

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
CALIFORNIA

Ussery v. Domeyer

Ussery · No. 2:25-cv-00594-DC-CSK · Decided June 10, 2025

SUMMARY

The court recommends denying Kimberly Ussery’s application to proceed in forma pauperis and dismissing her complaint without leave to amend. The recommendations conclude that the foreclosure-related action is duplicative of an earlier pending action involving the same property and defendant, and direct that the case be closed.

OPINION

(PS) Ussery v. Domeyer

PER CURIAM.

1 2 3 4 5 6 7

8 UNITED STATES DISTRICT COURT

9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 11 KIMBERLY USSERY, Case No. 2:25-cv-00594-DC-CSK 12 Plaintiff,

13 v. FINDINGS AND RECOMMENDATIONS

14 MARK DOMEYER, et al., 15 Defendants. (ECF Nos. 1, 2) 16 17 Plaintiff Kimberly Ussery is representing herself in this action and seeks leave to 18 proceed in forma pauperis (“IFP”) pursuant to 28 U.S.C. § 1915.1 (ECF No. 2.) For the 19 reasons that follow, the Court recommends Plaintiff’s IFP application be denied, and the 20 Complaint be dismissed without leave to amend.

21 I. MOTION TO PROCEED IN FORMA PAUPERIS

22 28 U.S.C. § 1915(a) provides that the court may authorize the commencement, 23 prosecution or defense of any suit without prepayment of fees or security “by a person 24 who submits an affidavit stating the person is “unable to pay such fees or give security 25 therefor.” This affidavit is to include, among other things, a statement of all assets the 26 person possesses. Id. The IFP statute does not itself define what constitutes insufficient 27 1 This matter proceeds before the undersigned pursuant to 28 U.S.C. § 636, Fed. R. 28 Civ. P. 72, and Local Rule 302(c). 1 assets. See Escobedo v. Applebees, 787 F.3d 1226, 1234 (9th Cir. 2015). In Escobedo, 2 the Ninth Circuit stated that an affidavit in support of an IFP application is sufficient 3 where it alleges that the affiant cannot pay court costs and still afford the necessities of 4 life. Id. “One need not be absolutely destitute to obtain benefits of the in forma pauperis 5 statute.” Id. Nonetheless, a party seeking IFP status must allege poverty “with some 6 particularity, definiteness and certainty.” Id.

According to the United States Department of Health and Human Services, the current poverty guideline for a household of one (not 8 residing in Alaska or Hawaii) is \$15,650.00. See U.S. Dept. Health & Human Service 9 (available at <https://aspe.hhs.gov/poverty-guidelines>). 10 Here, Plaintiff's IFP application does make the financial showing required by 11 28 U.S.C. § 1915(a). See ECF No. 2. However, the Court will recommend Plaintiff's IFP 12 application be denied because the action is facially frivolous and without merit because it 13 is duplicative of an earlier pending action in this district. "A district court may deny leave 14 to proceed in forma pauperis at the outset if it appears from the face of the proposed 15 complaint that the action is frivolous or without merit." *Minetti v. Port of Seattle*, 152 F.3d 16 1113, 1115 (9th Cir. 1998) (quoting *Tripati v. First Nat. Bank & Tr.*, 821 F.2d 1368, 1370 17 (9th Cir. 1987)); see also *McGee v. Dep't of Child Support Servs.*, 584 Fed. App'x. 638 18 (9th Cir. 2014) ("the district court did not abuse its discretion by denying McGee's 19 request to proceed IFP because it appears from the face of the amended complaint that 20 McGee's action is frivolous or without merit"); *Smart v. Heinze*, 347 F.2d 114, 116 (9th

21 Cir. 1965) ("It is the duty of the District Court to examine any application for leave to 22 proceed in forma pauperis to determine whether the proposed proceeding has merit and 23 if it appears that the proceeding is without merit, the court is bound to deny a motion 24 seeking leave to proceed in forma pauperis."). Because it appears from the face of 25 Plaintiff's Complaint that this action is frivolous and is without merit as discussed in more 26 detail below, the Court recommends denying Plaintiff's IFP motion. 27 /// 28 ///

