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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LOUIS BRANCH,

Plaintiff,

v.

N. GRANNIS, et al.,

Defendants.

1:08-cv-01655-AWI-GSA-PC

FINDINGS AND RECOMMENDATION TO
DENY DEFENDANT UMPHENOUR’S
MOTION TO DISMISS
(Doc. 49.)

OBJECTIONS, IF ANY, DUE IN TWENTY
DAYS

Plaintiff, Louis Branch (“Plaintiff”) is a state prisoner proceeding pro se in this civil rights action filed pursuant to 42 U.S.C. § 1983. Now pending before the Court is defendant Umphenour’s motion to dismiss this action as barred by the statute of limitations. (Doc. 49.)

I. RELEVANT PROCEDURAL HISTORY

Plaintiff filed the Complaint commencing this action on July 7, 2008. (Doc. 1.) This action now proceeds on the Second Amended Complaint, filed on August 25, 2010, against defendant Umphenour and Does 1 and 2 for failure to protect Plaintiff in violation of the Eighth Amendment, and defendant Umphenour for retaliation in violation of the First Amendment.¹ (Doc. 26.) On October 6, 2011, defendant Umphenour (“Defendant”) filed a motion to dismiss. (Doc. 49.) On October 27, 2011, Plaintiff filed an opposition to the motion. (Doc. 55.) On November 11, 2011,

¹Plaintiff has not sufficiently identified defendants Does 1 and 2 to enable service of process.

1 Defendant filed a reply. (Doc. 57.) On November 22, 2011 and November 28, 2011, Plaintiff filed
2 two surreplies. (Docs. 59, 62.) Defendant’s motion to dismiss is now before the Court.

3 **II. PLAINTIFF’S ALLEGATIONS**

4 Plaintiff is currently incarcerated at Solano State Prison in Vacaville, California. The events
5 at issue occurred at Avenal State Prison (“ASP”) in Avenal, California, when Plaintiff was
6 incarcerated there.

7 Plaintiff alleges that in May 2004, he was transferred to ASP. In June 2004, Plaintiff
8 submitted a sworn declaration that he had witnessed an inmate be battered and assaulted by an ASP
9 Officer. Defendant Umphenour confronted Plaintiff and said he “would be ‘dealt with’ for
10 submitting ‘a false declaration against an officer.’” (2ACP, Doc. 26 at 9.) Immediately, ASP
11 officials caused Plaintiff to be transferred five times in two weeks “amid the calumny and obloquy
12 that [p]laintiff was a ‘snitch’ and a ‘baby raper.’” (Id.) Each of Plaintiff’s verbal and written pleas
13 resulted in Plaintiff being transferred to another facility or building. These transfers “virtually
14 guaranteed” that Plaintiff’s grievances would not be responded to because they would be lost,
15 forgotten, misplaced, or not investigated due to being re-routed. (Id. at 10.) After Plaintiff was
16 transferred to Building 250 he was stabbed four times, bludgeoned about the head, and beaten to
17 semi-consciousness while defendants Umphenour and Does 1 and 2 watched without intervening.
18 Plaintiff was then hospitalized and placed in segregation. Defendant Umphenour was to gather and
19 inventory Plaintiff’s personal property. In August 2004, Plaintiff was transferred to Mule Creek
20 State Prison (“MCSP”). When Plaintiff arrived at MCSP, officials received his personal property
21 and documented that it had been sabotaged.

22 Plaintiff requests monetary damages.

23 **III. MOTION TO DISMISS**

24 **A. Rule 12(b)(6) Motion to Dismiss -- Legal Standard**

25 “The focus of any Rule 12(b)(6) dismissal . . . is the complaint,” Schneider v. California
26 Dept. of Corr., 151 F.3d 1194, 1197 n.1 (9th Cir. 1998), which must contain “a short and plain
27 statement of the claim showing that the pleader is entitled to relief . . . ,” Fed. R. Civ. P. 8(a)(2).
28 “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true,

1 to ‘state a claim that is plausible on its face.’” Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009)
2 (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964-65 (2007)); Moss
3 v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009). The mere possibility of misconduct falls
4 short of meeting this plausibility standard. Iqbal, 129 S.Ct. at 1949-50; Moss, 572 F.3d at 969.

