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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Ruben Guzman Hernandez,
10 Plaintiff,

No. CV-16-04238-PHX-GMS (ESW)

ORDER

11 v.

12 Banner Boswell Medical Center, et al.,
13 Defendants.
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16 This Order addresses the following three Motions: (i) Plaintiff's "Motion (1) to
17 Amend Scheduling Order and (2) for Leave to File Amended Pleading and Join New
18 Defendants" (Doc. 85); (ii) Defendant McCracken's Motion to Strike (Doc. 86); and (iii)
19 Defendant Greenbaum's Motion to Extend the Briefing Scheduling (Doc. 90).

20 **I. PROCEDURAL BACKGROUND**

21 This is a civil rights action filed by Plaintiff pursuant to 42 U.S.C. § 1983. In May
22 2017, the Court issued an Order (Doc. 13) screening Plaintiff's First Amended Complaint
23 (Doc. 12). The Court found that the First Amended Complaint stated a Fourteenth
24 Amendment claim against Defendants Greenbaum, McCracken, Doe Nurse 1, Doe Nurse
25 2, and John Doe 3. (Doc. 13 at 4). The claim is premised on factual allegations that
26 Plaintiff was catheterized against his will after he was arrested by the El Mirage Police
27 Department and taken to Banner Boswell Medical Center for a medical clearance. (Id. at
28 3-4). The Court directed service on Defendants Greenbaum and McCracken. (Id. at 6).

1 The Court deferred service on the Doe Defendants until Plaintiff discovered their
2 identities. The Court dismissed the Doe Defendants in March 2019 after Plaintiff failed
3 to show cause for failure to timely discover their identities and effect service. (Docs. 60,
4 62).

5 In May 2018, Defendant McCracken filed a Motion for Summary Judgment that
6 asserted qualified immunity. (Doc. 34). In its August 16, 2018 Order, the Court stated
7 that claims alleging forcible catheterization may implicate the Fourth Amendment. (Doc.
8 46 at 5). The Court noted that although the First Amended Complaint does not
9 specifically assert a Fourth Amendment claim, Plaintiff, as a pro se prisoner litigant, was
10 not required to do so as long as his factual allegation supported the claim. (Id. at 7). The
11 Court concluded that Plaintiff's allegations support a Fourth Amendment claim. (Id.).
12 The Court found the existence of genuine issues of material fact as to whether Defendant
13 McCracken violated Plaintiff's Fourth and Fourteenth Amendment rights. (Id. at 9). The
14 Court also denied Defendant McCracken's request for summary judgment on qualified
15 immunity grounds. (Id. at 11). Defendant McCracken appealed the Court's Order (Doc.
16 46) to the Ninth Circuit Court of Appeals. In its February 14, 2019 mandate, the Ninth
17 Circuit dismissed Defendant McCracken's appeal of Plaintiff's Fourth Amendment claim
18 for lack of subject matter jurisdiction. (Doc. 53-1 at 2). The Ninth Circuit concluded that
19 the Court erred in determining that Defendant McCracken is not entitled to qualified
20 immunity as to Plaintiff's Fourteenth Amendment claim. (Id. at 2-3). The Ninth Circuit
21 reversed the Court's ruling on that issue and remanded the matter with instructions to
22 grant Defendant McCracken's Motion for Summary Judgment on the basis of qualified
23 immunity as to the Fourteenth Amendment claim. (Id. at 3).

24 On March 8, 2019, following the Ninth Circuit mandate, the Court held a status
25 conference with Plaintiff and Defendant McCracken. (Doc. 56). The Court appointed an
26 attorney to serve as Plaintiff's pro bono counsel, who later withdrew for conflict of
27 interest reasons. (Docs. 58, 59, 61). The Court then appointed Mitchell Turbenson of
28 Ballard Spahr LLP to serve as replacement pro bono counsel for Plaintiff. (Doc. 64).

1 On May 31, 2019, the Court held another status conference at which counsel for
2 Plaintiff and Defendant appeared. (Doc. 67). The Court extended the service deadline
3 for Defendant Greenbaum to June 14, 2019. (Id.). Following service of Defendant
4 Greenbaum, Mr. Turbenson moved to withdraw as Plaintiff’s pro bono counsel based on
5 a newly discovered conflict of interest. (Doc. 72). The Court granted the Motion. (Doc.
6 73). The Court then appointed Gregory Scheiferstein of Snell and Wilmer LLP to
7 represent Plaintiff pro bono on a limited basis for pretrial and trial matters only. (Doc.
8 76).

9 On July 19, 2019, Defendant Greenbaum filed a Motion to Dismiss (Doc. 74).
10 Counsel for Plaintiff filed a Response (Doc. 80), and Defendant Greenbaum filed a Reply
11 (Doc. 81). The Motion to Dismiss remains pending.

