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

SHAI ALKEBU-LAN,

Plaintiff,

No. 2:11-cv-0291 LKK KJN P

vs.

K. DICKINSON, Warden, et al.,

Defendants.

ORDER and

FINDINGS AND RECOMMENDATIONS

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I. Introduction

Pending is defendants’ motion to revoke plaintiff’s in forma pauperis status pursuant to 28 U.S.C. § 1915(g). Plaintiff is a state prisoner who is proceeding in forma pauperis and without counsel in this civil rights action filed pursuant to 42 U.S.C. § 1983. On December 28, 2012, this court directed the U.S. Marshal to serve process of the Amended Complaint on defendants Brown, Jones, Mata, Mitchell, Moreno, Mullen, J. Pulsipher, and Spencer-Sims. (Dkt. No. 31.) Defendants Jones, Mata, Mitchell, Spencer-Sims, Brown and Pulsipher waived service. (Dkt. Nos. 36, 39.) Attempted service on defendant Mullen revealed that he is deceased (Dkt. No. 34), while attempted service on defendant Moreno indicated that further information was necessary (Dkt. No. 33). The court directed plaintiff to provide additional information to effect service of process on defendant Moreno (Dkt. No. 35); plaintiff responded with a request

1 for the court's assistance in obtaining such additional information if the court deemed such effort
2 warranted or, alternatively, that the court dismiss both defendants Moreno and Mullen (Dkt. No.
3 38).

4 Meanwhile, the appearing defendants filed a motion to revoke plaintiff's in forma
5 pauperis status pursuant to 28 U.S.C. § 1915(g), and to stay this action pending plaintiff's
6 payment of the full filing fee. (Dkt. No. 37.) Because at least three of plaintiff's prior cases were
7 dismissed for failure to state a claim, each case thereby constituting a "strike" under the "three
8 strikes" rule set forth in 28 U.S.C. § 1915(g), and because plaintiff fails to demonstrate that he
9 comes within the exception to this rule, the undersigned recommends that defendants' motion be
10 granted. Thus, this court recommends that plaintiff's in forma pauperis status be revoked, and
11 this action stayed pending plaintiff's payment of the full filing fee.

12 II. Three Strikes Rule Under 28 U.S.C. § 1915(g)

13 The Prison Litigation Reform Act of 1995 ("PLRA") authorizes federal courts to
14 permit the commencement and prosecution of a suit without prepayment of the filing fee if the
15 plaintiff demonstrates by affidavit that he or she is unable to pay such fee, and is thus entitled to
16 proceed "in forma pauperis." However, a prisoner-plaintiff is precluded from proceeding in
17 forma pauperis if he or she has had three or more prior actions dismissed on the ground that such
18 actions were frivolous, malicious, or failed to state a claim upon which relief could be granted,
19 provided the plaintiff is unable to demonstrate that he or she is under imminent danger of serious
20 physical injury. This rule, set forth at 28 U.S.C. § 1915(g), expressly provides:

21 In no event shall a prisoner bring a civil action or appeal a
22 judgment in a civil action or proceeding under this section if the
23 prisoner has, on 3 or more prior occasions, while incarcerated or
24 detained in any facility, brought an action or appeal in a court of
25 the United States that was dismissed on the grounds that it is
26 frivolous, malicious, or fails to state a claim upon which relief may
be granted, unless the prisoner is under imminent danger of serious
physical injury.

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1 On April 18, 2011, this court granted plaintiff leave to proceed in forma pauperis
2 because he had demonstrated that he was unable to afford the filing fee. (See Dkt. Nos. 2, 11.)
3 However, pursuant to defendants’ instant motion, the court is informed that plaintiff has
4 sustained dismissals in three prior actions for failure to state a claim, each qualifying as a “strike”
5 under 28 U.S.C. § 1915(g).¹ These dismissals were memorialized in a fourth case in which, on
6 that basis, the court denied plaintiff’s application to proceed in forma pauperis without prejudice
7 to refiling the claims in a new action in which plaintiff paid the full filing fee. These cases are as
8 follows:

9 1. Alkebu-Lan v. Lewis, Case No. 1:03-cv-05013 REC LJO P (E.D. Cal.):
10 May 30, 2003 district judge order adopting magistrate judge’s recommendation that the action be
11 dismissed for failure to state a claim, and failure to obey court’s order to file amended complaint.
12 (See Defs. Exhs. A-C (Dkt. No. 37-3 at 1-13).)

