil Procedure. However, federal subject matter jurisdiction cannot be based on Rule 4 of the Federal Rules of Civil Procedure. Rule 4 provides the procedures for a summons and the service of a summons. See Fed. R. Civ. P. 4. Rule 4 is not a federal law and it does not create a cause of action.

/ / /

G. Trust Fund Collection Case

Plaintiff states that the district court has jurisdiction because this is a trust fund collection case. It appears that Plaintiff is alleging that the district court has jurisdiction because he is seeking the collection of his trust fund. However, the fact that Plaintiff is seeking the collection of a trust that he alleges he is entitled to pursuant to a will is not sufficient to create federal question jurisdiction. To the extent that Plaintiff is only able to allege state law claims, state law claims are insufficient to invoke federal question jurisdiction.

H. Judicial Immunity

Plaintiff brings this action against Judge McCabe and Judge Kirihara, who are both judges at the Merced County Superior Court, for violations of Plaintiff's civil and constitutional rights and "fiduciary fraud." Plaintiff alleges that a judge violated the oath of affirmation of the United States and California Constitutions. It also appears that Plaintiff is alleging that judges had returned his petitions unfiled for two years. However, Plaintiff does not describe how the judge violated the oath of affirmation, what civil rights and constitutional rights the judges violated, or how the judges committed "fiduciary fraud." Plaintiff must explain what actions or inactions Judge McCabe and Judge Kirihara did or failed to do that allegedly violated Plaintiff's rights. Judge McCabe and Judge Kirihara may be entitled to judicial immunity for the claims against them.

Absolute judicial immunity is afforded to judges for acts performed by the judge that relate to the judicial process. In re Castillo, 297 F.3d 940, 947 (9th Cir. 2002), as amended (Sept. 6, 2002). "This immunity reflects the long-standing 'general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself.' " Olsen v. Idaho State Bd. of Med., 363 F.3d 916, 922 (9th Cir. 2004) (quoting Bradley v. Fisher, 13 Wall. 335, 347 (1871)). This judicial immunity insulates judges from suits brought under section 1983. Olsen, 363 F.3d at 923.

Absolute judicial immunity insulates the judge from actions for damages due to judicial acts taken within the jurisdiction of the judge's court. Ashelman v. Pope, 793 F.2d 1072, 1075

(9th Cir. 1986). "Judicial immunity applies 'however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff.' " Id. (quoting Cleavinger v. Saxner, 474 U.S. 193 (1985)). However a judge is not immune where he acts in the clear absence of jurisdiction or for acts that are not judicial in nature. Ashelman, 793 F.2d at 1075. Judicial conduct falls within "clear absence of all jurisdiction," where the judge "acted with clear lack of all subject matter jurisdiction." Stone v. Baum, 409 F. Supp. 2d 1164, 1174 (D. Ariz. 2005).

To determine if an act is judicial in nature, the court considers whether (1) the precise act is a normal judicial function; (2) the events occurred in the judge's chambers; (3) the controversy centered around a case then pending before the judge; and (4) the events at issue arose directly and immediately out of a confrontation with the judge in his or her official capacity. Duvall v. Cty. of Kitsap, 260 F.3d 1124, 1133 (9th Cir. 2001), as amended on denial of reh'g (Oct. 11, 2001) (quoting Meek v. County of Riverside, 183 F.3d 962, 967 (9th Cir. 1999)).

I. Quasi-Judicial Immunity from Damages

Plaintiff alleges that Merced County Superior Court Civil and Probate Clerks had returned unfiled his petitions for two years. Plaintiff states that he only received 74 or 76 pages of the record from the Superior Court Clerk, but she claimed she sent 82 pages. Plaintiff states that an unknown clerk changed the "Superior Court Civil/Probate, Collection case number" and did not file motions for telephonic appearances before Judge Kirihara. Plaintiff alleges that subpoenas were not served by the Merced Superior Court to attend the ordered probate civil/collection hearing. The court clerks may have quasi-judicial immunity from damages.

"Court clerks have absolute quasi-judicial immunity from damages for civil rights violations when they perform tasks that are an integral part of the judicial process." Mullis v. U.S. Bankr. Court for Dist. of Nevada, 828 F.2d 1385, 1390 (9th Cir. 1987); Fixel v. United States, 737 F.Supp. 593, 597 (D. Nev. 1990), aff'd sub nom. Fixel v. U.S. Dist. Court of Nevada, 930 F.2d 27 (9th Cir. 1991). Clerk action that is "a mistake or an act in excess of jurisdiction does not abrogate judicial immunity, even if it results in 'grave procedural errors.' " Mullis, 828 F.2d at 1390 (quoting Stump v. Sparkman, 435 U.S. 349, 359 (1978)). In Mullis, a bankruptcy

debtor filed an action against the bankruptcy court clerks. Mullis, 828 F.2d at 1390. The plaintiff alleged denial to access of the court after the court clerks refused to accept and file an amended petition in his bankruptcy action. Mullis, 828 F.2d at 1390. The court found that the clerk of court and deputy clerks are the court officials through whom filing in cases is done. Id. "Consequently, the clerks qualify for quasi-judicial immunity unless these acts were done in the clear absence of all jurisdiction." Id.

