IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SHAKA MUHAMMAD,

Plaintiff, No. CIV S-07-0375 GEB GGH P

vs.

DIRECTOR OF CORRECTIONS, et al.,

Defendants. ORDER

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Plaintiff is a prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. This action proceeds on the Second Amended Complaint against defendants Hines and Noble as to plaintiff's Eighth Amendment claims that he was compelled, in 2006, to sleep on a contaminated mattress at California State Prison-Solano (CSP-Solano).

The matters currently pending before the court are: (1) plaintiff's motions to compel discovery (Dockets 84 and 86); (2) plaintiff's "motions for injunctive relief" (Dockets 77, 79, 80, 85 and 90); and (3) defendants' motion for summary judgment (Docket 89). For the following reasons, the court denies plaintiff's motions but accords plaintiff additional time within which to further brief his claim he was denied access to the courts and to respond to defendants' motion for summary judgment.

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I. PLAINTIFF'S MOTION FOR DISCOVERY

The discovery deadline in this action was May 29, 2009. Docket 83. As set forth in the court's order filed January 28, 2009 (Docket 83, ¶ 1) (emphasis added):

> The parties may conduct discovery until May 29, 2009. Any motions necessary to compel discovery shall be filed by that date. *All requests for discovery pursuant to Fed. R. Civ. P. 31, 33, 34 or 36 shall be served not later than sixty days prior to that date.*

On April 7, 2009, plaintiff filed a "Motion for Discovery" seeking an order of this court compelling defendants to produce thirteen separate categories of documents pursuant to Fed. R. Civ. P. 34.[1] Docket 84. Although a proof of service upon the court, dated April 3, 2009, was attached to the motion, id. at 3, neither the requests for production nor the motion were served upon defendants. Decl. of Deputy Attorney General Ellen Y. Hung ("Hung Decl."), Docket 87-2, at ¶¶4, 5. However, upon receiving the court's electronic notification of this filing, defendants prepared and served, on May 15, 2009, their response to plaintiff's production requests, including some documents. Id. at ¶¶ 6, 7; Exh. A.

Plaintiff thereafter filed, on May 29, 2009 (the discovery deadline), a "Motion for an Order Compelling Discovery." Docket 86. This motion, made pursuant to Fed. R. Civ. P. 37(a), asserts that defendants interposed improper objections and failed to produce all requested documents, and seeks $1000 sanctions as plaintiff's reasonable expenses in pursuing this matter. The exhibits attached to this motion include a "rewrite" (rather than a copy) of the original thirteen production requests, essentially setting forth the same requests.[2]

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[1] The motion also references Fed. R. Civ. P. 33, but no specific interrogatories are referenced or included.

[2] Plaintiff also asserts that defendants failed fully to answer interrogatories, but no interrogatories are attached to this motion, and apparently none were propounded on defendants. Hung Decl., at ¶¶ 8, 9.

Also attached are three pages, each entitled an "Affidavit of Truth" and signed by plaintiff, which allege certain pertinent facts, e.g., "On April 14, 2009 in front side of Facility I Yard plaintiff saw 5 mattress[es] with stains unknown just in the trash" (Docket 86, at 10). Although plaintiff does not state why he has included these affidavits, it is reasonable to infer

Defendants' opposition to plaintiff's discovery motion is well taken. Notwithstanding the court's order that discovery requests be served on the opposing party no fewer than sixty days before May 29, 2009 (no later than March 30, 2009), plaintiff *never served* his requests upon defendants. Even if the court were to construe its April 7, 2009 electronic notification to defendants of plaintiff's motion and requests as "service," such notice would be untimely.[3] Moreover, review of the substance of defendants' responses and produced documents demonstrates adherence to the Federal Rules of Civil Procedure. The objections interposed, e.g., irrelevance, overbreadth, and "not within defendants' possession, custody or control," appear valid; plaintiff does not assert otherwise, alleging only generally that "defendants failed to and refused to produce items plaintiff requested (See Exhibit A [the production requests]) [and] to answer fully . . ." Docket 86, at 1.

Accordingly, plaintiff's motions for discovery and sanctions will be denied.

