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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

VIRGIL E. HOLT,	CASE NO. 1:09-cv-00800-AWI-SAB (PC)
Plaintiff,	ORDER ON FINDINGS AND
v.	RECOMMENDATIONS AND ORDER
R. NICHOLAS, et al.,	REFERRING MATTER BACK TO
Defendants.	MAGISTRATE JUDGE FOR FURTHER
	PROCEEDINGS
	(ECF Nos. 79, 86, & 110)

Plaintiff Virgil E. Holt, a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on May 4, 2009. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.¹

On June 11, 2012, Defendants filed a motion for summary judgment. Doc. No. 79. On August 1, 2012, Defendants requested supplemental briefing to comply with the new Ninth Circuit notice requirement. Doc. No. 86. On February 12, 2013, the Magistrate Judge issued a Findings and Recommendations (“F&R”), that recommended denying Defendants’ motion for summary judgment and denying Defendants’ request for supplemental briefing. Doc. No. 110. Neither party submitted objections to the F&R.

After reviewing this case, the Court respectfully disagrees with the F&R. The F&R recommends denying summary judgment because Defendants’ motion was filed untimely. The F&R is correct that the motion is untimely. However, there are 21 defendants in this case, with

¹The Court notes that this case was reassigned to a new Magistrate Judge in January 2013.

1 claims based on excessive force, failure to decontaminate/provide medical care, and supervisory
2 liability. A review of the summary judgment motion indicates that there are potentially
3 meritorious arguments that could reduce the claims to be tried and significantly reduce the
4 number of defendants. Further, Defendants are arguing that they are entitled to qualified
5 immunity. Addressing qualified immunity prior to trial is preferable to addressing the issue for
6 the first time during trial. Admittedly, until Plaintiff files an opposition, it is unknown whether
7 summary judgment in favor of any claims or any Defendants ultimately will be granted. If
8 Plaintiff creates genuine disputed issues of material fact for each claim and each Defendant, then
9 this case will proceed against all 21 Defendants and all claims. However, given the issues
10 involved and the potential to significantly narrow this case, the Court finds that permitting
11 Defendants the opportunity to move for summary judgment, despite untimeliness, is appropriate.

12 Further, in August 2012, an erroneous order issued that advised Plaintiff to either stand
13 on his opposition to summary judgment or submit a new opposition. See Doc. No. 89. Plaintiff
14 rightly stated that he had not filed an opposition. See Doc. No. 91. Plaintiff also indicated that
15 he needed discovery responses from Defendants and that he had motions to compel that were
16 pending. See id. A review of the record indicates that Plaintiff did file motions to compel
17 discovery responses, Defendants received various extensions of time to answer those motions, but
18 that the motions to compel were eventually denied as untimely under the scheduling order.

19 As indicated, the Court will permit Defendants the opportunity to file a timely summary
20 judgment motion. In light of Doc. No. 91 and the prior motions to compel, the Court also will
21 permit Plaintiff the opportunity to obtain additional discovery. Specifically, Plaintiff will be
22 permitted the opportunity to file a new motion to compel that addresses any outstanding
23 discovery to which Plaintiff believes himself entitled. Once that motion is filed, Defendants shall
24 file a response. The Magistrate Judge will then rule on the motion to compel. After the new
25 motion to compel is resolved, the parties will contact the Magistrate Judge for the purpose of
26 setting a new dispositive motions deadline and, if it is determined to be necessary, a new
27 discovery deadline. If Plaintiff believes that a motion to compel is no longer necessary, he shall
28 so inform the Court, and the Magistrate Judge will then set a new dispositive motions deadline.

1 Accordingly, IT IS HEREBY ORDERED that:

- 2 1. The Court DECLINES to adopt the Findings and Recommendation (Doc. No. 110);
- 3 2. Defendants' motion for summary judgment (Doc. No. 79) is DENIED without prejudice
- 4 to re-filing in accordance with a new dispositive motions deadline;
- 5 3. Defendants' request for supplemental briefing (Doc. No. 86) is DENIED as moot;
- 6 4. Plaintiff shall file either a new motion to compel discovery responses, or inform the Court
- 7 that a motion to compel is no longer necessary, no later than October 30, 2013;
- 8 5. Defendant shall file an opposition to the motion to compel within twenty-one (21) days of
- 9 receipt of Plaintiff's motion;
- 10 6. Plaintiff may file a reply within fourteen (14) days of service of Defendants' opposition;
- 11 and
- 12 7. This case is referred to the Magistrate Judge for the purpose of ruling on Plaintiff's
- 13 motion to compel, setting a new dispositive motions deadline, and possibly setting a new
- 14 discovery deadline.

15
16 IT IS SO ORDERED.

17 Dated: September 26, 2013



18 _____
19 SENIOR DISTRICT JUDGE