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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GARY R. XAVIER,
Plaintiff,
v.
M. FRENCH, et al.,
Defendants.

No. 2:09-cv-0783 LKK CKD P

ORDER

This prisoner civil rights action brought pursuant to 42 U.S.C. § 1983 proceeds on the Third Amended Complaint (“TAC”) against defendants French and Holland. The TAC was drafted by plaintiff’s former attorney; however, plaintiff is now proceeding pro se. Defendants have filed a motion for summary judgment (ECF No. 65), and plaintiff has been ordered to file either a supplemental motion pursuant to Fed. R. Civ. P. 56(d) or an opposition to the motion for summary judgment. (ECF No. 72.)

Before the court is plaintiff’s motion to file a fourth amended complaint. (ECF No. 73.) Essentially plaintiff requests that this action go forward on his proposed amended complaint rather than the TAC drafted by his former attorney. (ECF No. 75.)

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1 Under Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend shall be given
2 freely when justice requires. In deciding whether justice requires granting leave to amend, factors
3 to be considered include the presence or absence of undue delay, bad faith, dilatory motive,
4 repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing
5 party, and futility of proposed amendment.

6 The court has reviewed the proposed Fourth Amended Complaint, which names four
7 defendants: French, Holland, Friend, and Roche. The court concludes that, construed liberally,
8 the proposed complaint states a claim for deliberate indifference to serious medical needs against
9 defendants French and Friend. As Friend is not named in the TAC, amendment is not futile.
10 Moreover, as the proposed amended complaint represents plaintiff's first attempt to state his
11 claims without the involvement of his former attorney, with whom plaintiff disagreed about how
12 to proceed in this action, the court finds that justice requires leave to amend in this instance.

13 As to defendants' pending motion for summary judgment, the court notes that one
14 defendant – Debbie Holland – is not named in the Fourth Amended Complaint. Thus the court
15 will recommend that she be dismissed from this action. Rather than adjudicate summary
16 judgment separately as to defendant French and new defendant Friend, the court in the interest of
17 judicial efficiency will vacate the motion for summary judgment without prejudice to renewal.

18 Accordingly, IT IS HEREBY ORDERED THAT:

- 19 1. Plaintiff's motion to file a fourth amended complaint (ECF No. 73) is granted;
- 20 2. The Clerk of Court shall change the docket of ECF No. 74 to "Fourth Amended
21 Complaint";
- 22 3. Service is appropriate for the following additional defendants: J. Friend;
- 23 4. The Clerk of the Court shall send plaintiff one USM-285 form, one summons, an
24 instruction sheet and a copy of the complaint filed May 19, 2014;
- 25 5. Within thirty days from the date of this order, plaintiff shall complete the attached
26 Notice of Submission of Documents and submit the following documents to the court:
 - 27 a. The completed Notice of Submission of Documents;
 - 28 b. One completed summons;

1 c. One completed USM-285 form for each defendant listed in number 3 above;

2 and

3 d. Two copies of the endorsed complaint filed May 19, 2014.

4 6. Plaintiff need not attempt service on defendant and need not request waiver of service.
5 Upon receipt of the above-described documents, the court will direct the United States Marshal to
6 serve the above-named defendant pursuant to Federal Rule of Civil Procedure 4 without payment
7 of costs;

8 7. Defendants' motion for summary judgment (ECF No. 65) is vacated without prejudice
9 to renewal; and

10 8. All pending deadlines in this action are vacated. The court will issue new deadlines
11 following service on defendant Friend or as otherwise appropriate.

12 IT IS HEREBY RECOMMENDED that defendant Debbie Holland be dismissed from this
13 action with prejudice.

14 These findings and recommendations are submitted to the United States District Judge
15 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
16 after being served with these findings and recommendations, any party may file written
17 objections with the court and serve a copy on all parties. Such a document should be captioned
18 "Objections to Magistrate Judge's Findings and Recommendations." The parties are advised that
19 failure to file objections within the specified time may waive the right to appeal the District
20 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

21 Dated: June 5, 2014

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23 _____
24 CAROLYN K. DELANEY
25 UNITED STATES MAGISTRATE JUDGE
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