13 2. Alkebu-Lan v. Hall, Case No. 2:03-cv-00702 UA CT P (C. D. Cal.): February
14 4, 2003 district judge order adopting magistrate judge’s recommendation that plaintiff’s motion
15 to proceed in forma pauperis be denied, and the action dismissed, because the complaint was
16 “legally and/or factually patently frivolous.” (See Defs. Exhs. D-E (Dkt. No. 37-3 at 14-18).)

17 3. Alkebu-Lan v. Kane, et al., Case No. 4:05-cv-5069 CW PR P (N.D. Cal.):
18 June 12, 2006, district judge order denying leave to proceed in forma pauperis and dismissing the
19 action for failure to state a claim upon which relief may be granted. The appellate court
20 thereafter denied plaintiff’s motion to proceed in forma pauperis; plaintiff’s failure to pay the
21 filing fee resulted in the dismissal of the appeal for failure to prosecute. (See Defs. Exhs. F-I
22 (Dkt. No. 37-3 at 19-35).)

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25 ¹ Judicial notice may be taken of court records. Valerio v. Boise Cascade Corp.,
26 80 F.R.D. 626, 635 n.1 (N.D. Cal. 1978), aff’d, 645 F.2d 699 (9th Cir.), cert. denied, 454 U.S.
1126 (1981).

1 4. Alkebu-Lan v. Kane et al., Case No. 4:06-cv05991 CW PR P (N.D. Cal.)

2 August 25, 2009 district judge order dismissing action pursuant to 28 U.S.C. § 1915(g), based on
3 plaintiff's three prior strikes, set forth above, without prejudice to bringing the claims in a new
4 action in which plaintiff paid the full filing fee. (See Defs. Exhs. J-M (Dkt. No. 37-3 at 36-67).)

5 Plaintiff's name should have been added to the National Pro Se Three-Strikes
6 Database,² as a result of the August 25, 2009 decision in Case No. 4:06-cv05991 CW PR P. Had
7 plaintiff been timely included in the data base, this court would not have granted plaintiff in
8 forma pauperis status in the instant case, unless plaintiff had shown that he was under imminent
9 danger of serious physical injury when he initiated the action. Nevertheless, due to the decision
10 in Case No. 4:06-cv05991 CW PR P, plaintiff was personally on notice that he was precluded
11 from initiating another federal civil rights action without prepayment of the filing fee, unless he
12 could demonstrate that his circumstances met the statutory exception. Moreover, defendants'
13 instant motion places the burden on plaintiff to demonstrate that he meets the exception to the
14 three strikes rule. However, plaintiff did not file an opposition to defendants' motion, and the
15 court's review of plaintiff's original and amended complaints demonstrates that plaintiff fails to
16 meet the exception.

17 Plaintiff filed his original complaint on September 14, 2010, when incarcerated at
18 California State Prison-Solano ("CSP-SOL"). Plaintiff alleged therein, in pertinent part, that he
19 had been under imminent danger of serious physical injury since November 25, 2008, due to the
20 alleged false disciplinary report allegedly generated by California Medical Facility ("CMF")
21 defendants Pulsipher, Jones and Brown. (Dkt. No. 1 at 3.) Plaintiff alleged that, due to this false
22 report, he was "subjected . . . to a series of psychological and physical tortures, including lacing
23 his canteen with hallucinogenic drugs which caused mental health issues/placement, near death
24 and stalking/threatening petitioner's family." (Id.) Although the form complaint noted "see

25 ² National Pro Se Three-Strikes Database; see <http://nprose.circ9.dcn/Litigant.aspx>.

1 attached” (id.), the complaint contained no attachments. The court noted this omission in its
2 screening order, found that neither plaintiff’s general allegation of “imminent” harm, nor
3 plaintiff’s other allegations, stated a cognizable claim, and dismissed the complaint with leave to
4 amend. (Dkt. No. 11.)