II. PLAINTIFF'S "MOTIONS FOR INJUNCTIVE RELIEF"

The court notes initially that it has denied two of plaintiff's prior motions for injunctive relief. On September 25, 2008, the district court adopted the undersigned's findings and recommendation, after evidentiary hearing, that plaintiff's motion for preliminary injunction (based on allegations that he was forced to sleep on a contaminated mattress) be denied. Dockets 72, 60, 27. Thereafter, on December 24, 2008, the district court adopted the undersigned's further findings and recommendation that plaintiff's motion for temporary restraining order, to stay his proposed transfer from CSP-Solano, be denied. Dockets 81, 73, 62.

Currently pending is plaintiff's November 17, 2009 motion for "Exigent Restraining Order to Have Plaintiff Placed in a Cell by Himself," Docket 90, at 1, as well as four

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that he is challenging the veracity of defendants' discovery responses. However, such factual disputes are properly raised in response to defendants' motion for summary judgment or at trial.

[3] Court permission is not necessary to propound discovery requests, which should not be filed with the court unless, and until, they are at issue.

prior filed "motions for injunctive relief," Dockets 77, 79, 80, 85. For the following reasons, the court construes each pending matter as a request for protective order.

A. MOTIONS FOR PROTECTIVE ORDERS

The court construes plaintiff's motions for injunctive relief as motions for protective orders, and therefore properly before the undersigned for disposition by order. Local Rule 302 of the Eastern District of California authorizes magistrate judges to handle all aspects of a prisoner's case short of jury trial. This rule reflects the contours of magistrate judge authority established by Congress. Pursuant to Section 636, Title 28, United States Code, magistrate judges may determine any pretrial matter unless it is "dispositive" to the action, see United States v. Raddatz, 447 U.S. 667, 673, 100 S. Ct. 2406 (1980), or seeks injunctive relief of the same character as that which may be finally granted by the action, see De Beers Consolidated Mines, Ltd. v. United States, 325 U.S. 212, 219-200, 65 S.Ct. 1130 (1945). See 28 U.S.C. § 636(b)(1)(A).

A proper motion for injunctive relief must relate to the allegations of the complaint and seek an outcome that may ultimately be available in the action. If there is no such relation, injunctive relief is not properly sought. "[T]he purpose and effect of the injunction is to provide security for performance of a future order which may be entered by the court." De Beers, at 219-220. "Thus, a party moving for a preliminary injunction must necessarily establish a relationship between the injury claimed in the party's motion and the conduct asserted in the complaint." Devose v. Herrington, 42 F.3d 470, 471 (8th Cir.1994) (affirming district court's order denying without hearing plaintiff's motion for preliminary injunction on the ground that it had "nothing to do with preserving the district court's decision-making power over the merits of [plaintiff's] 42 U.S.C. § 1983 lawsuit") (citation omitted); cf., State of New York v. United States Metals Refining Co., 771 F.2d 796, 801 (3rd Cir. 1985) (affirming district court's order granting preliminary injunction because relief requested was also available to the court pursuant to final judgment, making the distinction that "this is not a case where the preliminary injunction

'deals with a matter lying wholly outside the issues in the suit,' De Beers, 325 U.S. at 200 []"). Rule 65, Federal Rules of Civil Procedure, governing requests for injunctive relief, underscores this relevance requirement, pursuant to provisions allowing the hearing on preliminary injunction to be accelerated into a trial on the merits, preserving the right to jury trial if otherwise appropriate, and making evidence received at the hearing on preliminary injunction admissible at trial. None of these provisions would make sense if disputes outside the complaint, and on which no trial will be had, could be considered as proceedings for injunctive relief.

Accordingly, since matters appropriate for injunctive relief (and therefore expressly outside the dispositive authority of the magistrate judge) are limited to the merits of an action, see, e.g., Reynaga v. Camisa, 971 F.2d 414, 416 (9th Cir. 1992) (orders pursuant to § 636(b)(1)(A) may not include "motions for injunctive relief"), it follows that *improper* requests for injunctive relief, addressing matters extraneous to the complaint, may be addressed and finally determined by the magistrate judge. Such matters typically filed by plaintiff/prisoners attempt to have the court regulate every term and condition of their confinement simply because they are "in court," regardless of the relation of the currently challenged activity to the claims set forth in the complaint.

