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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Robert Carrasco Gamez, Jr.,
Plaintiff,
vs.
Charles L. Ryan, et al.
Defendants.

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) No. CV-12-0760-PHX-RCB
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Plaintiff Robert Carrasco Gamez, Jr., who is confined in the Arizona State Prison Complex, Browning Unit, in Florence, Arizona, filed this *pro se* civil rights complaint pursuant to 42 U.S.C. § 1983, alleging excessive force. Currently pending before the court are plaintiff's objections to a Report and Recommendation ("R & R") issued by the Honorable Mark E. Aspey, United States Magistrate Judge. Plaintiff filed what he designated as a "Motion to Exceed Page Limit for Amended Complaint (Proposed)" (Doc. 24), and simultaneously lodged a proposed amended complaint (Doc. 24-

1) .¹ Shortly thereafter, plaintiff filed a "request" for a "stay" of the ruling on the motion to amend "until[] Defendant Valentine ha[s] been entered into this . . . case[.]" Mot. (Doc. 25) at 13-15. Construing the motion to exceed page limit as a "motion to amend[,]" the Magistrate Judge recommends denying that motion. R & R (Doc. 33) at 4:18. Properly treating plaintiff's "request" for a stay as a motion, the Magistrate Judge recommends denying that relief as well. Id. at 4:20-23.²

Background

Assuming familiarity with the prior proceedings herein, the court will recap only those aspects directly relevant to the pending objections to the R & R.

I. Screening Order

In the screening order, among other things, this court dismissed count II of the complaint "to the extent that Plaintiff asserts a failure to train against Defendants Ryan, Hemter, Fizer, Pittario, and Moore." Ord. (Doc. 5) at 7:4-5. In dismissing that claim, the court first pointed to the lack of allegations of "any facts to support how or when any of these Defendants knew or should have known that training in the use of force was inadequate." Id. at 6:23-25. Second,

¹ For brevity's sake, the court will refer to that lodged complaint as the First Amended Complaint ("FAC").

² For ease of reference, all citations to page numbers of docketed items are to the page assigned by the court's case management and electronic case filing (CM/ECF) system.

1 the court pointed to plaintiff's "fail[ure] to allege facts
2 to support that despite such knowledge, any of these
3 Defendants made a deliberate choice not to address the
4 allegedly inadequate training." Id. at 6:25-27. Plaintiff's
5 "conclusory allegations" were not sufficient to overcome
6 those pleading deficiencies, this court found. See id. at
7 6:27. Nor, as this court pointed out, could plaintiff Gamez
8 rely upon "a liberal interpretation of [his] civil rights
9 complaint . . . [to] supply essential elements of the claim
10 that were not initially pled." Id. at 7:2-3 (citation
11 omitted).

12 **II. Motions**

13 As mentioned at the outset, plaintiff Gamez did not
14 actually file a motion to amend his complaint. Rather, he
15 filed a "Motion to Exceed Page Limit for Amended Complaint
16 (Proposed)[.]" Mot. (Doc. 24) at 1. Other than asserting
17 the need for nine "additional pages" to "enable [him] to
18 adequately state each claim[.]" plaintiff did not provide any
19 reasons for allowing amendment. Id.

20 On the other hand, plaintiff's motion for a stay is
21 broader than its designation suggests. Plaintiff is not
22 merely seeking a stay until defendant Valentine becomes a
23 party to this action, but he is also seeking a stay until
24 defendants Norris and Valentine have complied document
25 requests in the form of their personnel records. Roughly a
26 month after plaintiff filed these motions, and before the
27 issuance of the R & R, defendant Valentine joined in the
28 answer previously filed by defendant Norris. See Joinder

1 (Doc. 29).

2 **III. Report & Recommendation**

3 As the Magistrate Judge construed the FAC, plaintiff is
4 "re-assert[ing] his negligent hiring and failure to train
5 claim against Defendants Moore, Hetmer and Ryan." R & R
6 (Doc. 33) at 3:2-4. Apparently discerning no difference
7 between the complaint and the FAC, the Magistrate Judge
8 recommends denying plaintiff's motion for leave to amend
9 because his FAC seeks "to add a claim which was previously
10 dismissed[]" - namely, the failure to train claim against
11 the three defendants just listed. Id. at 4:18-19.

