

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JASON LATRELL THOMAS,
Plaintiff,
v.
M. WILBER, et al.,
Defendants.

Case No. 1:10-cv-00006-AWI-SKO PC
ORDER DENYING MOTION TO STRIKE
SURREPLY AND GRANTING MOTION
FOR LEAVE TO SUBMIT DEFENDANT
VIKJORD'S DISCOVERY RESPONSES IN
SUPPORT OF OPPOSITION TO SUMMARY
JUDGMENT MOTION
(Docs. 83 and 84)

Plaintiff Jason Latrell Thomas, a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on January 4, 2010. This action is proceeding on Plaintiff's verified complaint against Defendants Salinas, Jr., Maldonado, Wilber, Vikjord, Frescura, Price, Hernandez, and Castro ("Defendants") on Plaintiff's numerous First Amendment and Eighth Amendment claims.

Pending before the Court is Defendants' motion for summary judgment, filed on May 20, 2013. (Docs. 62-65, 67.) After obtaining a stay due to his hospitalization for mental health issues, Plaintiff filed an opposition on August 1, 2013; and after obtaining an extension of time, Defendants a reply and evidentiary objections on September 13, 2013. (Docs. 74, 75, 77, 79, 80.) Plaintiff filed a surreply on October 4, 2013, and Defendants filed a motion to strike on October 10, 2013. (Docs. 82, 83.)

1 On October 28, 2013, Plaintiff filed a motion requesting leave to supplement his
2 opposition with additional evidence, and on December 16, 2013, Plaintiff filed an opposition to
3 Defendants' motion to strike. (Docs. 84, 85.)

4 Parties do not have the right to file surreplies and motions are deemed submitted when the
5 time to reply has expired. Local Rule 230(l). The Court generally views motions for leave to file
6 a surreply with disfavor. *Hill v. England*, No. CVF05869 REC TAG, 2005 WL 3031136, at *1
7 (E.D. Cal. 2005) (citing *Fedrick v. Mercedes-Benz USA, LLC*, 366 F.Supp.2d 1190, 1197 (N.D.
8 Ga. 2005)). However, district courts have the discretion to either permit or preclude a surreply.
9 See *U.S. ex rel. Meyer v. Horizon Health Corp.*, 565 F.3d 1195, 1203 (9th Cir. 2009) (district
10 court did not abuse discretion in refusing to permit "inequitable surreply"); *JG v. Douglas County*
11 *School Dist.*, 552 F.3d 786, 803 n.14 (9th Cir. 2008) (district court did not abuse discretion in
12 denying leave to file surreply where it did not consider new evidence in reply); *Provenz v. Miller*,
13 102 F.3d 1478, 1483 (9th Cir. 1996) (new evidence in reply may not be considered without giving
14 the non-movant an opportunity to respond).

15 On April 10, 2013, Plaintiff was placed in the custody of the Department of Mental Health
16 and housed at California Medical Facility in the Acute Care Program following a suicide attempt.¹
17 (Doc. 78, Status Report, Dec. of Dr. Banyas.) This placement unquestionably affected Plaintiff's
18 ability to litigate this case and prepare an opposition. Although Plaintiff filed an opposition on
19 August 1, 2013, the declaration of Plaintiff's treating psychiatrist, which was submitted by
20 Defendants, establishes the following timeline: Plaintiff received his legal work on July 12, 2013,
21 was permitted to receive reading material in his cell on July 17, 2013, and was permitted to
22 program solo without handcuffs on July 23, 2013. (*Id.*) Plaintiff was not scheduled for discharge
23 until August 12, 2013, and he is under a *Keyhea* medication plan that does not expire until March
24 27, 2014.² (*Id.*)

25
26
27 ¹ Plaintiff has a history of suicide attempts and mental health issues. (Doc. 78, Banyas Dec.)

28 ² *Keyhea v. Rushen*, 178 Cal.App.3d 526, 542, 223 Cal.Rptr. 746, 755-56 (Cal. Ct. App. 1986) (requiring a judicial determination before prisoners can be involuntarily medicated with psychotropic drugs long-term).

1 In this Circuit, courts are required to afford pro se litigants additional leniency. *E.g.*,
2 *Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir. 2012); *Watison v. Carter*, 668 F.3d 1108, 1112
3 (9th Cir. 2012); *Silva v. Di Vittorio*, 658 F.3d 1090, 1101 (9th Cir. 2011); *Thomas v. Ponder*, 611
4 F.3d 1144, 1150 (9th Cir. 2010). While this leniency does *not* extend to permitting surreplies as a
5 matter of course and the Court is not generally inclined to permit surreplies, Plaintiff's mental
6 health issues and the restrictions he faced as a result of those issues and his hospitalization weigh
7 in favor of permitting the surreply in this case.³ Therefore, Defendants' motion to strike the
8 surreply is denied.

9 These same considerations weigh in favor of permitting Plaintiff to supplement his
10 opposition to include Defendant Vikjord's responses to his interrogatories and requests for
11 admission. Plaintiff attested under penalty of perjury on October 20, 2013, that he only recently
12 received his legal property which included the discovery responses. Given that the exhibits in
13 question are discovery responses, the exhibits do not constitute new evidence previously unknown
14 to Defendants nor does there exist any surprise to Defendants.

15 Accordingly, Defendants' motion to strike Plaintiff's surreply, filed on October 10, 2013,
16 is DENIED, and Plaintiff's motion for leave to submit Defendant Vikjord's discovery responses in
17 support of his opposition to Defendants' motion for summary judgment, filed on October 28,
18 2013, is GRANTED.

19

20

21

IT IS SO ORDERED.

22

Dated: March 11, 2014

23

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE

24

25

26

27

28

³ The surreply has no evidentiary value, as it is neither verified nor supported by exhibits.