5 Detailed factual allegations are not required, but “[t]hreadbare recitals of the elements of a
6 cause of action, supported by mere conclusory statements, do not suffice,” Iqbal at 1949 (citing
7 Twombly, 550 U.S. at 555), and courts “are not required to indulge unwarranted inferences,” Doe
8 I v. Wal-Mart Stores, Inc., 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation
9 omitted). While factual allegations are accepted as true, legal conclusions are not. Iqbal, 129 S.Ct.
10 at 1949.

11 **B. Statute of Limitations - Legal Standard**

12 Federal law determines when a claim accrues, and “under federal law, a claim accrues “when
13 the plaintiff knows or has reason to know of the injury which is the basis of the action.” Lukovsky
14 v. City and County of San Francisco, 535 F.3d 1044, 1048 (9th Cir. 2008) (quoting Two Rivers v.
15 Lewis, 174 F.3d 987, 991 (9th Cir. 1999)); Fink v. Shedler, 192 F.3d 911, 914 (9th Cir. 1999). In
16 the absence of a specific statute of limitations, federal courts should apply the forum state’s statute
17 of limitations for personal injury actions. Lukovsky, 535 F.3d at 1048; Jones v. Blanas, 393 F.3d
18 918, 927 (2004); Fink, 192 F.3d at 914. California’s statute of limitations for personal injury actions
19 requires that the claim be filed within 2 years. Cal. Code Civ. Proc. § 335; Jones, 393 F.3d at 927.
20 In actions where the federal court borrows the state statute of limitation, the court should also borrow
21 all applicable provisions for tolling the limitations period found in state law. See Hardin v. Straub,
22 490 U.S. 536, 539, 109 S. Ct. 1998, 2000 (1989). Pursuant to the California Code of Civil Procedure
23 section 352.1, a two-year limit on tolling is imposed on prisoners. Section 352.1 provides, in
24 pertinent part, as follows:

25 (a) If a person entitled to bring an action, . . . is, at the time the cause
26 of action accrued, imprisoned on a criminal charge, or in execution
27 under the sentence of a criminal court for a term less than for life, the
time of that disability is not a part of the time limited for the
commencement of the action, not to exceed two years.

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1 Thus, incarcerated plaintiffs have four years from the date that the cause of action accrued
2 in which to file suit, if the cause of action accrued while the plaintiff was incarcerated. The equitable
3 tolling doctrine also tolls the statute of limitations while exhaustion occurs. Donoghue v. County
4 of Orange, 848 F.2d 926, 930-31 (9th Cir. 1988); Addison v. State of California, 21 Cal.3d 313, 318
5 (1978). Additionally whether an inmate is entitled to equitable tolling is decided by state law except
6 to the extent that it is inconsistent with federal law. Jones, 393 F.3d at 927. Under California law
7 equitable tolling is available where there is “timely notice, and lack of prejudice to the defendant,
8 and reasonable and good faith conduct on the part of the plaintiff.” Daviton v. Columbia/HCA
9 Healthcare Corp., 241 F.3d 1131, 1132 (9th Cir. 2001) (quoting Addison, 21 Cal.3d at 319).
10 Equitable tolling applies “to suspend or extend a statute of limitations as necessary to ensure
11 fundamental practicality and fairness.” Jones, 393 F.3d at 927 (quoting Lantzy v. Centex Homes,
12 31 Cal.4th 363, 370 (2003)). Application of equitable tolling “requires a balancing of the injustice
13 to the plaintiff occasioned by the bar of his claim against the effect upon the important public interest
14 or policy expressed by the . . . limitations statute.” Jones, 393 F.3d at 927 (quoting Lantzy, 31
15 Cal.4th at 371)).

16 C. Parties' Positions

17 Defendant argues that this action should be dismissed under Rule 12(b)(6) because Plaintiff’s
18 claims are barred by the statute of limitations. Defendant argues that the applicable statute of
19 limitations for personal injury actions was two years when plaintiff’s action accrued against
20 defendant sometime between May and July 2004. Defendant asserts that under California law, the
21 two-year statute of limitations is tolled for a period not to exceed two years while a person is
22 imprisoned on a criminal charge. Defendant argues that because Plaintiff’s complaint against him
23 was not filed until August 25, 2010, more than six years after the fact, the entire action against
24 Defendant is time-barred.

