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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ANGEL H. HERNANDEZ,
Plaintiff,

v.

CHRIS JORDAN, et al.,
Defendants.

CASE NO. 1:09-cv-00268-LJO-SKO PC
FINDINGS AND RECOMMENDATIONS
RECOMMENDING DEFENDANT’S MOTION
TO DISMISS BE DENIED
(Doc. 19)
TWENTY-DAY OBJECTION PERIOD

Findings and Recommendations Addressing Defendant’s Motion to Dismiss

I. Procedural History

Plaintiff Angel H. Hernandez, a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 and California law on February 11, 2009.¹ This action is proceeding on Plaintiff’s amended complaint, filed April 27, 2009, against Defendants Costner and Doe 1 for use of excessive physical force in violation of the Due Process Clause and for negligence in violation of California law.²

On December 16, 2010, Defendant Costner filed a motion seeking dismissal of the claims against him on the ground that they are barred by the applicable statutes of limitation. Fed. R. Civ.

¹ Plaintiff was a pretrial detainee at the time of the events at issue and he was incarcerated at the Kings County Jail when he filed suit.

² Only Defendant Costner has been served. At this juncture, Defendant Doe remains unidentified. See Wakefield v. Thompson, 177 F.3d 1160, 1163 (9th Cir. 1999) (although the use of Doe defendants is generally disfavored, the plaintiff must be given the opportunity to the identify Doe defendants through discovery).

1 P. 12(b)(6). Plaintiff filed an opposition on January 19, 2011, Defendant filed a reply on January
2 28, 2011, and the motion has been deemed submitted. Local Rule 230(l).

3 **II. Legal Standard**

4 In resolving a 12(b)(6) motion, the Court’s review is generally limited to the operative
5 pleading.³ Daniels-Hall v. National Educ. Ass’n, 629 F.3d 992, 998 (9th Cir. 2010); Sanders v.
6 Brown, 504 F.3d 903, 910 (9th Cir. 2007); Huynh v. Chase Manhattan Bank, 465 F.3d 992, 1003-04
7 (9th Cir. 2006); Schneider v. California Dept. of Corr., 151 F.3d 1194, 1197 n.1 (9th Cir. 1998). The
8 Court must accept the well-pleaded factual allegations as true and draw all reasonable inferences in
9 favor of the non-moving party. Daniels-Hall, 629 F.3d at 998; Sanders, 504 F.3d at 910; Huynh, 465
10 F.3d at 996-97; Morales v. City of Los Angeles, 214 F.3d 1151, 1153 (9th Cir. 2000). Plaintiff’s
11 failure to comply with the applicable statutes of limitation is properly raised in a 12(b)(6) motion so
12 long as his failure to do so is apparent from the face of the complaint. Huynh, 465 F.3d at 997;
13 Morales, 214 F.3d at 1153. The motion to dismiss may only be granted “if the assertions of the
14 complaint, read with the required liberality, would not permit the plaintiff to prove that the statute
15 was tolled.” Morales, 214 F.3d at 1153 (internal quotation marks and citation omitted).

16 **III. Discussion**

17 **A. Excessive Force Claim**

18 Federal law determines when a claim accrues, and “[u]nder federal law, a claim accrues when
19 the plaintiff knows or has reason to know of the injury which is the basis of the action.” Maldonado
20 v. Harris, 370 F.3d 945, 955 (9th Cir. 2004); Fink v. Shedler, 192 F.3d 911, 914 (9th Cir. 1999).
21 Because section 1983 contains no specific statute of limitation, federal courts should apply the forum
22 state’s statute of limitations for personal injury actions. Jones v. Blanas, 393 F.3d 918, 927 (2004);
23 Maldonado, 370 F.3d at 954; Fink, 192 F.3d at 914. California’s general statute of limitation for
24 personal injury actions is two years. Cal. Civ. Proc. Code § 335.1 (West 2011).

26 ³ Where applicable, courts may also consider evidence on which the complaint necessarily relies if the
27 complaint refers to the document, the document is central to the plaintiff’s claim, and no party questions the
28 authenticity of the document copy attached to the motion to dismiss. Daniels-Hall v. National Educ. Ass’n, 629 F.3d
992, 998 (9th Cir. 2010) (citing Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006)) (quotation marks omitted). In
this instance, the Court’s review is limited to Plaintiff’s amended complaint and attached exhibits.

1 In actions where the federal court borrows the state's statute of limitation, it should also
2 borrow all applicable state law provisions for tolling the limitation period. Jones, 393 F.3d at 927.
3 Under California law, the statute of limitation is tolled for up to two years for prisoners who at the
4 time the cause of action accrued were either imprisoned on a criminal charge or serving a sentence
5 of less than life for a criminal conviction. Cal. Civ. Proc. Code § 352.1 (West 2011). Although
6 Defendant did not address the applicability of the tolling statute, nothing alleged in Plaintiff's
7 amended complaint provides a basis for precluding its application. Morales, 214 F.3d at 1153.

