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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

FLOYD SCOTT,

Plaintiff,

v.

J. PALMER, et al.,

Defendants.

Case No. 1:09-cv-01329-LJO-SKO (PC)

ORDER DISREGARDING SURREPLY,
DENYING MOTION TO STRIKE AS
MOOT, GRANTING MOTION TO MODIFY
SCHEDULING ORDER, AND GRANTING
MOTION FOR CLARIFICATION

(Docs. 153, 161, 163, and 164)

Limited Discovery Deadline: 02/02/2015
Pretrial Dispositive Motion Deadline: 04/02/2015

I. Procedural History

Plaintiff Floyd Scott, a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on July 29, 2009. This action for damages is proceeding against Defendants Palmer, Rivera, and Lopez on Plaintiff's claim that while he was at Kern Valley State Prison in Delano, California, Defendant Palmer used excessive physical force against him and Defendants Rivera and Lopez failed to intervene, in violation of his rights under the Eighth Amendment of the United States Constitution.

Pursuant to the order filed on February 22, 2013, the discovery deadline was July 9, 2013, and the pretrial dispositive motion deadline was September 9, 2013. (Doc. 122.) On July 2, 2013, Defendants filed a timely motion to modify the scheduling order to extend the discovery deadline thirty days to permit Plaintiff's deposition and to extend the pretrial dispositive motion deadline.

1 Plaintiff filed an opposition on July 22, 2013, and Defendants filed a reply on July 29, 2013.
2 (Docs. 157, 159.) On August 8, 2013, Plaintiff filed a surreply and on August 14, 2013,
3 Defendants filed a motion to strike. (Docs. 161, 163.) On August 16, 2013, Plaintiff filed a
4 motion for clarification regarding the pretrial dispositive motion deadline in light of his pending
5 discovery motions. (Doc. 164.)

6 Plaintiff did not seek leave of court to file a surreply, and the Court declines to consider it.
7 Defendants' motion to strike is therefore denied as moot.

8 **II. Discussion**

9 **A. Discovery Deadline**

10 Defendants attempted to depose Plaintiff on February 26, 2013, and he refused to answer
11 any questions, based on his erroneous beliefs that the deposition notice was not timely served and
12 that refusal to testify was a remedy available to him. Defendants filed a motion to compel
13 Plaintiff's deposition on March 12, 2013, and the motion was granted in a separate order issued
14 concurrently with this order. Given their pending motion to compel and imminent expiration of
15 the discovery deadline, Defendants filed a motion seeking a thirty day extension of the discovery
16 deadline to depose Plaintiff.

17 Although Plaintiff opposes the motion and argues that nothing precluded Defendants from
18 simply re-noticing his deposition within fourteen days of the deposition, his argument is premised
19 on the correctness of his position that the deposition was improperly noticed and that he was
20 entitled to remedy such a deficiency by refusing to answer questions. As explained in greater
21 detail in the order granting the motion to compel, the deposition notice was not untimely served
22 and unilateral refusal to be deposed is not a remedy available to any party in any event. Fed. R.
23 Civ. P. 5(b)(2)(C); *Pioche Mines Consol., Inc. v. Dolman*, 333 F.2d 257, 269 (9th Cir. 1964).
24 Given Plaintiff's unmeritorious position regarding his obligation to cooperate for a deposition,
25 Plaintiff's argument that nothing prevented Defendants from simply re-noticing the deposition
26 with "proper" notice and within the discovery deadline is unpersuasive. See *Estrada v. Rowland*,
27 69 F.3d 405, 406 (9th Cir. 1995) (the remedy for appearance at but refusal to testify at a deposition
28 is a court order to testify). Although the Court does not suggest that Plaintiff purposefully acted in

1 bad faith, his position was nonetheless unsupportable under the law and his refusal to listen to
2 counsel, as evidenced by the deposition transcript, was not particularly reassuring concerning
3 future cooperation. Given the circumstances, Defendants decision to first seek an order
4 compelling Plaintiff's deposition, *Estrada*, 69 F.3d at 406, and then seek an extension of the
5 approaching deadline does not demonstrate a lack of due diligence and there is no arguable
6 prejudice to Plaintiff, *Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1087 (9th Cir.
7 2002). Accordingly, Defendants have shown good cause for the requested extension and it shall
8 be granted. Fed. R. Civ. P. 16(b)(4).

9 While the Court recognizes that Defendants are seeking only a limited extension of time to
10 depose Plaintiff, various other pending discovery motions were resolved in this series of orders
11 and equity dictates that those issues which directly impact Plaintiff's discovery be taken into
12 consideration in determining the length and purpose of a discovery deadline extension. To that
13 end, the discovery deadline will be extended (1) to allow Defendants to depose Plaintiff, (2) for
14 Plaintiff to receive and review the limited discovery requests to which he is entitled further
15 responses and file a motion to compel if necessary, and (3) for Plaintiff to make an offer of proof
16 regarding his ability to compensate an officer to take and record Defendants' depositions by
17 written questions.

18 **B. Pretrial Dispositive Motion Deadline**

19 Both Plaintiff and Defendants seeks an extension of the pretrial dispositive motion
20 deadline, and the resolution of the pending discovery disputes coupled with the discovery deadline
21 extension logically dictate an extension of the pretrial motion deadline. Fed. R. Civ. P. 16(b)(4).
22 (Docs. 153, 164.) However, the parties are reminded that the Court previously resolved a motion
23 for summary judgment which involved a determination that there were triable issues of fact
24 regarding (1) whether Defendant Palmer kicked and stomped Plaintiff after subduing him with
25 pepper spray and handcuffing him, and (2) whether Defendants Rivera and Lopez failed to
26 intervene during the incident. (Docs. 69, 71, 112, 132.) Excessive force cases such as this
27 generally require fact finding by a jury, and the parties are cautioned that the pretrial dispositive
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1 motion deadline is not intended to suggest that they take a second bite at the apple with respect to
2 issues that have been determined. *Ingle v. Circuit City*, 408 F.3d 592, 594 (9th Cir. 2005).

3 **III. Order**

4 Based on the foregoing, it is HEREBY ORDERED that:

- 5 1. Defendants' motion to modify the scheduling order and Plaintiff's motion for
6 clarification are GRANTED (docs. 153, 164);
- 7 2. The deadline for the completion of all discovery is extended to February 2, 2015,
8 limited to conducting Plaintiff's deposition, allowing Plaintiff to file a motion to
9 compel after receiving and reviewing the limited discovery requests to which he is
10 entitled further responses (RFP, set one, 18 and 19, and RFP, set two), and allowing
11 Plaintiff to make an offer of proof within thirty days regarding his ability to
12 compensate an officer to take and record Defendants' depositions by written
13 questions; and
- 14 3. The deadline for filing pretrial dispositive motions is April 2, 2015.

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17 IT IS SO ORDERED.

18 Dated: November 25, 2014

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE