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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRYAN MAZZA,

Plaintiff,

v.

L. AUSTIN, et al.,

Defendants.

No. 2:14-cv-0874 GEB AC P

ORDER and

ORDER TO SHOW CAUSE

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with this civil rights action filed pursuant to 42 U.S.C. § 1983. Plaintiff is pursuing claims against five defendants for alleged deliberate indifference to his serious medical needs. The operative complaint and addendum (exhibits), construed together by the court in deference to plaintiff’s pro se status, are identified on the docket at ECF No. 38. This action was stayed for several months while plaintiff was temporarily housed at a county jail facility. Upon plaintiff’s return to state prison, the court, on March 29, 2017, issued a Further Discovery and Scheduling Order, setting a discovery deadline of August 18, 2017, and a dispositive motion deadline of November 17, 2017. See ECF No. 83. Plaintiff has now filed several documents requesting the assistance of the court. For the reasons that follow, plaintiff’s requests are denied with the exception of his request that defendants be required to show cause why plaintiff is not obtaining the pain medication allegedly prescribed by his treating neurologist.

1 MEDICAL EXPERT

2 Plaintiff requests that he be provided a thorough medical examination, including review of
3 his medical records, by an outside medical expert. See ECF No. 88. Because there is no
4 authority or resources for appointing an expert medical witness to serve as plaintiff’s advocate in
5 this action, this motion will be denied. The in forma pauperis statute, 28 U.S.C. § 1915, “does not
6 waive payment of fees or expenses for witnesses.” Dixon v. Ylst, 990 F.2d 478, 480 (9th Cir.
7 1993). More specifically, “[t]he plain language of [S]ection 1915 does not provide for the
8 appointment of expert witnesses to aid an indigent litigant.” Pedraza v. Jones, 71 F.3d 194, 196
9 (5th Cir. 1995); accord, Boring v. Kozakiewicz, 833 F.2d 468, 474 (3d Cir. 1987), cert. denied,
10 485 U.S. 991 (1988) (district court has no authority under Section 1915 to pay or waive expert
11 witness fees in civil damage suits). However, should the court later determine that a neutral
12 medical expert is necessary in this action, it may appoint such expert and assess the costs as the
13 court deems appropriate. See Fed. R. Evid. 706(a); Walker v. American Home Shield Long Term
14 Disability Plan, 180 F.3d 1065, 1071 (9th Cir. 1999). Accordingly, plaintiff’s motion for a
15 medical expert is denied without prejudice.

16 WITNESSES

17 Plaintiff has identified four potential witnesses in this action and requests that the court
18 allow him to present these witnesses during the course of this litigation and at trial, by video-
19 conference if necessary. See ECF No. 89. The identified witnesses are two physicians, Dr.
20 McAlpine and Dr. Mitchell, and two prisoners, Mr. Kaufman and Mr. Christianson. For the
21 reasons previously stated by this court when plaintiff sought assistance in locating and obtaining
22 the testimony of Dr. McAlpine, plaintiff’s motion is denied without prejudice. See ECF No. 87
23 (copy attached).

24 Plaintiff is again informed that he is responsible for the costs associated with his discovery
25 requests and subpoenas, including deposition subpoenas, and therefore is again encouraged to
26 obtain written declarations from his medical witnesses; these declarations could be used before
27 trial in responding to any dispositive motion that may be filed earlier in this case. (Plaintiff has
28 already provided the declarations of Mr. Kaufman and Mr. Christianson, see ECF No. 89 at 5-6,

1 although each declaration would benefit from greater detail.) Should this case proceed to trial,
2 plaintiff will have an opportunity to obtain the trial attendance of his witnesses; however, he will
3 be required to compensate these physicians for their time and expenses.

4 LEAVE TO AMEND

5 Plaintiff moves for leave to further amend his complaint. See ECF No. 90. The Clerk of
6 Court provisionally filed plaintiff’s proposed amended complaint. ECF No. 91. Plaintiff seeks
7 amendment to add the following proposed state law claims, see ECF No. 90 at 4: California
8 Government Code § 84406 [sic] (Cal. Govt. Code § 884.06(d) (authorizing negligence liability of
9 public employees for injuries to prisoners due to medical malpractice); id., § 845.6 (same, entitled
10 “medical care for prisoners”); Cal. Health & Safety Code § 124960(b) (“Inadequate treatment of
11 acute and chronic pain originating from cancer or noncancerous conditions is a significant health
12 problem.”); and id., § 124960(d) (“A patient suffering from severe chronic intractable pain should
13 have access to proper treatment of his or her pain.”); Cal. Code Regs. tit. 15, § 3350 (CDCR
14 regulations re. provision of medical care to prisoners); and Cal. Const., Art. I (declaration of
15 rights). Defendants have filed statements of opposition to plaintiff’s motion to proceed on his
16 proposed further amended complaint. ECF Nos. 93, 94.

17 Rule 15, Federal Rules of Civil Procedure, allows amendment of a pleading upon leave of
18 court “when justice so requires.” Fed. R. Civ. P. 15(a)(2). This standard accords considerable
19 discretion to the district courts. “[A] federal court has jurisdiction over an entire action, including
20 state-law claims, whenever the federal-law claims and state-law claims in the case ‘derive from a
21 common nucleus of operative fact’ and are ‘such that [a plaintiff] would ordinarily be expected to
22 try them all in one judicial proceeding.’” Carnegie-Mellon University v. Cohill, 484 U.S. 343,
23 349 (1988) (quoting Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966)). “Under Gibbs, a federal
24 court should consider and weigh in each case, and at every stage of the litigation, the values of
25 judicial economy, convenience, fairness, and comity in order to decide whether to exercise
26 jurisdiction over a case brought in that court involving pendent state-law claims.” Cohill, 484
27 U.S. at 350. On a motion for leave to amend a federal action to add state law claims, the court
28 must carefully consider whether the proposed state law claims meet the pleading requirements of

1 Rule 8, Federal Rules of Civil Procedure. See Fed. R. Civ. P. 8(a).

2 There are several problems with plaintiff's proposed amended complaint. First, the list of
3 proposed state law claims does not include allegations describing how each named defendant
4 allegedly violated those provisions. While plaintiff's assessment could perhaps be inferred by
5 examining the challenged conduct of each defendant, that is not the role of this court or of
6 defendants. Because plaintiff has failed to allege with specificity how each defendant violated
7 one or more of the cited state provisions, his separately filed legal citations fail to meet minimum
8 pleading requirements. See Fed. R. Civ. P. 8(a).

9 Second, plaintiff has not demonstrated compliance with the California Tort Claims Act,
10 which is required before bringing a state negligence claim. Under California law, the timely
11 presentation of a claim under the California Tort Claims Act is a condition precedent for suit and
12 therefore an element of the cause of action that must be pled in the complaint. See Shirk v. Vista
13 Unified Sch. District, 42 Cal. 4th 201, 209 (Cal. 2007) (citations omitted). The proposed
14 amended complaint does not so plead.

15 Third, review of the 13-page proposed amended complaint demonstrates that it not only
16 fails to include the proposed state law claims but also fails to include page 8 of the otherwise
17 nearly identical operative complaint. The proposed amended complaint also improperly includes
18 previously dismissed defendants. Although the proposed amended complaint correctly identifies
19 the Eastern District Court of California (rather than the Northern District, where this case was
20 originally filed), this correction is not necessary for this case to continue proceeding in this court.
21 An attached two-page "memorandum" seeks to add general state law negligence claims and to
22 obtain injunctive relief ("to reinstitute previous prescription" and "get help with his ongoing pain
23 and suffering"). ECF No. 91 at 10-1. However, these additions do not remedy the deficiencies in
24 plaintiff's proposed amended complaint.

25 For all these reasons, plaintiff's motion for leave to file his proposed further amended
26 complaint is denied.

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1 MOTION FOR INJUNCTIVE RELIEF

2 Finally, plaintiff has filed a proposed “Order to Show Cause For A Preliminary
3 Injunction,” directing defendants to show cause why plaintiff is not receiving the pain medication
4 (morphine) prescribed plaintiff by his treating neurologist, Dr. Mitchell. See ECF No. 92.
5 Plaintiff, who is incarcerated at California State Prison Solano, also seeks a restraining order
6 preventing CDCR officials from transferring him to another prison. Id. at 4.

7 There is no legal authority supporting plaintiff’s effort to prevent his transfer to another
8 prison. Prisoners have no due process right to placement in a particular correctional facility, or to
9 prevent their transfer to other facilities. Meachum v. Fano, 427 U.S. 215, 224-5 (1976).¹ For this
10 reason, this court is without authority to restrain CDCR officials from transferring plaintiff to
11 another prison.

12 Plaintiff’s claim that he is being denied prescribed pain medication, in this lawsuit about
13 deliberate indifference to plaintiff’s pain, requires further inquiry. Plaintiff avers that defendants
14 and/or other CDCR medical staff are refusing to implement the medication treatment plan
15 (morphine) prescribed by his treating physician, outside state-contracted neurologist Dr. Mitchell.

16
17 ¹ As explained by the Supreme Court, Meachum, 427 U.S. at 224-5:

18 [G]iven a valid conviction, the criminal defendant has been
19 constitutionally deprived of his liberty to the extent that the State
20 may confine him and subject him to the rules of its prison system so
21 long as the conditions of confinement do not otherwise violate the
22 Constitution. The Constitution does not . . . guarantee that the
23 convicted prisoner will be placed in any particular prison. . . . The
24 initial decision to assign the convict to a particular institution is not
25 subject to audit under the Due Process Clause, although the degree
26 of confinement in one prison may be quite different from that in
27 another. The conviction has sufficiently extinguished the
28 defendant’s liberty interest to empower the State to confine him in
any of its prisons.

Neither . . . does the Due Process Clause in and of itself protect a
duly convicted prisoner against transfer from one institution to
another within the state prison system. Confinement in any of the
State’s institutions is within the normal limits or range of custody
which the conviction has authorized the State to impose. That life
in one prison is much more disagreeable than in another does not in
itself signify that a Fourteenth Amendment liberty interest is
implicated when a prisoner is transferred to the institution with the
more severe rules.

1 Defendants will be directed to the respond to this allegation and, if medication prescribed by Dr.
2 Mitchell is not being provided, explain why.

3 CONCLUSION

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

5 1. Plaintiff's motion for an expert medical examination, ECF No. 88, is DENIED without
6 prejudice.

7 2. Plaintiff's motion for assistance in obtaining the testimony of four identified witnesses,
8 ECF No. 89, is DENIED without prejudice.

9 3. Plaintiff's motion for leave to file a further amended complaint, ECF No. 90, is
10 DENIED.

11 4. Plaintiff's motion for injunctive relief, ECF No. 92, is GRANTED IN PART and
12 DENIED IN PART as follows:

13 a. Plaintiff's request for an order of this court directing prison officials to refrain
14 from transferring him to another institution is DENIED.

15 b. Plaintiff's request for an order of this court directing defendants to show cause
16 why plaintiff is not obtaining the pain medication (morphine) allegedly prescribed by his
17 treating physician, Dr. Mitchell, is GRANTED as follows:

18 c. Defendants are directed to file and serve, within 21 days after the filing date of
19 this order, a response to plaintiff's motion for injunctive relief. Defendants shall respond to
20 plaintiff's allegation that he is not receiving pain medication (morphine) prescribed by his treating
21 neurologist, Dr. Mitchell. If such medication has been prescribed and is not being provided,
22 defendants shall explain why not.

23 5. Plaintiff may, within 7 days after service of defendants' statement, file and serve a
24 response.

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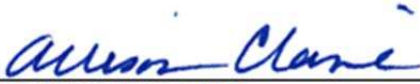
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6. The Clerk of Court is directed to: (a) strike the amended complaint at ECF No. 91; and (b) send to plaintiff, together with a copy of this order, a copy of the court's order filed May 18, 2017 (ECF No. 87).

DATED: June 12, 2017



ALLISON CLAIRE
UNITED STATES MAGISTRATE JUDGE