

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

THOMAS OSBORNE,  
Plaintiff,  
v.  
S. GATES, C. CRYER, D. ROBERTS,  
Defendants.

Case No. 1:19-cv-01732-JLT-HBK (PC)  
ORDER ADOPTING FINDINGS AND  
RECOMMENDATIONS IN PART  
ORDER GRANTING PLAINTIFF’S MOTION  
TO FILE A THIRD AMENDED COMPLAINT  
(Doc. 18, 19)

The magistrate judge issued findings and recommendations recommending the district court dismiss Plaintiff’s second amended complaint (“SAC”) for failure to state a claim arising under the Eighth Amendment. (Doc. 18 at 1-8.) The findings and recommendations provided notice to Plaintiff that he had fourteen days to file any objections. (*Id.* at 1, 8.) Instead of filing objections, Plaintiff filed a motion for leave to file a third amended complaint. (Doc. 19.)

According to 28 U.S.C. § 636(b)(1)(C), the Court has conducted a *de novo* review of this case. Having carefully reviewed the entire file, the Court finds the Findings and Recommendations to be supported by the record and by proper analysis insofar as they recommend dismissal of the SAC. As set forth in the findings and recommendations, Plaintiff alleges in the SAC that he had surgery on his ankle for an unspecified medical condition. (Doc. 18 at 2.) Plaintiff further asserts that staples remained in his ankle for five weeks after the surgery. (*Id.* at 3, 4-8.) The SAC alleges that “medical staff” had “forgotten” to remove the

1 staples from Plaintiff's ankle following surgery. (*Id.* at 2.) The findings and recommendations  
2 correctly conclude that the SAC fails to state a deliberate indifference claim because, among other  
3 things, the SAC fails to allege facts that suggest the sole defendant, S. Gates, was subjectively  
4 aware of a medical need and failed to adequately respond to that need. (*Id.* at 7-8.)

5 Plaintiff seeks leave to file a Third Amended Complaint. Though Plaintiff has been given  
6 two prior opportunities to file amended complaints, he now submits a declaration from someone  
7 in the prison who is prepared to assist him with amending his complaint. (Doc. 19.) Federal Rule  
8 of Civil Procedure 15(a)(2) states “[t]he court should freely give leave [to amend pleadings] when  
9 justice so requires” and the Ninth Circuit has “stressed Rule 15’s policy of favoring  
10 amendments.” *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989). “In  
11 exercising its discretion [to grant or deny leave to amend] ‘a court must be guided by the  
12 underlying purpose of Rule 15—to facilitate decision on the merits rather than on the pleadings or  
13 technicalities.’” *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) (quoting  
14 *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981)). Here, although the Court has serious  
15 doubts about Plaintiff’s ability to state a claim, it cannot conclusively find that he would be  
16 unable to successfully amend with some assistance. Therefore, in an abundance of caution,  
17 Plaintiff will be afforded on final opportunity to amend his complaint. Accordingly,

18 1. The Findings and Recommendations issued on May 25, 2022 (Doc. 18) are

19 **ADOPTED IN PART.**

20 2. The second amended complaint (Doc. 14) is **DISMISSED.**

21 3. Plaintiff’s motion to file a third amended complaint (Doc. 19) is **GRANTED.**

22 4. Plaintiff shall file an amended complaint within 30 days of the date of this order.

23 5. Plaintiff is warned that this will be his final opportunity to amend.

24  
25 IT IS SO ORDERED.

26 Dated: June 16, 2022

27   
28 UNITED STATES DISTRICT JUDGE