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13 S. McHunting, and Officer W. Partridge

8 **SUPERIOR COURT OF THE STATE OF ARIZONA**
9 **COUNTY OF COCHISE**

10 ELI DALTON-WEBB,

11 Plaintiff,

12 v.

13 CITY OF SIERRA VISTA, a municipal
14 corporation in Arizona, OFFICER E.
15 SLUSSER, R. HERTMAN, OFFICER S.
16 MCHUNTTING, M. PARTIDGE, peace
17 officers of the Sierra Vista Police Department,

18 Defendants.

NO. S0200CV202400628

**DEFENDANT CITY OF SIERRA VISTA'S
RESPONSE TO PLAINTIFF'S MOTION
FOR LEAVE TO AMEND COMPLAINT**

(Assigned to the Honorable David Thorn)

18 Defendant City of Sierra Vista¹ opposes Plaintiff's Motion for Leave to Amend
19 Complaint because amendment is futile for the reasons argued in the City's pending Motion to
20 Dismiss. Specifically, Plaintiff's state-law claims are barred by the applicable one-year statute of
21

22 ¹ The Individual Officer Defendants have only made a limited appearance for purposes of
23 opposing Plaintiff's Application for Default Judgment. As service on them has not yet been
completed, no pleading filed to date should be construed as the Individual Officers making a
general appearance, waiving service, or otherwise waiving their defenses under Arizona Rule of
Civil Procedure 12(b)(2)–(5).

1 limitations, no private cause of action under the Arizona Constitution exists, and any additional
2 claims fail to state a claim. Additionally, Plaintiff failed to respond to the City's pending Motion
3 to Dismiss, and thus, the Court should summarily grant the City's Motion pursuant to Arizona
4 Rule of Civil Procedure 7.1(b)(2). For these reasons, which are more fully explained below,
5 Defendant strongly urges the Court to deny the Motion For Leave to Amend Complaint and grant
6 the City's Motion to Dismiss.

7 **I. RELEVANT PROCEDURAL BACKGROUND**

8 As an initial matter, Plaintiff is being disingenuous when he claims that Defendants
9 have caused delay and are frustrating the process of this lawsuit. [Motion for Leave to Amend
10 Complaint at p. 2]. As noted in the City's Motion to Dismiss, Defendants conferred with Plaintiff
11 on multiple occasions regarding the issues in the City's Motion, and service generally. Plaintiff
12 could have informed defense counsel that he wanted to amend his Complaint to try and address
13 those issues. Instead, he refused, forcing the City to expend resources in drafting its December 3,
14 2024 Motion to Dismiss. Only *after* the City tried on multiple occasions to confer, and filed the
15 Motion to Dismiss, has Plaintiff now sought leave to file an Amended Complaint. The procedural
16 history is clear that Plaintiff is the sole reason for any delay and frustration in this lawsuit.

17 Plaintiff filed his Complaint on October 9, 2024. After several discussions between
18 the parties, in which Plaintiff was advised that Defendant would remove this matter to federal
19 court, the Parties stipulated to the dismissal of all federal claims on November 21, 2024. Plaintiff
20 refused to compromise regarding a deadline for the Defendants to answer or respond to his
21 complaint, and thus, the City moved to dismiss Plaintiff's Complaint on December 3, 2024. To
22 avoid having to respond to the City's Motion, Plaintiff filed his instant Motion for Leave to Amend
23 Complaint. At no point after the City filed its Motion to Dismiss did Plaintiff make an effort to
24 confer about the City's Motion or his forthcoming Motion for Leave to Amend Complaint.

25 ///

1 **II. THE COURT SHOULD DENY PLAINTIFF’S MOTION FOR LEAVE AND**
2 **GRANT THE CITY’S MOTION TO DISMISS**

3 On December 3, 2024, the City moved for dismissal of all remaining state law
4 claims. As outlined more fully therein, and expressly incorporated here, the Motion raised the
5 following arguments: (1) time-barred by the statute of limitations, (2) no private cause of action
6 under the Arizona Constitution, and (3) failure to state a claim. Under Arizona Rule of Civil
7 Procedure 7.1(a)(3), Plaintiff was required to file any responsive memorandum within 10 days
8 after the Motion was served. Plaintiff failed to respond to the City’s Motion and the time to do so
9 has now passed. Pursuant to Arizona Rule of Civil Procedure 7.1(b)(2), when the opposing
10 party—here, Plaintiff—does not file a response, the Court may summarily grant the motion. Ariz.
11 R. Civ. P. 7.1(b)(2). Accordingly, because Plaintiff did not respond to the Motion to Dismiss, and
12 the time to do so has expired, the Court should grant the City’s Motion and dismiss Plaintiff’s
13 remaining state law claims. *See Choisser v. State ex rel. Herman*, 12 Ariz. App. 259, 260 (1970)
14 (noting that a response is required whenever a motion is filed and failure to respond is a basis to
15 summarily dispose of the motion); *Strategic Dev. & Const., Inc. v. 7th & Roosevelt Partners, LLC*,
16 224 Ariz. 60, 65 ¶ 17 (App. 2010) (finding that the trial court did not abuse its discretion in
17 summarily granting a motion to dismiss when the non-moving party failed to respond).

