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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 William Lanny Upton,
10 Plaintiff,

11 v.

12 Corizon Health Care Incorporated, et al.,
13 Defendants.
14

No. CV-17-01502-PHX-JAT

ORDER

15 Pending before the Court is Plaintiff William Lanny Upton's ("Plaintiff") Motion
16 to Amend Complaint (hereinafter, "Motion") (Doc. 36). Because the parties' briefs were
17 adequate for the Court to resolve the issues arising in Plaintiff's Motion, the Court finds
18 this matter appropriate for decision without oral argument. *See* LRCiv 7.2(f). The Court
19 now rules on Plaintiff's Motion.

20 **I. BACKGROUND**

21 On May 17, 2017, Plaintiff filed a *pro se* Prisoner Civil Rights Complaint pursuant
22 to 42 U.S.C. § 1983 alleging that Defendant acted with deliberate indifference to his serious
23 medical needs, including a right wrist injury and recurrent myeloma/lymphoma. (Doc. 1 at
24 1, 3). On screening under 28 U.S.C. § 1915A(a), the Court determined that Plaintiff stated
25 an Eighth Amendment medical care claim against Defendant and directed Defendant to
26 answer the claims against it. (Doc. 5). Defendant filed an Answer on August 18, 2017
27 denying that it refused Plaintiff adequate medical care or acted with deliberate indifference
28 to Plaintiff's alleged medical conditions. (Doc. 2). On August 21, 2017, the Magistrate

1 Judge issued a Scheduling Order setting October 17, 2017 as the deadline for amendment
2 of pleadings.¹ (Doc. 10 at 1). The deadline for amendment of pleadings passed without
3 Plaintiff offering any proposed amendment.

4 On April 30, 2018, Defendant filed a Motion for Summary Judgment asking that the
5 Court dismiss Plaintiff's claim against Defendant with prejudice because Plaintiff failed to
6 present any evidence supporting his Eighth Amendment deliberate indifference claim and
7 because the course of medical care and treatment given to Plaintiff was appropriate.²
8 (Doc. 17 at 1, 23; *see* Doc. 14). Despite the May 8, 2018 Order directing Plaintiff to respond
9 by June 8, 2018, Plaintiff failed to file any response to Defendant's Motion for Summary
10 Judgment. In an Order dated September 13, 2018, the Court granted Defendant's motion
11 as to Plaintiff's claim regarding his fractured wrist, thereby dismissing that claim. (Doc. 20
12 at 31). However, the Court denied Defendant's Motion for Summary Judgment as to
13 Plaintiff's claim concerning his cancer treatment for recurrent myeloma/lymphoma. (*Id.*).
14 Following the Court's Order ruling on Defendant's Motion for Summary Judgment, the
15 Court appointed counsel to represent Plaintiff in this matter on October 5, 2018. (Doc. 21).
16 Thereafter, the Court set the Final Pretrial Conference for February 27, 2019 and set Trial
17 to begin on March 11, 2019. (Doc. 24).

18 On January 24, 2019, Plaintiff, through counsel, filed a Motion to Amend
19 Complaint. (Doc. 36). Plaintiff seeks leave to amend his Complaint to add a second count
20 alleging an ongoing pattern of deliberate indifference to his recurrent myeloma/lymphoma
21 covering the 267-day period from May 18, 2017, the date of Plaintiff's alleged last
22 treatment with Dr. Rakkar, through Plaintiff's alleged restarting of chemotherapy with
23

24 ¹ The August 21, 2017 Order also set the deadline for written discovery as
25 January 15, 2018, and the deadline for filing dispositive motions as April 16, 2018. (Doc.
26 10 at 2). Upon Defendant's motion, (*see* Doc. 11), the Court extended the dispositive
27 motion deadline to April 30, 2018. (Doc. 12).

28 ² When filing its Statement of Facts in conjunction with its Motion for Summary
Judgment, Defendant included Plaintiff's clinical records from April 18, 2017 through
April 5, 2018. (*See* Doc. 18 at 29–50). Defendant claims it did so “[o]ut of an abundance
of caution, because Plaintiff's requested relief was slightly ambiguous in terms of the
declaratory relief sought,” and to “demonstrate Plaintiff's extensive, ongoing course of
care.” (Doc. 40 at 3).