12 The Magistrate Judge also recommends denying plaintiff's
13 motion for a stay of the ruling on his motion to amend the
14 complaint "until[] defendant Valentine ha[s] been entered
15 into this . . . case[.]" See Mot. (Doc. 25) at 1:14-15. The
16 R & R is not explicit as to the basis for this
17 recommendation, but it can easily be inferred that it is
18 because prior to the issuance of the R & R, defendant
19 Valentine joined in defendant Norris' answer. See R & R
20 (doc. 33) at 2:24-26.

21 **IV. Plaintiff's "Objections"**

22 Plaintiff's purported "objections" to the R & R consist
23 of three sections. The "background" section is a verbatim
24 recitation of the "[s]upporting [f]acts" as alleged in count
25 I of the FAC, directed against defendants Norris and
26 Valentine. Compare FAC (doc. 24-1) at 6-10, ¶ 3 with, Obj.
27 (doc. 35) at 1:10-5:29. The "supporting facts" as alleged in
28 the FAC pertaining to count II - - negligent hiring and

1 failure to train and supervise as against defendants Moore,
2 Hetmer, and Ryan -- comprise most of the "argument" section
3 of plaintiff's objections. Compare FAC (doc. 24-1) at 11-
4 15:27, ¶ 3 with, Obj. (doc. 35) at 6:16-10:27.

5 The "background" section also briefly addresses the
6 Magistrate Judge's recommendation denying plaintiff's motion
7 for a stay. Although defendant Valentine joined in defendant
8 Norris' answer prior to the filing of plaintiff's objections,
9 plaintiff still insists that the court should issue a stay
10 until Valentine "has entered as a party[.]" Obj. (Doc. 35) at
11 11:4. Plaintiff also asserts that he is entitled to a stay
12 until both defendants Norris and Valentine have complied with
13 his requests for personnel records.

14 "For the foregoing reasons[,]" plaintiff "respectfully
15 request[s] that this . . . court . . . grant [hi]s 'Motion for
16 Objection and Recommendation[.]'" Obj. (Doc. 35) at 11:11-13.
17 Significantly, however, although plaintiff is claiming that
18 the R & R is clearly erroneous or contrary to law pursuant to
19 28 U.S.C. § 636(b)(1)(A) and Fed.R.Civ.P. 72(a),³ see id. at
20 6, his purported objections do not explain how or why that is
21 so. This omission is particularly glaring with respect to the
22

23 ³ Plaintiff designates his objections as being "pursuant to Rule
24 72(b)[,]" Obj. (doc. 35) at 1, which requires a district court to
25 "determine de novo any part of the magistrate judge's disposition that has
26 been properly objected to." Fed.R.Civ.P. 72(b)(3). In the body of his
27 objections, however, the plaintiff discusses only the clearly erroneous or
28 contrary to law standard, which is found in Rule 72(a). See Obj. (Doc. 35)
at 6, § (A). The court, therefore, assumes that plaintiff intends to rely
upon the standard as set forth in the latter Rule - Fed.R.Civ.P. 72(a),
which is consistent with his reliance upon section 636(b)(1)(A) in that
both provide for the clearly erroneous or contrary to law standard of
review.

1 Magistrate Judge's recommendation to deny plaintiff's motion
2 to amend. In any event, it is apparent that for the most
3 part, plaintiff simply cut and pasted from his FAC and then
4 styled those excerpts as objections.

5 **Discussion**

6 Arguably, as will be seen, there is the potential for
7 differing standards of review depending upon whether the court
8 is considering the recommendation to deny plaintiff's motion
9 to amend, or whether it is considering the recommendation to
10 deny his motion for a stay. Thus, for clarity's sake, the
11 court will separately address those two aspects of the R & R.