18 **III. THE COURT MUST DENY PLAINTIFF’S MOTION FOR LEAVE TO AMEND**
19 **COMPLAINT BECAUSE AMENDMENT IS FUTILE**

20 “The grant or denial of leave to amend a pleading is within the trial judge’s
21 discretion.” *Matter of Appeal in Maricopa Cty. Juv. Action No. JS-501904*, 180 Ariz. 348, 355
22 (App. 1994). “A court does not abuse its discretion in denying a motion for leave to amend if the
23 amendment would be futile.” *Swenson v. Cnty. of Pinal*, 243 Ariz. 122, 128 (App. 2017) (quoting
24 *ELM Ret. Ctr., LP v. Callaway*, 226 Ariz. 287 ¶ 26 (App. 2010)). Because Plaintiff’s basis for
25 amendment and the Amended Complaint itself does not negate the underlying basis for dismissal
as outlined in the City’s Motion to Dismiss, amendment is futile and must be denied.

1 To be sure that amendment is futile, the Court need only look at Plaintiff's
2 underlying motion. In his motion, Plaintiff purports to add additional claims pursuant to the
3 Arizona Constitution, "clarif[y] controversies over statute of limitations issues," and "Explains
4 Plaintiff's right to sue, compares state litigation to federal litigation." The overwhelming majority
5 of Plaintiff's additions in the proposed Amended Complaint are not factual allegations or even
6 new claims. Instead, they appear to be legal arguments, Plaintiff's general thoughts about his
7 lawsuit, and citations to legal authority in an end run around having to respond to the City's
8 Motion to Dismiss. These "allegations" do not save Plaintiff's proposed Amended Complaint
9 from being futile, however, as discussed below.

10 **A. No Private Cause of Action Exists Under the Arizona Constitution**

11 As the City noted in its Motion to Dismiss, Plaintiff's claims based on the Arizona
12 Constitution—both current and proposed—are not legally cognizable causes of action. For there
13 to be a private cause of action, the Arizona legislature would have had to enact a statute creating
14 a damage remedy for general violations of state constitutional rights. The legislature has not done
15 so and Courts addressing the issue have refused to fashion a judicial damages remedy in the
16 absence of the legislature. *See, e.g., Diaz v. Arizona*, 2012 WL 1203692, at *5 (D. Ariz. Apr. 11,
17 2012), *aff'd*, 555 Fed. Appx. 698 (9th Cir. 2014) (dismissing state-law constitutional claims
18 because plaintiffs failed to show that they were cognizable); *Cesare v. Pima County*, 2015 WL
19 13741218, at *25 (D. Ariz. Dec. 7, 2015), *report and recommendation adopted*, 2016 WL 836873
20 (D. Ariz. Mar. 4, 2016) ("[N]either of the cases cited by Plaintiffs give support to the argument
21 that Arizona recognizes a private right of action for damages under Art. II, § 6 of the Arizona
22 Constitution. Accordingly, Plaintiffs have failed to show that their claims are based on cognizable
23 legal theories . . .").

24 Here, Plaintiff's Amended Complaint cannot plead around the fact that the Arizona
25 Legislature has not enacted any statute authorizing a private right of action for general violations

1 of state constitutional rights. Notably, Plaintiff does not provide any statutory support for such
2 claims to be cognizable. While his proposed Amended Complaint appears to analyze the *Diaz*
3 matter, that is simply legal argument, it does not change that these claims are not cognizable, and
4 amendment to add more is futile.

5 **B. All Plaintiff's Claims are Barred by the One-Year Statute of Limitations.**

6 Defendant further argued in its Motion to Dismiss that Plaintiff's state-law claims
7 were time-barred because Plaintiff's Complaint, on its face, was untimely filed with the Court.
8 [See Motion to Dismiss at pp. 3-4.] Plaintiff's proposed Amended Complaint confirms that he is
9 still only asserting state, not federal, claims. [See Exhibit A to Motion for Leave to Amend
10 Complaint at ¶ 72 ("Plaintiff does not currently wish to litigate this case in federal court."; ¶ 76
11 ("This paragraph shall not be construed to be a standalone Fourth Amendment claim, but shall
12 only be construed to be an Article 2 Section 3 claim.").] Therefore, if Plaintiff failed to bring his
13 claims within one year from when his cause of action accrued, the latest being October 8, 2023,
14 all claims (whether in the original Complaint or in the proposed Amended Complaint) are
15 untimely and must be dismissed with prejudice. See A.R.S. § 12-821 ("All actions against any
16 public entity or public employee shall be brought within one year after the cause of action accrues
17 and not afterward.").

