

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jun 02, 2020

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

EDWARD NICHOLAS BURSIEL,
Plaintiff,

v.

RICHARD HOLLOMON and CHANCI
LOPEZ,
Defendants.

NO. 2:19-CV-00361-SAB

**ORDER DISMISSING ACTION
1915(g)**

Before the Court is Plaintiff's First Amended Complaint, ECF No. 8, an accompanying 3-page request to add information to his First Amended Complaint, ECF No. 10, and a Motion to Appoint Counsel, ECF No. 9. Plaintiff, a prisoner currently housed at the Idaho Correctional Institution, is proceeding *pro se* and *in forma pauperis*. Defendants have not been served.

Generally, an amended complaint supersedes the original complaint and renders it without legal effect. *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 927 (9th Cir. 2012). Therefore, "[a]ll causes of action alleged in an original complaint which are not alleged in an amended complaint are waived." *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987) (citing *London v. Coopers & Lybrand*, 644 F.2d 811,

ORDER DISMISSING ACTION -- 1

1 814 (9th Cir. 1981)), overruled in part by *Lacey*, 693 F.3d at 928 (any claims
2 voluntarily dismissed are considered to be waived if not re-pled)).

3 Liberalizing construing the First Amended Complaint in the light most
4 favorable to Plaintiff, the Court finds that Plaintiff has failed to cure the
5 deficiencies of the initial complaint and has failed to state a claim upon which
6 relief may be granted.

7 **FIRST AMENDED COMPLAINT**

8 Plaintiff asserts that Defendant Chanci Lopez, Spokane County Victim
9 Advocate, misused the power of her office and acted in concert with Plaintiff's
10 former landlord, Defendant Richard Michael Hollomon, to deprive Plaintiff of his
11 property without Plaintiff's authorization. ECF No. 8 at 4, 7-9.

12 Plaintiff asserts that on November 2, 2016, he received a letter from
13 Spokane County Victim Property Fraud Advocate Patricia Mullarkey, who is not
14 named as a Defendant in this action. ECF No. 12 at 5. He claims that Ms.
15 Mullarkey informed Plaintiff that he was a victim of property theft on October 31,
16 2016. *Id.*

17 Plaintiff contends that on November 7, 2016, Defendant Lopez authorized
18 Defendant Hollomon to "release" Plaintiff's property, which included Plaintiff's
19 business and personal property. ECF No. 8 at 7-8. He claims that on November 7,
20 2016, Defendant Hollomon "acted together with, and obtained significant aid
21 from" Defendant Lopez to remove Plaintiff's property from Defendant Hollomon's
22 residence. *Id.* at 7. Plaintiff complains that "as a further result of Plaintiff's
23 property being taken," on or about October 30, 2016, Plaintiff's driver's license,
24 Social Security card, and financial records were used to steal Plaintiff's identity.
25 *Id.* at 8.

26 Plaintiff asserts that on November 9, 2016, he contacted Defendant Lopez
27 and she admitted that she authorized Defendant Hollomon to release Plaintiff's
28 property, and that she should have followed proper procedures. ECF No. 8 at 4-5.

1 Plaintiff alleges that Defendant Lopez “admitted it was her fault” that Plaintiff’s
2 property was released. *Id.* at 5. Plaintiff asserts that his property was released
3 without his authorization. *Id.* at 5, 9.

4 Plaintiff contends that Defendants’ actions violated his Fifth Amendment
5 rights because they deprived Plaintiff of his property. ECF No. 8 at 4. The Fifth
6 Amendment provides that private property shall not be taken for public use without
7 just compensation. U.S. Const. amend. V; *Penn Cent. Transp. Co. v. New York*
8 *City*, 438 U.S. 104, 123 (1978). Here, Plaintiff presents no facts from which the
9 Court could infer that his property was taken for public use. Thus, he has failed to
10 state a plausible claim that he is entitled to relief under the Fifth Amendment. *See*
11 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