1 Dr. Chang on February 9, 2018. (Docs. 36 at 2; 36-1 at 5). Even though the Scheduling
2 Order's October 17, 2017 deadline for amendments had passed, Plaintiff's Motion did not
3 request that the Court modify the Scheduling Order, nor discuss whether Plaintiff has
4 demonstrated "good cause" justifying the amendment pursuant to Fed. R. Civ. P.
5 ("Rule") 16(b). (See Doc. 36). Rather, Plaintiff solely moved to amend his Complaint
6 pursuant to Rule 15(a)(2). (See *id.*).

7 After ordering the parties to complete expedited briefing on Plaintiff's Motion,³ (see
8 Doc. 37), Defendant filed a Response on January 31, 2019 opposing Plaintiff's Motion as
9 untimely and for its failure to comply with Rule 15(a)(2) and LRCiv 15.1(a). (Doc. 40).
10 Alternatively, Defendant seeks extension of the deadlines respective to trial. (*Id.*). On
11 February 4, 2019, Plaintiff filed a Reply in support of his Motion, arguing that Plaintiff has
12 "good cause" for the proposed amendment and making new arguments which he did not
13 raise in his original Motion. (Doc. 54). To give Defendant the opportunity to respond, the
14 Court ordered Defendant to file a surreply addressing the new arguments which Plaintiff
15 made in its Reply and discussing specifically what further discovery or preparation
16 Defendant would need if the Court were to grant Plaintiff's Motion. (Doc. 55). Defendant
17 filed this Surreply on February 11, 2019. (Doc. 61).

18 **II. ANALYSIS**

19 Generally, Rule 15(a) governs a motion to amend pleadings to add claims or parties.
20 However, Rule 16 also applies because Plaintiff filed his request to amend his Complaint
21 after the Rule 16 Scheduling Order's deadline for amendments passed. See *Johnson v.*
22 *Mammoth Recreations, Inc.*, 975 F.2d 604, 607 (9th Cir. 1992); (Doc. 10 at 1
23 ("Motions . . . for leave to amend pleadings shall be filed by October 17, 2017.")). "[O]nce
24 the district court has filed a pretrial scheduling order pursuant to Rule 16 which establishes
25 a timetable for amending pleadings, a motion seeking to amend pleadings is governed first
26 by Rule 16(b), and only secondarily by Rule 15(a)." *Jackson v. Laureate, Inc.*, 186 F.R.D.

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28 ³ The Court's January 25, 2019 Order directed Defendant to file a Response to Plaintiff's Motion to Amend Complaint by January 30, 2019 and ordered Plaintiff to file a Reply by February 4, 2019. (Doc. 37).

1 605, 607 (E.D. Cal. 1999) (citing *Johnson*, 975 F.2d at 607–08). To permit a party to
2 disregard a Rule 16 order by an appeal to the standards of Rule 15 would “undermine the
3 court’s ability to control its docket, disrupt the agreed-upon course of the litigation, and
4 reward the indolent and the cavalier.” *Johnson*, 975 F.2d at 610; *see also Sosa v. Airprint*
5 *Sys., Inc.*, 133 F.3d 1417, 1419 (11th Cir. 1998) (“If [the court] considered only Rule 15(a)
6 without regard to Rule 16(b), [it] would render scheduling orders meaningless and
7 effectively would read Rule 16(b) and its good cause requirement out of the Federal Rules
8 of Civil Procedure.”). Accordingly, the Court will evaluate Plaintiff’s motion first under
9 Rule 16, and then, if necessary, under Rule 15(a).

10 **A. Rule 16**

11 Under Rule 16, a scheduling order “may be modified only for good cause and with
12 the judge’s consent.” Fed. R. Civ. P. 16(b)(4). Under the “good cause” standard, “[t]he
13 pretrial schedule may be modified if it cannot reasonably be met despite the diligence of
14 the party seeking the extension. If the party seeking the modification was not diligent, the
15 inquiry should end and the motion to modify should not be granted.” *Zivkovic v. S. Cal.*
16 *Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002) (internal quotation marks and citation
17 omitted). “Although the existence or degree of prejudice to the party opposing the
18 modification might supply additional reasons to deny a motion, the focus of the inquiry is
19 upon the moving party’s reasons for seeking modification.” *Johnson*, 975 F.2d at 609
20 (citing *Gestetner Corp. v. Case Equip. Co.*, 108 F.R.D. 138, 141 (D. Me 1985)).

