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

JOHN MICHAEL KIRK

Plaintiff,

No. 2:08-cv-02249-SRT

vs.

T. FELKER, et al.,

Defendants.

ORDER

_____/

Plaintiff, prisoner at High Desert State Prison proceeding in forma pauperis, filed his complaint pursuant to 42 U.S.C. § 1983 alleging an Eighth Amendment violation by defendants Warden Felker, Chief of Inmate Appeals Grannis, Doctor David, and Doctor James.¹ Defendant David was dismissed for lack of jurisdiction. On May 18, 2010, the Court dismissed plaintiff's claims against Felker and Grannis and granted plaintiff leave to amend to cure the pleading deficiencies as to Felker and Grannis. The Court did not grant plaintiff general leave to amend his complaint. On June 14, 2010, defendant James answered plaintiff's complaint. The Court then ordered that discovery be completed by November 15, 2010 and all pretrial motions

¹ In the complaint, plaintiff sued defendants Warden Felker and Chief of Inmate Grannis in their official capacities. The Clerk of the Court will be directed to update the caption in this case to reflect that the Warden of High Desert State Prison is now Mike McDonald.

1 be filed on or before January 18, 2011. On January 18, 2011, defendant James filed a motion for
2 summary judgment, pursuant to Federal Rule of Civil Procedure 56. Plaintiff did not respond to
3 the motion. On February 25, 2011, James filed a declaration of counsel in lieu of reply to
4 opposition.

5 Plaintiff's Motion to Proceed In Forma Pauperis

6 The Court need not address plaintiff's December 13, 2010 motion to proceed in
7 forma pauperis, because the Court granted plaintiff leave to proceed in forma pauperis in an
8 order filed April 10, 2009.

9 Plaintiff's December 13, 2010 "Complaint"

10 On December 13, 2010, plaintiff filed another "complaint," naming defendant
11 Warden McDonald in place of Felker, defendant Chief of Inmate of Appeals Walker in place of
12 Grannis, as well as new defendants Story, Miranda, Langford, Nepomuceno, and Swingle. The
13 complaint form does not contain a statement of plaintiff's claim or requested relief, but refers to
14 attached exhibits of plaintiff's habeas filings in state superior court, which appear to concern
15 events arising out of plaintiff's inmate appeals in 2009 and 2010.

16 The Court is required to screen complaints brought by prisoners seeking relief
17 against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. §
18 1915A(a). The Court must dismiss a complaint or portion thereof if the prisoner has raised
19 claims that are legally "frivolous or malicious," that "fail[] to state a claim on which relief may
20 be granted," or that "seek[] monetary relief against a defendant who is immune from such relief."
21 28 U.S.C § 1915(e)(2)(B).

22 Plaintiff's December 13, 2010 "complaint" fails to adequately amend his original
23 complaint as to Felker and Grannis. In the Court's May 18, 2010 order dismissing plaintiff's
24 claims against Felker and Grannis, the Court identified the following pleading deficiencies in
25 Plaintiff's original complaint: (1) Plaintiff failed to allege any facts indicating defendant Felker's
26 liability as a supervisor, and (2) plaintiff has no due process claim under § 1983 for defendant

1 Grannis' actions solely in the inmate appeals process. Plaintiff's December 13, 2010 filing does
2 not cure either deficiency—it contains no new factual allegations concerning Felker or Grannis
3 (indeed, it does not even name Felker or Grannis, but instead refers to attached habeas filings
4 concerning the conduct of other individuals).

5 Nor did plaintiff seek permission to amend his original complaint beyond curing
6 the pleading deficiencies as to Felker and Grannis. The Court's May 18, 2010 order did not
7 grant Plaintiff general leave to amend the complaint. At the time of his December 13, 2010
8 filing, therefore, plaintiff was no longer permitted to amend his complaint "as a matter of
9 course." Fed. R. Civ. Proc. 15(a)(1) ("A party may amend its pleading once as a matter of
10 course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive
11 pleading is required, 21 days after service of a responsive pleading or 21 days after service of a
12 motion under Rule 12(b), (e), or (f), whichever is earlier."). Instead, plaintiff was required to
13 seek "the opposing party's written consent or the court's leave" to amend his complaint. Fed. R.
14 Civ. Proc. 15(a)(2). He did neither.² Accordingly, IT IS HEREBY ORDERED that plaintiff's
15 December 13, 2010 "complaint" will be stricken.

16 In addition, because plaintiff's December 13, 2010 filing does not cure pleading
17 deficiencies as to claims against Felker and Grannis and was unaccompanied by a motion for
18 leave to amend the original complaint, IT IS HEREBY ORDERED that, within 21 days of the
19 date of this order, plaintiff will show cause why his claims against Felker and Grannis should not
20 be dismissed. Failure to comply with this order will result in dismissal of plaintiff's claims
21 against defendants Felker and Grannis, pursuant Federal Rule of Civil Procedure 41(b).

