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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MARINO ANTONIO HERNANDEZ
Plaintiff,
v.
WINFRED M. KOKOR, et al.,
Defendants.

1:16-cv-00716-DAD-MJS (PC)

**FINDINGS AND RECOMMENDATION TO
DENY REQUEST FOR TEMPORARY
RESTRAINING ORDER AND PRELIMINARY
INJUNCTION**

(ECF No. 38)

FOURTEEN DAY OBJECTION DEADLINE

Plaintiff Marino Antonio Hernandez (“Plaintiff”) is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. The action proceeds on Plaintiff’s Eighth Amendment medical indifference claim against Defendants Dr. Kokor and Nurse Stronach for denying him treatment for chronic left ankle pain. (ECF No. 1)

On June 19, 2017, Plaintiff filed a motion for a temporary restraining order and preliminary injunction directing Defendants to provide “medically appropriate” treatment, appropriate pain medication, and a physical examination. (ECF No. 38.) He seeks treatment for pain in his left ankle and also now for more recent groin and leg pain from hernia surgery. Defendants did not file an opposition and the time to do so has passed. The matter is submitted. Local Rule 230(*l*).

1 **I. Legal Standard**

2 The purpose of a temporary restraining order is to preserve the status quo before
3 a preliminary injunction hearing may be held; its provisional remedial nature is designed
4 merely to prevent irreparable loss of rights prior to judgment. Sierra On-Line, Inc. v.
5 Phoenix Software, Inc., 739 F.2d 1415, 1422 (9th Cir. 1984). Under Federal Rule of Civil
6 Procedure 65, a temporary restraining order may be granted only if “specific facts in an
7 affidavit or verified complaint clearly show that immediate and irreparable injury, loss, or
8 damage will result to the movant before the adverse party can be heard in opposition.”
9 Fed. R. Civ. P. 65(b)(1)(A).

10 The analysis for a temporary restraining order is substantially identical to that for a
11 preliminary injunction, Stuhlberg Intern. Sales Co., Inc. v. John D. Brush and Co., Inc.,
12 240 F.3d 832, 839 n.7 (9th Cir. 2001), and “[a] preliminary injunction is an extraordinary
13 remedy never awarded as of right,” Winter v. Natural Resources Defense Council, Inc.,
14 555 U.S. 7, 24 (2008) (citation omitted). “A plaintiff seeking a preliminary injunction must
15 establish that he is likely to succeed on the merits, that he is likely to suffer irreparable
16 harm in the absence of preliminary relief, that the balance of equities tips in his favor,
17 and that an injunction is in the public interest.” Id. at 20 (citations omitted). A preliminary
18 injunction may issue where the plaintiff demonstrates the existence of serious questions
19 going to the merits and the hardship balance tips sharply toward the plaintiff, assuming
20 the other two elements of the Winter test are also met. Alliance for the Wild Rockies v.
21 Cottrell, 632 F.3d 1127, 1131-32 (9th Cir. 2011). Under either formulation of the
22 principles, preliminary injunctive relief should be denied if the probability of success on
23 the merits is low. See Johnson v. Cal. State Bd. of Accountancy, 72 F.3d 1427, 1430
24 (9th Cir. 1995) (even if the balance of hardships tips decidedly in favor of the moving
25 party, it must be shown as an irreducible minimum that there is a fair chance of success
26 on the merits).

27 An injunction may only be awarded upon a *clear showing* that the plaintiff is
28 entitled to relief. Id. at 22 (citation omitted) (emphasis added). In addition, in cases

1 brought by prisoners involving conditions of confinement, any preliminary injunction must
2 be narrowly drawn, extend no further than necessary to correct the harm the court finds
3 requires preliminary relief, and be the least intrusive means necessary to correct the
4 harm. 18 U.S.C. § 3626(a)(2).

5 **II. Discussion**

6 Plaintiff's complaint alleged that Dr. Kokor and Nurse Stronach continued to
7 prescribe Plaintiff Tylenol 3 for ankle pain despite knowing that it did not alleviate his
8 pain but instead caused adverse side effects. The Court found that Plaintiff's allegations
9 were sufficient to warrant service of the complaint on Defendants. (ECF Nos. 15 & 19.)¹
10 In the instant motion, Plaintiff now alleges that in addition to continuing ankle pain, a
11 January 8, 2016 hernia surgery has left him with pain in his groin, leg, and back, and
12 possibly an infection, and he alleges Dr. Kokor has failed to address these new issues.
13 (ECF No. 38 at 5-7.) As noted, Plaintiff here asks the Court order that he be provided
14 "medically appropriate" treatment, appropriate pain medication, and a physical
15 examination

16 Plaintiff argues that he has shown a high likelihood of success on the merits of his
17 claim that Defendants' conduct constitutes deliberate indifference. He seems to believe
18 that passing through screening reflects a likelihood of success. However, there has been
19 no finding that the care Plaintiff received was constitutionally inadequate. Indeed, the
20 case remains in its early stages, there have been no dispositive motions filed, and
21 Plaintiff still carries the burden of proving that his constitutional rights were in fact
22 violated. The screening order simply reflects the conclusion that if all the facts prove to
23 be as Plaintiff alleges them, they could support a finding of medical indifference. There
24 is no finding with regard to likelihood of success.