J. Principles of Abstention Apply to Plaintiff's Claims

It appears that Plaintiff may be seeking to have this Court adjudicate a matter that is being adjudicated in Merced County Superior Court. Plaintiff attaches the civil case cover sheet for a civil case that he filed in Merced County Superior Court, which also includes the case number of a probate action. A review of the Merced County Superior Court dockets in both the civil action and probate action indicates that these actions are still pending in Merced County Superior Court. See Estate of: John S. Bettencourt, No. PR000628 (Merced Sup. Ct.); Gary Bettencourt v. Vanise Bettencourt, No. 15CV-01551 (Sup. Ct.).[4] It appears that one of two abstention principles articulated by the United States Supreme Court may apply to this case.

The Younger doctrine precludes a federal court's intervention in ongoing state proceedings. Younger v. Harris, 401 U.S. 37 (1971). Younger abstention is required when: (1) state proceedings, judicial in nature, are pending; (2) the state proceedings involve important state interests; and (3) the state proceedings afford adequate opportunity to raise the constitutional issue. Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1982); Dubinka v. Judges of the Superior Court of State of Cal. for Cty. Of Los Angeles, 23 F.3d 218, 223 (9th Cir. 1994) (citations omitted). The rationale of Younger applies throughout the appellate proceedings, requiring that state appellate review of a state court judgment be exhausted before federal court intervention is permitted. Dubinka, 23 F.3d at 223 (even if criminal trials were completed at time of abstention decision, state court proceedings are still

[4] The Court takes judicial notice of the actions filed in the Merced County Superior Court. Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 n.6 (9th Cir. 2006); Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001).

considered pending).

Further, once a state court proceeding has concluded, the Rooker–Feldman abstention doctrine applies when the relief requested in the federal court would effectively reverse a state court decision or void its ruling. The application of the Rooker–Feldman doctrine is necessarily limited to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284 (2005). However, the Rooker-Feldman doctrine encompasses claims that were not only actually litigated, but also those that are "inextricably intertwined" with the adjudication by a state court. Id. at 286 (citation omitted).

K. Leave to Amend

Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend shall be freely given when justice so requires. Fed. R. Civ. P. 15(a)(2). In determining whether to grant leave to amend, the court considers five factors: "(1) bad faith; (2) undue delay; (3) prejudice to the opposing party; (4) futility of amendment; and (5) whether the plaintiff has previously amended his complaint." Nunes v. Ashcroft, 375 F.3d 805, 808 (9th Cir. 2004).

As Plaintiff is proceeding pro se in this action, the Court shall provide him with a final opportunity to correct the deficiencies of his claims.

III.

CONCLUSION AND ORDER

Plaintiff's complaint fails to state a cognizable claim for relief under federal law. The Court will provide Plaintiff with the opportunity to file a first amended complaint curing the deficiencies identified by the Court in this order. Akhtar v. Mesa, 698 F.3d 1202, 1213 (9th Cir. 2012).

If Plaintiff decides to file a first amended complaint, he is advised that he may not change the nature of this suit by adding new, unrelated claims in his amended complaint. George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007) (no "buckshot" complaints). Plaintiff's first amended complaint should be brief, Fed. R. Civ. P. 8(a), but must state what each named defendant did

that led to the deprivation of Plaintiff's constitutional or other federal rights, Iqbal, 556 U.S. at 678-79. "The inquiry into causation must be individualized and focus on the duties and responsibilities of each individual defendant whose acts or omissions are alleged to have caused a constitutional deprivation." Leer v. Murphy, 844 F.2d 628, 633 (9th Cir. 1988). Although accepted as true, the "[f]actual allegations must be [sufficient] to raise a right to relief above the speculative level . . . ." Twombly, 550 U.S. at 555 (citations omitted).

Finally, an amended complaint supersedes the original complaint, Lacey v. Maricopa County, 693 F.3d 896, 927 (9th Cir. 2012); Valdez-Lopez v. Chertoff, 656 F.3d 851, 857 (9th Cir. 2011), and must be "complete in itself without reference to the prior or superseded pleading," Local Rule 220.

Based on the foregoing, it is HEREBY ORDERED that:

1. Plaintiff's complaint, filed April 27, 2017, is DISMISSED with leave to amend;
2. Within **thirty (30) days** from the date of service of this order, Plaintiff shall file a first amended complaint curing the deficiencies identified by the Court in this order, and
3. If Plaintiff fails to comply with this order, this action will be dismissed for failure to state a claim.

IT IS SO ORDERED.

Dated: **July 24, 2017**

UNITED STATES MAGISTRATE JUDGE