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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LEO B. TURNER, Jr.,
Plaintiff,
v.
R. COLON, et al.,
Defendants.

No. 2:11-cv-2343 KJM AC P

ORDER

This prisoner civil rights action was remanded from the Ninth Circuit with the instruction that under Albino v. Baca, 747 F. 1162 (9th Cir. 2014), a motion for summary judgment, not a non-enumerated Rule 12(b) motion, is the appropriate vehicle for defendants to seek to plead and prove plaintiff’s failure to exhaust administrative remedies.¹ ECF Nos. 113, 117. Defendants were subsequently ordered to file a response to the second amended complaint. ECF Nos. 116, 120. On September 2, 2014, defendants filed both an answer and a motion for summary judgment on the ground that plaintiff has failed to exhaust his administrative remedies. ECF Nos. 122, 123. Plaintiff has filed an opposition to defendants’ summary judgment motion. ECF No. 132. Defendants also filed, on September 5, 2014, a motion for a protective order staying discovery pending resolution of the potentially case-dispositive motion. ECF No. 124. Plaintiff

¹ The matter had been adjudicated in the district court -- and was appealed from -- prior to the April 3, 2014 ruling in Albino.

1 has not expressly addressed the motion for a protective order but seeks a 60-day extension of time
2 to file certain discovery documents in support of his own motion for summary judgment against
3 defendants. ECF No. 133.

4 I. Defendants' Motion for a Protective Order

5 Defendants seek a protective order pending adjudication of their motion for summary
6 judgment, to forestall the additional expenditure of resources for discovery responses.

7 Defendants contend that their motion may dispose of the entire case or specific claims and/or
8 defendants. ECF No. 124.

9 A. Standards Governing Motion to Stay

10 The scope of discovery under Fed.R.Civ.P. 26(b)(1) is broad. Discovery may be obtained
11 as to “any nonprivileged matter that is relevant to any party's claim or defense---including the
12 existence, description, nature, custody, condition and location of any documents or other tangible
13 things and the identity and location of persons who know of any discoverable matter.” Id.

14 Discovery may extend to relevant information not admissible at trial “if the discovery appears
15 reasonably calculated to lead to the discovery of admissible evidence.” Id. The court, however,
16 may limit discovery if it is “unreasonably cumulative or duplicative,” or can be obtained from
17 another source “that is more convenient, less burdensome, or less expensive”; or if the party who
18 seeks discovery “has had ample opportunity to obtain the information by discovery”; or if the
19 proposed discovery is overly burdensome. Fed.R.Civ.P. 26(b)(2)(C)(i), (ii) and (iii).

20 A party may seek a protective order that stays discovery pending resolution of a
21 potentially dispositive motion such as a motion to dismiss pursuant to Federal Rule of Civil
22 Procedure 12(b)(6). See, e.g., Wenger v. Monroe, 282 F.3d 1068, 1077 (9th Cir. 2002) (affirming
23 district court's grant of protective order staying discovery pending resolution of motion to dismiss
24 filed pursuant to Federal Rule of Civil Procedure 12(b)(6)). District courts may exercise “wide
25 discretion in controlling discovery.” Little v. City of Seattle, 863 F.2d 681, 685 (9th Cir.1988).

26 The Federal Rules provide that good cause is required in order for a party to obtain a
27 protective order. Fed. R. Civ. P. 26(c); Kiblen v. Retail Credit Co., 76 F.R.D. 402, 404 (E.D.
28 Wash. 1977). “Good cause” exists when justice requires the protection of “a party or person from

1 any annoyance, embarrassment, oppression, or undue burden or expense.” Fed. R. Civ. P.
2 26(c)(1). To prevail on a motion for a protective order, the party seeking the protection has the
3 burden to demonstrate “particular and specific demonstration[s] of fact, as distinguished from
4 conclusory statements” Twin City Fire Ins. Co. v. Employers Ins. of Wausau, 124 F.R.D.
5 652, 653 (D. Nev. 1989); Kamp Implement Co. v. J.I. Case Co., 630 F. Supp. 218, 219 (D. Mont.
6 1986).

7 The Ninth Circuit has not articulated a clear standard for staying discovery in the face of a
8 pending, potentially dispositive motion. Mlejnecky v. Olympus Imaging Am., Inc., No. 2:10-cv-
9 2630-JAM-KJN, 2011 WL 489743 at *6 (E.D. Cal. Feb. 7, 2011). “However, federal district
10 courts in California have applied a two-part test when evaluating such a request for a stay.” Id.;
11 Lowery v. F.A.A., 1994 WL 912632, *3 (E.D. Cal. 1994). “First, the pending motion must be
12 potentially dispositive of the entire case, or at least dispositive on the issue at which discovery is
13 aimed.” Mlejnecky, *6. Second, the court must determine whether the potentially dispositive
14 pending motion can be decided without additional discovery. Id. If these two prongs are satisfied
15 by the moving party, the court may issue a protective order. Id. If either prong of the test is not
16 met, discovery should proceed. Id.