25 Plaintiff claims he is threatened with irreparable harm, in that his continued pain
26 has affected the movement and function of his leg, and he fears that he "may never walk

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28 ¹ Plaintiff's remaining Defendants and claims, including his prayer for the reinstatement of his morphine
prescription, were dismissed. (ECF No. 19.)

1 normally again.” It appears from Plaintiff’s supporting documentation that Plaintiff
2 receives regular medical attention and has been prescribed a plethora of medications.
3 (See, e.g., Primary Care Provider (“PCP”) Progress Note dated Jan. 12, 2016 (ECF No.
4 38 at 18); PCP Progress Note dated Feb. 1, 2016 (id. at 22); RN Encounter Form dated
5 Mar. 18, 2016 (id. at 30-31); PCP Progress Note dated Jun. 21, 2016 (id. at 36); RN
6 Encounter Form dated Jul. 11, 2016 (id. at 39-40); PCP Progress Note dated Oct. 18,
7 2016 (id. at 43); RN Encounter Form dated Nov. 18, 2016 (id. at 45-6); RN Encounter
8 Form dated Dec. 21, 2016 (id. at 48-9); PCP Progress Note dated Jan 5, 2017 (id. at
9 51)). That Plaintiff disagrees with the course of treatment he received, or still suffers pain
10 in spite of that treatment, is not enough to support Court’s intervention into the prison
11 medical staff’s course of treatment. See Jackson v. MacIntosh, 90 F.3d 330, 332 (9th
12 Cir. 1996) (a mere disagreement over treatment plans is insufficient to invoke section
13 1983); see also Sandin v. Conner, 515 U.S. 472, 482-83 (1995) (disapproving the
14 involvement of federal courts in the day-to-day-management of prisons)). Suffice it to
15 say, Plaintiff “has not sufficiently demonstrated that he is currently receiving a level of
16 care that would violate constitutional standards such that he is entitled to preliminary
17 injunctive relief.” McSorley v. N. Nevada Corr. Ctr., 225 F. App’x 448, 449 (9th Cir.
18 2007). In any case, Plaintiff, a layman, is not qualified to diagnose himself, dictate the
19 appropriate treatment plan, or predict his long-term prognosis.

20 Plaintiff next argues the balance of hardships tips in favor, as he suffers pain and,
21 on the other hand, his motion asks only that Defendants provide adequate medical care
22 for that pain. His assessment is incorrect. While the prospect of continued suffering tips
23 the balance toward Plaintiff, his relief, if requested, would require the Court to wrest
24 medical decision-making authority away from those most qualified to dispense it. Plaintiff
25 essentially asks the Court to substitute its untrained judgment for that of medical
26 personnel trained to treat his myriad non-life threatening ailments. This is not an instance
27 where Plaintiff has been deprived of all medical treatment, but rather where he, also an
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1 untrained layman, prefers a different course of treatment. The balance of hardships
2 does not tip far enough in Plaintiff's favor to demand the Court intervene so radically.

3 Finally, Plaintiff argues the relief sought will serve the public interest because it is
4 always in the public interest for prison officials to obey the law. That assumes the
5 Defendants are disregarding law. There is no basis for such an assumption here.

6 This is not the first time Plaintiff has sought a preliminary injunction requiring the
7 prison to provide him with what he considers appropriate medical care, namely, narcotic
8 medications. Plaintiff does not have a constitutional right to receive narcotics. The Court
9 will not entertain such prayers for relief.

10 In sum, Plaintiff has not shown a likelihood of success on the merits, irreparable
11 harm, that the balance of equities is in his favor, or that an injunction is in the public
12 interest. See Fed. R. Civ. P. 65; Local Rule 231; Winter, 555 U.S. at 24.

13 Accordingly, IT IS HEREBY RECOMMENDED THAT Plaintiff's motion for a
14 temporary restraining order and preliminary injunction be DENIED.

15 These Findings and Recommendations will be submitted to the United States
16 District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. §
17 636(b)(1). Within **fourteen (14) days** after being served with these Findings and
18 Recommendations, the parties may file written objections with the Court. The document
19 should be captioned "Objections to Magistrate Judge's Findings and Recommendations."
20 The parties are advised that failure to file objections within the specified time may result
21 in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir.
22 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

23
24 IT IS SO ORDERED.

25 Dated: September 25, 2017

26 /s/ Michael J. Seng
27 UNITED STATES MAGISTRATE JUDGE
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