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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

KEVIN ALLEN,
Plaintiff,
v.
T. VIRGA, et al.,
Defendants.

No. 2:12-cv-1583 TLN AC P

ORDER

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with an action filed pursuant to 42 U.S.C. § 1983. Presently before the court are plaintiff’s motions to stay and for appointment of counsel, ECF Nos. 48, 50, as well as a second amended complaint, ECF No. 49.

BACKGROUND

Plaintiff’s original complaint alleged that defendants Warden Virga and Rabbi Korik had denied plaintiff a kosher diet in violation of his First Amendment right to practice his religion. Defendants Virga and Korik brought motions to dismiss which were granted in part and denied in part on September 16, 2013. The motions to dismiss on statute of limitations grounds were denied with prejudice. The motions to dismiss on grounds of qualified immunity were denied but without prejudice. Defendant Virga’s motion to dismiss for failure to state a claim was granted, but plaintiff was granted leave to amend. In addition, plaintiff was granted leave to amend to state a claim under the Religious Land Use and Institutionalized Persons Act of 2000

1 (“RLUIPA”), 42 U.S.C. § 2000cc-1. Plaintiff’s prospective injunctive relief claims were
2 dismissed as moot and the matter proceeded at that point only on plaintiff’s claims for money
3 damages. See ECF No. 43 (Order adopting Findings and Recommendations (ECF No. 37)).

4 Plaintiff subsequently filed a timely first amended complaint which stated colorable
5 RLUIPA and First Amendment free exercise claims against defendant Virga, but which failed to
6 identify defendant Korik as a party and made insufficiently supported claims of conspiracy. The
7 first amended complaint was dismissed with leave to file a second amended complaint. See ECF
8 No. 47. Defendant Korik’s request for a protective order with respect to plaintiff’s discovery
9 requests was granted, staying discovery as to defendant Korik because it was unclear whether
10 plaintiff intended to proceed against him. Id. Plaintiff, however, filed a timely second amended
11 complaint. ECF No. 49.

12 SECOND AMENDED COMPLAINT

13 The second amended complaint states a cognizable claim for relief against defendants I.
14 Korik and T. Virga pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1915A(b), for violating
15 plaintiff’s First Amendment right to the free exercise of religion and of his rights under RLUIPA¹
16 by denying him access to a kosher diet. Defendants must file a response to the second amended
17 complaint within 21 days.

18 PLAINTIFF’S MOTIONS

19 Plaintiff filed a “motion to stay,” on November 7, 2013, prior to the filing of his second
20 amended complaint. Plaintiff seeks a stay in order for the court to determine “whether a non-
21 requested amended complaint ordered by the court for one defendant can reverse a final judgment
22 rendered against another defendant.” ECF No. 48. Plaintiff evidently objected to defendant
23 Korik’s having sought a protective order with regard to plaintiff’s discovery requests because, at
24 least with respect to the original complaint, plaintiff was still proceeding against defendant Korik.
25 However, as plaintiff was informed in the order of October 31, 2013, his superseding first
26 amended complaint did not indicate he was proceeding against that defendant. Therefore,
27

28 ¹ Religious Land Use and Institutionalized Persons Act.

1 plaintiff's inapposite motion for a stay, which in any event is now moot, will be denied.

2 Plaintiff has also requested appointment of counsel. The United States Supreme Court has
3 ruled that district courts lack authority to require counsel to represent indigent prisoners in § 1983
4 cases. Mallard v. United States Dist. Court, 490 U.S. 296, 298 (1989). In certain exceptional
5 circumstances, the district court may request the voluntary assistance of counsel pursuant to 28
6 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991); Wood v.
7 Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990).

8 The test for exceptional circumstances requires the court to evaluate the plaintiff's
9 likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se in
10 light of the complexity of the legal issues involved. See Wilborn v. Escalderon, 789 F.2d 1328,
11 1331 (9th Cir. 1986); Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983). Circumstances
12 common to most prisoners, such as lack of legal education and limited law library access, do not
13 establish exceptional circumstances that would warrant a request for voluntary assistance of
14 counsel. In the present case, the court does not find the required exceptional circumstances.

15 Accordingly, IT IS HEREBY ORDERED that:

- 16 1. This matter now proceeds against defendants Korik and Virga on plaintiff's second
17 amended complaint, ECF No. 49, for money damages on plaintiff's allegations of violation of his
18 First Amendment right to the free exercise of religion and his rights under RLUIPA;
- 19 2. Defendants' response to the second amended complaint must be filed within 21 days;
- 20 3. The stay of discovery by way of a protective order granted defendant Korik is hereby
21 lifted;
- 22 4. Plaintiff's "motion for a stay," ECF No. 48, is denied;
- 23 5. Plaintiff's request for appointment of counsel, ECF No. 50, is denied.

24 DATED: April 11, 2014

25 
26 ALLISON CLAIRE
27 UNITED STATES MAGISTRATE JUDGE
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