21 Federal courts in Arizona and within the Ninth Circuit “have articulated and
22 undertaken [a] three-step inquiry in resolving the question of diligence in the context of
23 determining good cause under Rule 16[.]” *Morgal v. Maricopa County Bd. of Supervisors*,
24 284 F.R.D. 452, 460 (D. Ariz. June 6, 2012) (citations omitted) (quoting *Grant v. United*
25 *States*, 2011 WL 5554878, at *4 (E.D. Cal. Nov. 15, 2011), adopted by, 2012 WL 218959,
26 at * 1 (E.D. Cal. Jan. 23, 2012)). Under this inquiry, the movant may be required to show:

- 27 (1) that he was diligent in assisting the court in creating a
28 workable Rule 16 order; (2) that his noncompliance with a

1 Rule 16 deadline occurred or will occur, notwithstanding his
2 diligent efforts to comply, because of the development of
3 matters which could not have been reasonably foreseen or
4 anticipated at the time of the Rule 16 scheduling conference;
5 and (3) that he was diligent in seeking amendment of the Rule
6 16 order, once it became apparent that he could not comply
7 with the order.

8 *Morgal*, 284 F.R.D. at 460 (citing *Grant*, 2011 WL 5554878, at *4).

9 Here, Plaintiff failed to demonstrate the diligence necessary to meet Rule 16’s “good
10 cause” requirement. Regarding the first step of the good cause inquiry, there is nothing to
11 suggest that Plaintiff was or was not diligent in assisting the Court in fashioning a workable
12 Rule 16 Order. *Morgal*, 284 F.R.D. at 460–61. The parties did not take part in a Rule 16
13 Scheduling Conference; rather, the Magistrate Judge assigned to this case issued the
14 Scheduling Order (Doc. 10) on August 21, 2017 after Defendant answered Plaintiff’s
15 Complaint.

16 Plaintiff fails to demonstrate diligence under the second step of the good cause
17 inquiry, as Plaintiff’s noncompliance with the Scheduling Order’s October 17, 2017
18 deadline for filing motions to amend occurred due to circumstances which were foreseeable
19 at the time of the Scheduling Order. Plaintiff seeks leave to amend his Complaint to add a
20 second count alleging an ongoing pattern of deliberate indifference to his recurrent
21 myeloma/lymphoma covering the 267-day period from May 18, 2017 to February 9, 2018.
22 (Docs. 36 at 1–2; 36-1 at 5). However, as Defendant correctly points out, the “majority of
23 the time frame for which Plaintiff now wants to expand his claim occurred before the
24 deadline to amend.” (Doc. 40 at 6). Thus, because a large part of the alleged conduct
25 prompting Plaintiff to seek his proposed amendment had occurred prior to the
26 October 17, 2017 deadline for amendment of pleadings, these circumstances were
27 foreseeable as of that date.

28 Although Plaintiff contends that “Mr. Upton cannot be expected to have foreseen
that Corizon would continue to delay, deny, and intentionally interfere with his medical
care[,]” (Doc. 54 at 4), it remains that Plaintiff had either actual or constructive knowledge

1 that he was allegedly due to receive chemotherapy in the summer of 2017, but did not
2 receive it prior to the expiration of the amendment deadline. (*See* Doc. 36-1 at 6 (“On
3 June 11, 2017, Plaintiff reported that he was suffering from fatigue and loss of appetite,
4 noting that he was due for maintenance chemotherapy in early July.”); *see also* Doc. 18-3
5 at 145 (Plaintiff’s Health Needs Request dated June 11, 2017)). Plaintiff offers no
6 explanation why he failed to amend his Complaint to include this alleged delay in receiving
7 chemotherapy by the deadline set forth in the Scheduling Order. While Plaintiff was
8 proceeding *pro se* at the time of the expiration of the amendment deadline, this is no excuse.
9 “A *pro se* litigant’s status does not entitle *pro se* litigants to special treatment not given to
10 represented parties, nor does it exempt them from compliance with the Federal Rule of
11 Civil Procedure, Local Rules, or the orders of this Court.” *Nelson v. Target Corp.*, No. CV-
12 13-2519-PHX-LOA, 2014 WL 1384604, at *2 (D. Ariz. Apr. 9, 2014). Accordingly, the
13 Court finds that Plaintiff failed to demonstrate diligence under the second step of the good
14 cause inquiry.