25 In opposition, Plaintiff asserts that Defendant has erroneously argued that the complaint for
26 this action was filed on August 25, 2010, whereas the complaint was filed on July 7, 2008. Based
27 on the July 7, 2008 date of filing, Plaintiff argues that his claims in this action accrued within four
28 years of the date of filing. Plaintiff asserts that in July 2004, Defendant retaliated against him by

1 threatening him for submitting an allegedly false declaration against a prison officer whom Plaintiff
2 observed assaulting an inmate, and immediately thereafter Plaintiff was transferred to Building 250
3 where Defendant worked. Plaintiff asserts that Defendant then set Plaintiff up to be murdered by
4 other inmates and failed to protect Plaintiff from being stabbed, beaten, and bludgeoned. Plaintiff
5 also asserts that in August 2004, less than thirty days after the attempted murder, he was transferred
6 to another prison.

7 Defendant "concedes that he erroneously argues in the motion to dismiss that [Plaintiff's]
8 complaint was not filed until August 25, 2010 (which is the date when the second amended
9 complaint was filed)." (Reply, Doc. 57 at 3 fn.1.) Defendant argues that the Court should
10 nonetheless dismiss Plaintiff's retaliation claim which accrued prior to July 8, 2004. Defendant also
11 requests that Plaintiff be required to provide a more definite statement as to when the alleged act of
12 deliberate indifference occurred.

13 **D. Discussion**

14 Defendant has not adequately argued that the statute of limitations bars Plaintiff's claims.
15 Plaintiff filed this action on July 7, 2008. (Doc. 1.) According to Plaintiff's Second Amended
16 Complaint ("2ACP") upon which this action now proceeds, Plaintiff's claims of retaliation against
17 Defendant arose between May 2004 when he arrived at ASP and August 2004 when he was
18 transferred to MCSP. (2ACP, Doc. 26 at 9:14, 10 ¶¶29.) Plaintiff alleges that sometime after June
19 2004, Defendant threatened him because he complained about another officer.² (2ACP at 9 ¶¶21-
20 22.) Plaintiff also alleges that Defendant "sabotaged" his legal and personal property in August 2004
21 upon Plaintiff's transfer to MCSP. (2ACP at 10 ¶¶28-30.) Plaintiff's claims of deliberate
22 indifference against Defendant arose between June and August 2004 at ASP when Plaintiff was
23 assaulted by other inmates while Defendant stood by and failed to protect him.³ (2ACP at 10 ¶26.)
24 Defendant argues that Plaintiff's claims arising more than four years before Plaintiff filed the
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26 ²In his Surreply filed on November 22, 2011, Plaintiff asserts that Defendant threatened him on or about
27 June 16, 2004. (Surreply, Doc. 59 at 2:9-10.)

28 ³In his Surreply filed on November 22, 2011, Plaintiff asserts that the assault occurred on July 11, 2004.
(Surreply, Doc. 59 at 2:1.)

1 Complaint on July 7, 2008 are barred by the statute of limitations. However, Defendant fails to
2 allow for tolling while Plaintiff was exhausting his administrative remedies. Plaintiff declares that
3 he began the appeals process at MCSP sometime during or after August 2004 and completed the
4 process for all claims at issue in this action. (2ACP at 2 ¶II, 10 ¶31.) Defendant has not provided
5 sufficient information about the time period during which Plaintiff exhausted his remedies. Without
6 knowing the date Plaintiff filed his prison appeal and the date of the final decision, the Court cannot
7 determine how long the time was tolled. The Court finds that Defendant's evidence is not sufficient
8 to support his argument that, under applicable law, Plaintiff's suit is time-barred by the statute of
9 limitations and applicable tolling, and therefore Defendant's motion to dismiss must be denied.

10 **IV. CONCLUSION AND RECOMMENDATION**

11 Based on the foregoing, the Court HEREBY RECOMMENDS that defendant Umphenour's
12 motion to dismiss, filed on October 6, 2011, be DENIED.

13 The Court further ORDERS that these Findings and Recommendation be submitted to the
14 United States District Court Judge assigned to this action. Within **TWENTY (20) days** after being
15 served with a copy of these Findings and Recommendation, any party may file written Objections
16 with the Court and serve a copy on all parties. Such a document should be captioned "Objections
17 to Magistrate Judge's Findings and Recommendation." The parties are advised that failure to file
18 Objections within the specified time may waive the right to appeal the Order of the District Court.
19 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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21 IT IS SO ORDERED.

22 **Dated: August 23, 2012**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE