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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JOSEPH D. RODRIGUEZ,

Plaintiff,

v.

EDMUND G. BROWN, JR, et al.,

Defendants.

1:15-cv-01754-LJO-EPG (PC)

FINDINGS AND RECOMMENDATIONS
THAT PLAINTIFF’S MOTION TO STRIKE
DEFENDANT’S AFFIRMATIVE DEFENSES
TO COMPLAINT BE DENIED IN PART
AND GRANTED IN PART

(ECF NO. 31)

I. BACKGROUND

Joseph D. Rodriguez (“Plaintiff”) is a state prisoner proceeding *pro se* and *in forma pauperis* in this civil rights action filed pursuant to 42 U.S.C. § 1983. The case now proceeds on the original Complaint filed by Plaintiff on November 19, 2015, against Stuart Sherman (Warden of the California Substance Abuse Treatment Facility (“SATF”)) (“Defendant”), for adverse conditions of confinement and related state claims. (ECF No. 28.)

Plaintiff filed his complaint on November 19, 2015. (ECF No. 1.) Plaintiff is presently incarcerated in the custody of the California Department of Corrections and Rehabilitation at the SATF in Corcoran, California, where the events at issue in the Complaint allegedly occurred. *Id.* In Plaintiff’s complaint, he alleges various adverse conditions including an infestation of vermin in the dining facility at SATF, causing unsanitary conditions affecting his

1 meals. Id. On December 8, 2015, the Court screened Plaintiff’s complaint, finding only a
2 cognizable claim under the Eighth Amendment against only Defendant Sherman for his failure
3 to remedy the sanitation issues, and that Plaintiff failed to state any other sort of claim against
4 any of the other Defendants. (ECF No. 6.) The Court also exercised supplemental jurisdiction
5 over Plaintiff’s state law claims that arise out of the same case or controversy as the
6 aforementioned cognizable federal claim. Id.

7 Defendant Sherman filed an answer to the complaint on December 7, 2016, listing
8 various affirmative defenses. (ECF No. 29.) On December 19, 2016, Plaintiff filed a motion to
9 strike Defendant’s affirmative defenses to complaint arguing that “Defendants’ affirmative
10 defenses are vague, conclusory allegations that fail.” (ECF No. 31, p. 2.) On January 6, 2017,
11 Defendant Sherman filed an opposition to the motion. (ECF No. 33.) This motion and
12 opposition are now before the Court.

13 **II. MOTION TO STRIKE**

14 Rule 12(f) of the Federal Rules of Civil Procedure allows a district court to “strike from
15 a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous
16 matter.” Whittlestone, Inc. v. Handi-Craft Co., 618 F.3d 970, 973 (9th Cir. 2010). “[T]he
17 function of a 12(f) motion to strike is to avoid the expenditure of time and money that must
18 arise from litigating spurious issues by dispensing with those issues prior to trial . . .” Everett
19 H. v. Dry Creek Joint Elementary Sch. Dist., 5 F. Supp. 3d 1167, 1177 (E.D. Cal. 2014) (citing
20 Sidney–Vinstein v. A.H. Robins Co., 697 F.2d 880, 885 (9th Cir.1983)).

21 Defendants are required to “affirmatively state any avoidance or affirmative defenses.”
22 Fed. R. Civ. P. 8(c)(1). Plaintiff asserts that Defendant’s affirmative defenses failed to “plead
23 facts showing that the defense is plausible, not just possible.” (ECF No. 31, p. 3) (citing
24 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2000)). The Ninth Circuit has indicated that “‘the fair
25 notice’ required by the pleading standards only requires describing the defense in ‘general
26 terms.’” Kohler v. Flava Enterprises, Inc., 779 F.3d 1016, 1019 (9th Cir. 2015) (citing 5
27 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, § 1274 (3d ed.
28 1998)). Since Kohler, this District has routinely applied the fair notice standard to a motion to

1 strike affirmative defenses. Gomez v. J. Jacobo Farm Labor Contractor, Inc., 188 F. Supp. 3d
2 986, 991–92 (E.D. Cal. 2016) (citing United States v. Gibson Wine Co., 2016 WL 1626988,
3 *4–6 (E.D. Cal. Apr. 25, 2016)).

4 The fair notice standard “is less demanding than the Twombly/Iqbal standard, but still
5 requires a party to plead some factual basis for its allegations.” Sherwin-Williams Co. v.
6 Courtesy Oldsmobile- Cadillac, Inc., No. 1:15-CV-01137 MJS HC, 2016 WL 615335, at *2
7 (E.D. Cal. Feb. 16, 2016). “The key to determining the sufficiency of pleading an affirmative
8 defense is whether it gives plaintiff fair notice of the defense.” Simmons v. Navajo Cty., Ariz.,
9 609 F.3d 1011, 1023 (9th Cir. 2010) (citing Wyshak v. City National Bank, 607 F.2d 824, 827
10 (9th Cir. 1979)). “Although ‘fair notice’ is a low bar that does not require great detail, it does
11 require a defendant to provide ‘some factual basis’ for its affirmative defenses. [Citations]
12 Simply referring to a doctrine or statute is insufficient to afford fair notice.” Gomez, 188 F.
13 Supp. 3d at 992 (quoting Gibson Wine Co., 2016 WL 1626988, *4–6).

14 **III. DISCUSSION OF PLAINTIFF’S MOTION TO STRIKE**

15 Defendant’s answer lists eight affirmative defenses. To evaluate the merits of Plaintiff’s
16 motion to strike, each of Defendant’s affirmative defenses will be discussed in turn.

17 **A. First Affirmative Defense: Not Entitled to Punitive Damages**

18 In Defendant’s first affirmative defense, he states “Plaintiff is not entitled to punitive
19 damages because this answering Defendant did not act with malicious intent to deprive him of
20 any constitutional right or to cause any other injury.” (ECF No. 29, p. 5.) Plaintiff argues this
21 defense is merely “an assertion that the [plaintiff] cannot prove the elements of [his or] her
22 claim.” (ECF No. 31, p. 4).

23 “[P]roper ‘[a]ffirmative defenses plead matters extraneous to the plaintiff’s prima facie
24 case, which deny plaintiff’s right to recover, even if the allegations of the complaint are true.”
25 Leos v. Rasey, No. 1:14-CV-02029-LJO-JLT-PC, 2016 WL 1162658, at *2 (E.D. Cal. Mar. 24,
26 2016) (citing Federal Deposit Ins. Corp. v. Main Hurdman, 655 F. Supp. 259, 262 (E.D. Cal.
27 1987)). In contrast to these defenses, “a denial of allegations in the complaint or ‘an assertion
28 that the [plaintiff] cannot prove the elements of [its] claim’ is not a proper affirmative defense.”

1 Id. (citing Solis v. Couturier, No. 2:08-CV-02732-RRB-GGH, 2009 WL 2022343, at *3 (E.D.
2 Cal. July 8, 2009)).

3 As such, the Court recommends the first affirmative defense be stricken without leave
4 to amend. Defendant can contest punitive damages in the ordinary course without pleading it as
5 an affirmative defense.

6 **B. Second Affirmative Defense: Statute of Limitations**

7 Defendant's second affirmative defense states, "[t]his action is barred by the applicable
8 statute of limitations." (ECF No. 29, p. 5.) Plaintiff argues that Defendant presents "no facts
9 suggesting Plaintiff's suit is untimely and identify no prior action which could conceivabl[y]
10 bar the present." (ECF No. 31, p. 4.) This affirmative defense can be proper under Federal
11 Rules of Civil Procedure Rule 8(c)(1), which allows for defenses on the basis of statute of
12 limitations dependent on the underlying statute of limitations. Fed. R. Civ. P. 8.

13 However, Defendant has not identified a specific limitations period that would apply
14 and has provided no information about how Plaintiff's claim is barred. See Television Educ.,
15 Inc. v. Contractors Intelligence Sch., Inc., No. CV 2:16-1433-WBS-EFB, 2016 WL 7212791, at
16 *2 (E.D. Cal. Dec. 12, 2016). Defendant's defense "merely state[s] a doctrine or legal theory
17 without any indication as to how the doctrine may apply in this case." Bird v. Zuniga, No.
18 1:15-CV-00910-DAD-MJS-PC, 2016 WL 7912005, at *3 (E.D. Cal. Nov. 30, 2016), report and
19 recommendation adopted sub nom. Bird v. Musleh, No. 1:15-CV-00910-DAD-MJS, 2017 WL
20 272226 (E.D. Cal. Jan. 19, 2017). Although Defendant may learn more in the course of
21 discovery, it should have sufficient information regarding the filing date in relation to the
22 claims to state a further basis for this affirmative defense in order to allow Plaintiff to assess if
23 this is a serious defense requiring discovery regarding tolling or similar issues.

