UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

AFREDO GOMEZ,

Plaintiff,

v.

MIKE McDONALD et al.,

Defendants.

No. 2:11-cv-0649 LKK DAD P

ORDER

Plaintiff is a state prisoner proceeding pro se and in forma pauperis. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983. Several motions filed by the parties are pending before the court.

BACKGROUND

Plaintiff is proceeding on an amended complaint against defendants Davey, Domondan, Gower, Sanders, and Van Leer. Therein, plaintiff alleges that on October 6, 2009, defendants placed him in a Single Cell Unit/Special Purpose Segregation Unit ("SCU/SPSU") and retained him there for eight months because they believed he was a member of the 2-5 disruptive group. While segregated, plaintiff alleges that defendants refused to inform him of any disciplinary charges being brought against him or of their reasons for holding him in segregation him and did not provide him with an informal non-adversary hearing to allow him to present his views. Plaintiff also alleges that while held in segregation defendants denied him outdoor exercise, forced him to stay in a cell in which the temperature averaged only 35 degrees, and refused to

provide him with personal hygiene necessities. Plaintiff alleges that on May 25, 2010, defendants asked him to sign a document stating that he had no intention of participating in any 2-5 activities. Plaintiff signed the document, and two days later, he was returned to the general population at the institution where he was incarcerated. (Am. Compl. Attach. at 6-32.)

On July 31, 2012, the court found that plaintiff's amended complaint appeared to state cognizable claims for relief against defendants Davey, Domondan, Gower, Sanders, and Van Leer. Specifically, the court found that plaintiff's amended complaint appeared to state a cognizable claim against those defendants for denial of plaintiff's right to due process under the Fourteenth Amendment in connection their alleged involvement with his placement and retention in an SCU/SPSU. In addition, the court found that plaintiff's amended complaint appeared to state a cognizable claim against defendants Davey, Gower, and Van Leer for cruel and unusual punishment under the Eighth Amendment for their alleged involvement in denying plaintiff outdoor exercise, placing him in a cold cell, and refusing to provide him with personal hygiene items. Finally, however, the court found that plaintiff's amended complaint did not state cognizable claims for relief against defendant Chapman or for the alleged denial of equal protection under the Fourteenth Amendment, denial of religious freedom under the First Amendment, retaliation under the First Amendment, and conspiracy. (Doc. No. 9)

On December 18, 2012, defendants filed a motion to dismiss, arguing that plaintiff's amended complaint fails to state any cognizable claim. (Doc. No. 18) On July 23, 2013, the undersigned issued findings and recommendations, recommending that defendants' motion to dismiss be denied. (Doc. No. 28) On August 26, 2013, the assigned district judge adopted those findings and recommendations in full. (Doc. No. 29) On September 12, 2013, defendants filed an answer to plaintiff's amended complaint. (Doc. No. 30) On September 23, 2013, the court issued a discovery and scheduling order in this matter. (Doc. No. 31)

THE PARTIES' PENDING MOTIONS

I. Plaintiff's Motion to Deem Facts in the Amended Complaint Admitted

Plaintiff has filed a motion to deem facts in the amended complaint admitted because, in plaintiff's view, defendants' answer did not properly admit or deny certain allegations, or

defendants merely asserted "a sham" of a claim that they lack information and belief as to factual content for which defendants purportedly have first-hand knowledge. (Pl.'s Mot. to Deem Facts Admitted at 1-8.) Defendants have opposed the motion, and plaintiff has filed a reply.

Under Rule 8(b) of the Federal Rules of Civil Procedure, a party in responding to a pleading must "admit or deny the allegations asserted against it by an opposing party." Fed. R. Civ. P. 8(b)(1)(B). Under Rule 11(b), "a party certifies that . . . the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or lack of information." Fed. R. Civ. P. 11(b)(4).

Here, the court agrees with defense counsel's observation that many of the allegations that plaintiff believes defendants failed to properly answer relate to claims that the court already found are not cognizable or are related to prison officials who are not named defendants in this action. (See Am. Compl. at 7-8.) Plaintiff is advised that defendants were not required to respond to plaintiff's allegations in connection with claims this court previously found fail to state a cognizable claim. See Fed. R. Civ. P. 8(b)(1)(B) (responding party must "admit or deny the allegations asserted against it . . . .") Nor were defendants required to respond to allegations concerning the alleged conduct of other prison officials not named as defendants. (Id.) Finally, defendants were not required to respond to plaintiff's allegations concerning events that allegedly took place at different prisons well before the named defendants had any contact with plaintiff. (Id.)

