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

KELVIN FULLER,

Plaintiff,

vs.

YATES, et al.,

Defendants.

1:08-cv-00465-LJO-GSA-PC

ORDER GRANTING FINDINGS
AND RECOMMENDATIONS IN PART
(Doc. 22.)

ORDER DISMISSING FEDERAL CLAIMS,
WITH PREJUDICE, FOR FAILURE TO STATE A
CLAIM

ORDER REMANDING STATE CLAIMS TO
FRESNO COUNTY SUPERIOR COURT
[Case Number 07 CE CG 04211 AMS]

ORDER DIRECTING CLERK TO CLOSE CASE
AND SEND NOTICE OF REMAND

_____ /

Kelvin Fuller (“Plaintiff”) is a state prisoner proceeding pro se in this civil rights action pursuant to 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On March 25, 2011, findings and recommendations were entered, recommending that Plaintiff’s state claims be dismissed without prejudice for lack of jurisdiction; that this action be dismissed with prejudice for failure to state a claim; and that the dismissal of this action count as a strike pursuant to 28 U.S.C. § 1915(g). (Doc. 22.) On July 11, 2011, Plaintiff filed objections to the findings and recommendations. (Doc. 27.)

1 In accordance with the provisions of 28 U.S.C. § 636 (b)(1)(B) and Local Rule 304, this court
2 has conducted a de novo review of this case. Plaintiff's sole objection to the Magistrate Judge's
3 findings and recommendations is to the recommendation that Plaintiff's state claims be dismissed
4 from this action. Instead of dismissing the state claims, Plaintiff requests that the Court remand the
5 claims to the Fresno County Superior Court, where this case originated before defendants removed it
6 to the federal court.

7 28 U.S.C. § 1447(c) provides: "If at any time before final judgment it appears that the district
8 court lacks subject matter jurisdiction, the case shall be remanded." This does not, however, compel
9 remand of cases in which federal question jurisdiction existed at the time of removal if the federal
10 claim is later dismissed. Legislative history shows Congress intended that federal courts exercise
11 discretion whether to remand a case to state court after all federal claims are dismissed. Albingia
12 Versicherungs A.G. v. Schenker Int'l Inc., 344 F.3d 931, 936 (9th Cir. 2003), *opinion amended*, 350
13 F.3d 916 (9th Cir. 2003). Therefore, following dismissal of the federal claims, the federal court may
14 properly dismiss the action for lack of federal jurisdiction or remand the remaining state law claims
15 to state court. Usually, remand is "preferable" to dismissal because it avoids any statute of
16 limitations problem and the time and expense of filing new pleadings in state court. Carnegie-
17 Mellon Univ. v. Cohill, 484 U.S. 343, 351, 108 S.Ct. 614, 620 (1988).

18 Plaintiff filed the Complaint commencing this action on December 17, 2007, at the Fresno
19 County Superior Court, Case Number 07 CE CG 04211 AMS. (Doc. 2, Exh. 1.) On April 1, 2008,
20 defendants James Yates and F. Igbinsa removed the case to federal court pursuant to 28 U.S.C. §
21 1441(b). (Doc. 2.) The court reviewed the Complaint and found the case to be properly removed,
22 based on Plaintiff's claim for inadequate medical care under the Eighth Amendment. (Docs. 7, 15.)
23 This case now proceeds on Plaintiff's Second Amended Complaint, filed on November 23, 2009.
24 (Doc. 18.) The Magistrate Judge found that the Second Amended Complaint fails to state any viable
25 federal claims and recommended that the federal claims be dismissed with prejudice, leaving only
26 state law tort claims. In light of this recommendation, the court finds good cause to remand the state
27 claims to the Fresno County Superior Court where they originated.

1 With respect to the Magistrate Judge's recommendation that the dismissal of this action count
2 as a strike pursuant to under 28 U.S.C. § 1915(g), the court finds no authority in the Ninth Circuit
3 that a case filed by a prisoner-plaintiff, such as Plaintiff, in state court and removed to federal court
4 by the defendants, is an action "brought" by a prisoner in a court of the United States, within the
5 meaning of § 1915(g).¹ Therefore, the dismissal of this action shall not count as a strike against
6 Plaintiff under § 1915(g).

7 The court finds the balance of the findings and recommendations to be supported by the
8 record and proper analysis.

9 Accordingly, THE COURT HEREBY ORDERS that:

- 10 1. The Findings and Recommendations issued by the Magistrate Judge on March 25,
11 2011, are adopted in part;
- 12 2. Plaintiff's federal claims are dismissed from this action, with prejudice, for failure to
13 state a claim upon which relief may be granted under § 1983;
- 14 3. Plaintiff's state tort claims are remanded to the Fresno County Superior Court; and
- 15 4. The Clerk of Court is directed to close this case and serve notice of the remand.

16 IT IS SO ORDERED.

17 **Dated: July 14, 2011**

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE

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¹Section 1915(g) provides that “[i]n no event shall a prisoner bring a civil action . . . under this section if the *prisoner* has, on 3 or more prior occasions, while incarcerated or detained in any facility, *brought an action* or appeal in a *court of the United States* that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.” 28 U.S.C. § 1915(g) (emphasis added).