12 Moreover, private parties do not generally act under color of state law.
13 *Price v. Hawaii*, 939 F.2d 702, 707-08 (9th Cir. 1991). “A private person may act
14 under color of state law if he willfully participate[s] in joint action with state
15 officials to deprive others of their constitutional rights.” *Taylor v. List*, 880 F.2d
16 1040, 1048 (9th Cir. 1988) (citation omitted). The private party must share the
17 common objective of the conspiracy or enter into an agreement with the state actor.
18 *United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1540-41 (9th
19 Cir. 1989) (en banc). Vague and conclusory allegations are not sufficient to
20 support a claim for civil rights violations based on conspiracy. *Ivey v. Bd. of*
21 *Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982); *Aldabe v. Aldabe*,
22 616 F.2d 1089, 1092 (9th Cir. 1980).

23 Here, Plaintiff has alleged no facts, apart from his conclusory assertions that
24 Defendant Holloman, his former landlord, “acted in concert with” and “acted
25 together with, and obtained significant aid from” Defendant Lopez, a victim’s
26 advocate, to remove Plaintiff’s property from Defendant Hollomon’s residence
27 without authorization, from which the Court could infer that Defendant Hollomon,
28

1 a private party, conspired with state officials to deprive Plaintiff of his
2 constitutionally protected rights. ECF No. 8 at 7, 9.

3 Further, assuming that Plaintiff's factual allegations are true, he has failed to
4 state a cognizable claim under § 1983 for his alleged property loss. Even if the
5 deprivation of his property was intentional, Plaintiff has adequate post-deprivation
6 remedies. *See Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (“[A]n unauthorized
7 intentional deprivation of property by a state employee does not constitute a
8 violation of the procedural requirements of the Due Process Clause of the
9 Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is
10 available); *Barnett v. Centoni*, 31 F.3d 813, 816 (9th Cir. 1994) (“[A] negligent or
11 intentional deprivation of a prisoner's property fails to state a claim under section
12 1983 if the state has an adequate post deprivation remedy.”). This rule also applies
13 to the Fifth Amendment's Due Process Clause. *Raditch v. United States*, 929 F.2d
14 478, 481 (9th Cir. 1991).

15 Plaintiff may seek redress in Washington state courts for his claim of lost
16 property. Indeed, in his motion to add information to his First Amended
17 Complaint, Plaintiff indicates that he has done so to no avail. ECF No. 10.
18 Regardless of the outcome of any state proceeding, the remedy is available to
19 Plaintiff through that avenue. Therefore, he has failed to state a claim upon which
20 relief may be granted under 42 U.S.C. § 1983.

21 Plaintiff was given the opportunity to amend his claims and was unable to do
22 so, making clear that further leave to amend is futile. Therefore, his First Amended
23 Complaint against Defendants Chanci Lopez and Richard Michael Hollomon is
24 **DISMISSED with prejudice** for failure to state a claim upon which relief may be
25 granted under 28 U.S.C. §§ 1915A(b)(1) and 1915(e)(2).

26 Pursuant to 28 U.S.C. § 1915(g), enacted April 26, 1996, a prisoner who
27 brings three or more civil actions or appeals which are dismissed as frivolous or for
28 failure to state a claim will be precluded from bringing any other civil action or

1 appeal *in forma pauperis* “unless the prisoner is under imminent danger of serious
2 physical injury.” 28 U.S.C. § 1915(g). Plaintiff is advised to read the statutory
3 provisions under 28 U.S.C. § 1915. This dismissal of Plaintiff’s complaint may
4 count as one of the three dismissals allowed by 28 U.S.C. § 1915(g) and may
5 adversely affect his ability to file future claims.

6 **IT IS SO ORDERED.** The Clerk of Court is directed to enter this Order,
7 enter judgment, provide copies to Plaintiff at his last known address, and close the
8 file. The Clerk of Court is directed to forward a copy of this Order to the Office of
9 the Attorney General of Washington, Corrections Division. The Court certifies any
10 appeal of this dismissal would not be taken in good faith.

11 **DATED** this 2nd day of June 2020.



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A handwritten signature in blue ink, reading "Stanley A. Bastian".

17 Stanley A. Bastian
18 United States District Judge
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