

JUL 21 2008

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSH THOMAS,

Plaintiff - Appellant,

v.

D. A. CARRASCO; VERONICA
MENDOZA,

Defendants - Appellees.

No. 06-15491

D.C. No. CV-04-05793-OWW

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Oliver W. Wanger, District Judge, Presiding

Argued and Submitted July 14, 2008
San Francisco, California

Before: W. FLETCHER and TALLMAN, Circuit Judges, and DAWSON,**
District Judge.

Josh Thomas appeals the district court's dismissal of his complaint pursuant to 28 U.S.C. § 1915A(b)(1) for failure to state a claim upon which relief may be

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Kent J. Dawson, United States District Judge for the District of Nevada, sitting by designation.

granted. To the extent that the district court concluded that Thomas improperly brought a separate action under 42 U.S.C. § 1983, the parties concede that the district court was in error. The district court's conclusion that "release of the records would likely be ordered, even over objection, during discovery" does not preclude Thomas from potentially stating a claim upon which relief may be granted. *See Gonzalez v. Spencer*, 336 F.3d 832, 835 (9th Cir. 2003) (per curiam) (holding that the plaintiff was "entitled at least to nominal damages, even if [the defendant] could have obtained the documents lawfully"). We therefore reverse the judgment of the district court and remand for further proceedings.

We decline to consider the arguments raised by the defendants for the first time on appeal. *Taniguchi v. Schultz*, 303 F.3d 950, 959 (9th Cir. 2002); *Salmeron v. United States*, 724 F.2d 1357, 1364 (9th Cir. 1983). We remand with instructions that the district court order a response from the defendants.

REVERSED and REMANDED.