

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

BRIAN APPLEGATE,

Plaintiff,

v.

KHALEL EL SAID,

Defendant.

CASE No. 1:16-cv-0958-MJS (PC)

ORDER VACATING ORDER TO SHOW CAUSE

(ECF NO. 8)

FOURTEEN- DAY DEADLINE

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in a civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff has consented to the jurisdiction of a magistrate judge. (ECF No. 6.)

Plaintiff's complaint, which is before the Court for screening, asserts a First Amendment retaliation claim and a California Bane Act claim against a single Defendant, Dr. Khalel El Said, for conduct that occurred on December 15, 2015.

On December 27, 2016, the undersigned issued an Order to Show Cause why this action should not be dismissed as duplicative of an earlier-filed case, Applegate v. Said, 1:16-cv-0289-JLT (“the earlier-filed case”), where Plaintiff asserted identical claims against Dr. Said for identical conduct. Plaintiff filed a response on January 6, 2017, acknowledging the similarity of the claims and conceding that the claims asserted in the earlier-filed case are subject to dismissal for his failure to exhaust administrative remedies before initiating that action. (ECF No. 9.) Plaintiff asks that the claims in the earlier-filed case be dismissed and he be allowed to proceed on his claims in this case.

1 Plaintiff is informed that the Court has no authority to dismiss any claim in a case
2 that is not assigned to it. In that regard, Plaintiff's request to dismiss his claims against
3 Dr. Said in Applegate v. Said, 1:16-cv-289-JLT, is denied. Plaintiff will however be
4 granted fourteen days to dismiss the identical claims asserted against Dr. Said in the
5 earlier-filed case. Alternatively, if Plaintiff seeks to have the two actions related, he may
6 file a Notice of Related Case pursuant to Eastern District of California Local Rule 123, in
7 which case Magistrate Judge Jennifer L. Thurston, as the judge assigned to the action
8 with the lower number, will make the determination as to whether the two cases should
9 be related and this case reassigned to her.

10 ||| Based on the foregoing, IT IS HEREBY ORDERED that:

11 1. The December 27, 2016, Order to Show Cause (ECF No. 8) is VACATED;

12 2. Plaintiff is granted fourteen days to submit a notice in this case either

13 confirming (a) his dismissal of the duplicative claims asserted in Applegate v.

14 Said, 1:16-cv-0289-JLT, or (b) his filing of a Notice of Related Case in the

15 earlier-filed case; and

16 3. Failure to file a notice in this case within the prescribed time period will result

17 in the dismissal of this action as duplicative.

IT IS SO ORDERED.

Dated: January 23, 2017

/s/ *Michael J. Seng*
UNITED STATES MAGISTRATE JUDGE