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24 ² The Court notes that on December 22, 2010, Felker and Grannis filed an opposition to
25 plaintiff's December 13, 2010 "complaint", seeking dismissal on grounds that (1) plaintiff was
26 only given leave to amend as to his claims against Felker and Grannis and has failed to allege
any facts to cure his pleading deficiencies, and (2) filing an amended complaint seven months
after being given leave to amend demonstrates a lack of prosecution and diligence by plaintiff,
under Federal Rule of Procedure 41(b). Plaintiff has not responded to the opposition.

1 Defendant James’s Motion for Summary Judgment

2 As noted above, plaintiff has not opposed James’s January 18, 2010 motion for
3 summary judgment.

4 Local Rule 230(1) provides in part: “Failure of the responding party to file an
5 opposition or to file a statement of no opposition may be deemed a waiver of any opposition to
6 the granting of the motion” In the Court’s order filed April 12, 2010, plaintiff was advised
7 of the requirements for filing an opposition to a motion and that failure to oppose such a motion
8 may be deemed a waiver of opposition to the motion.³

9 Local Rule 110 provides that failure to comply with the Local Rules “or with any
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11 ³ The Court’s order stated, *inter alia*, that: (1) “Unless otherwise ordered, all motions to
12 dismiss, motions for summary judgment, motions concerning discovery, motions pursuant to
13 Rules 7, 11, 12, 15, 41, 55, 56, 59 and 60 of the Federal Rules of Civil Procedure, and motions
14 pursuant to Local Rule 11-110 shall be briefed pursuant to Local Rule 78-230(m). Failure to
15 oppose such a motion timely may be deemed a waiver of opposition to the motion. Opposition to
16 all other motions need be filed only as directed by the court.” (¶ 7); and (2) “Pursuant to *Rand v.*
17 *Rowland*, 154 F.3d 952, 957 (9th Cir. 1998) (en banc), *cert. denied*, 527 U.S. 1035 (1999), and
18 *Klinge v. Eikenberry*, 849 F.2d 409 (9th Cir. 1988), plaintiff is advised of the following
19 requirements for opposing a motion for summary judgment made by defendants pursuant to Rule
20 56 of the Federal Rules of Civil Procedure. Such a motion is a request for an order for judgment
21 in favor of defendants without trial. A defendant’s motion for summary judgment will set forth
22 the facts that the defendants contend are not reasonably subject to dispute and that entitle the
23 defendants to judgment. To oppose a motion for summary judgment, plaintiff must show proof
24 of his or her claims. Plaintiff may do this in one or more of the following ways. Plaintiff may
25 rely upon statements made under the penalty of perjury in the complaint if the complaint shows
26 that plaintiff has personal knowledge of the matters stated and plaintiff calls to the court’s
attention those parts of the complaint upon which plaintiff relies. Plaintiff may serve and file one
or more affidavits or declarations setting forth the facts that plaintiff believes prove plaintiff’s
claims; the person who signs an affidavit or declaration must have personal knowledge of the
facts stated. Plaintiff may rely upon written records, but plaintiff must prove that the records are
what plaintiff claims they are. Plaintiff may rely upon all or any part of the transcript of one or
more depositions, answers to interrogatories, or admissions obtained in this proceeding. If
plaintiff fails to contradict the defendants’ evidence with counteraffidavits or other admissible
evidence, the defendants’ evidence may be taken as the truth and the defendants’ motion for
summary judgment granted. If there is some good reason why such facts are not available to
plaintiff when required to oppose a motion for summary judgment, the court will consider a
request to postpone considering the defendants’ motion. If plaintiff does not serve and file a
written opposition to the motion or a request to postpone consideration of the motion, the court
may consider the failure to act as a waiver of opposition to the defendants’ motion. If the
defendants’ motion for summary judgment, whether opposed or unopposed, is granted, judgment
will be entered for the defendants without a trial and the case will be closed.” (¶ 10).

1 order of the Court may be grounds for imposition by the Court of any and all sanctions
2 authorized by statute or Rule or within the inherent power of the Court.” In the Court’s April 12,
3 2010 order, plaintiff was also advised that failure to comply with the Local Rules may result in a
4 recommendation that the action be dismissed.

5 Finally, Rule 41(b) of the Federal Rules of Civil Procedure provides:

6 **Involuntary Dismissal; Effect.** If the plaintiff fails to prosecute
7 or to comply with these rules or a court order, a defendant may
8 move to dismiss the action or any claim against it. Unless the
9 dismissal order states otherwise, a dismissal under this subdivision
(b) and any dismissal not under this rule--except one for lack of
jurisdiction, improper venue, or failure to join a party under Rule
19--operates as an adjudication on the merits.

10 *Id.*

11 Good cause appearing, IT IS HEREBY ORDERED that, within 21 days of the
12 date of this order, plaintiff shall file an opposition, if any he has, to the motion for summary
13 judgment or a statement of non-opposition. Failure to comply with this order will result in
14 dismissal of plaintiff’s claims against defendant James, pursuant Federal Rule of Civil Procedure
15 41(b).

16 DATED: June 17, 2011

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18 /s/ Sidney R. Thomas
19 Sidney R. Thomas, United States Circuit Judge
20 Sitting by Designation
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