MARK S. SOKOLSKY, Plaintiff, vs. JIM ROSTRON, et al., Defendants.

No. CIV S-07-1002 GEB KJM P

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

2008 U.S. Dist. LEXIS 83171

September 9, 2008, Decided
September 9, 2008, Filed

COUNSEL: [*1] Mark S. Sokolsky, Plaintiff, Pro se, Coalinga, CA.

For Jim Rostron, Sylvia Blount, George Bukowski, Defendants: Roy Stephan Liebman, LEAD ATTORNEY, Office of The Attorney General, State of California, Sacramento, CA.

JUDGES: Kimberly J. Mueller, U.S. MAGISTRATE JUDGE.

OPINION BY: Kimberly J. Mueller

OPINION

FINDINGS & RECOMMENDATIONS

Plaintiff is a civil committee proceeding pro se with a civil rights action under *42 U.S.C. § 1983*. He alleges that the defendants, former and current directors of the Sex Offender Commitment Program of the Department of Mental Health, have advised evaluators on contract with the Department to use a mentally disordered sex offender (MDSO) commitment, which had been reversed on appeal, in determining his suitability for commitment as a sexually violent predator. Complaint (Compl.) PP 11, 14, 18. He further alleges that this violates his rights to due process and equal protection. Defendants have filed a motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)*. Plaintiff opposes the motion.

I. *Standards For A Motion To Dismiss*

In considering a motion to dismiss, the court must accept as true the allegations of the complaint in question, *Erickson v. Pardus, U.S. , 127 S.Ct. 2197 (2007)*, [*2] and construe the pleading in the light most favorable to the plaintiff. *Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)*. In order to survive dismissal for failure to state a claim a complaint must contain more than "a formulaic recitation of the elements of a cause of action;" it must contain factual allegations sufficient "to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly, U.S. , 127 S.Ct. 1955, 1965 (2007)*. However, "[s]pecific facts are not necessary; the statement [of facts] need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Erickson, 127 S.Ct. at 2200* (internal citation, quotation omitted).

Generally, a motion to dismiss is decided on the pleadings only and the court must accept the allegations of the complaint as true for purposes of ruling on its sufficiency. *Cortez v. County of Los Angeles, 294 F.3d 1186, 1188 n.2 (9th Cir. 2002)*. However, in considering the motion, the court may take judicial notice of matters of public record, such as court orders. *Schneider v. California Department of Corrections, 151 F.3d 1194, 1197 (9th Cir. 1998)*; *Shaw v. Hahn, 56 F.3d 1128, 1129 n.1 (9th Cir. 1995)*; [*3] *MGIC Indem. Co. v. Weisman, 803 F.2d 500, 505 (9th Cir. 1986)*. To the extent that a public record, such as a court order, contains disputed facts, a court may not rely on it in ruling on a motion to dismiss for failure to state a claim. *Lee v. City of Los Angeles, 250 F.3d 668, 689-90 (9th Cir. 2001)*.

Defendants have submitted a number of records, including a docket from the California Court of Appeal for the Second Appellate District in the case of *People v. Mark Steven Sokolsky,* No. 2CRIM32776. It contains the following notation, dated February 26, 1979: "The Court: the criminal conviction is affirmed. The order committing appellant to the State Dept. of Mental Health is reversed and remanded as indicated." Counsel for defendants has submitted his own

declaration as well, averring that any file on the case maintained by the Attorney General's Office had been purged because of the age of the case. Motion to Dismiss (MTD), Ex. B, Declaration of Roy S. Liebman PP 3-4 & Attach. 1 (docket). [1] The court takes judicial notice of the docket.