12 On September 10, 2019, Plaintiff’s counsel filed a “Motion to Amend the
13 Scheduling Order for Limited Reopening of Discovery” (Doc. 83). The Motion
14 requested that the Court “reopen discovery on a limited basis for a limited time so that his
15 counsel may prepare for trial through appropriate pre-trial discovery, which is calculated
16 to sharpen the issues for trial, increase efficiency, and advance the trial’s truth-seeking
17 purpose.” (Id. at 1). The Motion states that counsel for Defendants McCracken and
18 Greenbaum did not oppose the requested limited reopening of discovery. (Id. at 4). The
19 Court granted the Motion to Amend the Scheduling Order and reopened discovery until
20 March 10, 2020 for the limited purposes detailed in Plaintiff’s Motion. (Doc. 84).

21 **II. DISCUSSION OF PENDING MOTIONS (DOCS. 85, 86, 90)**

22 On October 11, 2019, Plaintiff, through counsel, filed a “Motion (1) to Amend
23 Scheduling Order and (2) for Leave to File Amended Pleading and Join New
24 Defendants” (Doc. 85). Defendant McCracken has moved to strike Plaintiff’s Motion.
25 (Doc. 86). Defendant McCracken argues that the Court appointed Plaintiff counsel on a
26 limited basis that does not include pursuing amendments to the First Amended
27 Complaint. The Court’s July 31, 2019 Order states that Mr. Scheiferstein is appointed
28 “to represent Plaintiff on a limited basis for pretrial and trial matters only.” (Doc. 76).

1 As a motion to amend a pleading is technically a pretrial matter, the Court does not find
2 that the October 11, 2019 Motion (Doc. 85) exceeds the scope of the Court’s Order (Doc.
3 76). Defendant McCracken’s Motion to Strike (Doc. 86) will be denied.

4 In his “Motion (1) to Amend Scheduling Order and (2) for Leave to File Amended
5 Pleading and Join New Defendants” (Doc. 85), Plaintiff acknowledges that the deadline
6 for amending the pleadings expired nearly two years ago, on November 13, 2017. (Doc.
7 85 at 7). Plaintiff contends that good cause exists to amend the deadline. (Id. at 7-9).
8 However, an extension of a deadline sought after its expiration requires a showing of
9 “excusable neglect,” not merely “good cause.” See Fed. R. Civ. P. 6(b)(1)(B).
10 Excusable neglect exists where a party’s failure to comply with a deadline was negligent.
11 See Lemoge v. United States, 587 F.3d 1188, 1195 (9th Cir. 2009). There are at least four
12 factors in determining whether neglect is excusable: (i) the danger of prejudice to the
13 opposing party; (ii) the length of the delay and its potential impact on the proceedings;
14 (iii) the reason for the delay; and (iv) whether the movant acted in good faith. See
15 Bateman v. U.S. Postal Serv., 231 F.3d 1220, 1223-24 (9th Cir. 2000) (citing Pioneer Inv.
16 Servs. Co. v. Brunswick Assoc. Ltd. P’ship, 507 U.S. 380, 395 (1993)). The
17 determination of whether neglect is excusable is ultimately an equitable one, taking into
18 account of all relevant circumstances surrounding the party’s omission. See Pioneer, 507
19 U.S. at 395. This equitable determination is left to the discretion of the district court. See
20 Pincay v. Andrews, 389 F.3d 853, 860 (9th Cir. 2004).

21 Briefing on Plaintiff’s Motion (Doc. 85) is incomplete. As the Court has denied
22 Defendant McCracken’s Motion to Strike (Doc. 86), the Court will allow Defendant
23 McCracken to file a response to Plaintiff’s Motion (Doc. 85). The Court will set
24 **November 13, 2019** as the deadline for Defendant McCracken’s response. Plaintiff may
25 file a reply within seven days from the date of service of Defendant McCracken’s
26 response.

27 The Court has reviewed Defendant Greenbaum’s Motion to Extend the Briefing
28 Scheduling (Doc. 90). Defendant Greenbaum has made a limited appearance and moved

1 for dismissal based on untimely service of process. (Doc. 74). Defendant Greenbaum
2 requests that the Court extend his deadline to respond to Plaintiff's Motion (Doc. 85)
3 until after a ruling on his Motion to Dismiss (Doc. 74) and order requiring him to file an
4 answer. (Doc. 90 at 2). Defendant Greenbaum acknowledges that he has no standing at
5 this time to respond to Plaintiff's Motion. (Id. at 1). The Court will deny without
6 prejudice Defendant Greenbaum's Motion to Extend the Briefing Scheduling (Doc. 90).

7 **III. CONCLUSION**

8 Based on the foregoing,

9 **IT IS ORDERED** denying Defendant McCracken's Motion to Strike (Doc. 86).

10 **IT IS FURTHER ORDERED** setting **November 13, 2019** as the deadline for
11 Defendant McCracken to respond to Plaintiff's "Motion (1) to Amend Scheduling Order
12 and (2) for Leave to File Amended Pleading and Join New Defendants" (Doc. 85).
13 Plaintiff may file a reply within seven days from the date of service of Defendant
14 McCracken's response.

15 **IT IS FURTHER ORDERED** denying without prejudice Defendant
16 Greenbaum's Motion to Extend the Briefing Scheduling (Doc. 90).

17 Dated this 31st day of October, 2019.

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19 _____
20 Honorable Eileen S. Willett
21 United States Magistrate Judge