1 II. SCREENING REQUIREMENT

2 Even if the Court were to grant Plaintiff's IFP application, Plaintiff's Complaint 3 warrants dismissal pursuant to 28 U.S.C. § 1915(e)'s required pre-answer screening. 4 Pursuant to 28 U.S.C. § 1915(e), the court must screen every in forma pauperis 5 proceeding, and must order dismissal of the case if it is "frivolous or malicious," "fails to 6 state a claim on which relief may be granted," or "seeks monetary relief against a 7 defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B); *Lopez v. Smith*, 8 203 F.3d 1122, 1126-27 (2000) (en banc). A claim is legally frivolous when it lacks an 9 arguable basis either in law or in fact. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). In 10 reviewing a complaint under this standard, the court accepts as true the factual 11 allegations contained in the complaint, unless they are clearly baseless or fanciful, and 12 construes those allegations in the light most favorable to the plaintiff. See *id.* at 326-27; 13 *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 14 2010), cert. denied, 564 U.S. 1037 (2011). 15 Pleadings by self-represented litigants are liberally construed. *Hebbe v. Pliler*, 627 16 F.3d 338, 342 & n.7 (9th Cir. 2010) (liberal construction appropriate even post-*Iqbal*). 17 However, the court need not accept as true conclusory allegations, unreasonable 18 inferences, or unwarranted deductions of fact. *Western Mining Council v. Watt*, 643 F.2d 19 618, 624 (9th Cir. 1981). A formulaic recitation of the elements of a cause of action does 20 not suffice to state a claim. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,

555-57 (2007); 21 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). 22 To state a claim on which relief may be granted, the plaintiff must allege enough 23 facts “to state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570. “A 24 claim has facial plausibility when the plaintiff pleads factual content that allows the court 25 to draw the reasonable inference that the defendant is liable for the misconduct alleged.” 26 *Iqbal*, 556 U.S. at 678. A pro se litigant is entitled to notice of the deficiencies in the 27 complaint and an opportunity to amend unless the complaint’s deficiencies could not be 28 cured by amendment. See *Lopez*, 203 F.3d at 1130-31; *Cahill v. Liberty Mut. Ins. Co.*, 801 F.3d 336, 339 (9th Cir. 1996).

2 III. THE COMPLAINT

3 Plaintiff brings this action “to challenge the unlawful non-judicial foreclosure of her 4 real property” located at 1405 East Roosevelt St., Stockton, California 95205. Compl. at 5 1, 3 (ECF No. 1). Plaintiff raises the following causes of actions against Defendants Mark 6 Domeyer, NewRez LLC d/b/a ShellPoint Mortgage Servicing, Peak Foreclosure and 7 Caliber Home Loans: (1) wrongful foreclosure; (2) violation of the Fifth Amendment; 8 (3) violation of Racketeer Influenced and Corrupt Organizations (“RICO”) pursuant to 9 18 U.S.C. §§ 1961-1968; (4) tax evasion under 26 U.S.C. § 7201; (5) violation of the Fair 10 Debt Collection Practices Act (“FDCPA”) pursuant to 15 U.S.C. § 1692e; and 11 (6) violation of the Real Estate Settlement Procedures Act (“RESPA”) pursuant to 12 12 U.S.C. § 2605 and FDCPA pursuant to 15 U.S.C. § 1692k. *Id.* at 3-4. Plaintiff alleges 13 Defendants are “not the holders in due course of the promissory note, are not in 14 possession of the original note, and lack standing to foreclose on Plaintiff’s property.” *Id.* 15 at 3. For relief, Plaintiff is seeking the Court to “declare the foreclosure void and restore 16 legal title to Plaintiff,” disgorgement, “a forensic audit” and damages. *Id.* at 4.

17 IV. DISCUSSION

18 A. Duplicative Suits 19 A district court has broad discretion to control its own docket, including the power 20 to dismiss duplicative claims. *M.M. v. Lafayette Sch. Dist.*, 681 F.3d 1082, 1091 (9th Cir. 21 2012). “To determine whether a suit is duplicative, we borrow from the test for claim 22 preclusion.” *Adams v. California Dep’t of Health Servs.*, 487 F.3d 684, 688 (9th Cir. 23 2007), overruled on other grounds by *Taylor v. Sturgell*, 553 U.S. 880 (2008). In 24 assessing whether a suit is duplicative, the court examines whether the causes of action, 25 the relief sought, and the parties or privies to the action, are the same. *Id.* at 689. To 26 determine whether the causes of action are the same, courts utilize the “transaction test” 27 which requires the application of four factors, the last of which is the most important: 28 / / / 1 (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of 2 the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two 3 suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of 4 facts. 5 *Id.* (citing *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir. 1982)). 6 On December 26, 2024, Plaintiff initiated an action in

this district court, Kimberly 7 *Ussery v. Newrez LLC dba Shellpoint Mortgage Servicing*, 2:24-cv-03699-DJC-CKD 8 (E.D. Cal. Dec. 26, 2024) (“Ussery I”), that is ongoing and has pending Findings and 9 Recommendations recommending dismissal for failure to prosecute. See Ussery I, ECF

