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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DANNY R. GARCIA,
Plaintiff,
v.
C/O HEATH, et al.,
Defendants.

No. 2:13-cv-1952 JAM AC P

ORDER

I. Introduction

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with this civil rights action. By order filed December 27, 2016, all defendants with the exception of defendant Mendoza were dismissed due to plaintiff's failure to exhaust his available administrative remedies. See ECF Nos. 78, 68. On October 25, 2017, defendant Mendoza filed a motion for summary judgment on the merits of plaintiff's remaining claim that Mendoza engaged in a campaign of retaliatory searches of plaintiff's cell and central file in violation of the First Amendment. See ECF No. 111. Plaintiff's opposition or statement of non-opposition is due within 21 days after service of defendant's motion. See Local Rule 230(l). However, currently pending is plaintiff's request for appointment of counsel or the dismissal of this case without prejudice together with instructions on the applicable statute of limitations. See ECF No. 114.

1 For the reasons set forth below, plaintiff's request for appointment of counsel is denied,
2 and plaintiff is directed to timely file either a response to defendant's pending motion for
3 summary judgment or a request that this action be voluntarily dismissed.

4 II. Request for Appointment of Counsel

5 This is plaintiff's tenth request for appointment of counsel. In denying plaintiff's ninth
6 request, the court found that plaintiff had again failed to demonstrate "exceptional circumstances"
7 warranting appointment, based on the factors set forth in Palmer v. Valdez, 560 F.3d 965, 970
8 (9th Cir. 2009), and Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th Cir. 1986). See ECF No.
9 77. The undersigned noted that plaintiff has been an "articulate and capable litigant" in this case,
10 the complexities of which were significantly reduced by the court's December 27, 2016 decision.
11 Id. at 3. These factors have not changed. Moreover, plaintiff's instant request is premised on the
12 alleged importance of the original issues presented in this action ("conspiracy of harassment" by
13 all defendants) to "hundreds of other inmates who are too afraid to defend themselves," and the
14 need for this court to again "view all of the evidence." ECF No. 114 at 2-3. Plaintiff implores the
15 court, id. at 2 (with minor edits):

16 "If" the court does not want to see the extreme need for counsel for
17 such a severe case that is clearly damaged and that plaintiff cannot
18 proceed by himself to seek justice then plaintiff asks the court to
19 dismiss this case without prejudice so that plaintiff can start all over
20 again, but first plaintiff will need time to study more law for such a
complicated case and needs to know how much time he will have to
re-file (§ 1983) before the statute of limitations runs out because it
would be very irresponsible for plaintiff to not pursue justice for
such heinous crimes.

21 For the reasons previously stated by the undersigned, the court again finds that plaintiff
22 has failed to demonstrate "exceptional circumstances" warranting the appointment of counsel.
23 See ECF No. 77 and prior orders cited therein. Significantly, the court did appoint counsel for
24 plaintiff for the limited purpose of representing him at a settlement conference on June 5, 2017.
25 See ECF No. 95. However, the case did not settle. Thereafter, the court authorized an additional
26 period of discovery specific to enable plaintiff to fully develop his narrowed case against
27 defendant Mendoza. See ECF No. 102. Plaintiff's continuing efforts to "restart" this case with
28 the previously dismissed defendants remain unavailing, both in substance and as a rationale for

1 obtaining appointment of counsel. Accordingly, plaintiff's instant request for appointment of
2 counsel will be denied.

3 III. Alternative Request for Dismissal

4 This court is without authority to advise plaintiff whether to voluntarily dismiss this case,
5 which is his decision alone. Requests for voluntary dismissal are made pursuant to Rule 41(a)(2),
6 Federal Rules of Civil Procedure. The court provides the following general information
7 concerning the statute of limitations in prisoner civil rights actions, but expresses no opinion
8 concerning its application in the instant case.

9 "[B]ecause there is no specified statute of limitations for an action under 42 U.S.C. §
10 1983, the federal courts look to the law of the state in which the cause of action arose and apply
11 the state law of limitations governing an analogous cause of action." Pouncil v. Tilton, 704 F.3d
12 568, 573 (9th Cir. 2012) (citation omitted). "For actions under 42 U.S.C. § 1983, courts apply the
13 forum state's statute of limitations for personal injury actions, along with the forum state's law
14 regarding tolling, including equitable tolling, except to the extent any of these laws is inconsistent
15 with federal law." Jones v. Blanas, 393 F.3d 918, 927 (9th Cir. 2004); see also Azer v. Connell,
16 306 F.3d 930, 935-36 (9th Cir. 2002).

17 In California, the statute of limitations for personal injury actions is two years. See Cal.
18 Code Civ. Proc. § 335.1; Maldonado v. Harris, 370 F.3d 945, 954-55 (9th Cir. 2004). This
19 limitations period is statutorily tolled for another two years for prisoners serving less than a life
20 sentence, resulting in a total limitations period of four years; however, prisoners serving life
21 sentences are not entitled to this statutory tolling. See Cal. Civ. Proc. Code § 352.1(a); Johnson v.
22 State of California, 207 F.3d 650, 654 (9th Cir. 2000).

23 Also in California, "the applicable statute of limitations must be tolled while a prisoner
24 completes the mandatory [administrative] exhaustion process." Brown v. Valoff, 422 F.3d 926,
25 943 (9th Cir. 2005).

26 Additionally, "[u]nder California law, a plaintiff must meet three conditions to equitably
27 toll a statute of limitations: (1) defendant must have had timely notice of the claim; (2) defendant
28 must not be prejudiced by being required to defend the otherwise barred claim; and (3) plaintiff's

1 conduct must have been reasonable and in good faith.” Fink v. Shedler, 192 F.3d 911, 916 (9th
2 Cir. 1999), cert. denied, 529 U.S. 1117 (2000) (citation omitted); see also Lantzy v. Centex
3 Homes (2003) 31 Cal. 4th 363, 370 (“This court has applied equitable tolling in carefully
4 considered situations to prevent the unjust technical forfeiture of causes of action, where the
5 defendant would suffer no prejudice.”) (collecting cases); but see Diggs v. Williams, 2006 WL
6 1627887, at *3, 2006 U.S. Dist. LEXIS 37772, at *9 (E.D. Cal. June 8, 2006) (Case No. 2:05-cv-
7 1168 DFL GGH P) (“California courts have declined to find equitable tolling in cases where the
8 plaintiff’s own conduct delayed the prosecution of his previous action.”) (collecting cases).


9 Finally, “[a]lthough state law determines the length of the limitations period, ‘federal law
10 determines when a civil rights claim accrues.’” Azer, 306 F.3d at 936 (quoting Morales v. City of
11 Los Angeles, 214 F.3d 1151, 1153-54 (9th Cir. 2000). “Under federal law, a claim accrues when
12 the plaintiff knows or has reason to know of the injury which is the basis of the action.”
13 TwoRivers v. Lewis, 174 F.3d 987, 991 (9th Cir. 1999).

14 IV. Conclusion

15 For the foregoing reasons, IT IS HEREBY ORDERED that:

- 16 1. Plaintiff’s tenth request for appointment of counsel, ECF No. 114, is denied without
17 prejudice; and
18 2. Plaintiff shall, within 21 days after service of defendant’s pending motion for summary
19 judgment, either (1) file and serve a response to defendant’s motion, or (2) submit a request that
20 this action be voluntarily dismissed pursuant to Rule 41(a)(2), Federal Rules of Civil Procedure.

21 DATED: October 31, 2017

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23 ALLISON CLAIRE
24 UNITED STATES MAGISTRATE JUDGE
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