24 The Court recommends Defendant's second affirmative defense be stricken without
25 prejudice with leave to amend.

26 **C. Third Affirmative Defense: Res Judicata and Collateral Estoppel**

27 Defendant's third defense raises the issues of res judicata and collateral estoppel. (ECF
28 No. 29.) Plaintiff counters the defense stating that Defendant provided no facts that would

1 indicate the suit was untimely or barred by previous actions. (ECF No. 31.)

2 Res judicata and collateral estoppel are both appropriate affirmative defenses under
3 Rule 8(c)(1). Fed. R. Civ. P. 8. Even so, as Plaintiff asserts, the answer does not contain facts
4 that support such defenses and for instance provides no facts that indicate that Plaintiff has
5 previously litigated any of the claims in the suit. See Gomez, 188 F. Supp. 3d at 1004
6 (indicating that a claim or issue preclusion defense “should at least reference the suits” that are
7 the basis of the claim.). At the very least, Plaintiff should be made aware of any cases that
8 could provide res judicata or collateral estoppel issues.

9 Accordingly, the defense as worded is insufficient and does not place Plaintiff on fair
10 notice. It is recommended that the third affirmative defense be stricken without prejudice with
11 leave to amend.

12 **D. Fourth Affirmative Defense: Exhaustion**

13 Defendant’s fourth defense states, “[t]o the extent Plaintiff has failed to exhaust
14 available administrative remedies, his claims are barred by 42 U.S.C. § 1997e.” (ECF No. 29,
15 p. 5.) Plaintiff’s motion to strike asserts that Defendant provided no evidence that Plaintiff had
16 failed to exhaust administrative remedies. (ECF No. 31.)

17 A failure to exhaust is a valid affirmative defense. Jones v. Bock, 549 U.S. 199, 212
18 (2007) (“[T]he usual practice under the Federal Rules is to regard exhaustion as an affirmative
19 defense.”); see also Johnson v. California Med. Facility Health Servs., No. 2:14-CV-0580 KJN
20 P, 2015 WL 4508734, at *4 (E.D. Cal. July 24, 2015) (“Failure to exhaust is an affirmative
21 defense the defendant must plead and prove.”). For such a defense, the defendant needs to show
22 “that there was an available administrative remedy, and that the prisoner did not exhaust that
23 available remedy.” Albino v. Baca, 747 F.3d 1162, 1172 (9th Cir. 2014).

24 Plaintiff has fair notice of the requirement to exhaust administrative remedies because it
25 applies to every civil rights case filed by a prisoner under 42 U.S.C. § 1997e. Plaintiff has
26 knowledge of his own grievance process and it is appropriate for Defendant to assert this
27 defense while taking discovery on the extent of the grievance process.

28 As such, the Court recommends Plaintiff’s motion to strike the fourth affirmative

1 defense be denied.

2 **E. Fifth Affirmative Defense: Plaintiff's Own Conduct**

3 Defendant's fifth defense raises the issue of Plaintiff's conduct and contribution. (ECF
4 No. 29.)

5 Contributory negligence is an appropriate affirmative defense under Rule 8(c)(1). Fed.
6 R. Civ. P. 8. Plaintiff claims that the affirmative defense fails for it "failed to set forth any facts
7 to suggest why [Defendant] think[s] Plaintiff[']s own conduct has contributed to his damage[s],
8 nor [did Defendant] expressly provide any legal support for this possibility." (ECF No. 31, p.
9 4.) As plaintiff indicates, the defense fails to set forth any facts that indicated Plaintiff
10 contributed to his damages. See Leos, 2016 WL 1162658, at *3 (striking contribution defense
11 when defendants failed to set forth *any* facts concerning contribution).

12 The Court recommends the fifth affirmative defense be stricken without prejudice with
13 leave to amend.

14 **F. Sixth Affirmative Defense: Failure to Mitigate**

15 Defendant's sixth defense states that, "[t]o the extent Plaintiff failed to take reasonable
16 actions to mitigate his damages, if any such damages occurred, any recovery against the
17 Defendant must be reduced by the amount of damage that Plaintiff could have prevented
18 through the exercise of reasonable diligence." (ECF No. 29, p. 6.) Plaintiff asserts that
19 Defendant "failed to set forth any facts to suggest why they think Plaintiff[']s own conduct has
20 contributed to his damage, nor [does he] expressly provide any legal support for this
21 possibility." (ECF No. 31, p. 4.)

