

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

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MARK ANTHONY MORENO,

Plaintiff,

No. CIV S-08-1344 JAM EFB P

vs.

DAVID MEDINA, et. al,

Defendants.

ORDER AND
FINDINGS AND RECOMMENDATIONS

_____/

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. Pending before the court are defendants’ January 28, 2010 motion for summary judgment and plaintiff’s August 9, 2010 motion for a preliminary injunction. The court denies the motion for summary judgment without prejudice, and recommends that the motion for preliminary injunction be denied.

I. Summary Judgment

As stated above, defendants filed their motion for summary judgment on January 28. Dckt. No. 49. On March 9 the court granted plaintiff a 60-day extension of time to file his opposition, as he claimed that he had been recently rehoused in administrative segregation and lacked legal materials, and needed to conduct additional discovery and review his medical records to oppose the motion. Dckt. No. 52, 53. On March 12 plaintiff filed a motion to amend

1 his complaint. Dckt. No. 54. On May 20 the court denied plaintiff's motion to amend his
2 complaint, and ordered plaintiff to file his opposition to defendants' summary judgment motion
3 within 14 days.¹ Dckt. No. 60. On May 7 and June 7, plaintiff filed motions to compel
4 defendants to produce medical records that he claimed were necessary to oppose their summary
5 judgment motion. Dckt. Nos. 58, 61. On June 16, the court ordered defendants to file a response
6 to plaintiff's motions to compel, and temporarily relieved plaintiff of his obligation to file an
7 opposition to defendants' summary judgment motion. Dckt. No. 62. On July 19, following
8 defendants' response to the motion to compel, the court ordered defendants to inform the court
9 within seven days whether plaintiff had reviewed his medical file, and ordered plaintiff to file his
10 opposition to the summary judgment motion within 30 days if the review had taken place. Dckt.
11 No. 67. On July 26, defendants responded that plaintiff had reviewed his medical file on June
12 28. Dckt. No. 69. On August 2, the court issued another order denying plaintiff's motions to
13 compel as moot and reiterating that plaintiff's opposition to the summary judgment motion was
14 due by August 18. Dckt. No. 69. On August 9, plaintiff filed a motion for a preliminary
15 injunction. Dckt. No. 70.

16 On August 19, plaintiff filed a letter requesting an extension of time to file his opposition
17 to summary judgment, stating that there were problems with the law library and that some of his
18 legal mail had gone to another part of the prison. Dckt. No. 72. On August 24, plaintiff filed a
19 more detailed request for an extension of time stating that critical medical records are missing in
20 his medical file² and that he is being prevented from going to the law library. Dckt. No. 73. In
21 addition to his request for an extension of time, plaintiff seeks an order directing his prison to
22 surrender the missing medical documents and to allow him to go to the law library as a P.L.U.

23
24 ¹ Due to a clerical error, on May 19 the court issued an order granting plaintiff a second
25 60-day extension of time to file his opposition. Dckt. No. 59. As noted above, the following day
the court ordered plaintiff to file his opposition within 14 days. Dckt. No. 60.

26 ² Plaintiff has previously asserted that his medical file was missing documents, as "papers
that I remember being in there is not in there no more." Dckt. No. 49, Ex. E.

1 status inmate. *Id.*

2 As plaintiff claims that he is still missing documents necessary to oppose defendants'
3 summary judgment motion, the court treats his request as a request pursuant to Rule 56(f) to
4 either deny or continue the motion pending the completion of his review of the documents. The
5 court will permit plaintiff one last opportunity to complete his review and prepare an opposition
6 to the motion. In the interim, defendants' summary judgment motion is denied without prejudice
7 to renewal after the limited additional discovery is complete. *See* Fed. R. Civ. P. 56(f). Within
8 14 days of the date of this order, plaintiff shall file a motion to compel explaining specifically
9 what documents are missing from his medical file and why he believes such documents exist or
10 existed. Defendants may file an opposition to plaintiff's motion within 14 days from service of
11 plaintiff's motion to compel. Within 21 days after the court resolves the motion to compel,
12 defendants may renote their motion for summary judgment by filing a notice of renewal.
13 Alternatively, if defendants prefer, they may file a new brief and supporting papers in support of
14 their motion for summary judgment. Plaintiff must file his opposition to such a motion within 30
15 days. The court is not inclined to grant any further extensions of time.

16 Plaintiff shall present this court order to any prison official preventing him from
17 accessing the prison law library. Should plaintiff be denied access to the law library, he shall
18 inform the court of the name of the prison official preventing access and the attendant
19 circumstances.

20 **II. Preliminary Injunction**

21 Plaintiff filed a motion for a preliminary injunction on August 9, 2010. Dckt. No. 70.
22 Defendants have not filed an opposition.

