

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 09-03074-GHK (OP)	Date	February 12, 2013
Title	Michael Darnell Thomas v. James Smith, III, et al.		

Present: The Honorable	Oswald Parada, United States Magistrate Judge
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As assigned Deputy Clerk	N/A Court Reporter / Recorder	N/A Tape No.
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Attorneys Present for Plaintiffs:

None

Attorneys Present for Defendants:

None

Proceedings: **IN CHAMBERS: ORDER TO SHOW CAUSE; MOTION FOR RECONSIDERATION (ECF No. 53)**

**I.
Proceedings**

On or about February 16, 2007, Michael Darnell Thomas (“Plaintiff”), was arrested for a cocaine-related crime. On November 1, 2007, the United States Attorney’s Office filed a criminal indictment charging Plaintiff with two criminal counts: Count 1, conspiracy to distribute cocaine and marijuana (21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(B) and 841(b)(1)(D)); and Count 3, knowingly and intentionally possessing with the intent to distribute a mixture or substance containing a detectable amount of cocaine (21 U.S.C. §§ 841(a)(1) and (b)(1)(B)). (CR 07-1213-MMM ECF No. 1.)

On September 3, 2008, Plaintiff entered into a plea agreement with the United States. (Id. ECF No. 222.) On November 17, 2008, Plaintiff entered a guilty plea to Count 1 of the Indictment pursuant to the plea agreement.¹ (Id. ECF No. 234.) As part of the plea agreement, Plaintiff gave up his right to pursue any Fourth or Fifth Amendment claims and any other pretrial motions that were or could have been filed. (Id. at 5, 6.)

¹ An amended plea agreement was filed on November 22, 2008, deleting the name of co-defendant, Krystale Alwanda Harris. The substantive terms of the agreement remained unchanged. (Id. ECF No. 237.)

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On or about March 23, 2009, the Court granted Plaintiff's request for new counsel, and appointed Dale Rubin to replace Errol Stambler. (Id. ECF No. 277.) The Court also vacated the sentencing hearing and instructed Plaintiff to advise the Court how he wished to proceed. (Id.)

Meanwhile, on May 1, 2009, Plaintiff filed a pro se Civil Rights Complaint pursuant to 42 U.S.C. § 1983 and Bivens v. Six Unknown Named Agents, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) ("Complaint"), after having paid the requisite filing fee. (ECF No. 1.) In the Complaint, Plaintiff named as Defendants Federal Bureau of Investigation ("FBI") Special Agent James Smith, III, Plaintiff's former criminal attorney Errol Stambler, and Sprint Telecommunications. Plaintiff sought damages. (CV 09-3074 ECF No. 1.)

Although service of the Complaint was never authorized or ordered, on May 25, 2009, Defendant Stambler filed a Motion to Dismiss the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Id. ECF No. 7.) On June 18, 2009, Plaintiff filed an Opposition to the Motion to Dismiss. (Id. ECF No. 12.)

On August 17, 2010, the Court stayed the current action, including Defendant Stambler's Motion to Dismiss, pending resolution of Plaintiff's criminal case. The parties were ordered to inform the Court within seven days of the entry of a judgment of conviction or the entry of an order dismissing the pending criminal charges against Plaintiff. (Id. ECF No. 45.)

The Court's independent review of its computerized case management system, CM/ECF, revealed that on September 10, 2012, Plaintiff was sentenced on Count 1 of the Indictment to the custody of the Bureau of Prisons for a term of ninety-two months. (CR 07-1213 ECF No. 550.)

On September 17, 2012, Plaintiff filed a Motion for Leave to File a First Amended Complaint ("FAC"), along with a proposed FAC. (CV 09-3074 ECF No. 47.)

On October 24, 2012, the Court lifted the stay of the current proceedings in light of Plaintiff's sentencing in the criminal case, granted Plaintiff's Motion for Leave to file the FAC, ordered the filing of the FAC as the operative pleading, and denied Defendant

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Stambler's Motion to Dismiss as moot. (ECF Nos. 48, 49.) On October 25, 2012, the Court issued a Memorandum and Order Dismissing the FAC with Leave to Amend, allowing Plaintiff thirty days to file a Second Amended Complaint ("SAC"). (ECF No. 50.)

On January 15, 2013, after Plaintiff failed to file a SAC, the Court issued an Order to Show Cause ("OSC") why this case should not be dismissed for failure to prosecute. Plaintiff was admonished that his failure to file the SAC or failure to otherwise respond to the OSC by February 15, 2013, shall result in the Court recommending that this action be dismissed without prejudice for failure to prosecute. (ECF No. 51.)

On January 28, 2013, Plaintiff filed a change of address indicating that he had been transferred from Los Angeles to the Federal Correctional Institution ("FCI") at Herlong, California. (ECF No. 52.)

II.
Discussion

On February 4, 2013, Plaintiff filed a Motion for Reconsideration of the dismissal of the FAC with leave to amend. (ECF No. 53.) The Local Rules of this Court provide in pertinent part that:

A motion for reconsideration of the decision on any motion may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion.

C.D. Cal. R. 7-18.

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After a review of Plaintiff's Motion for Reconsideration, the Court finds that he has failed to make the requisite showing to warrant reconsideration. However, as indicated in the order dismissing the FAC with leave to amend, Plaintiff may file a SAC, attempting to cure the defects in the FAC.

Accordingly, Plaintiff is again ordered to show cause why this case should not be dismissed for failure to prosecute. Plaintiff is admonished that his failure to file the SAC or failure to otherwise respond to this OSC by March 15, 2013, shall result in the Court recommending that this action be dismissed without prejudice for failure to prosecute.

IT IS SO ORDERED.

cc: All Parties of Record

I hereby certify that these Minutes were served by electronic means via the ECF system and NEF to Petitioner M. Thomas, at his address of record; and sent via NEF to Defendant Counsel's E.mail address of record, in this action on this date.

Dated: February 12, 2013

J. Holmes /s/

DEPUTY CLERK

Initials of deputy clerk jh-relief