

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

BERNARD HUGHES,

Plaintiff,

No. 2:11-cv-00530 DAD P

vs.

CALIFORNIA DEP'T OF CORRECTIONS
AND REHABILITATION, et al.,

ORDER

Defendant.

_____/

Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff has consented to Magistrate Judge jurisdiction over this action pursuant to 28 U.S.C. § 636(c). (Doc. No. 9.) Before the court are plaintiff's motion to modify prior court orders and his motion for a temporary restraining order and/or preliminary injunction.

I. Motion to Modify Prior Court Orders

Plaintiff requests modification of the orders filed on October 16, 2012 and November 20, 2012 (Docs. No. 24 & 26.) Therein, the court ordered plaintiff to submit copies of his amended complaint, filed on July 11, 2011, as well as other documents to effect service on defendants. In his motion for modification, plaintiff contends that he is unable to comply with the court's orders because he is in pain, has difficulty walking, and has been unable to obtain assistance from the head librarian at his institution of confinement. In order to move this already

1 dated action forward, the court will grant plaintiff's motion and direct the Clerk of the Court to
2 provide the necessary copies of the amended complaint when the court issues its order directing
3 the U.S. Marshall to serve the defendants. However, plaintiff is cautioned that he must prosecute
4 this action diligently and that he must comply with court orders. Failure to do so in the future
5 will result in the dismissal of this action. Moreover, plaintiff is forewarned that the court will not
6 continue to provide him photocopies of documents.

7 **II. Motion for Injunctive Relief**

8 In his motion for a temporary restraining order¹ and/or preliminary injunction,
9 plaintiff seeks an order from this court requiring the Department of Corrections and
10 Rehabilitation (CDCR) to arrange his examination by an orthopedic specialist. (Doc. No. 30.)
11 Plaintiff contends that since his transfer to Kern Valley State Prison on October 31, 2012, he has
12 received inadequate medical care, that his new primary care physician interviewed him for only
13 five-minutes, and that his "pain management was stopped." (Id. at 3.)

14 "[I]njunctive relief [is] an extraordinary remedy that may only be awarded upon a
15 clear showing that the plaintiff is entitled to such relief." Winter v. Natural Res. Def. Council,
16 Inc., 555 U.S. 7, 22 (2008). "The proper legal standard for preliminary injunctive relief requires
17 a party to demonstrate 'that he is likely to succeed on the merits, that he is likely to suffer
18 irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor,
19 and that an injunction is in the public interest.'" Stormans, Inc. v. Selecky, 586 F.3d 1109, 1127
20 (9th Cir. 2009) (quoting Winter, 555 U.S. at 20); see also Center for Food Safety v. Vilsack, 636
21

22 ¹ "A temporary restraining order is designed to preserve the status quo until there is an
23 opportunity to hold a hearing on the application for a preliminary injunction." Whitman v.
24 Hawaiian Tug and Barge Corp./Young Bros., Ltd. Salaried Pension Plan, 27 F. Supp.2d 1225,
25 1228 (D. Hawaii 1998). "In many cases the emphasis of the court is directed to irreparable harm
26 and the balance of hardships because the merits of a controversy are often difficult to ascertain
and adjudicate on short notice." Wilson v. Tilton, No. 2:07-cv-1192 GEB DAD (PC), 2012 WL
43615, at *1 (E.D. Cal. Jan. 9, 2012). The factors considered for issuing a temporary restraining
order are the same as the standards for issuing a preliminary injunction. Ohio Republican Party
v. Brunner, 543 F.3d 357, 361 (6th Cir. 2008).

