

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

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

KEVIN GUNN,

Plaintiff,

v.

JAMES TILTON, et al.,

Defendants.

CASE NO. 1:08-cv-01038-LJO-GBC (PC)

ORDER REQUIRING DEFENDANTS TO FILE
NOTICE OF INTENT TO REFILE MOTION
FOR SUMMARY JUDGMENT

Doc. 41; Doc. 49

Plaintiff Kevin Gunn (“Plaintiff”) is a state prisoner proceeding in forma pauperis (“IFP”) in this civil rights action pursuant to 42 U.S.C. § 1983. On March 6, 2009, Plaintiff filed his First Amended Complaint. Doc. 14. On December 24, 2009, Plaintiff filed a motion for leave to file an amended complaint (Doc. 28) pursuant to FED. R. CIV. P. 15(a), and lodged his Second Amended Complaint (Doc. 29). On May 19, 2010, Defendants filed a motion for summary judgment. Doc. 41. On September 21, 2010, Judge Roll granted in part Plaintiff’s motion to amend. Doc. 49. In its order filed on September 21, 2010, the Judge Roll stated that Defendants may amend or supplement their motion for summary judgment within thirty days of the filing date of Plaintiff’s amended complaint or file a notice of their intent not to amend or supplement. Doc. 49. After being granted an extension, Plaintiff filed an additional amended complaint on November 29, 2010. Doc. 52. On December 7, 2010, Defendants filed a motion to strike the amended complaint filed on November 29, 2010, as it did not conform to the order filed on September 21, 2010. Doc. 54.

Subsequently, however, the case was transferred to this Court (Doc. 60) and on July

1 20, 2011, the Court issued findings and recommendations wherein the Court construed the
2 lodged second amended complaint filed on December 24, 2009, as the operative amended
3 complaint and recommended that Plaintiff's third amended complaint filed on October 25,
4 2010, be stricken. Doc. 66. In its findings and recommendations, the Court also
5 recommended that Defendants be given thirty days to amend or supplement their motion for
6 summary judgment or to file a notice of intent not to supplement. Doc. 66. After being
7 granted three extensions of time, On December 21, 2011, Plaintiff filed objections to the
8 Court's findings and recommendations. Doc. 77. On December 22, 2011, the findings and
9 recommendations were adopted in full. Doc. 78. On January 10, 2012, Plaintiff filed notice
10 of appeal. Doc. 81. Because Plaintiff is attempting to appeal an order which is not a final
11 appealable order of the court, Plaintiff's filing of the notice of appeal does not deprive the court of
12 jurisdiction.

13 Given the history of this action and the fact that the operative amended complaint was
14 filed after Defendants' motion for summary judgment, the Court HEREBY ORDERS that:
15 within FIFTEEN (15) days of service of this order, Defendants' attorney file a notice regarding
16 whether Defendants wish to withdraw and refile the motion for summary judgment to address the
17 operative amended complaint or file a notice of their intent to proceed on the Defendants'
18 current motion for summary judgment.

19
20 IT IS SO ORDERED.

21 Dated: January 17, 2012

22 
UNITED STATES MAGISTRATE JUDGE