22 "[T]he duty to mitigate damages is an affirmative defense . . ." Edwards v. Cty. of
23 Modoc, No. 2:14-CV-02646-MCE, 2015 WL 4456180, at *3 (E.D. Cal. July 20, 2015) (quoting
24 Wehrs v. Wells, 688 F.3d 886, 893 (7th Cir. 2012)). "Courts have held that a generalized
25 statement meets [D]efendant's pleading burden with respect to the affirmative defense of
26 damage mitigation." Deleon v. Elite Self Storage Mgmt., LLC, No. 2:15-CV-02087-MCE-
27 EFB, 2016 WL 881144, at *3 (E.D. Cal. Mar. 8, 2016) (citations omitted).

28 The Court recommends that Plaintiff's motion to strike the sixth affirmative defense be

1 denied.

2 **G. Seventh Affirmative Defense: Failure to Comply with the Government**
3 **Claims Act**

4 Defendant's seventh defense states that "Plaintiff's claims are barred because he failed
5 to timely comply with the Government Claims Act." (ECF No. 29, p. 6.) Plaintiff argues that
6 Defendant "has not supported by any facts whatsoever that Plaintiff has not submitted a claim
7 to the California victim Compensation and government claim Board as per *Cal. Gov't Cod*
8 *[sic]* §§ 905, 910, 911.2, 945 and 950.2." (ECF No. 31, p. 5) (italics in original). A defense
9 asserting the "defenses and all rights granted to them and each of them by virtue of provisions
10 of the [Government Claims Act]" is generally enough under the fair notice standard. See
11 Vargas v. Cty. of Yolo, No. 2:15-CV-02537-TLN-CKD, 2016 WL 3916329, at *6 (E.D. Cal.
12 July 20, 2016). "The Court construes this affirmative defense as an assertion of immunity and
13 the failure to comply with the Government Claims Act is the factual basis on which the
14 assertion lies." Id.

15 This is applicable here; therefore, the defense as currently worded provides fair notice.
16 It is recommended that Plaintiff's motion to strike the seventh affirmative defense be denied.

17 **H. Eighth Affirmative Defense: Ability to Assert Further Defenses**

18 Defendant's eighth defense provides that "Because portions of the Complaint are
19 couched in vague or conclusory terms, Defendant cannot fully anticipate all affirmative
20 defenses that may be applicable to this matter. Accordingly, the right to assert affirmative
21 defenses, to the extent such affirmative defenses are applicable, is hereby reserved." (ECF No.
22 29, p. 6.) Plaintiff counters that "[t]his is not an affirmative defense. The right to assert
23 affirmative defenses depends upon whether they have been pleaded in the answer and the right
24 to amend an answer to add further affirmative defenses depends upon *Rule 15* and the
25 scheduling order." (ECF No. 31, p. 5.)

26 "Defendants need not 'reserve' that right, *see* Federal Rule of Civil Procedure 15(a)(2),
27 and their attempt to reserve it is not a valid affirmative defense." Edwards, 2015 WL 4456180,
28 at *3-4; see also J & J Sports Prods., Inc. v. Sandana, No. 1:13-CV-00842-LJO, 2013 WL

1 5587386, at *5 (E.D. Cal. Oct. 10, 2013) (providing that if a defendant seeks to add affirmative
2 defenses at a later date, the defendant must seek leave to file an amended pleading). As such,
3 the Court recommends striking Defendant’s eighth affirmative defense without leave to amend.
4 See J & J Sports Prods., Inc., 2013 WL 5587386, at *5.

5 **IV. CONCLUSION AND ORDER**

6 Therefore, based on the foregoing, the Court HEREBY RECOMMENDS that Plaintiff’s
7 motion to strike, filed on December 19, 2016 (ECF No. 31) be DENIED IN PART, GRANTED
8 IN PART as follows:

- 9 1. Plaintiff’s motion be GRANTED as to the first, second, third, fifth, and eighth
10 affirmative defenses. Accordingly, these defenses be STRIKEN from
11 Defendants’ Answer.
- 12 a. Leave to amend within 14 days of this order be granted as to the second,
13 third and fifth defenses.
- 14 b. Leave to amend be denied as to the first and eighth defenses because
15 amendment would be futile.
- 16 2. Plaintiff’s motion be DENIED as to the fourth, sixth, and seventh affirmative
17 defenses in Defendants’ Answer.

18 These findings and recommendations are submitted to the United District Judge
19 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **twenty (20)**
20 **days** after being served with these findings and recommendations, any party may file written
21 objections with the Court. Any such objections should be captioned “Objections to Magistrate
22 Judge’s Findings and Recommendations.” Any reply to the objections shall be served and filed
23 within ten days after service of the objections.

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