5 Following plaintiff’s transfer to San Quentin State Prison (Dkt. Nos. 17, 18), the
6 court found that plaintiff’s Second Amended Complaint (Dkt. No. 24) stated potentially
7 cognizable First and Fourteenth Amendment claims against defendants Spencer-Sims, Pulsipher,
8 Jones, Mata, Brown, Mullen, Moreno and Mitchell, based on plaintiff’s claims that he was
9 falsely charged and improperly found guilty of a disciplinary violation, which was later
10 overturned; as well as a potentially cognizable Eighth Amendment claim against these same
11 defendants, based on plaintiff’s allegedly related cell extraction and placement in administrative
12 segregation. (See Dkt. No. 26.) Plaintiff remains incarcerated at San Quentin State Prison.

13 To meet the exception of 28 U.S.C. § 1915(g), plaintiff must have alleged facts
14 demonstrating that he was “under imminent danger” at the time of filing the initial complaint.
15 Andrews v. Cervantes, 493 F.3d 1047, 1053 (9th Cir. 2007) (“it is the circumstances at the time
16 of the filing of the complaint that matters for purposes of the ‘imminent danger’ exception under
17 § 1915(g)”; see also, Abdul-Akbar v. McKelvie, 239 F.3d 307, 312-14 (3rd Cir. 2001);
18 Medberry v. Butler, 185 F.3d 1189, 1192-93 (11th Cir. 1999). The court finds that plaintiff
19 failed to make this demonstration. Despite the general allegations of plaintiff’s original
20 complaint that he faced “imminent” danger of serious physical injury, the alleged danger had
21 been “imminent” for a period of two years, and the only relief sought by plaintiff was damages.
22 (See Dkt. No. 1 at 3-4.) Plaintiff did not seek injunctive relief, presumably because he had
23 already been transferred from CMF. Moreover, in the operative Second Amended Complaint,
24 plaintiff seeks only damages (see Dkt. No. 24 at 3, 15; but see id. at 5 (generally request for an
25 injunction “as well”), without reference to any current danger of serious physical injury.

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1 For these reasons, the court finds that plaintiff is precluded from proceeding in
2 forma pauperis in this action. 28 U.S.C. § 1915(g). The undersigned recommends that plaintiff
3 be permitted to proceed in this action only if he pays the full filing fee within fourteen (14) days
4 after service of the district judge’s order adopting these findings and recommendations.

5 III. Conclusion

6 Accordingly, for the foregoing reasons, IT IS HEREBY ORDERED that:

7 1. Plaintiff’s motion to amend the Second Amended Complaint and related
8 matters (Dkt. No. 38) is denied without prejudice to the renewal of these matters after plaintiff
9 has paid the full filing fee in this action.

10 Additionally, IT IS HEREBY RECOMMENDED that:

11 1. Defendants’ motion to revoke plaintiff’s in forma pauperis status (Dkt. No.
12 37), be granted.

13 2. Plaintiff’s in forma pauperis status be revoked.

14 3. Plaintiff be ordered to pay the \$350.00 filing fee within fourteen (14) days after
15 service of the district judge’s order adopting the instant findings and recommendations.³

16 4. This action be stayed pending plaintiff’s submission of the filing fee.

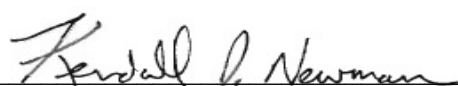
17 5. Failure of plaintiff to timely submit the full filing fee will result in the
18 dismissal of this action pursuant to 28 U.S.C. § 1915(g).

19 These findings and recommendations are submitted to the United States District
20 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
21 days after being served with these findings and recommendations, any party may file written
22 objections with the court and serve a copy on all parties. Such a document should be captioned
23 “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the

24 ³ Plaintiff may submit a current copy of his prison trust account balance, indicating the
25 amounts paid to date toward the filing fee in this action, pursuant to plaintiff’s in forma pauperis
26 status, and request that the total amount paid to date be deducted from the full filing fee of
\$350.00.

1 objections shall be filed and served within fourteen days after service of the objections. The
2 parties are advised that failure to file objections within the specified time may waive the right to
3 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

4 DATED: April 15, 2013

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6 
7 KENDALL J. NEWMAN
8 UNITED STATES MAGISTRATE JUDGE

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