1 The court does not consider the hearsay portions of Mr. Liebman's declaration.

Defendants have also provided a certified copy of plaintiff's criminal [*4] history record, which shows that in 1978 plaintiff was convicted of three sex crimes, that proceedings were suspended as a result of an MDSO commitment and that thereafter plaintiff was sentenced to a term of probation, which was later revoked. MTD, Ex. A, Attach. 1 at 224-225. Plaintiff objects, arguing in essence that the document is not accurate because it shows that he registered as a sex offender at an address in Bellflower, where he had never lived. Opposition (Opp'n) at 5 n.3. The court declines to take judicial notice of the criminal history record because "it is not capable of accurate and ready determination." *Fed. R. Evid. 201(b)*; *see United States Department of Justice v. Reporters Committee For Freedom Of Press, 489 U.S. 749, 752 (1989)* (recognizing that "because of the volume of rap sheets, they are sometimes incorrect or incomplete and sometimes contain information about other persons with similar names"); *see also United States v. Scott, 592 F.2d 1139, 1143 (10th Cir. 1979)* (rap sheet not admissible as a public record of conviction); *United States v. Perlmuter, 693 F.2d 1290, 1295-96 (9th Cir. 1982)* (Ferguson, J., concurring) (same).

Finally, defendants have submitted [*5] a series of court documents maintained in plaintiff's file at Coalinga State Hospital, including a copy of the judgment committing plaintiff to prison for the 1978 convictions, a copy of the Sexually Violent Predator (SVP) Screening Form prepared for plaintiff in 1999, and copies of minute orders from the 2006 hearing to recommit plaintiff as a sexually violent predator. MTD, Ex. C, Attachs. 1-3. The court will take judicial notice of the court records, but not of the screening form. *Fed. R. Evid. 201(b).*

II. *Failure To State A Claim*

Defendants argue that the complaint fails to state a claim because plaintiff's current SVP commitment is based on his criminal record and the screening rather than on the MDSO commitment. MTD at 7-8. Plaintiff argues that his criminal convictions are not relevant because when the first SVP Act (SVPA) petition was filed against him, a conviction resulting in an MDSO finding was the equivalent of a sexually violent offense. Opp'n at 6-7. In the complaint, plaintiff also alleges that the defendants have allowed the mental health professionals who evaluate him to rely on this reversed commitment. Compl. PP 14, 16.

Currently, the definition of a sexually violent [*6] predator in California is one who "has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." *Cal. Welf. & Inst. Code § 6600(a)(1).* A sexually violent offense can be "[a] conviction resulting in a finding that the person was a mentally disordered sex offender" and a "diagnosed mental disorder" may include "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others." *Cal. Welf. & Inst. Code § 6600(a)(2)(g) & (c).* Former versions of the statute also permitted a conviction resulting in a finding that the person was a MDSO to be used as a predicate sexually violent offense. *See, e.g., Cal. Welf. & Inst. Code § 6600(a)* (1999).

In addition, if an initial screening undertaken by the Department of Corrections before a person's release from prison "leads to a determination that the defendant is likely to be a sexually [*7] violent predator," then he undergoes "an evaluation by two psychiatrists or psychologists. If both find that the defendant has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody, the department forwards a petition for commitment to the county of the defendant's last conviction." *People v. Torres, 25 Cal.4th 680, 682 (2001)* (citation omitted).

Even if the complaint is supplemented with those portions of the exhibits supporting defendants' motion subject to judicial notice, this court cannot find that the complaint fails to state a claim. Defendants' exhibits show plaintiff's MDSO commitment was reversed and the complaint alleges that the defendants have allowed reliance on it. That reliance could be as a predicate sexually violent offense, or as evidence showing that plaintiff has a diagnosed mental disorder, or as a factor in the evaluations. *See People v. Superior Court (Ghilotti), 27 Cal.4th 888, 910 (2002)* (evaluation must employ standardized assessment protocol that includes such factors as "type, degree and duration of sexual deviance and severity of mental disorder."). Plaintiff may be able to [*8] prove that such reliance either as a predicate offense or as part of the evaluation of his mental state violated his right to due process, *see United States v. Tucker, 404 U.S. 443, 447 (1972)* (sentencing judge relied on three prior convictions, two of which were invalid), or equal protection. *Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000)* ("class of one" equal protection violation may be

shown if defendants "intentionally treated [plaintiff] differently from others similarly situated and that there is no rational basis for the difference in treatment").