B. "MOTION FOR EXIGENT RESTRAINING ORDER" (DOCKET 90)

Plaintiff's most recent "motion for exigent restraining order" (Docket 90) does not go the merits of plaintiff's complaint. Plaintiff alleges that prison guard T. Frietas (not a defendant in this action) "is using overt methods to have Plaintiff moved out of Building 2," and seeks a temporary restraining order requiring that plaintiff "not [] be moved," or "be allowed to make compatibility moves," or be "placed in the cell by myself." Id. at 2. The motion alleges that Frietas made improper statements to plaintiff and denied his requests to be moved, demonstrating intimidation, racism or discrimination, in violation of 15 Cal. Code. Regs. § 3391 (setting forth standards of conduct for corrections employees), and in response to plaintiff "filing litigation." Plaintiff states that he made a "citizen's complaint" against Frietas in August and/or

October 2009, as provided for by 15 U.S.C. § 3391, and Cal. Penal Code § 832.5, and that he filed a Form 602 appeal challenging Frietas' allegedly improper statements. Like plaintiff's November 25, 2008 "emergency motion for a temporary restraining order" to obtain single cell status based on the allegation that prison staff were forcing plaintiff, in retaliation for his legal action, to cell with prisoners who eat pork and are mentally unstable (Docket 75), also construed as a request for protective order (Docket 82), the instant motion is unrelated to the allegations of plaintiff's complaint and will be construed as a motion for protective order.

The fact that plaintiff challenges the conduct of a nonparty and seeks relief on matters outside the complaint weighs against plaintiff's request for a protective order. The court has no jurisdiction to issue an order against individuals or entities that are not parties to the underlying litigation, Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 110, 89 S.Ct. 1562 (1969), absent extraordinary circumstances not present here, see 28 U.S.C. 1651 ("All Writs Act"); Ex parte Fahey, 332 U.S. 258, 259-260, 67 S.Ct. 1558 (1947) ("drastic and extraordinary remedies . . . reserved for really extraordinary causes.")[4]

The only correlation that may be inferred between this motion and the underlying litigation is a possible retaliation claim,[5] viz., plaintiff's claim that Frietas "discriminat[ed]

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[4] Moreover, "the All Writs Act does not operate to confer jurisdiction and may only be invoked in aid of jurisdiction which already exists." Malone v. Calderon, 165 F.3d 1234, 1237 (9th Cir.1999). "A writ of mandamus is appropriately issued only when (1) the plaintiff's claim is clear and certain; (2) the defendant official's duty to act is ministerial, and so plainly prescribed as to be free from doubt; and (3) no other adequate remedy is available." Barron v. Reich, 13 F.3d 1370, 1374 (9th Cir.1994) (internal citations and quotations omitted).

[5] Retaliation by prison officials for the exercise of a prisoner's constitutional right of access to the courts violates the federal constitution. Pratt v. Rowland, 65 F.3d 802, 807 (9th Cir. 1995); Schroeder v. McDonald, 55 F.3d 454, 461 (9th Cir. 1995); Black v. Lane, 22 F.3d 1395, 1402 (7th Cir. 1994); Woods v. Smith, 60 F.3d 1161, 1164 (5th Cir. 1995); Rizzo v. Dawson, 778 F.2d 527, 532 (9th Cir. 1985). In order to state a retaliation claim, a plaintiff must plead facts which suggest that retaliation for the exercise of protected conduct was the "substantial" or "motivating" factor behind the defendant's conduct. Soranno's Gasco, Inc. v. Morgan, 874 F.2d 1310, 1314 (9th Cir. 1989); Rizzo 778 F.2d at 532. The plaintiff must also plead facts which suggest an absence of legitimate correctional goals for the conduct he contends was retaliatory. Pratt at 806 (citing Rizzo at 532). Verbal harassment alone is insufficient to state a claim. See Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987). However, even threats of bodily

against plaintiff for filing litigation." Docket 90, at 1. However, this singular reference appears only to describe plaintiff's interactions with Frietas, unrelated to the instant action, that plaintiff found offensive, disrespectful, or contrary to plaintiff's placement requests. This scenario fails to present a claim for retaliation or any other basis for seeking a protective order in the instant litigation. The motion will therefore be denied.

C. ADDITIONAL MOTIONS (DOCKETS 77, 79, 80, 85)

The following outstanding motions, which also request some form of injunctive relief, are also construed as motions for protective order for the reasons set forth above.

– Docket 77 (filed December 15, 2008), entitled "Emergency Injunction and Motion to Remove Plaintiff from CDCR Custody," repeats many of the allegations previously addressed by this court in its findings and recommendations filed November 21, 2008, viz., that Deputy Attorney General Hung conspired with prison officials to propose the transfer of plaintiff out of CSP-Solano as "retaliation." Plaintiff also asserts that he is not receiving his mail (and that his mail is being censored and curtailed), and denied the practice of his Muslim faith, in violation of his First Amendment rights. Plaintiff seeks, without authority, his "removal from CDCR custody." Since these matters are outside the gravamen of the instant complaint that plaintiff was required to sleep on a contaminated mattress, and fail to present any grounds for extraordinary relief, the motion will be denied.

