

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

GREGORY V. BALDWIN,

Plaintiff,

No. CIV S-09-0711 WBS GGH P

vs.

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND
REHABILITATION, et al.,

Defendants.

ORDER &

FINDINGS AND RECOMMENDATIONS

Plaintiff, a state prisoner proceeding pro se, seeks relief pursuant to 42 U.S.C. § 1983. Plaintiff filed an interlocutory appeal of the Order, filed on July 23, 2009, wherein plaintiff's request for emergency injunctive relief in the form of a prison transfer was denied. Essentially, he sought to be transferred away from defendant Fannon due to Fannon's allegedly threatening remarks; within the allegations of his underlying complaint, plaintiff has made claims of excessive force by, inter alia, this defendant.

In defendants' putative request for a stay of this case pending resolution of the appeal, citing L.R. 6-144, defendants set forth the current briefing schedule of the appeal, and contend that they are not seeking an extension of time, but are ready to file their responsive

1 pleading in this court on the current due date, which is October 23, 2009.¹ However, defendants
2 argue that the Ninth Circuit's ruling on plaintiff's appeal, could have a significant impact on the
3 resolution of this case.

4 The court observes that defendants fail to cite the appropriate provision in seeking
5 this stay. Local Rule 6-144 governs the appropriate procedure for filing requests for extending
6 and shortening time, not requests for stays; no doubt defendants cite it because their request for a
7 stay was made belatedly, on October 16, 2009, even though the notice of interlocutory appeal
8 had been filed on August 5, 2009. Under the applicable provision, 28 U.S.C. § 1292(a), it is
9 clear that the Ninth Circuit has jurisdiction of plaintiff's appeal of a district court's interlocutory
10 order, inter alia, "refusing" an injunction. Defendants do make clear that the Ninth Circuit has
11 issued a briefing schedule and plaintiff's opening brief was due on October 13, 2009, and
12 defendants' response due on November 10, 2009.² Defendants' representation that the outcome
13 of the appeal is likely to materially impact the resolution of this litigation is persuasive.

14 Accordingly, IT IS ORDERED that defendants are granted an extension of time
15 until seven (7) days after the district judge rules on these findings and recommendations, should
16 the request for a stay be denied, to file their responsive pleading.

17 IT IS HEREBY RECOMMENDED that:

18 1. Defendants' October 16, 2009 (docket # 42) request for a stay of this action
19 pending resolution of the interlocutory appeal in this matter be granted; and

20 2. Defendants be granted an extension of time until fourteen (14) days following
21 the Ninth Circuit's ruling on the interlocutory appeal to file a responsive pleading.

22 \\\

24 ¹ By an Order, filed on September 2, 2009, defendants were granted a 60-day extension of
25 time to file their response to the complaint.

26 ² This briefing schedule is confirmed by this court's review of the on-line docket of the
appeal in Pacer (Case No. 09-16661).

1 These findings and recommendations are submitted to the United States District
2 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty
3 days after being served with these findings and recommendations, any party may file written
4 objections with the court and serve a copy on all parties. Such a document should be captioned
5 “Objections to Magistrate Judge's Findings and Recommendations.” Any reply to the objections
6 shall be served and filed within ten days after service of the objections. The parties are advised
7 that failure to file objections within the specified time may waive the right to appeal the District
8 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

9 DATED: October 22, 2009

/s/ Gregory G. Hollows

10 _____
11 GREGORY G. HOLLOWS
12 UNITED STATES MAGISTRATE JUDGE

13 GGH:009
14 bald0711.req
15
16
17
18
19
20
21
22
23
24
25
26