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7 **UNITED STATES DISTRICT COURT**

8 EASTERN DISTRICT OF CALIFORNIA

9 JOHN MADRID,
10

11 Plaintiff,

12 v.

13 P. PEASE, et al.,

14 Defendants.
15
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Case No.: 1:15-cv-00770-LJO-BAM (PC)

ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS, DENYING
MOTION TO STAY CASE PENDING
PAYMENT OF COSTS OF A PRIOR
ACTION

(ECF Nos. 23, 24, 29)

17 Plaintiff John Madrid is a state prisoner proceeding *pro se* and *in forma pauperis* in this
18 civil rights action pursuant to 42 U.S.C. § 1983. This action proceeds on Plaintiff's second
19 amended complaint against Defendants Pease, Mendez, Burnes, Thatcher, Aguerralde, and
20 Saucedo for excessive force in violation of the Eighth Amendment. (ECF No. 17.)

21 **I. Background**

22 On September 1, 2018, Defendants filed a motion to stay this case pending the payment
23 of costs of a prior action, (ECF No. 23), and a request for judicial notice, (ECF No. 24.)¹ On
24 November 7, 2017, the assigned magistrate judge issued findings and recommendations
25 recommending that Defendants' motion be denied. (ECF No. 29.) The parties were advised that
26 they could file objections within fourteen (14) days. (*Id.* at 12.)

27 _____
28 ¹ Defendants filed amended exhibits to their request for judicial notice on September 5, 2018. (ECF No. 25.)

1 On November 21, 2017, Defendants filed objections to the findings and
2 recommendations. On November 22, 2017, Defendants served the objections on Plaintiff, (ECF
3 No. 32), and also moved for an extension of time to serve the objections *nunc pro tunc* due to an
4 administrative error, (ECF No. 32). The Court granted the extension of time. (ECF No. 33.)

5 On December 6, 2017, Plaintiff requested a thirty-day extension of time to respond to
6 Defendants' objections to the findings and recommendations. (ECF No. 34.) On December 7,
7 2017, the Court granted the requested extension. (ECF No. 35.)

8 On January 8, 2018, Plaintiff filed his response to Defendants' objections to the findings
9 and recommendations. (ECF No. 36.)

10 **II. Objections and Response to Objections**

11 Plaintiff alleges in this case that on February 7, 2010, Defendants used excessive force on
12 him while he was housed at Pleasant Valley State Prison. Defendants assert in their motion to
13 stay that Plaintiff should be required to pay \$546 in costs incurred by Defendants to litigate a
14 prior state court action before he may proceed in this suit.

15 As noted above, the assigned magistrate judge recommended denial of Defendants'
16 motion. (ECF No. 29.) The magistrate judge found that it was undisputed that the state court
17 action and the current federal lawsuit are based on the same facts and circumstances, and involve
18 the same parties. (*Id.* at 7.) Plaintiff's prior state court action was dismissed without prejudice
19 due to California Government Code § 945.3, because criminal charges were then-pending based
20 on the same incidents as Plaintiff's lawsuit. (*Id.* at 4-5.) A few months after those charges were
21 dismissed, Plaintiff initiated the current lawsuit. (*Id.* at 7.)

22 The magistrate judge recommended denial of Defendants' motion to stay and
23 recommending declining to award costs here. Factors the magistrate judge considered included
24 that: (1) Plaintiff did not cause Defendants to simultaneously litigate duplicative actions in two
25 separate courts; (2) Plaintiff did not re-file his action until after his criminal charges were
26 resolved; (3) the state court deliberated on whether to allow Plaintiff's state court suit to proceed,
27 showing the issue was reasonably litigated by Plaintiff; and (4) Plaintiff was not engaging in
28 forum shopping.

1 Defendants object that the magistrate judge misapplied the relevant case law, erred in
2 finding that Plaintiff's conduct here was not harassing or vexatious in nature, and thus erred in
3 not recommending that Plaintiff be required to pay the court costs here. Defendants assert that
4 although requiring the payment of costs is an important method of deterring harassing and
5 vexatious litigation, it is not required to award costs, and that an award of costs is appropriate in
6 under the facts and circumstances of this case. (ECF No. 31, at 3) (citing *Hacopian v. U.S. Dep't*
7 *of Labor*, 709 F.2d 1295 (9th Cir. 1983)). Defendants cite that the state court ultimately
8 concluded that Plaintiff's state court suit violated California law, that his *pro se* status and
9 ignorance of the law does not excuse his mistake in filing his initial suit while criminal charges
10 were pending, and that they incurred costs related to his state court claims which will not benefit
11 them in the instant suit.

