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6 UNITED STATES DISTRICT COURT
7 FOR THE EASTERN DISTRICT OF CALIFORNIA
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9 DANIEL MURPHY COSTON,

10 Plaintiff,

11 v.

12 MAJID RAHIMIFAR and MUSHTAQ
13 AHMED,

14 Defendants.¹
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16

Case No. 1:17-cv-00765-JDP

FINDINGS AND RECOMMENDATIONS
THAT COURT DENY LETTER MOTION
TO DISMISS

OBJECTIONS DUE WITHIN 30 DAYS

ECF No. 16

ORDER DIRECTING SERVICE OF
DOCUMENTS AND ASSIGNING CASE TO
UNITED STATES DISTRICT JUDGE

17 Plaintiff Daniel Murphy Coston, a state prisoner, proceeds without counsel in this civil
18 rights action brought under 42 U.S.C. § 1983. Plaintiff proceeds against Majid Rahimifar, a
19 surgeon, and Mushtaq Ahmed, a doctor, on deliberate-indifference claims under the Eighth
20 Amendment, alleging denial of adequate medical care. He alleges that defendant Rahimifar
21 told him that he would need to stay at a hospital for two to three days to recover from his
22 cervical discectomy, but that Rahimifar later discharged him from the hospital merely hours
23 after the surgery. ECF No. 11 at 3-4. Plaintiff further alleges that a hospital admitted him
24 when an unidentified complication arose following surgery and that defendant Ahmed
25 discharged him within hours of plaintiff's admission to the hospital. *Id.* at 4. This order
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27 ¹ This case caption has been amended to reflect defendant Mushtaq Ahmed's full name, and the
28 order below will direct the clerk of court to amend the case caption.

1 concerns a letter from Ahmed requesting dismissal.

2 **I. Ahmed's letter motion**

3 Ahmed, without an attorney, has filed a one-page letter asking the court to dismiss this
4 case. He states in his letter:

5 Mr. Coston is an inmate of Corcoran Correction facility. I was one
6 of the physicians on his case, but I was not the surgeon.

7 Mr. Coston is complaining that he was discharged too soon after the
8 surgery. It should be noted that the length of an inmate's hospital
9 stay is determined by the correctional facility (Corcoran) and the
10 charge nurse of the hospital (Mercy Hospital of Bakersfield) and not
11 by the physician. Hence, I request that the case be dismissed while
12 the response should be forthcoming from the responsible parties
13 (Corcoran Correctional Facility and Mercy Hospital Charge Nurse).

14 ECF 16. Ahmed presents no evidence supporting his statements.

15 The court should deny Ahmed's letter motion, which we construe as a motion for
16 summary judgment.² The court should not dismiss the case on the basis of an unsubstantiated
17 claim that unidentified individuals at plaintiff's prison or hospital—rather than defendant—
18 determined the duration of plaintiff's hospital stay. Because Ahmed has not supported his
19 factual assertions, he has not shown either the absence of a genuine dispute of any material fact
20 or entitlement to summary judgment, so the court should deny his letter motion. *See*
21 *Fed. R. Civ. P. 56(a)*. The court should deny the motion without prejudice and allow him to
22 raise the same defense later in the case, as Ahmed has filed his motion without the assistance
23 of counsel. *See Fed. R. Civ. P. 56(e)*. Likewise, because Ahmed does not have an attorney,
24 the court should not deem him to have waived any defenses—Rules 12(g)(2) and 12(h)(1)
25 notwithstanding.

26 ² The letter asserts a defense not enumerated under Federal Rule of Civil Procedure 12, and
27 Ahmed needs to plead and prove the asserted defense; a motion for summary judgment would
28 be the appropriate vehicle for such a defense. *See Fed. R. Civ. P. 12(d); Albino v. Baca*, 747
F.3d 1162, 1168-71 (9th Cir. 2014) (reasoning that motion for summary judgment, not motion
to dismiss, is appropriate procedural vehicle when motion refers to defense that is not
enumerated under Rule 12 and defendant must plead and prove asserted defense).

1 Ahmed's letter suggests that plaintiff has sued the wrong defendants, and Rule 19(a)
2 requires the court to join any required party to the action. Ahmed, however, has not properly
3 supported his factual assertions with evidence, so it is premature to consider whether other
4 individuals should be joined as defendants.

5 **II. Other matters**

6 We end by addressing three other issues. First, the docket designates this case as a matter
7 in which the parties have consented to a magistrate judge's jurisdiction, but this appears to be
8 an error: Ahmed has not consented. Because not all parties have consented to the jurisdiction
9 of a magistrate judge, Ahmed's letter motion requires a district judge's ruling and review of
10 findings and recommendations.

11 Second, it appears that Ahmed has not been receiving court orders. Ahmed appears pro
12 se and does not receive notices of electronic filings, so he should be served by a conventional
13 method of service. *See* Local Rule 135(b). The docket does not show that either the
14 scheduling order or the order regarding consent to a magistrate judge's jurisdiction has been
15 served on Ahmed. The order below will direct the clerk of court to mail these orders to
16 Ahmed.

17 Third, certain claims in the original complaint were dismissed by a magistrate judge
18 without findings and recommendations. ECF No. 10. If Ahmed does not consent to the
19 jurisdiction of a magistrate judge, the screening of the original complaint will be addressed
20 through findings and recommendations.

21 **III. Findings and recommendations**

22 The court should deny defendant Mushtaq Ahmed's letter motion to dismiss, ECF No.
23 16, without prejudice. These findings and recommendations are submitted to a U.S. district
24 judge under 28 U.S.C. § 636(b)(1)(B) and Local Rule 304. Within 30 days of the service of
25 the findings and recommendations, the parties may file written objections to the findings and
26 recommendations with the court and serve a copy on all parties. That document must be
27 captioned "Objections to Magistrate Judge's Findings and Recommendations." The presiding
28 district judge will then review the findings and recommendations under 28 U.S.C.

1 § 636(b)(1)(C). The parties' failure to object within the specified time may waive their rights
2 on appeal. *See Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014).

3 **IV. Order**

- 4 1. The clerk of court is directed to assign this case to a district judge who will review these
5 findings and recommendations.
- 6 2. The clerk of court is directed to mail the following documents to defendant Mushtaq
7 Ahmed:
- 8 a. a copy of the order reassigning this case, ECF 17,
 - 9 b. a copy of the discovery and scheduling order, ECF 20, and
 - 10 c. a form order regarding consent to the jurisdiction of a magistrate judge or request
11 for reassignment.
- 12 3. The clerk of court is directed to amend the case caption to reflect defendant Mushtaq
13 Ahmed's full name.
- 14 4. If the presiding judge adopts these findings and recommendations, an answer or a
15 responsive motion by defendant Mushtaq Ahmed is due within 21 days from the date of
16 the adoption.

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18 IT IS SO ORDERED.

19 Dated: October 23, 2018

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UNITED STATES MAGISTRATE JUDGE

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