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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ANTONIO C. BUCKLEY,

CASE NO. 1:04-cv-05688-OWW-GBC PC

Plaintiff,

ORDER DENYING WITHOUT PREJUDICE
PLAINTIFF’S MOTION FOR SUBSTITUTION
OF DEFENDANT KORDAN

v.

ALAMEIDA, et al.,

(Doc. 160)

Defendants.

ORDER DIRECTING ATTORNEY FOR
DEFENDANT KORDAN TO FORMALLY
SUGGEST THE DEATH OF DEFENDANT
KORDAN PURSUANT TO RULE 25

I. Procedural History

Plaintiff Antonio Cortez Buckley (“Plaintiff”) is a state prisoner proceeding pro se in this civil rights action pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 2000cc-1 (the Religious Land Use and Institutionalized Persons Act (“RLUIPA”)). On September 29, 2003, Plaintiff filed the original complaint. Doc. 1. On March 23, 2007, Plaintiff filed the third amended complaint which the Court found to have stated cognizable claims against the following defendants: Calderon; Vo; Meadors; Reed; Kordan; Traynham; Papac; Winett; Woodley; Barker; Howard; Johnson; Mack; and Chappel (“Defendants”). Doc. 42; Doc. 44. On January 25, 2012, Defendants’ motion for summary judgement was granted as to all claims against Defendants Vo; Meadors; Woodley; and Johnson. Doc. 125; Doc. 153; Doc. 155. Additionally summary judgement was denied as to Plaintiff’s Eighth Amendment claim against Defendants Reed, Mack, and Traynham for placing Plaintiff in a cell that was covered in feces and denied as to Plaintiff’s Equal Protection claim against Defendants Chappel

1 and Barker for the confiscated menorah and candles. Doc. 125; Doc. 153; Doc. 155. The Court also
2 ordered parties to address whether Defendants Howard, Winnett, Papac, Calderon and Kordan
3 violated the Eighth amendment by maliciously implementing a contraband search without a valid
4 penological interest. Doc. 125; Doc. 153; Doc. 155. On March 28, 2012, in a motion for extension
5 of time, Defendants stated that Defendant Kordan has died. Doc. 156. On April 20, 2012, Plaintiff
6 motioned to substitute Defendant Kordan with Defendant Vo pursuant to Rule 25 of the Federal
7 Rules of Civil Procedure. Doc. 160.

9 **II. Rule 25 Statement of Death**

10 Rule 25(a)(1) provides for the dismissal of this action if a motion for substitution is not made
11 within ninety days after service of a statement noting Plaintiff's death. Fed. R. Civ. P. 25(a)(1).

12 Two things are required of a party for the running of the ninety-day period to commence: a party
13 must 1) formally suggest the death of the party on the record, and 2) serve the suggestion of death
14 on the other parties and nonparty successors or representatives. *Barlow v. Ground*, 39 F.3d 231, 233
15 (9th Cir. 1994). In order for the ninety-day period for substitution to be triggered, a party must
16 formally suggest the death of the party upon the record, Fed. R. Civ. P. 25(a)(1), and must serve
17 other parties and nonparty successors or representatives of the deceased with a suggestion of death
18 in the same manner as required for service of the motion to substitute, Fed. R. Civ. P. 25(a)(3).

19 Thus, a party may be served the suggestion of death by service on his or her attorney, Fed. R. Civ.
20 P. 5(b), while non-party successors or representatives of the deceased party must be served the
21 suggestion of death in the manner provided by Rule 4 for the service of a summons. Fed. R. Civ.
22 P. 25(a)(3); *Barlow v. Ground*, 39 F.3d at 232-234. Rule 25 requires dismissal absent a motion for
23 substitution within the ninety-day period only if the statement of death was properly served. *Unicorn*
24 *Tales, Inc., v. Bannerjee*, 138 F.3d 467, 469-471 (2d Cir. 1998).

1 The ninety-day period has not been triggered by the notice because there is no declaration of
2 service or other proof reflecting that there was proper service of the notice on Plaintiff’s successor
3 or representative as provided by Rule 4.
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5 **III. Plaintiff’s Request to Substitute Dr. Vo for Defendant Kordan**

6 Under section 1983, Plaintiff must demonstrate that each named defendant personally
7 participated in the deprivation of his rights. *Ashcroft v. Iqbal*, 556 U.S. 662, 676-77 (2009);
8 *Simmons v. Navajo County, Ariz.*, 609 F.3d 1011, 1020-21 (9th Cir. 2010); *Ewing v. City of Stockton*,
9 588 F.3d 1218, 1235 (9th Cir. 2009); *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002). Each
10 defendant is only liable for his or her own misconduct. *Ashcroft v. Iqbal*, 556 U.S. 662, 676-77;
11 *Ewing v. City of Stockton*, 588 F.3d 1218, 1235. In this case, the Court has found granted summary
12 judgement in favor of Dr. Vo and Dr. Vo cannot serve as a substitute for the now deceased
13 Defendant Kordan, because Dr. Vo’s actions and involvement are not the same as Defendant
14 Kordan’s actions in the violation of Plaintiff’s constitutional rights.
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16 However, Plaintiff’s claims are not abated upon the death of a defendant. *See Carlson v.*
17 *Green*, 446 U.S. 14, 24, 100 S.Ct. 1468, 1474–75, 64 L.Ed.2d 15 (1980) (a cause of action for an
18 Eighth Amendment violation survives the death of a party); *In re Estate of Ferdinand Marcos,*
19 *Human Rights Litigation*, 25 F.3d 1467, 1476 (9th Cir. 1994). In other words, Plaintiff’s claims
20 survive the death of Defendant Kordan and Defendant Kordan’s nonparty successors or
21 representatives could be given notice and be substituted as a party in this section 1983 claim. *See*
22 *Carlson v. Green*, 446 U.S. 14, 24, 100 S.Ct. 1468, 1474–75, 64 L.Ed.2d 15 (1980) (a cause of
23 action for an Eighth Amendment violation survives the death of a party); *In re Estate of Ferdinand*
24 *Marcos, Human Rights Litigation*, 25 F.3d 1467, 1476 (9th Cir. 1994).
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1 For the reasons set forth herein, it is HEREBY ORDERED that:

- 2 1. Attorney for Defendant Kordan must formally suggest the death of Defendant Kordan
3 pursuant to Fed. R. Civ. P. 25(a)(1), and must serve other parties and nonparty
4 successors or representatives of Defendant Kordan with a suggestion of death in
5 accordance with Fed. R. Civ. P. 25(a)(3), Fed. R. Civ. P. 5(b), Fed. R. Civ. P. 4;
- 6 2. Plaintiff's motion for substitution of Defendant Kordan is DENIED WITHOUT
7 PREJUDICE to Plaintiff seeking to substitute Defendant Kordan with his nonparty
8 successors or representatives.

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10 IT IS SO ORDERED.

11 Dated: August 24, 2012

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14 UNITED STATES MAGISTRATE JUDGE
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