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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ANTHONY TYRONE GARRISON,
Plaintiff,
v.
OFFICER BAUTISTA,
Defendant.

No. 2:13-cv-0479 JAM KJN P

FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner, currently incarcerated at California State Prison–Solano. Plaintiff proceeds, in forma pauperis and without counsel, in this civil rights action filed pursuant to 42 U.S.C. § 1983.

Throughout the course of this action, plaintiff has alleged that sole defendant Officer Bautista, a police officer with the City of Vallejo Police Department, used excessive force during the course of plaintiff’s arrest by kicking plaintiff in the jaw. Defendant Bautista eventually filed a motion for summary judgment, in which he asserted the absence of any genuine dispute regarding the fact that he (Bautista) did not kick plaintiff in the jaw. (ECF No. 60.) The court conducted an initial review of the materials submitted by the parties in support of, and in opposition to, the motion for summary judgment. Upon concluding its review, the court noted that – at least according to a police report submitted by defendant in support of his summary judgment motion – the individual who kicked plaintiff in the jaw may have been one Corporal

1 Estudillo (a non-party), rather than defendant Bautista. (See ECF No. 69.) Out of an abundance
2 of caution, the court granted plaintiff leave to file an amended complaint naming Estudillo as an
3 additional defendant. (Id.)¹

4 In response to the court's order, plaintiff filed a motion to amend the complaint, together
5 with a proposed amended complaint. (ECF No. 70.) Notably, in his proposed amended
6 complaint, plaintiff chose to proceed solely against Corporal Estudillo, rather than against both
7 Estudillo and Bautista. (See ECF No. 71.) Defendant Bautista timely filed an opposition to
8 plaintiff's motion to amend. (ECF No. 72.) Plaintiff failed to file a reply.

9 Defendant argues in his opposition that the applicable statute of limitations has run on
10 plaintiff's claim against defendant Corporal Estudillo. Because 42 U.S.C. § 1983 has no
11 independent statute of limitations, Johnson v. State of California, 207 F.3d 650, 653 (9th Cir.
12 2000), courts must instead apply the limitations period governing personal injury actions in the
13 state where the cause of action arose. Wallace v. Kato, 549 U.S. 384, 387 (2007) (citing Owens
14 v. Okure, 488 U.S. 235, 238 (1989)); see also Wilson v. Garcia, 471 U.S. 261, 271-72, 276
15 (1985). Under California law, as of January 1, 2003, the generally-applicable statute of
16 limitations in personal injury actions is two years. See Cal. Code Civ. Proc. § 335.1.²

17 As plaintiff alleges that Corporal Estudillo subjected him to excessive force on November
18 10, 2012, the statute of limitations on any Section 1983 claim against Estudillo would have run on
19 November 10, 2014.³ In order to state a claim solely against Estudillo, then, plaintiff's proposed

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21 ¹ The undersigned expressly suggested plaintiff name an additional defendant to potentially avoid
the relation-back issue.

22 ² As plaintiff was not incarcerated at the time he alleges that Corporal Estudillo struck him, he is
23 not entitled to tolling under California Code of Civil Procedure § 352.1(a), which provides: "If a
24 person entitled to bring an action . . . is, at the time the cause of action accrued, imprisoned on a
25 criminal charge, or in execution under the sentence of a criminal court for a term less than for life,
the time of that disability is not a part of the time limited for the commencement of the action, not
to exceed two years." Id.

26 ³ Defendant's brief contends that the applicable deadline is November 14, 2014 (ECF No. 72 at
27 6), rather than November 10, 2014, without further explanation. The court is uncertain as to why
28 defendant chose the former date, but in any event, the analysis as to the limitations period is the
same whichever date is chosen.

1 amended complaint would have to relate back to March 8, 2013, the date on which plaintiff filed
2 his initial complaint against defendant Bautista.

3 Under the applicable provision of Federal Rule of Civil Procedure 15:

4 **An amendment to a pleading relates back to the date of the**
5 **original pleading when:**

6 (A) the law that provides the applicable statute of limitations allows
7 relation back;

8 (B) the amendment asserts a claim or defense that arose out of the
9 conduct, transaction, or occurrence set out--or attempted to be set
10 out--in the original pleading; or

11 (C) **the amendment changes the party or the naming of the party**
12 **against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied**
13 **and if, within the period provided by Rule 4(m) for serving the**
14 **summons and complaint, the party to be brought in by**
15 **amendment:**

16 (i) received such notice of the action that it will not be
17 prejudiced in defending on the merits; and

18 (ii) **knew or should have known that the action would**
19 **have been brought against it, but for a mistake**
20 **concerning the proper party's identity.**

21 Fed. R. Civ. P. 15(c) (emphasis added).

22 Federal Rule of Civil Procedure 4(m) provides 90 days after filing for service of the
23 summons and complaint,⁴ and in a non-prisoner case, would ordinarily have established a
24 deadline of June 6, 2013. However, given the requirement set forth in 28 U.S.C. § 1915A that the
25 court review “a complaint in a civil action in which a prisoner seeks redress from a[n] . . . officer
26 or employee of a governmental entity” prior to ordering service, the court finds that the applicable
27 deadline was October 31, 2013, i.e., 90 days after August 2, 2013, the date on which the court
28 ordered service of the summons and complaint on defendant Baustista. (See ECF No. 20.)