23 A preliminary injunction will not issue unless necessary to prevent threatened injury that
24 would impair the court's ability to grant effective relief in a pending action. *Sierra On-Line, Inc.*
25 *v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984); *Gon v. First State Ins. Co.*, 871
26 F.2d 863 (9th Cir.1989). A preliminary injunction represents the exercise of a far reaching

1 power not to be indulged except in a case clearly warranting it. *Dymo Indus. v. Tapeprinter,*
2 *Inc.*, 326 F.2d 141, 143 (9th Cir.1964). In order to be entitled to preliminary injunctive relief, a
3 party must demonstrate “that he is likely to succeed on the merits, that he is likely to suffer
4 irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor,
5 and that an injunction is in the public interest.” *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127
6 (9th Cir. 2009) (citing *Winter v. Natural Res. Def. Council, Inc.*, ___ U.S. ___, 129 S.Ct. 365, 374
7 (2008)). The Ninth Circuit has also held that the “sliding scale” approach it applies to
8 preliminary injunctions—that is, balancing the elements of the preliminary injunction test, so that
9 a stronger showing of one element may offset a weaker showing of another—survives *Winter* and
10 continues to be valid. *Alliance for Wild Rockies v. Cottrell*, ___ F.3d ___, 2010 WL 2926463, *3-4
11 (filed July 28, 2010). In cases brought by prisoners involving conditions of confinement, any
12 preliminary injunction “must be narrowly drawn, extend no further than necessary to correct the
13 harm the court finds requires preliminary relief, and be the least intrusive means necessary to
14 correct the harm.” 18 U.S.C. § 3626(a)(2).

15 Plaintiff asks that the court issue a preliminary injunction ordering that he 1) receive his
16 prescribed testosterone cream for his hypogonadism; 2) be seen by a urologist for his testicles,
17 urinary tract, and prostate; 3) receive his medication for his carpal tunnel syndrome (gabapentin);
18 4) receive his medication for his chronic lower back and right knee pain.

19 Plaintiff seeks to enjoin persons who are not defendants in this action. The motion is
20 directed towards “Spaeth: Chief Medical Surgeon at Kern Valley State Prison” and “Shirley
21 Lopez: Chief Medical Officer at Kern Valley State Prison.” Dckt. No. 70 at 1. Plaintiff claims
22 that a Doctor Kandkhorova, a Kern Valley State Prison employee, told him that Lopez and
23 Spaeth denied his testosterone cream because “they said there’s no medical necessity for you to
24 take the testosterone medication cause you’re not sexual active in prison with a female nor can
25 you make babies in prison.” *Id.* at 3. However, this lawsuit proceeds on plaintiff’s claims that
26 defendants at High Desert State Prison were deliberately indifferent to his medical needs in 2007

1 and 2008. Defendants, who are at a different institution, simply do not have the authority or
2 ability to initiate changes in plaintiff's current medical treatment.

3 The court cannot issue an order against individuals or institutions who are not parties to a
4 suit pending before it. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 112
5 (1969). *See also Zepeda v. United States Immigration Service*, 753 F.2d 719, 727 (9th Cir. 1985)
6 ("A federal court may issue an injunction if it has personal jurisdiction over the parties and
7 subject matter jurisdiction over the claim; it may not attempt to determine the rights of persons
8 not before the court."). Thus, plaintiff's motion for a preliminary injunction should be denied.
9 Plaintiff may attempt to obtain relief for his current medical complaints by filing an internal
10 appeal, and then, if necessary, a separate federal lawsuit.

11 Accordingly, it is hereby ORDERED that:

12 1. Defendants' summary judgment motion is denied without prejudice to renewal after
13 discovery is complete;

14 2. Plaintiff shall file a motion to compel explaining what documents are missing from his
15 medical file and why he believes such documents exist or existed within 14 days of the date of
16 this order;

17 3. Defendants may file an opposition to plaintiff's motion within 14 days of service of
18 plaintiff's motion to compel;

19 4. Defendants may re-file their motion for summary judgment by filing a notice of
20 renewal, or may alternatively file an amended motion for summary judgment within 21 days of
21 the date that the court resolves the motion to compel; and

22 5. Plaintiff shall file his opposition to such a motion within 30 days of service of the
23 defendants' renewed motion.

24 ///

25 ///

26 ///

1 Further, it is RECOMMENDED that plaintiff's August 9, 2010, motion for a preliminary
2 injunction be denied.

3 These findings and recommendations are submitted to the United States District Judge
4 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
5 after being served with these findings and recommendations, any party may file written
6 objections with the court and serve a copy on all parties. Such a document should be captioned
7 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections
8 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
9 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

10 Dated: August 30, 2010.

11 
12 EDMUND F. BRENNAN
13 UNITED STATES MAGISTRATE JUDGE
14
15
16
17
18
19
20
21
22
23
24
25
26