12 **I. Leave to Amend**

13 Generally, non-dispositive motions are subject to review
14 under the clearly erroneous or contrary to law standard, 28
15 U.S.C. § 636(b)(1)(A); and Fed.R.Civ.P. 72(a), whereas
16 dispositive motions are subject to *de novo* review. 28 U.S.C.
17 § 636(b)(1); and Fed.R.Civ.P. 72(b)(3). Assuming for the sake
18 of argument that a motion for leave to amend is non-
19 dispositive, then, as plaintiff urges, the recommendation to
20 deny that motion would be subject to a clearly erroneous or
21 contrary to law standard of review. See Cazares v. Morris,
22 2011 WL 2414543, at *2 (D.Ariz. June 16, 2011) ("Generally, a
23 motion for leave to amend the pleadings is a nondispositive
24 matter that may be ruled on by a magistrate judge pursuant to
25 28 U.S.C. § 636(b)(1).") (citing, *inter alia*, JJCO, Inc. v.
26 Isuzu Motors America, Inc., 2009 WL 3818247, *2 (D.Haw. Nov.
27 12, 2009) (magistrate judge's denial of a motion for leave to
28 amend complaint to add new defendant not a dispositive

1 ruling)) (citing, in turn, U.S. Dominator, Inc. v. Factory
2 Ship Robert E. Resoff, 768 F.2d 1099, 1102 n. 1 (9th Cir.
3 1985), *superseded by statute on other grounds as recognized in*
4 Simpson v. Lear Astronics Corp., 77 F.3d 1170 (9th Cir. 1996)
5 (noting that the plaintiff's motion for leave to amend its
6 Complaint was properly treated as a nondispositive motion when
7 the magistrate judge granted the plaintiff's motion)).

8 In the present case, however, because the Magistrate
9 Judge specifically premised recommending denial of plaintiff's
10 motion for leave to amend on futility grounds, arguably such
11 denial is "view[ed] . . . as a dispositive ruling." See JJCO,
12 Inc., 2009 WL 3818247, at *3 (citing cases). That "view is not
13 universal[,]" though. Id. at *3 (citing Hall v. Norfolk S.
14 Ry. Co., 469 F.3d 590, 595 (7th Cir. 2006) (magistrate judge's
15 denial of a motion to amend on grounds of futility to be
16 nondispositive and subject to review for clear error by the
17 district court)). This court need not become mired down in
18 resolving the applicable standard of review here because
19 plaintiff cannot prevail under either.

20 Insofar as the motion to amend is concerned, plaintiff
21 does not even hint at any "clearly erroneous" factual
22 findings. See Morgal v. Maricopa County Bd. of Sup'rs, 284
23 F.R.D. 452, 458 (D.Ariz. 2012) ("The clearly erroneous
24 standard applies to the magistrate judge's factual
25 findings[.]") (internal quotation marks and citations
26 omitted), reconsideration denied, 2012 WL 2368478 (D.Ariz.
27 June 21, 2012). Plaintiff also has not, directly or
28 implicitly, indicated that any of the Magistrate Judge's legal

1 conclusions are contrary to law. See id. (“[T]he contrary to
2 law standard applies to the magistrate judge’s legal
3 conclusions[.]”) (internal quotation marks and citations
4 omitted). Additionally, as to his motion to amend, as already
5 discussed, plaintiff’s so-called “objections” regarding his
6 motion to amend consist of nothing more than a verbatim
7 reiteration of the *allegations* in his FAC. Obviously, such
8 allegations do not in any way constitute objections to the
9 R & R which, in turn could be subject to *de novo* review.
10 Accordingly, the court finds no merit to plaintiff’s
11 “objections” to the Magistrate Judge’s recommendation to deny
12 plaintiff’s motion to amend (Doc. 24).

