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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

IVAN KILGORE,
Plaintiff,
v.
DIRECTOR, et al.,
Defendants.

No. 2:11-cv-1745 TLN KJN P (TEMP)
ORDER AND
FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner, proceeding pro se, with a civil rights action seeking relief under 42 U.S.C. § 1983. Plaintiff has filed a motion to amend, together with a proposed second amended complaint. Defendants filed an opposition to the motion, and plaintiff filed a reply.

PLAINTIFF’S MOTION TO AMEND

Plaintiff is proceeding on a first amended complaint against defendants Auer, King, Molina, Mawai, Okoroike, and Riggs for their alleged deliberate indifference to his medical needs in violation of the Eighth Amendment. Plaintiff seeks leave to amend his complaint to add eleven new defendants, including two “Doe” defendants, and to assert state law negligence claims. Plaintiff explains that a discussion with defense counsel prompted him to review his first amended complaint in this action, and he realized that he made the mistake of not pleading his state law causes of action. (Pl.’s Mot. to Am. at 2, Pl.’s Proposed Sec. Am. Compl.)

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1 Defendants filed an opposition to plaintiff's motion to amend and argue that plaintiff
2 unduly delayed in bringing these negligence causes of actions and that defendants would suffer
3 undue prejudice if the court allows plaintiff to amend his complaint at this late date. Defendants
4 also argue that any amendment that would add state law claims to this action would be futile
5 because plaintiff did not comply with the California Torts Claims Act statute of limitations.
6 (Def.'s Opp'n to Pl.'s Mot. to Am. at 3-6.)

7 In reply, plaintiff argues that defendants' arguments based on prejudice are exaggerated.
8 He also contends that he is entitled to equitable tolling of any statute of limitations. (Pl.'s Reply
9 at 2-5.)

10 Rule 15(a) of the Federal Rules of Civil Procedure states that a court should grant leave to
11 amend "freely . . . when justice so requires." Fed. R. Civ. P. 15(a)(2). However, the Ninth
12 Circuit Court of Appeals has made clear that a court should not grant leave to amend
13 automatically. Zivkovic v. S. California Edison Co., 302 F.3d 1080 (9th Cir. 2002). A court
14 "may exercise its discretion to deny leave to amend due to 'undue delay, bad faith or dilatory
15 motive on part of the movant, repeated failure to cure deficiencies by amendments previously
16 allowed, undue prejudice to the opposing party ..., [and] futility of amendment.'" Carvalho v.
17 Equifax Info. Servs., 629 F.3d 876, 892-93 (9th Cir. 2010) (alterations in original) (quoting
18 Foman v. Davis, 371 U.S. 178, 182 (1962)). See also Gonzalez v. Planned Parenthood of Los
19 Angeles, 759 F.3d 1112, 1116 (9th Cir. 2014) ("And the district court's discretion in denying
20 amendment is particularly broad when it has previously given leave to amend.") (internal
21 quotations omitted).

22 In this case, the court agrees with defense counsel that plaintiff unduly delayed in bringing
23 his proposed amendments. Specifically, plaintiff filed the operative amended complaint in this
24 action on September 13, 2013. Plaintiff delayed filing the pending motion to amend until May
25 15, 2015. In his motion, plaintiff contends that he intended to plead his state law claims, but he
26 offers no explanation as to why he delayed nearly two years to file his proposed amendments,
27 particularly when he bases his negligence claims on many of the same facts he alleges in support
28 of his Eighth Amendment deliberate indifference claims. Allen v. City of Beverly Hills, 911 F.2d

1 367, 374 (9th Cir. 1990) (“a district court does not ‘abuse its discretion in denying a motion to
2 amend a complaint . . . when the movant presented no new facts but only ‘new theories’ and
3 ‘provided no satisfactory explanation for his failure to fully develop his contentions originally’”).

4 The court also agrees with defense counsel that defendants would suffer undue prejudice
5 if the court allowed plaintiff to amend his complaint at this late date. According to the court’s
6 discovery and scheduling order, the parties needed to complete discovery on or before April 3,
7 2015. Plaintiff filed his motion to amend more than a month after discovery had closed in this
8 case. As noted above, in plaintiff’s proposed second amended complaint, plaintiff seeks to add
9 eleven new defendants, including two “Doe” defendants, and to assert state law negligence
10 claims. Where, as here, plaintiff has failed to explain his lack of diligence in bringing the
11 proposed amendments, and the proposed amendments would require re-opening discovery and a
12 considerable delay of these proceedings, the court finds that defendants would suffer undue
13 prejudice. Zikovic, 302 F.3d at 1087 (district court did not abuse its discretion in denying motion
14 to amend where additional causes of action would have required the parties to engage in further
15 discovery and discovery was set to close five days after the motion to amend was filed); see also
16 Lamon v. Ellis, 584 F.App’x 514, 516 (9th Cir. 2014) (district court did not abuse its discretion in
17 denying prisoner-plaintiff’s motion to amend, which would have caused undue delay and
18 unnecessary prejudice); Fausett v. LeBlanc, 553 F.App’x 665, 667 (9th Cir. 2014) (district court
19 did not abuse its discretion in denying prisoner-plaintiff’s motion to amend, which he filed after
20 discovery had closed).