– Docket 79 (filed December 17, 2008), entitled "Motion for Injunction and Motion to Remove from CDCR Custody Due to Persecution and Torture of Plaintiff," and citing 18 U.S.C. § 2340 and 2340A(b) (defining the crime of torture, and the court's jurisdiction

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injury are insufficient to state a claim, because a mere naked threat is not the equivalent of doing the act itself. See Gaut v. Sunn, 810 F.2d 923, 925 (9th Cir. 1987). Mere conclusions of hypothetical retaliation will not suffice, a prisoner must "allege specific facts showing retaliation because of the exercise of the prisoner's constitutional rights." Frazier v. Dubois, 922 F.2d 560, 562 (n.1) (10th Cir. 1990). Moreover, in Pratt, the Ninth Circuit concluded that in evaluating retaliation claims, courts should defer "to prison officials in the evaluation of proffered legitimate penological reasons for conduct alleged to be retaliatory." Pratt, 65 F.3d at 807 (citing Sandin v. Conner, 515 U.S. 472, 115 S. Ct. 2293 (1995)).

thereto) again seeks plaintiff's removal from CDCR custody, based on the alleged conspiracy between Deputy Attorney General Hung and prison staff to transfer plaintiff or place him in a cell "with someone plaintiff is not compatible with so plaintiff can get hurt or hurt someone," and because plaintiff has been placed on a "hit list" by prison guards Orrick and Salear [sp] (neither are defendants in this case). Again, plaintiff's allegations fall outside the instant litigation and seek unsupportable relief; accordingly, the motion will be denied.

– Docket 80 (filed December 22, 2008), entitled "Motion to Remove Plaintiff from CDCR Custody Due to Torture, Retaliation and Persecution," again references the alleged conspiracy between Deputy Attorney General Hung and prison staff to transfer plaintiff to another state facility, and again asserts denial of plaintiff's First Amendment rights due to interference with his mail and exercise of his Muslim faith, and attributes these matters to "retaliation and persecution due to this pending litigation." For the same reasons set forth above, plaintiff fails to state a claim for retaliation, or any other matter warranting extraordinary relief within the confines of this litigation. This motion will also be denied.

– Docket 85 (filed April 9, 2009), entitled "Motion for Recusement of the Attorney Generals Office[;] Motion for Removal of Plaintiff from CDCR in Violation of Convention Against Torture, 18 U.S.C. 2340A(b)," based on allegations that plaintiff's requests for transfer to the federal prison system have been denied, that CCI staff members Racklin and Sanchez (not defendants herein) are retaliating/torturing plaintiff for filing Form 602 allegations of conspiracy between prison staff and Deputy Attorney General Hung, that such retaliation has included the taking of legal documents and religious material from plaintiff's cell on October 17, 2008, and denial of access to the law library. Plaintiff seeks, inter alia, recusal of the California Attorney General's Office, and a "federal system placement transfer" pursuant to Cal. Penal Code § 2911 and 15 Cal. Code Regs. § 3379 [authorizing such transfers on an individual basis].

Plaintiff's repeated efforts to recuse the California Attorney General's Office are without legal support. The court has reviewed plaintiff's claims of conspiracy between the AG's

office and prison officials, and concluded that the record demonstrates the (apparently unexecuted) decision to transfer plaintiff to another state facility was made not in retaliation for his legal activities, but based on a legitimate correctional need to transfer inmates in order to retrofit CSP-Solano. See Docket 73. These allegations are therefore without merit.

Further, plaintiff has no constitutional right to incarceration in the prison of his choice. McKune v. Lile, 536 U.S. 24, 39, 122 S.Ct. 2017 (2002). California statutory authorization to grant or deny a prisoner's request for transfer to a federal prison lies in the sound discretion of state prison officials. See, e.g., People v. Lara, 155 Cal .App. 3d 570, 575-76 (1984). Plaintiff therefore fails to state a claim in support of his request to be transferred to the federal prison system.