13 **II. Stay**

14 Preliminarily, the court must determine the appropriate
15 standard of review where, as here, a Magistrate Judge
16 recommends denying a motion for a stay. “‘Motions to stay
17 have not been held to be generically dispositive. However,
18 where the effect of the motion is a denial of relief, it is
19 considered dispositive.’” Navarro v. Ryan, 2013 WL 1561111, at
20 *1 n. 1 (D.Ariz. Feb. 25, 2013), adopted as modified on other
21 grounds, 2013 WL 1561470 (D.Ariz. April 12, 2013), (quoting
22 Bishop v. Schriro, 2009 WL 1749989, at *2 (D. Ariz. June 18,
23 2009) (citing Reynaga v. Cammisa, 971 F.2d 414, 416 (9th Cir.
24 1992) (when injunctive relief sought goes to the merits of
25 plaintiff’s action or a complete stay of an action, magistrate
26 judge’s orders under 28 U.S.C. § 636(b)(1)(A) are precluded)
27 (“Here, however, the magistrate did not recommend the
28 imposition of a stay; rather, he imposed it himself. That

1 order was beyond the magistrate [judge]'s authority: it was
2 beyond his jurisdiction and was, in essence, a legal
3 nullity."); but see, Powershare, Inc. v. Syntel, Inc., 597
4 F.3d 10, 13-14 (1st Cir. 2010) (Magistrate Judge's ruling on
5 motion to stay litigation pending arbitration was not
6 dispositive) (citations omitted)).

7 In the present case, denying plaintiff's motion for a
8 stay of a ruling on his motion to amend does not have the
9 effect of denying him relief. Therefore, plaintiff's motion
10 for a stay is non-dispositive. Hence, the clearly erroneous
11 or contrary to law standard governs this aspect of the R & R.
12 Magistrate Judge Aspey's recommendation to deny plaintiff's
13 motion for a stay readily survives that standard of review.

14 First, as with his "objections" pertaining to his motion
15 to amend, plaintiff has not identified any factual findings
16 pertaining to his motion for a stay which he deems to be
17 clearly erroneous. Plaintiff also has not identified any
18 specific legal conclusions regarding his motion to amend which
19 he believes are contrary to law.

20 Moreover, plaintiff claimed the need for a stay because
21 when he filed that motion, defendant Valentine was not yet a
22 party. Since then, however, and before the issuance of the
23 R & R, Mr. Valentine did become a party to this action through
24 joinder in defendant Norris' answer. Defendant Valentine's
25 joinder effectively mooted this asserted basis for a stay.

26 Finally, in objecting to the recommendation denying a
27 stay, plaintiff claims that a stay is necessary until
28 defendant Valentine also "compl[ies] with [a] request for

1 production of 'personnel records.'" Obj. (Doc. 35) at 11:4-5
2 (citing Docs. 25, 26, 27 and 28). The record belies that
3 claim. Docket 25 is plaintiff's own motion for a stay, which
4 is obviously irrelevant to this claim. Dockets 26, 27 and 28
5 are, respectively, plaintiff's motion to compel discovery as
6 to defendant Norris, not defendant Valentine, defendant
7 Norris' response and plaintiff's reply. As an aside, that
8 motion to compel was filed the same day as plaintiff's motion
9 for a stay, and has since been denied (Doc. 52).
10 Consequently, this record does not show any outstanding
11 document request as to defendant Valentine so as to warrant
12 staying a ruling on plaintiff's motion for leave to amend.
13 For these reasons, the court finds no merit to plaintiff's
14 "objections" to the R & R insofar as it recommends denying his
15 motion for a stay.

16 **Conclusion**

17 In sum, as set forth above, the court **HEREBY ORDERS** that:

- 18 (1) United States Magistrate Judge Aspey's Report and
19 Recommendation (Doc. 33) is **ADOPTED**; and accordingly
20 (2) "Plaintiff's Motion to Exceed page Limit for Amended
21 Complaint (Proposed)" (Doc. 24) and "Plaintiff['s]
22 request that this court stay his Ruling on Amended
23 Complaint (Dkt.24) until[] Defendant Valentine had
24 [sic] been entered into this civil case" (Doc. 25)
25 are **DENIED**.

26 DATED this 6th day of May, 2013.

27 

28 Robert C. Broomfield
Senior United States District Judge

Copies to counsel of record and plaintiff *pro se*