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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

FRED W. DAVIS,)	1:04-cv-6763-LJO-SMS-PC
)	
Plaintiff,)	FINDINGS AND RECOMMENDATION RE:
v.)	DEFENDANT'S MOTION TO DISMISS
)	(DOC. 31)
J. W. HUSKEY, et al.,)	
)	
Defendants.)	
)	
)	

Plaintiff is a state prisoner proceeding in forma pauperis and pro se with an action for damages for violation of his civil rights. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b) and Local Rules 72-302 and 72-304.

Pending before the Court is the motion of Defendant C. Ramey to dismiss the action, filed on July 5, 2007, along with a supporting memorandum of points and authorities, a declaration of service, and a certification of the custodian of records of the government claims program of the state of California with attachments. Plaintiff filed opposition to the motion on July 16, 2007, consisting of a memorandum, proof of service thereof, and exhibits. No reply was filed.

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1 I. Background

2 Plaintiff commenced this action in December 2004 by filing
3 an unverified complaint; an unverified first amended complaint
4 (FAC) was filed on April 24, 2006, in which Plaintiff sought
5 compensatory and punitive damages and injunctive relief against
6 two correctional officers, Ramey and Ayala, and a warden, Huskey.
7 Plaintiff alleged that on March 25, 2002, without any cause in
8 the way of threats, resistance, or rules violations, Defendant
9 Ramey maliciously and sadistically barred Plaintiff from using
10 the restroom, handcuffed and jerked Plaintiff, twisted his arm,
11 caused him to fall, and injured Plaintiff, who as a result was
12 hospitalized for five days. (FAC [Doc. 12] pp. 2-3.) Plaintiff
13 complained that this conduct constituted an application of
14 excessive force in violation of the Eighth Amendment's
15 prohibition against cruel and unusual punishment, the tort of
16 assault, and a violation of Due Process. (Id. at 3-4.)

17 On May 7, 2007, the Court adopted findings and a
18 recommendation that had been filed on February 26, 2007,
19 screening the case and determining that the case would proceed
20 only against Defendant Ramey and only concerning the Eighth
21 Amendment excessive force claim and pendant state claims of
22 assault and battery. (Docs. 26, 21.)

23 On April 11, 2007, an informational order was filed and
24 served by mail on Plaintiff. The order informed Plaintiff
25 concerning the significance of, and requirements and procedures
26 concerning, motions to dismiss and motions for summary judgment.

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1 II. Legal Standards

2 A. Motion to Dismiss

3 Fed. R. Civ. P 12(b) (6) provides for the making of a motion
4 to dismiss for failure to state a claim upon which relief can be
5 granted; such a motion tests the legal sufficiency of the claim
6 or claims stated in the complaint. The motion tests whether there
7 is any set of "facts that could be proved consistent with the
8 allegations of the complaint" that would entitle plaintiff to
9 some relief. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514
10 (2002); Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Diaz
11 v. Gates, 380 F.3d 480, 482 (9th Cir. 2004). Dismissal for
12 failure to state a claim is proper only if it is clear that no
13 relief could be granted under any set of facts that could be
14 proved consistent with the allegations. Cervantes v. City of San
15 Diego, 5 F.3d 1273, 1274 (9th Cir. 1993). A complaint should not
16 be dismissed under Rule 12(b) (6) "unless it appears beyond doubt
17 that the plaintiff can prove no set of facts in support of his
18 claim which would entitle him to relief." Conley v. Gibson, 355
19 U.S. 41, 45-46, (1957). Dismissal is proper only where there is
20 either a lack of a cognizable legal theory, or an absence of
21 sufficient facts alleged under a cognizable legal theory.
22 Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir.
23 1990).

24 In considering a motion under Fed. R. Civ. P. 12(b) (6), a
25 court must construe the complaint in the light most favorable to
26 the plaintiff; accept all well-pleaded factual allegations as
27 true; and determine whether the plaintiff can prove any set of
28 facts to support a claim that would merit relief. Cahill v.

1 Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996).

2 Here, Defendants seek dismissal of plaintiff's state law
3 tort claims for assault and battery because Plaintiff has failed
4 to allege compliance with the California Tort Claims Act.

5 B. California Tort Claims Act

6 The California Tort Claims Act requires that a tort claim
7 against a public entity or its employees be presented to the
8 California Victim Compensation and Government Claims Board
9 (CVCGCB), formerly known as the State Board of Control, no more
10 than six months after the cause of action accrues. Cal. Govt.
11 Code §§ 905.2, 910, 911.2, 945.4, 950-950.2 (West 2008).