Prisoners do, however, have a constitutional right of access to the courts. See Lewis v. Casey, 518 U.S. 343, 346 (1996); Bounds v. Smith, 430 U.S. 817, 821 (1977); Bradley v. Hall, 64 F.3d 1276, 1279 (9th Cir. 1995) (discussing the right in the context of prison grievance procedures); Vandelft v. Moses, 31 F.3d 794, 796 (9th Cir. 1994); Ching v. Lewis, 895 F.2d 608, 609 (9th Cir. 1989) (per curiam). To establish a violation of the right of access to the courts, a prisoner must establish that he has suffered an actual injury, a jurisdictional requirement that flows from standing doctrine and may not be waived. See Lewis, 518 U.S. at 349; Madrid v. Gomez, 190 F.3d 990, 996 (9th Cir. 1999). An "actual injury" is "'actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing deadline or to present a claim.'" Lewis, 518 U.S. at 348; see also Madrid, 190 F.3d at 96; Keenan v. Hall, 83 F.3d 1083, 1094 (9th Cir. 1996), amended by 135 F.3d 1318 (9th Cir. 1998); Vandelft, 31 F.3d at 796; Sands v. Lewis, 886 F.2d 1166, 1171 (9th Cir. 1990) (per curiam).

Although plaintiff has attached forty pages of supporting documents, the court is unable to ascertain which, if any, may be applicable to a "denial of access" claim in the instant litigation. The court will therefore permit plaintiff an opportunity to clarify and refine this claim. If plaintiff pursues this matter, he must demonstrate that he has suffered an actual injury, as

defined above, in this litigation.

In summary, plaintiff's motions set forth in Dockets 77, 79, and 80, will be denied; plaintiff's motion set forth in Docket 85 will be denied without prejudice to granting plaintiff further opportunity to articulate his claim that he has been denied access to the courts in this litigation.

III. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On October 2, 2009, defendant filed and served a motion for summary judgment pursuant to to Rule 56, Federal Rule of Civil Procedure. Plaintiff has not responded to the motion, and the deadline for doing so has passed.

"A district court may not grant a motion for summary judgment simply because the nonmoving party does not file opposing material, even if the failure to oppose violates a local rule." Brydges v. Lewis, 18 F.3d 651, 652 (9th Cir. 1994) (citing Henry v. Gill Industries, Inc., 983 F.2d 943, 950 (9th Cir. 1993)). However, where a local rule "does not require, but merely permits the court to grant a motion for summary judgment, the district court has discretion to determine whether noncompliance should be deemed consent to the motion." Brydges, 18 F.3d at 652.

Local Rule 230(l) provides in part (emphasis added):

> Opposition, if any, to the granting of the motion shall be served and filed by the responding party not more than twenty-one (21) days after the date of service of the motion. A responding party who has no opposition to the granting of the motion shall serve and file a statement to that effect, specifically designating the motion in question. Failure of the responding party to file an opposition or to file a statement of no opposition *may be deemed a waiver of any opposition to the granting of the motion and may result in the imposition of sanctions*.

Further, Local Rule 110 provides that failure to comply with the Local Rules or any order of this court "may be grounds for imposition by the Court of any and all sanctions authorized by statute or Rule or within the inherent power of the Court."

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The court will grant plaintiff additional time within which to respond to defendants' motion for summary judgment. Plaintiff is informed that failure to file an opposition will be deemed a statement of non-opposition and shall result in a recommendation that this action be dismissed pursuant Fed. R. Civ. P. 41(b).

CONCLUSION

Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff's motions for discovery and sanctions filed April 7, 2009, and May 29, 2009 (Dockets 84 and 86), are denied.

2. Plaintiff's motion for an "exigent restraining order" filed November 17, 2009 (Docket 90), construed as a motion for a protective order, is denied.

3. Plaintiff's motions for injunctive relief, construed as motions for protective order (Dockets 77, 79, 80) are denied.

4. Plaintiff's remaining motion for injunctive relief, also construed as a motion for protective order (Docket 85), is denied without prejudice to plaintiff filing, within 21 days after the filing date of this order, a new motion for protective order clearly articulating how his alleged denial of access to the courts (e.g., destruction of legal property, denial of access to law library) resulted in actual injury to plaintiff in this litigation.

5. Plaintiff may also file, within 21 after the filing date of this order, an opposition to defendants' motion for summary judgment, or statement of nonopposition thereto. Failure timely to file a responsive pleading shall be construed as a statement of nonopposition to the motion for summary judgment.

SO ORDERED.

DATED: January 5, 2010

/s/ Gregory G. Hollows

UNITED STATES MAGISTRATE JUDGE