Moreover, as to defendants' assertion of lack information and belief as to certain factual allegations made by plaintiff, courts have deemed an assertion of lack of knowledge in an initial answer as an admission only in extreme circumstances, primarily, after a party persists in disclaiming knowledge throughout the adjudication of claims. See Gallagher v. England, No. CIVR 050750 AWI SMS, 2005 WL 3299509 at *4-*5 (E.D. Cal. Dec. 5, 2005) (discussing cases involving "extreme circumstances" of parties claiming lack of knowledge to contrast a party's acceptable assertion of lack of knowledge in an initial answer). Defendants have not disclaimed knowledge throughout the adjudication here, and in fact, they have recently filed a detailed motion for summary judgment addressing the merits of plaintiff's case. (Doc. No. 55)

Finally, as defense counsel argues, defendants explicitly state in the first paragraph of their answer that any allegations that they do not expressly admit, they deny. (Defs.' Opp'n to Pl.'s Mot. to Deem Facts Admitted at 2-3.). Under Rule 8(b)(3), the defendants are permitted to "generally deny all [allegations] except those specifically admitted." Fed. R. Civ. P. 8(b)(3). See generally 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1266 (Dec. 2013).

Accordingly, for these reasons, the court will deny plaintiff's motion to deem facts in the amended complaint admitted.

II. Plaintiff's Request for Sanctions

Plaintiff has also filed a request for sanctions against defendants for not timely opposing his motion to deem facts in the amended complaint admitted. Plaintiff contends that, under the mailbox rule, he filed his motion with the court on September 22, 2013, and defendants did not file their opposition until October 17, 2013. (Pl.'s Req. for Sanctions at 1-2.) Defendants have opposed plaintiff's request for sanctions, and plaintiff has filed a reply.[1]

Whenever a prisoner uses the prison's internal mail system, the court considers the date the prisoner turns over his filing to prison authorities for mailing the filing date. See Houston v. Lack, 487 U.S. 266, 270 (1988). The court applies this so-called "mailbox rule" to pro se prisoner legal filings to ensure that their filings are not unfairly barred as untimely due to delays beyond their control. See Douglas v. Noelle, 567 F.3d 1103, 1107 (9th Cir. 2009). The mailbox rule, however, is not intended for use against an opposing party to prevent the court from considering that party's filings. See Brown v. Kyle, No. 1:04-cv-06539 AWI SKO PC, 2011 WL 3358967 at *1 (E.D. Cal. Aug. 3 2011).

Based on the record before the court, defense counsel received service of plaintiff's motion via the court's electronic filing service on September 27, 2013. Defendants then filed

[1] In plaintiff's reply in support of his motion to deem facts in the amended complaint admitted, plaintiff asks to withdraw his request for sanctions. However, plaintiff subsequently filed a reply in support of his request for sanctions in which he persists with his argument that the court should grant his request for the imposition of sanctions. Under these circumstances, the court will proceed as though plaintiff wishes to pursue his request for sanctions.

their opposition to the motion twenty days later on October 17, 2013. Under Local Rule 230(l), "[o]pposition, if any, to the granting of the motion shall be served and filed by the responding party not more than twenty-one (21), days after the date of service of the motion." See E.D. Cal. Local Rule 230(l). Given that this court, and therefore presumably defense counsel, did not receive plaintiff's motion by mail until September 27, 2013, the court finds that defendants timely filed their opposition to plaintiff's motion to deem facts in the amended complaint admitted on October 17, 2013.

Accordingly, the court will deny plaintiff's request for sanctions.

III. Defendants' Motion to Strike

Defendants have filed a motion to strike plaintiff's opposition to their previously-filed motion for an extension of time on the grounds that plaintiff's motion to strike is an unauthorized pleading and is now moot. On November 6, 2013, defendants filed a request for an extension of time to respond to plaintiff's discovery requests, sets one and two. On November 8, 2013, the court granted defendants' request. On November 15, 2013, seven days after the court issued its order, plaintiff filed his "conditional opposition" to defendants' request for an extension of time and asserted that he would not oppose defendants' request if defendants were willing to respond to his discovery requests without objections. (Defs.' Mot. to Strike at 3.) Plaintiff has opposed defendants' motion to strike, and defendants have filed a reply.

Local Rule 144(c) provides:

> The court may, in its discretion, grant an initial extension ex parte upon the affidavit of counsel that a stipulation extending time cannot reasonably be obtained, explaining the reasons why such a stipulation cannot be obtained and the reasons why the extension is necessary.

Local Rule 144(c).

