

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

ANTHONY E. FELDER,
Plaintiff,
v.
HENSON, et al
Defendants.

Case No. 1:13-cv-01622-JLT (PC)
ORDER GRANTING WITHDRAWAL OF MOTION TO DISMISS BASED ON EXHAUSTION AND DENYING MOTION FOR DEADLINE TO FILE MOTION FOR SUMMARY JUDGMENT AS PREMATURE
(Doc. 33)

Plaintiff Anthony E. Felder is a state prisoner proceeding pro se and inform a pauperis in this civil action pursuant to 42 U.S.C. § 1983. On March 4, 2014, Defendants filed a Motion to Dismiss Plaintiff’s Complaint: 1) under non-enumerated Federal Rule of Civil Procedure 12(b), for failure to exhaust administrative remedies; and 2) under Rule 12(b)(6) for failure to state a claim upon which relief may be granted. (Doc. 21.) The motion is pending and fully briefed.

On May 13, 2014, Defendants filed a notice (Doc. 33) requesting to withdraw the portion of their MTD based on the affirmative defense of Plaintiff’s failure to exhaust his administrative remedies prior to filing suit in light of *Albino v Baca*, --- F.3d ---, No. 10-55702, 2014 WL 1317141 (9th Cir. Apr. 3, 2014) (en banc). In that notice, Defendants requested an order issue authorizing them to file a motion for summary judgment on the exhaustion defense within forty-five days and that the remaining issues in their motion to dismiss be considered as briefed, or that forty-five days be provided for them to re-file. (Doc. 33.)

1 Federal Rule of Civil Procedure 56(b) provides that, "[u]nless a different time is set by
2 local rule or the court orders otherwise, a party may file a motion for summary judgment at any
3 time until 30 days after the close of all discovery." The practice of this Court is to set a discovery
4 cut-off date and a separate dispositive motion filing deadline in a discovery and scheduling order
5 -- which also opens discovery. No discovery and scheduling order has issued in this case. Thus,
6 there is no need for Defendants to be granted leave to file a motion for summary judgment as the
7 dispositive motion filing deadline has not lapsed, nor even yet been set.

8 Accordingly, it is **HEREBY ORDERED** that Defendants' motion, filed May 13, 2014
9 (Doc. 33), to withdraw the portion of their motion to dismiss based on the alleged lack of
10 exhaustion of available administrative remedies is **GRANTED**. Defendants' request for an order
11 authorizing their filing of motion for summary judgment on the exhaustion defense is **DENIED**
12 as premature.

13
14 **IT IS SO ORDERED.**

15 Dated: May 15, 2014

/s/ Jennifer L. Thurston
16 UNITED STATES MAGISTRATE JUDGE
17
18
19
20
21
22
23
24
25
26
27
28