⁴ Prior to December 1, 2015, Federal Rule of Civil Procedure 4(m) provided 120 days after filing for service of the complaint. However, the court must “apply the legal standards presently in effect, rather than those that were [previously] in effect” Frye v. Wong, No. CIV. S-99-628 LKK CKD, 2014 WL 4369161 at *3 (E.D. Cal. Aug. 28, 2014). Accord Tully v. Mobil Oil Corp., 455 U.S. 245, 247 (1982) (“The normal rule in a civil case is that we judge it in accordance with the law as it exists at the time of our decision.”). Accordingly, the court applies the new 90 day deadline herein.

1 Accompanying defendant's opposition is the declaration of defendant's counsel, Kelly J.
2 Trujillo, which sets forth facts establishing that Corporal Estudillo retired from the City of Vallejo
3 Police Department on February 24, 2013, before the filing of this action. (ECF No. 72-1 ¶ 2.)
4 The declaration further provides that "when a new lawsuit is served on the City of Vallejo, the
5 City Attorney's office provides email notification of the new lawsuit to the named Defendant(s),
6 the department head of the named employee(s)[,] and City administration. [. . .] [S]uch notice
7 was provided via email on September 10, 2013, to the Chief of Police and City administration.
8 On October 11, 2013, an email regarding the lawsuit was sent to Officer Bautista. Corporal
9 Estudillo was not sent this notice during the Rule 4(m) period or at any other time regarding this
10 matter because he was not a named Defendant." (Id. ¶¶ 3-4.)

11 In the court's view, under these facts, plaintiff cannot show that Corporal Estudillo
12 "should have known" of the instant lawsuit within the applicable period. Fed. R. Civ.
13 P. 15(c)(1)(C)(ii).

14 Defendant's briefing nevertheless left open the question of whether Corporal Estudillo
15 "knew," i.e., had actual knowledge of, the instant lawsuit within the applicable period. Therefore,
16 by order filed November 3, 2015, the court directed defendant to "file and serve a declaration,
17 signed by Corporal Estudillo under penalty of perjury, that states the date on, and the
18 circumstances under, which Corporal Estudillo learned of the instant lawsuit." (ECF No. 74 at 4.)
19 On November 16, 2015, defendant filed a responsive declaration made under penalty of perjury
20 by Corporal Estudillo. Estudillo therein avers that "[p]rior to September 2015, [he] had not
21 knowledge about the instant lawsuit from any source." (ECF No. 75 at 2.)

22 In light of Corporal Estudillo's declaration, plaintiff has failed to show that Corporal
23 Estudillo "knew" of the instant lawsuit within the applicable period. Fed. R. Civ.
24 P. 15(c)(1)(C)(ii). Consequently, plaintiff cannot demonstrate that his proposed amended
25 complaint "relates back" to the date on which he filed his original complaint. Plaintiff's motion
26 for leave to file an amended complaint naming Corporal Estudillo as the sole defendant must
27 therefore be denied.

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1 Moreover, through the filing of a proposed amended complaint omitting Officer Bautista
2 as a named defendant, plaintiff has implicitly conceded that Bautista was not the individual who
3 committed the alleged civil rights violations. See Fed. R. Civ. P. 11(b) (“By presenting to the
4 court a pleading . . . an attorney or unrepresented party certifies that to the best of the person’s
5 knowledge, information, and belief, formed after an inquiry reasonable under the
6 circumstances: . . . the factual contentions have evidentiary support . . .”).⁵ It therefore appears
7 that Officer Bautista is entitled to entry of summary judgment in his favor, on the grounds that
8 there is no genuine dispute that he was not the individual who allegedly kicked plaintiff in the
9 face on November 10, 2012. (See ECF No. 60.)

10 Dismissal of this action therefore appears warranted.

11 In light of the foregoing, IT IS HEREBY RECOMMENDED that:

- 12 1. Plaintiff’s motion for leave to file a third amended complaint (ECF No. 70) be denied,
13 based on plaintiff’s failure to file a complaint against Corporal Brian Estudillo within the
14 applicable statute of limitations;
- 15 2. Defendant’s motion for summary judgment (ECF No. 60) be granted; and
- 16 3. This action be dismissed.

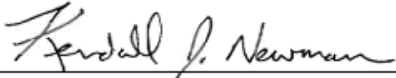
17 These findings and recommendations are submitted to the United States District Judge
18 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
19 after being served with these findings and recommendations, any party may file written
20 objections with the court and serve a copy on all parties. Such a document should be captioned
21 “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the
22 objections shall be filed and served within fourteen days after service of the objections. The

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25 ⁵ Plaintiff also filed a declaration, in support of his motion for leave to file an amended complaint
26 naming Corporal Estudillo as the sole defendant, in which he states that his “intentions is to bring
27 action against the officer that kicked me in my face there would be no need to seek litigation
28 against two defendants when there was only one who violated my constitutional rights.” (sic)
(ECF No. 70-1 at 2.) This statement reinforces the court’s view that plaintiff has acknowledged
that Officer Bautista did not kick him in the face, thereby conceding the grounds for defendant’s
summary judgment motion.

1 parties are advised that failure to file objections within the specified time may waive the right to
2 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 Dated: December 18, 2015

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KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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