21 Accordingly, for all of the foregoing reasons, the court recommends denying plaintiff’s
22 motion to amend. The court declines to address defendants’ alternative argument concerning
23 plaintiff’s compliance with the California Tort Claims Act.

24 **OTHER MATTERS**

25 Plaintiff also filed two requests for appointment of counsel. Plaintiff contends that he
26 needs counsel because he is not a lawyer and has limited ability to elicit necessary facts and
27 articulate legal claims. The court sympathizes with these challenges. However, district courts
28 lack authority to require counsel to represent indigent prisoners in section 1983 cases. Mallard v.

1 United States Dist. Court, 490 U.S. 296, 298 (1989). In exceptional circumstances, the court may
2 request an attorney to voluntarily represent such a plaintiff. See 28 U.S.C. § 1915(e)(1); Terrell
3 v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36
4 (9th Cir. 1990). When determining whether “exceptional circumstances” exist, the court must
5 consider plaintiff’s likelihood of success on the merits as well as the ability of the plaintiff to
6 articulate his claims pro se in light of the complexity of the legal issues involved. Palmer v.
7 Valdez, 560 F.3d 965, 970 (9th Cir. 2009) (district court did not abuse discretion in declining to
8 appoint counsel). The burden of demonstrating exceptional circumstances is on the plaintiff. Id.

9 Having considered the factors under Palmer, the court finds that plaintiff has failed to
10 meet his burden of demonstrating exceptional circumstances warranting the appointment of
11 counsel at this time. Accordingly, the court denies plaintiff’s motions for appointment of
12 counsel.¹

13 Finally, defendants filed a request for an extension of time to file a motion for summary
14 judgment. Good cause appearing, the court grants defendants’ request and directs defendants to
15 file any motion for summary judgment within forty-five days of any order adopting the findings
16 and recommendations herein.

17 CONCLUSION

18 Accordingly, IT IS HEREBY ORDERED that:

- 19 1. Plaintiff’s motions for appointment of counsel (Doc. Nos. 41 & 47) are denied;
- 20 2. Plaintiff’s motion for a court order (Doc. No. 47) is denied;

21 ¹ In one of his motions for appointment of counsel, plaintiff also requests a court order directing
22 prison officials to relinquish his legal property. As an initial matter, not long after plaintiff filed
23 his motion, he filed a notice of change of address indicating that he recently moved from CSP-
24 Sacramento to Salinas Valley State Prison where he is presently incarcerated. In this regard,
25 insofar as plaintiff’s motion could be construed as a motion for preliminary injunctive relief,
26 plaintiff is no longer subject to the alleged conditions he complained of at CSP-Sacramento, so
27 any request for a court order providing immediate relief is now moot. Andrews v. Cervantes, 493
28 F.3d 1047, 1053 n.5 (9th Cir. 2007) (citing Johnson v. Moore, 948 F.2d 517, 510 (9th Cir. 1991)
(per curiam)). In any case, at this time there are no motions pending before the court that require
a response from plaintiff, so there is insufficient reason for this court to interfere with the day-to-
day operations of plaintiff’s prison. Wright v. Rushen, 642 F.2d 1129, 1132 (9th Cir. 1981)
(courts should “avoid enmeshing themselves in the minutiae of prison operations”). Accordingly,
the court will deny plaintiff’s motion for a court order.

1 3. Defendants' motion for an extension of time to file a motion for summary judgment
2 (Doc. No. 46) is granted;

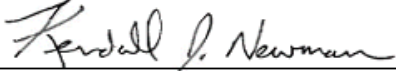
3 4. Within forty-five days of an order adopting these findings and recommendations,
4 defendants shall file any motion for summary judgment; and

5 5. Except as otherwise provided in this order, the court's discovery and scheduling order
6 remains in effect.

7 IT IS HEREBY RECOMMENDED that plaintiff's motion to amend his complaint (Doc.
8 No. 38) be denied.

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

17 Dated: February 26, 2016

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20 KENDALL J. NEWMAN
21 UNITED STATES MAGISTRATE JUDGE

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