8 Plaintiff's claim accrued on January 18, 2007, when the incident of force allegedly occurred,
9 and he filed suit on February 11, 2009, well within the four-year period in which he had to file suit.
10 Accordingly, the Court recommends that Defendant's motion to dismiss Plaintiff's excessive force
11 claim as barred by the two-year statute of limitation be denied.⁴

12 **B. Negligence Claim**

13 California's Tort Claims Act requires that a tort claim against a public entity or its employees
14 be presented to the California Victim Compensation and Government Claims Board no more than
15 six months after the cause of action accrues. Cal. Gov't Code §§ 905.2, 910, 911.2, 945.4, 950-
16 950.2 (West 2011). Presentation of a written claim and action on or rejection of the claim are
17 conditions precedent to suit, Shirk v. Vista Unified Sch. Dist., 42 Cal.4th 201, 208-09 (Cal. 2007);
18 State v. Superior Court of Kings Cnty. (Bodde), 32 Cal.4th 1234, 1239 (Cal. 2004); Mabe v. San
19 Bernardino Cnty. Dep't of Pub. Soc. Servs., 237 F.3d 1101, 1111 (9th Cir. 2001); Mangold v.
20 California Pub. Utils. Comm'n, 67 F.3d 1470, 1477 (9th Cir. 1995), and suit must be commenced
21 not later than six months after the date the rejection is deposited in the mail, Cal. Gov't Code §
22 945.6(a)(1) (West 2011) (quotation marks omitted).

23 In his amended complaint, Plaintiff alleges compliance with the Tort Claims Act and he
24 includes as an exhibit what is purportedly a handwritten copy of the claim rejection letter he
25 received, dated and mailed on March 27, 2007. Thus, under section 945.6(a)(1), Plaintiff had only
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27 ⁴ The two-year tolling provision does not apply to Plaintiff's negligence claim, as claims brought against
28 public employees and subject to compliance with the Tort Claims Act are specifically precluded. Cal. Civ. Proc.
Code § 352.1(b).

1 six months from March 27, 2007, within which to commence suit and he did not do so. However,
2 the statute also includes a tolling provision for prisoners, which provides:

3 When a person is unable to commence suit on a cause of action described in
4 subdivision (a) within the time prescribed in that subdivision because he has been
5 sentenced to imprisonment in state prison, the time limit for the commencement of
6 suit is extended to six months after the date that the civil right to commence suit
7 action is restored to such person, except that the time shall not be extended if the
8 public entity establishes that the plaintiff failed to make a reasonable effort to
9 commence the suit, or to obtain a restoration of his civil right to do so, before the
10 expiration of the time prescribed in subdivision (a).

11 Cal. Gov't Code § 945.6(b) (West 2011).

12 Defendant did not address the applicability of section 945.6(b), and while some courts have
13 found that subsection (b) is no longer operative, Brown v. Grove, 647 F.Supp.2d 1178, 1187
14 (C.D.Cal. Jul. 16, 2009); Boyd v. Alameda County, No. C 02-02461 SI, 2005 WL 2171870, at *18
15 (N.D.Cal. Sept. 6, 2005); Moore v. Twomey, 201 Cal.App.4th 910, 914 (2004), other courts have
16 continued to apply it in the absence of any express invalidation, Lanier v. City of Fresno, No. CV
17 F 10-1120 LJO SKO, 2010 WL 3957440, at *9-11 (E.D.Cal. Oct. 8, 2010); see also Flores v. City
18 of Hayward, No. C 10-2396 MEJ, 2010 WL 3490221, at *3-4 (N.D.Cal. Sept. 2, 2010). Because
19 Plaintiff may be able to prove that the statute of limitation was tolled pursuant to section 945.6(b),
20 the Court recommends that Defendant's motion to dismiss Plaintiff's negligence claim be denied,
21 without prejudice. Morales, 214 F.3d at 1153.

22 **IV. Conclusion and Recommendation**

23 For the reasons set forth herein, the Court RECOMMENDS that Defendant Costner's motion
24 to dismiss, filed December 16, 2010, be DENIED.

25 These Findings and Recommendations will be submitted to the United States District Judge
26 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **twenty (20)**
27 **days** after being served with these Findings and Recommendations, the parties may file written
28 objections with the Court. The document should be captioned "Objections to Magistrate Judge's
Findings and Recommendations." The parties are advised that failure to file objections within the

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1 specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d
2 1153 (9th Cir. 1991).

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5 IT IS SO ORDERED.

6 **Dated: June 27, 2011**

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE

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