

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOHN R. MARTINEZ,

1:03-cv-05125-OWW-SMS-PC

Plaintiff,

ORDER CONSTRUING PLAINTIFF’S  
MOTION TO DISMISS AS A MOTION  
TO AMEND  
(Doc. 94)

vs.

W. SHAW, YBARRA, F. A. RODRIGUEZ,  
LONNIE LOPEZ, J. L. COBBS, AND

TWENTY DAY DEADLINE FOR  
PARTIES TO RESPOND

KERRI BERKELER,

Defendants.

\_\_\_\_\_/

Plaintiff John R. Martinez (“plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in a civil rights action pursuant to 42 U.S.C. § 1983. This action proceeds on the amended complaint filed July 30, 2003. (Doc. 13.) On February 26, 2007, defendants Shaw, Ybarra, Rodriguez, Lopez, Cobbs and Berkeler filed a motion for summary judgment on plaintiff’s two pending claims, one for violation of due process for insufficient evidence, and the other for unconstitutionality of California regulation 15 CCR 3378(a)(4) as overbroad (“overbroad claim”). (Doc. 94.) On September 10, 2007, plaintiff filed an opposition to the motion for summary judgment. (Doc. 103.) In the opposition, plaintiff stated his belief that the “court dismissed Plaintiff’s overbroad claim when it screened Plaintiff’s complaint for failure to state a claim,” concluding that “[T]hus, this claim should not be subject to litigation, and in any event, Plaintiff moves to dismiss his overbroad claim from this action.” (Pltf’s Opp at 12 ¶4.) Plaintiff may not dismiss a claim in this manner.

1 **1. Rules 41(a)(1) and 41(a)(2)**

2 After the adverse party has served a motion for summary judgment, a plaintiff may not  
3 voluntarily dismiss his action. Fed. R. Civ. P. 41(a)(1). Furthermore, a voluntary dismissal cannot be  
4 used to dispose of only certain claims while not dismissing any defendant. Ethridge v. Harbor House  
5 Restaurant, 861 F.2d 1389, 1392 (9th Cir. 1988.) The rule is the same where the voluntarily dismissal  
6 is with judicial consent under Rule 41(a)(2). Fed. R. Civ. P. 41(a)(2); Hells Canyon Preservation  
7 Council v. United States Forrest Service, 403 F.3d 683, 688 (9th Cir. 2005.) Where plaintiff wants to  
8 drop certain claims but not to dismiss any defendant, the proper procedure is to amend the complaint.  
9 Fed. R. Civ. P. 15(a); Ethridge, 861 F.2d at 1392.

10 At this juncture, plaintiff may not dismiss a claim from this action, whether voluntarily or with  
11 the court's consent, because defendants have filed and served two motions for summary judgment.  
12 (Docs. 58, 94.) Therefore, the court shall construe plaintiff's motion to dismiss as a motion to amend  
13 the complaint under Rule 15(a).

14 **2. Rule 15(a)**

15 Under Rule 15(a) of the Federal Rules of Civil Procedure, a party may amend the party's  
16 pleading once as a matter of course at any time before a responsive pleading is served. Otherwise, a  
17 party may amend only by leave of the court or by written consent of the adverse party, and leave shall  
18 be freely given when justice so requires. Fed. R. Civ. P. 15(a). In this case, on December 10, 2004,  
19 defendants filed and served an answer. Therefore, plaintiff may only amend his complaint with written  
20 consent from defendants or with leave of court.

21 "Rule 15(a) is very liberal and leave to amend 'shall be freely given when justice so requires.'"   
22 AmerisourceBergen Corp. v. Dialysis West, Inc., 445 F.3d 1132, 1136 (9th Cir. 2006) (quoting Fed. R.  
23 Civ. P. 15(a)). The court recognizes that plaintiff merely wishes to remove his overbroad claim from  
24 the litigation. Plaintiff states that he believed the overbroad claim had been previously dismissed by the  
25 court, and he no longer wishes to pursue the claim. However, a motion to amend is untimely at this  
26 stage of the litigation. The deadline to amend pleadings in this action was August 5, 2005, pursuant to  
27 the court's scheduling order of January 4, 2005. (Doc. 37.) The court finds no basis on which to grant  
28 leave to amend at this stage of the litigation, in light of the fact that defendants have moved for