12 Presentation of a written claim and action on, or rejection
13 of, the claim are conditions precedent to suit; compliance with
14 the claims presentation requirement is an element of the cause of
15 action, or claim, and failure to allege facts demonstrating or
16 excusing compliance with the requirement subjects a claim against
17 a public entity to a demurrer for failure to state a claim. State
18 v. Superior Court of Kings County (Bodde), 32 Cal.4th 1234, 1239,
19 1243 (2004); Mangold v. California Pub. Utils. Comm'n., 67 F.3d
20 1470, 1477 (9th Cir. 1995). This means that a plaintiff must
21 allege that he has presented a timely claim to the CVCGCB. City
22 of San Jose v. Superior Court, 12 Cal.3d 447, 454 (1974). A
23 person who receives written rejection of a claim has six months
24 from the date the rejection was mailed to file a lawsuit
25 regarding the claim. Cal. Govt. Code § 945.6(a)(1). The six-month
26 statute of limitations of section 945.6(a)(1) is applicable to
27 suits brought by prisoners. See, May v. Enomoto, 633 F.2d 164,
28 166, n.2, 167 (9th Cir. 1980).

1 III. Analysis

2 Plaintiff is not required to file a claim with the CVCGCB in
3 order to exhaust his federal section 1983 claim pursuant to the
4 Eighth Amendment. Rumbles v. Hill, 182 F.3d 1064, 1069 (9th Cir.
5 1999) (overruled in part on other grounds by Booth v. Churner,
6 532 U.S. 731 (2001)).

7 However, to pursue any tort claims under California law
8 against a public employee such as Defendant Ramey, Plaintiff is
9 required to exhaust non-judicial remedies by filing a claim with
10 the CVCGCB, and Plaintiff is required to plead such exhaustion in
11 his complaint. State v. Superior Court, 32 Cal.4th at 1243;
12 Mangold, 67 F.3d at 1477; Karim-Panahi, 839 F.2d at 627.

13 Here, there are no allegations whatsoever in Plaintiff's FAC
14 concerning any presentation of a claim. Further, Plaintiff has
15 not alleged any facts concerning compliance, or excuse from
16 compliance, with California's Tort Claims Act.

17 Thus, Plaintiff has not alleged facts demonstrating or
18 excusing compliance with the requirement. Plaintiff's opposition
19 to the motion consisted of matter pertinent to the merits of the
20 controversy concerning the alleged excessive use of force and
21 other matters relating to the disciplinary proceedings in prison
22 that resulted from the incident in question. To the extent that
23 the FAC may be construed to plead state law tort claims,
24 including assault and battery claims, Defendant is entitled to
25 dismissal of those claims.

26 With respect to the issue of whether or not Plaintiff could
27 state facts constituting a claim, the Court has considered the
28 materials submitted by Defendant consisting of documents

1 certified by Carolyn Perry, the custodian of records for the
2 Government Claims Program, which reflect that the Victim
3 Compensation and Government Claims Board received Plaintiff's
4 claim on September 16, 2002, and subsequently notified Plaintiff
5 in a writing dated November 8, 2002, that it had rejected
6 Plaintiff's claim on October 25, 2002, and warned him that he had
7 only six months from the date of mailing in which to file a court
8 action. Plaintiff's initial complaint, filed on December 28,
9 2004, was signed on December 23, 2004; the judicial complaint was
10 not filed within six months of the notification of rejection of
11 the tort claim in November 2002. It is clear that even if
12 Plaintiff could allege filing a claim and receiving a rejection
13 of the claim, he could not allege that the complaint was timely
14 filed in compliance with the statute. Thus, granting leave to
15 amend would be futile

16 Finally, the Court notes that Plaintiff has been given an
17 opportunity to oppose the motion to dismiss and to apprise the
18 Court of any facts that might affect his compliance with the
19 pertinent statutes, but no factual circumstances have been set
20 forth.

21 IV. Recommendation

22 Accordingly, because Plaintiff failed to allege compliance
23 with the California Tort Claims Act, and further because it
24 appears beyond doubt that Plaintiff can allege no set of facts in
25 support of his claim which would entitle him to relief, it IS
26 RECOMMENDED that Defendant's motion to dismiss the pendant state

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1 claims of assault and battery BE GRANTED, and Plaintiff's state
2 claims BE DISMISSED without leave to amend.

3 This report and recommendation is submitted to the United
4 States District Court Judge assigned to the case, pursuant to the
5 provisions of 28 U.S.C. § 636 (b) (1) (B) and Rule 72-304 of the
6 Local Rules of Practice for the United States District Court,
7 Eastern District of California. Within twenty days after being
8 served with a copy, any party may file written objections with
9 the Court and serve a copy on all parties. Such a document should
10 be captioned "Objections to Magistrate Judge's Findings and
11 Recommendations." Replies to the objections shall be served and
12 filed within ten (10) court days (plus three days if served by
13 mail) after service of the objections. The Court will then review
14 the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636
15 (b) (1) (C). The parties are advised that failure to file
16 objections within the specified time may waive the right to
17 appeal the District Court's order. Martinez v. Ylst, 951 F.2d
18 1153 (9th Cir. 1991).

19 IT IS SO ORDERED.

20 Dated: February 8, 2008

/s/ Sandra M. Snyder
UNITED STATES MAGISTRATE JUDGE

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