1 F.3d 1166, 1172 (9th Cir. 2011) (“After Winter, ‘plaintiffs must establish that irreparable harm is
2 likely, not just possible, in order to obtain a preliminary injunction.”); Am. Trucking Ass’n, Inc.
3 v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009). The Ninth Circuit has also held
4 that “[a] preliminary injunction is appropriate when a plaintiff demonstrates . . . that serious
5 questions going to the merits were raised and the balance of hardships tips sharply in the
6 plaintiff’s favor.” Alliance for Wild Rockies v. Cottrell, 632 F.3d 1127, 1134-35 (9th Cir. 2011)
7 (quoting Lands Council v. McNair, 537 F.3d 981, 97 (9th Cir. 2008) (en banc)).²

8 In addition, as a general rule this court is unable to issue an order against
9 individuals who are not parties to a suit pending before it. Zenith Radio Corp. v. Hazeltine
10 Research, Inc., 395 U.S. 100 (1969); Zepeda v. United States Immigration Service, 753 F.2d 719,
11 727 (9th Cir. 1985) (“A federal court may issue an injunction if it has personal jurisdiction over
12 the parties and subject matter jurisdiction over the claim; it may not attempt to determine the
13 rights of persons not before the court.”).

14 Here, the court has not obtained personal jurisdiction over any of the defendants
15 since they have not yet been served with process in this action. In addition, the court notes that
16 the defendants in this action are employees at Deuel Vocational Institution and that plaintiff
17 seeks injunctive relief against the CDCR or unnamed persons at Kern Valley State Prison where
18 he is currently incarcerated. Thus, his motion for injunctive relief is not only premature but
19 directed to persons or an entity not parties to this suit. Accordingly, plaintiff’s motion for
20 injunctive relief will be denied.

21 **III. USM-285 Form for Defendant Fong**

22 Upon review of the USM-285 forms submitted by plaintiff for service on the

23
24 ² The Ninth Circuit has found that this “serious question” version of the circuit’s sliding
25 scale approach survives “when applied as part of the four-element Winter test.” Alliance for
26 Wild Rockies v. Cottrell, 632 F.3d 1127, 1134 (9th Cir. 2011). “That is, ‘serious questions going
to the merits’ and a balance of hardships that tips sharply towards the plaintiff can support
issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood
of irreparable injury and that the injunction is in the public interest.” Id. at 1135.

1 defendants, it appears that plaintiff has not submitted a USM-285 form for defendant Lawrence
2 Fong. Instead, plaintiff has submitted a USM-285 form for a Lawrence Fox. However, Mr. Fox
3 is not named as a defendant in plaintiff's amended complaint and there are no allegations in
4 plaintiff's amended complaint concerning Mr. Fox. Plaintiff will be provided a final opportunity
5 to submit a USM-285 form for defendant Lawrence Fong. Plaintiff's failure to do so will result
6 in the dismissal of defendant Fong pursuant to Rule 4(m) of the Federal Rules of Civil
7 Procedure.

8 **IV. Conclusion**

9 In accordance with the above, IT IS HEREBY ORDERED that:

10 1. Plaintiff's December 14, 2012 motion to modify the court's prior orders (Doc.
11 No. 29) is granted;

12 2. Plaintiff's December 14, 2012 motion for injunctive relief (Doc. No. 30) is
13 denied;

14 3. Within fourteen days from the service of this order, plaintiff shall file the
15 attached Notice of Submission of Documents and a USM-285 form for defendant Lawrence
16 Fong. Plaintiff's failure to submit these documents within fourteen days will result in the
17 dismissal of defendant Fong; and

18 4. The Clerk of the Court is directed to provide five copies of the endorsed
19 amended complaint filed July 11, 2011, when the court issues a subsequent order directing the
20 U.S. Marshall to serve process on the defendants. In addition, the Clerk of the Court is directed
21 to provide plaintiff with one USM-285 form with this order.

22 DATED: June 7, 2013.

23
24
25 DAD:4
26 hugh530.modify



DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

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

BERNARD HUGHES,

Plaintiff,

No. 2:11-cv-00530 DAD P

vs.

CALIFORNIA DEP'T OF CORRECTIONS
AND REHABILITATION, et al.,

NOTICE OF SUBMISSION
OF DOCUMENTS

Defendants.

_____ /

Plaintiff hereby submits the following documents in compliance with the court's
order filed _____:

_____ [#] completed USM-285 forms.

DATED: _____.

Plaintiff