18 Here, the top right stamp on Plaintiff's Complaint notates that his lawsuit was filed
19 on October 9, 2024—outside of the one-year statute of limitations. As the City indicated in the
20 Motion to Dismiss, Plaintiff pointed to the date stamp on the bottom left of the Complaint as being
21 received on October 4, 2024. Plaintiff's proposed Amended Complaint adds allegations relating
22 to his inability to initially pay the court a filing fee on October 4, 2024. Plaintiff appears to have
23 been aware long before October 4, 2024 that he would not have the funds to pay his filing fee and
24 would need to submit a fee deferral application. Plaintiff's proposed Amended Complaint
25 provides zero basis or allegations as to why Plaintiff did not file his Complaint earlier, which

1 would have provided the Court with enough time to grant the fee deferral request so Plaintiff's
2 Complaint would be timely filed. Relying on the Court's filed date of October 9, 2024, because
3 of a deficiency within Plaintiff's sole control, Plaintiff's Complaint is untimely and amendment
4 cannot cure this defect.

5 **C. Plaintiff's Proposed Amended Complaint Also Fails to State a Claim for which**
6 **Relief may be granted.**

7 This Court should also deny Plaintiff's Motion for Leave to Amend Complaint
8 because the proposed Amended Complaint still fails to state a claim for which relief can be granted
9 as to Plaintiff's non-Arizona constitutional claims. "If a pleading does not comply with Rule 8, an
10 opposing party may move to dismiss the action for '[f]ailure to state a claim upon which relief
11 can be granted.'" *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419 ¶ 7 (2008) (quoting Ariz. R.
12 Civ. P. 12(b)(6)). Because Arizona courts evaluate a complaint's well-pled facts, mere conclusory
13 statements are insufficient to state a claim upon which relief can be granted. *Id.*

14 Plaintiff's proposed Amended Complaint includes the same conclusory language
15 that "the City and its officers are responsible for gross negligence and/or willful negligence . . ."
16 [Exhibit A to Motion for Leave to Amend Complaint at ¶ 32]. The only new allegation is the
17 insertion of "and its officers" into the paragraph. This addition does change the fact that Plaintiff
18 has failed to plead a gross negligence claim. His proposed Amended Complaint still does not
19 identify the individual who supposedly held such a "responsibility" and does not even conclusory
20 allege what duty of law was owed. The failure to plead any facts sufficient to establish the
21 elements of a gross negligence claim further proves that amendment is futile. *See Quiroz v.*
22 *ALCOA Inc.*, 243 Ariz. 560, 563, ¶ 7, 416 P.3d 824, 827 (2018); *Scott v. Scott*, 75 Ariz. 116, 122,
23 252 P.2d 571, 575 (1953) (Gross negligence requires conduct that is flagrant and evinces a lawless
24 and destructive spirit). For the same reasons argued in the City's Motion to Dismiss, Plaintiff's
25 gross negligence claim is futile and must be dismissed.

1 Although Plaintiff did not state he was bringing a new claim for false imprisonment
2 in his motion, as he did with his new constitutional claims, a liberal reading of the proposed
3 Amended Complaint shows that he may be intending to bring one. [See Exhibit A to Motion for
4 Leave to Amend Complaint at ¶ 38 (“The City and its officers seized Plaintiff’s person, unlawfully
5 imprisoned/detained/arrested Plaintiff, and interrupted Plaintiff’s affairs.”)]. Absent from
6 Plaintiff’s proposed Amended Complaint are any allegations as to who allegedly unlawfully
7 detained him, how he was detained, the amount of time he was detained, under what authority any
8 individual conveyed that he was denied, or the result of such detainment. This is the definition of
9 threadbare recitals that go no further than conclusory allegations that fail to state a claim. *See*
10 *Cullen*, 218 Ariz. at 419 ¶ 7. Consequently, in addition to being time-barred, these claims also fail
11 to state a claim upon which relief can be granted, and thus, amendment is futile.

12 **IV. CONCLUSION**

13 For the foregoing reasons, as well as those incorporated by reference in the City’s
14 Motion to Dismiss, Plaintiff’s Motion for Leave to Amend Complaint must be denied as futile
15 and the Court should grant the City’s pending Motion to Dismiss.

16
17 DATED this 6th day of January, 2025.

18 JONES, SKELTON & HOCHULI P.L.C.

19
20 By /s/ Derek R. Graffious

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1 ORIGINAL of the foregoing electronically filed
2 this 6th day of January, 2025.

3 COPY of the foregoing mailed and emailed
4 this 6th day of January, 2025, to:

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9 *Plaintiff, in Pro Per*

10 /s/ Cindy Castro