17 B. Discussion

18 In the instant case, defendants contend that their pending summary judgment motion is
19 potentially case dispositive. ECF No. 124-1 at 3. Even if the motion does not resolve this case,
20 the claims and the scope of permissible discovery may be narrowed if any portion of their motion
21 is granted. Id. Moreover, defendants argue that plaintiff does not require further discovery in
22 order to oppose the motion, as evidenced by the fact that he has already filed an opposition. Id.
23 The court finds that both prongs of the test are met in that the motion is potentially case
24 dispositive or at a minimum may narrow the issues. Davis v. Monroe County Bd. of Educ., 526
25 U.S. 629, 633, 654 (1999); Mlejnecky at *10. In addition, the motion can be adjudicated without
26 further discovery.

27 Moreover, a Discovery and Scheduling Order has not yet issued in this case. The court
28 finds that defendants should not be subjected to the undue burden or expense of responding to

1 discovery which may ultimately prove not to be reasonably calculated to lead to the discovery of
2 relevant evidence.

3 II. Plaintiff's Motion

4 Plaintiff has filed a motion for a sixty day extension of time “to file a[] deposition,
5 interrogatory, and affidavit, discovery in support of my summary judgment against defendants.”
6 ECF No. 133. Plaintiff has evidently recently paroled. He contends that an unnamed property
7 officer at Kern Valley State Prison destroyed his legal books and materials related to this case and
8 is seeking the extension “so my lawyer can prepare a defen[s]e on my behalf” and, in the first
9 instance, is seeking counsel. Id. at 1-2.

10 In the district court order granting the motion to dismiss, plaintiff's motion for summary
11 judgment, ECF No. 83, was vacated as moot. ECF No. 103. The order of remand addresses only
12 the dismissal on administrative exhaustion grounds, it does not reinstate the vacated motion.
13 Accordingly, plaintiff's request relates to a motion that is not pending before the court.

14 Even if plaintiff's summary judgment motion, originally filed on September 16, 2013, was
15 renewed by the remand, it would be vacated now on different grounds. The undersigned finds
16 that the motion is premature, and that it is defective in that does not comply with Rule 56(c)(1) of
17 the Federal Rules of Civil Procedure² or Local Rule 260(a). In his Statement of Undisputed
18 Facts, plaintiff has failed to “cite the particular portions of any pleading, affidavit, deposition,
19 interrogatory answer, admission, or other document relied upon to establish that fact.” L. R.
20 260(a). If plaintiff intends to bring a summary judgment motion addressing the merits of this
21 case, it is not yet the appropriate time to do so. If this case survives summary judgment on the
22 administrative exhaustion issue, the court will lift the stay here imposed on discovery and a
23 Discovery and Scheduling Order will issue. Plaintiff will then have the opportunity to conduct
24 discovery and bring whatever motions he wishes.

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26 ² “A party asserting that a fact cannot be . . . genuinely disputed must support the assertion by:
27 (A) citing to particular parts of materials in the record, including depositions, documents,
28 electronically stored information, affidavits or declarations, stipulations (including those made for
purposes of the motion only), admissions, interrogatory answers, or other materials Fed. R.
Civ. P. 56(c)(1)(A).

1 III. Defendants' Request for the Application of Non-Prisoner Provisions of the Local Rules

2 Defendants ask the court to apply the non-prisoner provisions of the Local Rules in place
3 of L.R. 230(1) because plaintiff has been discharged from the California Department of
4 Corrections and Rehabilitation (CDCR). ECF No. 131 at 3, Declaration of Janet N. Chen ¶¶ 2-3.
5 Plaintiff has not opposed the request. The request will be granted but as to defendants' pending
6 summary judgment motion, this matter will be deemed submitted on the papers without need for
7 oral argument.

8 Accordingly, IT IS ORDERED that:

9 1. Defendants' motion for a protective order staying discovery (ECF No. 124) is
10 GRANTED;


11 2. Discovery in this case is STAYED until resolution of defendants' pending summary
12 judgment motion on grounds of non-exhaustion of administrative remedies;

13 3. Assuming, in light of the Ninth Circuit remand, the renewal of plaintiff's previously
14 vacated motion for summary judgment (ECF No. 83), the motion is vacated as premature and
15 procedurally defective;

16 4. Plaintiff's motion for an extension of time to file documents in support plaintiff's
17 motion for summary judgment (ECF No. 133) is denied without prejudice as premature;

18 5. Defendants' unopposed request at ECF No. 131 that this matter be governed by the
19 non-prisoner provisions of L.R. 230, and not L.R. 230(1), is granted on the basis that plaintiff has
20 been discharged from prison. Defendants' pending summary judgment motion is nonetheless
21 ordered submitted on the papers.

22 DATED: October 15, 2014

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24 ALLISON CLAIRE
25 UNITED STATES MAGISTRATE JUDGE
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