15 As to the third step of the good cause inquiry, Plaintiff has not met his burden of
16 showing that he “was diligent in seeking amendment of the Rule 16 order, once it became
17 apparent that he could not comply with the order.” *Morgal*, 284 F.R.D. at 460 (citing *Grant*,
18 2011 WL 5554878, at *4). Plaintiff filed his Motion to Amend Complaint on
19 January 24, 2019—464 days after the Court’s October 17, 2017 deadline for amendment
20 of pleadings. Moreover, Plaintiff’s Motion did not request that the Court modify its
21 Scheduling Order, nor discuss whether he has demonstrated “good cause” justifying the
22 amendment pursuant to Rule 16(b). (*See* Doc. 36). Rather, Plaintiff solely moved to amend
23 his Complaint pursuant to Rule 15(a)(2). (*See id.*). Only in his Reply does Plaintiff argue
24 that he has “good cause” for the proposed amendment.⁴ (*See* Doc. 54). In this Reply,
25 Plaintiff points out that he filed his Motion “within four months of the appointment of
26 counsel and within a day after Defendant voiced its objection to admission of evidence of
27 post-filing treatment delays, specifically any treatment after April 18, 2017.” (*Id.* at 2).

28 ⁴ Arguments made for the first time in a reply are generally waived. *U.S. v. Romm*, 455 F.3d 990, 997 (9th Cir. 2006).

1 Plaintiff's counsel attempts to justify this four-month delay by asserting that it received
2 Plaintiff's medical records from defense counsel "in complete disorder" which made it
3 difficult to review and investigate Plaintiff's claims. (*Id.* at 3; Doc. 54-1 at 2). Nevertheless,
4 reviewing and re-sorting Plaintiff's records in chronological order is not a task which the
5 Court believes would take four months. Therefore, the Court finds that Plaintiff failed to
6 demonstrate diligence in seeking amendment of his Complaint.

7 Prejudice to the non-moving party, although not required under Rule 16, can supply
8 additional reasons to deny a motion. *Johnson*, 975 F.2d at 609. "A need to reopen discovery
9 and therefore delay proceedings supports the district court's finding of prejudice from a
10 delayed motion to amend the complaint." *Lockheed Martin Corp. v. Network Solutions,*
11 *Inc.*, 194 F.3d 980, 986 (9th Cir. 1999) (citing *Solomon v. North Am. Life & Cas. Ins.*
12 *Co.*, 151 F.3d 1132, 1139 (9th Cir. 1998)). Here, Defendant asserts that if the Court were
13 to allow the proposed amendment, Defendant would need to consider "approximately 5
14 nurses, 3 nurse practitioners, and three physicians" as possible witnesses, interview those
15 potential witnesses who still work for Corizon, and locate any prospective witnesses who
16 might have left Corizon's employ. (Doc. 61 at 5). In addition to amending the Proposed
17 Final Pretrial Order, Defendant also states it would need to amend its choice of exhibits.
18 (*Id.*). The addition of Plaintiff's proposed amendment at this late date threatens the sort of
19 disruption that Rule 16 was designed to prevent. As trial in this matter is set to begin in
20 less than one month, allowing Plaintiff to amend his Complaint would impair the efficient
21 adjudication of this action.

22 Plaintiff failed to demonstrate the diligence necessary to meet Rule 16's "good
23 cause" requirement. Therefore, the Court declines to exercise its discretion to modify the
24 Rule 16 Scheduling Order and will not grant Plaintiff leave to amend her Complaint at such
25 a late stage in the proceedings.

26 **B. Rule 15**

27 As Plaintiff failed to demonstrate "good cause" under Rule 16 justifying amendment
28 of the Scheduling Order, an analysis under Rule 15(a) discussing whether plaintiff should

1 be granted leave to amend his Complaint is unnecessary. *See Johnson*, 975 F.2d at 608–
2 09; *Sosa v. Airprint Sys., Inc.*, 133 F.3d 1417, 1419 (11th Cir. 1998) (holding that the Court
3 need not evaluate Rule 15(a) unless the movant first meets the “good cause” requirement
4 of Rule 16). Accordingly, Defendant’s Motion to Amend Complaint (Doc. 36) is denied.

5 **III. CONCLUSION**

6 For the foregoing reasons,

7 **IT IS ORDERED** that Plaintiff’s Motion to Amend Complaint (Doc. 36) is
8 **DENIED**. To the extent the new count(s) attempted to be added by Plaintiff’s proposed
9 amendment are freestanding claims, the Court denies leave to amend without prejudice to
10 Plaintiff filing a new case premised on the new claim(s) identified in the proposed
11 amendment. Additionally, this Order makes no ruling on whether the evidence underlying
12 the new claim(s) in Plaintiff’s proposed amendment is admissible in the trial of this case.

13 Dated this 12th day of February, 2019.

