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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

KEITH ZAVALA,

Plaintiff,

v.

CHRIS CHRONES, et al.,

Defendants.

CASE NO. 1:09-cv-01352-BAM PC

ORDER DENYING DEFENDANTS’ MOTION FOR LEAVE TO FILE MOTION FOR SUMMARY JUDGMENT

(ECF No. 96)

ORDER STRIKING DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT

(ECF No. 97, 98)

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Plaintiff Keith Zavala is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. This action is proceeding on the second amended complaint, filed May 24, 2010, against Defendants C. Chrones, S. Kays, D. Smith, S. Chandler, C. Martin, and J. Soto for deliberate indifference in violation of the Eighth Amendment, and is currently set for trial on February 11, 2013. On August 31, 2012, Defendants filed a motion for leave to file a motion for summary judgment, motion for summary judgment, and notice of lodging documents in paper. (ECF No. 96, 97, 98.)

Defendants request they be allowed to file a late motion for summary judgment due to excusable neglect. For good cause, a court may extend the time for filing a motion “after the time has expired if the party failed to act because of excusable neglect.” Fed. R. Civ. P. 6(b)(1)(B). In determining whether delay is due to excusable neglect, the court is to consider the danger of prejudice to the nonmoving party, the length of delay and impact upon the proceedings, the reason

1 for the delay including whether it was within the reasonable control of the moving party, and whether
2 the movant acted in good faith. Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership,
3 507 U.S. 380, 395, 113 S.Ct. 1489, 1498 (1993); Los Altos El Granada Investors v. City of Capitola,
4 583 F.3d 674, 683 (9th Cir. 2009); Pincay v. Andrews, 389 F.3d 853, 855 (9th Cir. 2004).

5 In this instance, the danger of prejudice to the plaintiff and length of delay weigh against
6 finding excusable neglect. The dispositive motion deadline in this action was March 15, 2012, and
7 Defendants' motion was filed five and one half months after the dispositive deadline had passed.
8 Allowing Defendants to file a motion for summary judgment will result in the trial being vacated.
9 This action has been proceeding since August 3, 2009, and vacating the trial date would result in a
10 substantial delay in setting a new trial date due to the caseload of the Eastern District.

11 Additionally, the reason for the delay was within the reasonable control of defense counsel.
12 Defense counsel was aware of the scheduling order and should have filed a motion to amend the
13 scheduling order prior to the deadline. Defense counsel states that he had two trials and numerous
14 dispositive motions during the time he was assigned to this case and the dispositive motion was due.
15 Defense counsel's busy schedule is not grounds to find excusable neglect. See Hawks v. J.P.
16 Morgan Chase Bank, 591 F.3d 1043, 1048 (2010) (two trials and Social Security hearing does not
17 constitute excusable neglect); McLaughlin v. City of LaGrange, 662 F.2d 1385, 1387 (11th Cir.
18 1981) cert. denied 456 U.S. 979 (solo practitioner engaged in the preparation of other cases does not
19 establish excusable neglect).

20 The final factor weighs in favor of Defendants, as the Court does not find that the motion was
21 filed in bad faith. Based upon the length of the delay in bringing the motion, prejudice to Plaintiff,
22 and the reason for delay, the Court finds that the factors weigh against finding excusable delay.

23 Further modification of a scheduling order requires a showing of good cause, Fed. R. Civ.
24 P. 16(b), and good cause requires a showing of due diligence, Johnson v. Mammoth Recreations,
25 Inc., 975 F.2d 604, 609 (9th Cir. 1992). If the party seeking to amend the scheduling order fails to
26 show due diligence the inquiry should end and the court should not grant the motion to modify.
27 Zivkovic v. Southern California Edison, Co., 302 F.3d 1080, 1087 (9th Cir. 2002). This action has
28 been defended by the Attorney General's Office since Defendants made an appearance in this action.

1 According to the Court's docket, the reassignment to current defense counsel occurred on September
2 1, 2011. Defense counsel requests leave to file a motion for summary judgment due to inadvertence
3 in failing to request an extension of the scheduling order. Additionally, Defendants state that a
4 motion for summary judgment was not filed because a motion to dismiss was pending. Dispositive
5 motions were due on March 15, 2012, and the motion for leave to file a motion for summary
6 judgment was not filed until August 31, 2012, approximately five and one half months later. The
7 order denying Defendants' motion to dismiss was issued on July 26, 2012, and the instant motion
8 was filed over one month later.

9 Defendants have not shown good cause to modify the scheduling order. Defense counsel
10 states his caseload caused him to be unable to file a motion for summary judgment prior to the
11 dispositive motion deadline in this action and he inadvertently neglected to file a motion to modify
12 the scheduling order. The Federal Rules of Civil Procedure, Local Rules, and Court's scheduling
13 orders are not to be set aside or disregarded because an attorney neglects to pay attention to deadlines
14 set in the action. See Johnson, 975 F.2d at 610 (Good cause to modify scheduling order to amend
15 not shown where plaintiff's "attorneys filed pleadings and conducted discovery but failed to pay
16 attention to the responses they received."). Defendants do not show good cause to modify the
17 schedule based upon counsel's press of business.

18 Further, the Court rejects Defendants' argument that it is in the interest of the conservation
19 of judicial resources to allow their late motion. Judicial resources are best conserved when the
20 parties comply with Court's scheduling orders and raise all applicable grounds for dismissal or
21 judgment as a matter of law in a timely filed motion. The requirement that parties abide by the
22 Court's scheduling orders absent a showing of good cause is itself intended directly to serve the
23 interest of conserving judicial resources by allowing for the resolution of untimely or otherwise non-
24 meritorious claims prior to trial and not at the eleventh hour.

25 Defendants' current counsel substituted into this case on September 1, 2011. The motion for
26 leave to file a dispositive motion was filed more than five months after the dispositive motion
27 deadline had passed and over one month after the motion to dismiss was denied. Defendants have
28 failed to show diligence in attempting to comply with the scheduling order and to allow a

1 modification of the scheduling order without good cause would render scheduling orders essentially
2 meaningless, and directly interfere with courts' attempts to manage their dockets and with the
3 standard course of litigation in actions such as this. Johnson, 975 F.2d at 610 ("A scheduling order
4 is not a frivolous piece of paper, idly entered" (internal quotations and citation omitted)).

5 Accordingly, IT IS HEREBY ORDERED that:

- 6 1. Defendants' motion for leave to file a motion for summary judgment, filed August
7 31, 2012 is DENIED; and
- 8 2. Defendants' motion for summary and notice of lodging, filed August 31, 2012, are
9 STRICKEN FROM THE RECORD.

10 IT IS SO ORDERED.

11 **Dated: September 5, 2012**

/s/ **Barbara A. McAuliffe**
UNITED STATES MAGISTRATE JUDGE