12 Plaintiff responds that Defendants are misstating the purpose of Rule 41 in seeking the
13 payment of the costs from the prior state court action. Plaintiff further asserts that Defendants
14 should have sought these costs in the state court action or as a sanction, and that he has not acted
15 in bad faith here.²

16 **III. Discussion**

17 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), the Court has conducted a
18 *de novo* review of this case, including Defendants' objections to the findings and
19 recommendations and Plaintiff's response to those objections. Having carefully reviewed the
20 entire file, the Court finds the findings and recommendations to be supported by the record and
21 by proper analysis.

22 Federal Rule of Civil Procedure 41(d) confers broad discretion upon the federal courts to
23 order stays and payment of costs, although neither is mandatory. *Esquivel v. Arau*, 913 F. Supp.
24 1382, 1386 (C.D. Cal. 1996). The rule does not require a showing of subjective bad faith, *id.* at
25 1388, as the rule effectively presumes dismissing an action and then bringing the same action

26 ² Plaintiff also asserts that Defendants' objections should be considered waived for untimeliness due to
27 their one-day delay in serving them. As noted above, the Court granted Defendants an extension of time
28 *nunc pro tunc* upon finding that Defendants showed good cause for the delay and that there was no
prejudice to Plaintiff. Thus, Defendants' objections will be considered here.

1 again is abusive *per se*, *id.* at 1391. Thus, the decision whether to impose costs and a stay is left
2 to “the judge’s discretion in light of the surrounding circumstances.” *Id.* at 1391 n.14.

3 A court may decline to award costs where the plaintiff has a persuasive explanation for
4 his litigation conduct, where a plaintiff is financially unable to pay the costs, or where justice so
5 requires. *Id.* (citing *Zucker v. Katz*, 708 F. Supp. 525, 539 (S.D.N.Y. 1989), *Wahl v. Wichita*, 701
6 F. Supp. 1530 (D. Kan. 1988), *Bellamy v. Jones*, 600 F. Supp. 150 (E.D. Ark. 1985), *Gregory v.*
7 *Dimock*, 286 F.2d 717 (2d Cir. 1961)). The purpose of an award of costs is to deter forum
8 shopping and vexatious litigation, *id.* at 1386 (quoting *Simeone v. First Bank Nat’l Ass’n*, 971
9 F.2d 103, 108 (8th Cir. 1992)), including attempts to gain tactical advantages through a voluntary
10 dismissal, *Johnson v. Gonzalez*, No. 1:14-cv-1252-LJO-EPG, 2017 WL 2119913, at *3 (E.D.
11 Cal. May 16, 2017). In deciding whether to exercise its discretion to award costs, courts consider
12 whether doing so is necessary to prevent prejudice to the defendant. *Esquivel*, 913 F. Supp. at
13 1387.

14 Considering the intent of the rule here, the applicable law, and the circumstances in this
15 case, the Court finds it appropriate to deny Defendants’ motion to stay this action and declines to
16 award costs here for the prior state court action. Plaintiff’s act of waiting to re-file this action
17 until after his criminal charges were resolved show that he seeks a determination on the merits of
18 his claim, rather than attempting exploit some kind of tactical advantage, or to seek a more
19 favorable forum. Deterrence of abusive litigation tactics is not served by an award of costs here.

20 There is no prejudice to Defendants in this case, as they received the outcome they sought
21 through their state court demurrer—they avoided litigating Plaintiff’s civil claim while his
22 criminal charges were pending. Defendants previously argued that had Plaintiff brought a §1983
23 suit rather than a state court case, the suit would not have been barred by California law and they
24 would have been required to simultaneously defend against Plaintiff’s civil claim Plaintiff’s
25 criminal charges were pending. Thus, they appear to have benefitted from Plaintiff’s mistake and
26 his apparent belief that he could not litigate these issues at all while the criminal charges were
27 pending, which he refrained from doing. Also, the factors considered by the magistrate judge are
28 persuasive.

1 Finally, although not conclusive, Plaintiff has declared that he has no source of income or
2 employment, (ECF No. 2), and thus an award of costs here would likely result in the termination
3 of this suit for Plaintiff's non-payment. Under these collective circumstances, the Court declines
4 to award the costs Defendants seek in this case for the prior state court action.

5 **IV. Conclusion and Order**

6 Accordingly, IT IS HEREBY ORDERED that:

- 7 1. The findings and recommendations, filed on November 7, 2017 (ECF No. 29), are
8 adopted in full;
- 9 2. Defendants' motion to stay this case pending payment of costs of a prior action,
10 filed on September 1, 2017 (ECF No. 23), is denied; and
- 11 3. Defendants shall respond to the second amended complaint within fourteen days
12 of the date of service of this order. Fed. R. Civ. P. 12(a)(4)(A).

13
14 IT IS SO ORDERED.

15 Dated: January 23, 2018

/s/ Lawrence J. O'Neill
UNITED STATES CHIEF DISTRICT JUDGE