III. *Qualified Immunity*

Defendants argue they are immune from damages in their official capacity and are entitled to qualified immunity in their individual capacities. It is true that plaintiff is not entitled to damages from an official sued in his official capacity, but plaintiff has sued the defendants in their individual capacities as well. Compl. P 10.

Qualified immunity is difficult to resolve on a motion to dismiss because of the fact-specific nature of the inquiry. *Alvarado v. Litscher, 267 F.3d 648, 651-52 (7th Cir. 2001)* (plaintiff is not required to plead facts that anticipate and overcome qualified immunity). The [*9] Ninth Circuit has noted the problems in evaluating a claim of qualified immunity "on a non-existent factual record." *Hydrick v. Hunter, 500 F.3d 978, 985 (9th Cir. 2007)*, *petition for cert. filed, 76 U.S.L.W. 3410 (Jan. 17, 2008)* (No. 07-958).

Nevertheless, in determining whether a governmental officer is immune from suit based on the doctrine of qualified immunity, the court must answer two questions. The first is, taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? *Saucier v. Katz, 533 U.S. 194, 201 (2001).* A negative answer ends the analysis, with qualified immunity protecting defendant from liability. *Id.* If a constitutional violation occurred, a court must further inquire "whether the right was clearly established." *Id.* "If the law did not put the [defendant] on notice that [his] conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Id. at 202*. The reasonableness of a defendant's conduct is judged "against the backdrop of the law at the time of the conduct." *Brosseau v. Haugen, 543 U.S. 194, 198 (2004).*

The Supreme Court has recognized that [*10] because involuntary civil commitment represents "a massive curtailment of liberty," it must be accompanied by due process protections. *Vitek v. Jones, 445 U.S. 480, 491 (1980).* In the context of SVP legislation, the Court has also recognized that involuntary commitment statutes are constitutional only insofar as the "confinement takes place pursuant to proper procedures and evidentiary standards." *Kansas v. Hendricks, 521 U.S. 346, 357 (1997)*; *see also People v. Otto, 26 Cal.4th 200, 210 (2001)* (hearsay used in SVP proceedings must contain indicia of reliability to satisfy due process; use of unreliable hearsay may affect not only the hearing but also "the psychological experts' "conclusion that [Otto] was and remained a pedophile . . . likely to reoffend"); *Carty v. Nelson 426 F.3d 1064, 1075*, *as amended, 431 F.3d 1185 (9th Cir. 2005)*, *cert. denied, 547 U.S. 1130 (2006).* As one court has recognized, "due process does demand that the decision to order an involuntary . . . commitment be made in accordance with a standard that promises some reasonable degree of accuracy." *Rodriguez v. City of New York, 72 F.3d 1051, 1062 (2d Cir. 1995).*

Whether plaintiff was afforded due process in the [*11] evaluations leading to his commitment is a factual determination that cannot be made on the present record. Accordingly, this court cannot find plaintiff will be unable to show a violation of clearly established rights consistent with the factual basis of his amended complaint. *Hydrick, 500 F.3d at 993*.

Moreover, as noted above, the Supreme Court has recognized that irrational and arbitrary official action and difference in treatment violates the *equal protection clause of the Fourteenth Amendment*. *Village of Willowbrook, 528 U.S. at 564*. "A class of one plaintiff must show that the discriminatory treatment '"was intentionally directed just at him, as opposed ... to being an accident or a random act."' *North Pacifica LLC v. City of Pacifica, 526 F.3d 478, 486 (9th Cir. 2008)* (quoting *Jackson v. Burke, 256 F.3d 93, 96 (2d Cir. 2001)).* Once again, this inquiry is fact intensive and so impossible to determine on this as yet undeveloped record.

IT IS HEREBY RECOMMENDED that defendants' motion to dismiss (docket no. 8) be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of *28 U.S.C. § 636(b)(l).* Within [*12] twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).*

DATED: September 9, 2008.

/s/ Kimberly J. Mueller

U.S. MAGISTRATE JUDGE