In this case, defendants' initial request for an extension of time to respond to plaintiff's discovery requests showed good cause and complied with Local Rule 144. Moreover, on December 5, 2013, defense counsel served plaintiff with responses to all of his discovery requests. (Defs.' Reply, Bajwa Decl.)

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Accordingly, the court will grant defendants' motion to strike and strike plaintiff's "conditional opposition" as having been rendered moot.

IV. Plaintiff's Motion to Strike

The court now turns to plaintiff's motion to strike affirmative defenses in defendants' answer. In the motion, plaintiff seeks to strike various affirmative defenses as redundant or because they fail to provide plaintiff with fair notice with respect to their application to his claims. (Pl.'s Mot. to Strike at 4-13.) Defendants have opposed the motion, and plaintiff has filed a reply.

Rule 12(f) of the Federal Rules of Civil Procedure provides:

> Motion to Strike. The Court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:
>
> (1) on its own; or
>
> (2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading."

Fed. R. Civ. P. 12(f).

Here, defendants filed and served their answer on September 12, 2013. Plaintiff did not file his motion to strike until December 20, 2013, well outside of the 21-day time period allowed to file a motion to strike. The court will therefore sua sponte decline to consider striking defendants' affirmative defenses. See Fed. R. Civ. P. 12(f)(1). Accordingly, plaintiff's motion to strike is denied.

V. Plaintiff's Motion to Modify the Scheduling Order

Finally, plaintiff has filed a motion to modify the previously issued discovery and scheduling order in this case to allow the parties an additional sixty days to resolve discovery disputes. In the motion, plaintiff contends that this court previously granted defendants thirty days to serve plaintiff with responses to his discovery requests, and that extension of time left him with only thirty days to review defendants' objections and research their applicability to the discovery requests. Plaintiff contends that he made a diligent effort to resolve all discovery disputes informally with defense counsel to no avail. (Pl.'s Mot. to Modify the Discovery &

Scheduling Order at 4-7.) Defendants have opposed plaintiff's motion to modify the discovery and scheduling order, and plaintiff has filed a reply.

Under Rule 16 of the Federal Rules of Civil Procedure, the court may modify the scheduling order for "good cause." Fed. R. Civ. P. 16(b)(4). The "good cause" standard "primarily considers the diligence of the party seeking the amendment." See Johnson v. Mammoth Re-creations, 975 F.2d 604, 608 (9th Cir. 1992). In this regard, the court may modify a scheduling order deadline "if it cannot reasonably be met despite the diligence of the party seeking the extension." Id. See also Zivkovich v. Southern California Edison Co., 302 F.3d 1080, 1087 (9th Cir. 2002) ("If the party seeking the modification 'was not diligent, the inquiry should end' and the motion to modify should not be granted.").

Here, the court finds that plaintiff has demonstrated diligence in complying with the original dates set forth in the court's discovery and scheduling order and that plaintiff has established "good cause" to modify the discovery deadline to allow him thirty days to file a motion to compel. Although plaintiff has requested an additional sixty days to conduct discovery, plaintiff only seeks sixty additional days because he believes the parties need that time to comply with Local Rule 251 (a)-(c). As stated in the court's discovery and scheduling order, however, Local Rule 251 does not apply to this action. (Doc. No. 31)

Accordingly, the court will grant plaintiff's motion to modify the discovery and scheduling order in part and allow him an additional thirty days to file a motion to compel if he so desires. In addition, on March 21, 2014, defendants filed a motion for summary judgment. The court will relieve plaintiff of the obligation to file an opposition to defendants' motion for summary judgment until thirty days after the court rules on his motion to compel or thirty days after expiration of the time granted to plaintiff to file a motion to compel in the event he fails to file such a motion.

CONCLUSION

Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff's motion to deem facts in the amended complaint admitted (Doc. No. 32) is denied;

2. Plaintiff's request for sanctions (Doc. No. 34) is denied;

3. Defendants' motion to strike (Doc. No. 43) is granted. Plaintiff's conditional opposition (Doc. No. 42) is stricken as moot.

4. Plaintiff's motion to strike (Doc. No. 47) is denied; and

5. Plaintiff's motion to modify the court's discovery and scheduling order (Doc. No. 49) is granted in part. Plaintiff is granted thirty days from the date of this order to file a motion to compel if he so desires. Plaintiff is also relieved of the obligation to file an opposition to defendants' motion for summary judgment until thirty days after the court rules on any forthcoming motion to compel or thirty days after expiration of the time to file such a motion. Except as provided in this order, the court's September 23, 2013 discovery and scheduling order remains in effect.

Dated: April 1, 2014

Dale A. Drozd

DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

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