10 No. 4 (E.D. Cal. May 5, 2025).² In Ussery I, Plaintiff names the same Defendant as in
11 this action: Newrez LLC dba Shellpoint Mortgage Servicing. Ussery I Compl. at 1 (ECF
12 No. 1). The instant action and Ussery I plead substantial similar allegations related to the
13 foreclosure proceedings of Plaintiff’s property located at 1405 E. Rossevelt St., Stockton, 14
California. Compare Compl. at 1, 3, with Ussery I Compl. at 1, 6. 15 Here, all the factors of the
transaction test are satisfied. See *Costantini*, 681 F.2d 16 at 1201-02. In both actions, the parties
are identical, and Defendant is the same named 17 defendant as in Ussery I. Compare Compl.,
with Ussery I Compl. Most importantly, both 18 actions stem from allegations regarding the
ongoing foreclosure proceedings on 19 Plaintiff’s same real property and therefore consequently
involve substantially the same 20 evidence. Although it is not entirely clear which claims Plaintiff
seeks to bring in Ussery I, 21 Plaintiff was provided an opportunity to amend her complaint to
allege her claims for 22 relief and the basis for the Court’s jurisdiction in Ussery I. See Ussery I,
ECF No. 3 (E.D. 23 Cal. Mar. 26, 2025). If Plaintiff is attempting to amend her complaint by
initiating a new 24 2 Plaintiff has previously attempted on multiple occasions to remove from the
San 25 Joaquin County Superior Court her unlawful detainer proceeding involving the same real
26 property. The previous four removal actions were all remanded back to the superior court.
NewRez LLC dba Shellpoint Mortgage Servicing v. Ussery, 2:24-cv-03698-TLN- 27 CSK;
NewRez LLC dba Shellpoint Mortgage Servicing v. Ussery, 2:25-cv-00740-DJC- JDP; *NewRez*
LLC et al v. Ussery et al, 2:25-cv-00895-DC-JDP; and *NewRez LLC v. 28 Ussery*, 2:25-cv-01169-
DJC-AC. 1 action, this is not proper. It is clear that both actions share a common set of facts, 2
impacting the same rights and requested relief, thereby rendering this action duplicative 3 of
Plaintiff’s prior action. See *Costantini*, 681 F.2d at 1201-02. This action is therefore 4 duplicative
of Ussery I, an ongoing earlier case in this district, and should be dismissed 5 without leave to
amend. See *Lathus v. City of Huntington Beach*, 56 F.4th 1238, 1243 6 (9th Cir. 2023) (“denying
leave to amend is not an abuse of discretion if it is clear that 7 granting leave to amend would
have been futile”) (internal quotation marks and citations 8 omitted). 9 B. Leave to Amend 10 In
considering whether leave to amend should be granted, the Court finds that the 11 Complaint is
duplicative of an earlier filed, ongoing lawsuit and leave to amend is not 12 appropriate. Compare
Compl., with Ussery I Compl. If Plaintiff seeks to file an amended 13 complaint, she should do so
in Ussery I, her earlier filed case. Because this case is 14 duplicative of the case pending in Ussery
I, No. 2:24-cv-03699-DJC-CKD (E.D. Cal.), the 15 Complaint should therefore be dismissed
without leave to amend. See *Lopez*, 203 F.3d 16 at 1130-31; *Cato v. United States*, 70 F.3d 1103,
1105-06 (9th Cir. 1995).

17 V. CONCLUSION

18 Based upon the findings above, it is RECOMMENDED that: 19 1. Plaintiff's motion to
proceed in forma pauperis (ECF No. 2) be DENIED; 20 2. Plaintiff's Complaint (ECF No. 1) be
DISMISSED without leave to amend; 21 and 22 3. The Clerk of the Court be directed to CLOSE
this case. 23 These findings and recommendations are submitted to the United States District 24
Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 25 14 days
after being served with these findings and recommendations, any party may file 26 written
objections with the Court and serve a copy on all parties. This document should 27 be captioned
"Objections to Magistrate Judge's Findings and Recommendations." Any 28 reply to the
objections shall be served on all parties and filed with the Court within 14 1 | days after service of
the objections. Failure to file objections within the specified time 2 || may waive the right to
appeal the District Court's order. Turner v. Duncan, 158 F.3d 449, 3 || 455 (9th Cir. 1998);
Martinez v. Yist, 951 F.2d 1153, 1156-57 (9th Cir. 1991). 4 5 Dated: June 9, 2025 i s \C

6 GHI 500 KIM

UNITED STATES MAGISTRATE JUDGE

7 4, usse0594.25 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28