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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

NICOLAS DAVID ANDREAS,

Plaintiff,

v.

JAMES YATES, et al.,

Defendants.

CASE NO. 1:08-cv-01410-LJO-SMS PC

ORDER DISMISSING EIGHTH
AMENDMENT MEDICAL CARE
CLAIM AND DEFENDANTS CATE
AND YATES, AND REFERRING MATTER
TO MAGISTRATE JUDGE FOR INITIATION
OF SERVICE OF PROCESS

(Docs. 16, 19, and 27)

_____ /

Plaintiff Nicolas David Andreas, a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on September 8, 2008. Plaintiff filed an amended complaint as a matter of right on January 14, 2009. Fed. R. Civ. P. 15(a). On February 6, 2009, the Court dismissed Plaintiff’s amended complaint for failure to comply with Federal Rule of Civil Procedure 8(a), with leave to amend. 28 U.S.C. § 1915A. Plaintiff filed a second amended complaint on March 16, 2009; and on July 30, 2009, the Court issued an order dismissing certain claims from the action without leave to amend, finding that the second amended complaint stated a cognizable excessive force claim, and granting Plaintiff leave to amend his Eighth Amendment medical care claim. Id. Plaintiff was ordered to either file a third amended complaint or notify the Court of his willingness to proceed only on his excessive force claim.

Plaintiff sought reconsideration of the screening order and filed a notice of appeal on August 31, 2009. The Court denied the motion for reconsideration on September 3, 2009, the appellate court dismissed the appeal for lack of jurisdiction on October 23, 2009, and the Court issued an order on

1 October 27, 2009, requiring Plaintiff to comply with the July 30 screening order within thirty days.
2 On November 25, 2009, Plaintiff notified that Court that he declines to file a third amended
3 complaint. Accordingly, based on Plaintiff's notice, it is HEREBY ORDERED that:

- 4 1. This action shall proceed on Plaintiff's second amended complaint, filed March 16,
5 2009, against Defendants Cruz, Rodriguez, Gonzales, Cabral, Clark, and Green for
6 use of excessive force, in violation of the Eighth Amendment:
- 7 2. Plaintiff's Eighth Amendment medical care claim is dismissed, with prejudice, for
8 failure to state a claim upon which relief may be granted;
- 9 3. Plaintiff's supervisory liability claim against Defendants Cate and Yates is dismissed,
10 with prejudice, for failure to state a claim upon which relief may be granted; and
- 11 4. This matter is referred to the Magistrate Judge for the initiation of service of process.

12
13 IT IS SO ORDERED.

14 **Dated:** November 30, 2009

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