

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
FOR THE EASTERN DISTRICT OF CALIFORNIA

G. J. GUTIERREZ,

Plaintiff,

v.

A. GUTIERREZ,

Defendant.

No. 1:13-cv-00421-DAD-SAB

ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS, AND DENYING
DEFENDANT’S MOTION TO DISMISS

(Doc. Nos. 98, 103)

Plaintiff G. J. Gutierrez 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 proceeds on plaintiff’s Eighth Amendment claim of the excessive use of force and failure to protect against defendant A. Gutierrez. This matter was referred to the assigned magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On September 16, 2016, defendant filed a motion to dismiss pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, for dilatory prosecution on the part of plaintiff and due to plaintiff’s failure to serve discovery responses. (Doc. No. 98.) On December 2, 2016, the assigned magistrate judge filed findings and recommendations addressing that motion. (Doc. No. 103.) The magistrate judge found, based on a status report filed by defense counsel and a letter filed by plaintiff, that plaintiff had previously been unable to communicate with defendant and the

1 court due to his hospitalization. (*Id.*) The magistrate judge further found that plaintiff was at that
2 time prepared to proceed with prosecuting this action. Accordingly, the magistrate judge
3 recommended that defendant's motion to dismiss be denied. (*Id.*) Those findings and
4 recommendations were served on the parties and contained a notice that objections thereto were
5 to be filed within fourteen days. (*Id.*) More than fourteen days have passed, and no objections
6 were filed.

7 In accordance with 28 U.S.C. § 636(b)(1)(C), the court has conducted a *de novo* review of
8 this case. Having carefully reviewed the entire file, the court finds the findings and
9 recommendations to be supported by the record and by proper analysis.

10 Accordingly,

- 11 1. The December 2, 2016 findings and recommendations (Doc. No. 103) are adopted in
12 full;
- 13 2. Defendant's motion to dismiss (Doc. No. 98) is denied; and
- 14 3. This matter is referred back to the assigned magistrate judge for further proceedings
15 consistent with this order.

16 IT IS SO ORDERED.

17 Dated: February 7, 2017

18 
19 _____
20 UNITED STATES DISTRICT JUDGE