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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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Evgeniy Gubanov,

No. 2:14-cv-01731-JAM-EFB

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Plaintiff,

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v.

**ORDER GRANTING DEFENDANT CORRECT
CARE'S MOTION TO DISMISS**

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Stanislaus County, et al,

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Defendants.

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This matter is before the Court on Defendant Correct Care Solutions, LLC's ("Correct Care") motion to dismiss (Doc. #16).¹ Plaintiff Evgeniy Gubanov ("Plaintiff") opposes the motion (Doc. #18).

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I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

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In November 2012, Plaintiff severely fractured his ankle. First Amended Complaint ("FAC") ¶ 3 (Doc. #13). Orthopedic surgeon Stephen Berrien operated on Plaintiff's ankle and put

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¹ This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for November 18, 2015.

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1 Plaintiff's ankle in a solid white cast. Id. ¶ 21. Plaintiff
2 was told that he could not put weight on his ankle and that he
3 needed crutches to walk. Id.

4 Two months after he fractured his ankle, Plaintiff was
5 arrested and taken to Stanislaus County Jail. Id. at ¶ 2.
6 Plaintiff alleges that when he was arrested, he was wearing an
7 ankle cast and could not put any weight on his ankle. Id. at
8 ¶ 22. Police officers took Plaintiff to a hospital, where his
9 cast was removed and replaced with a plastic cast. Id.

10 Plaintiff alleges that he was taken back to the jail and not
11 given crutches or a wheelchair. Id. ¶ 23. Three days after
12 Plaintiff's arrest, jail staff took him to Correct Care, the
13 medical provider located in the jail. Id. Plaintiff alleges
14 that Correct Care's staff removed his plastic cast. Id.
15 Plaintiff alleges that due to his cast being removed, he had to
16 walk on his unhealed ankle to shower, use the bathroom, and walk
17 up the stairs to make his court appearances. Id. Plaintiff
18 alleges that walking on his unhealed ankle caused "extreme pain"
19 and "unnecessary re-injury and trauma to his ankle." Id. ¶ 24.

20 About a month after Plaintiff was arrested, jail staff took
21 him to see Dr. Berrien. Id. ¶ 26. Dr. Berrien allegedly told
22 Plaintiff that he needed surgery on his ankle as soon as
23 possible. Id. Dr. Berrien scheduled the surgery for mid-March.
24 Id. Plaintiff alleges that on March 7, 2013, Dr. Gustaveson
25 (allegedly an employee of Correct Care) told him that he had
26 cancelled Plaintiff's surgery with Dr. Berrien because, in Dr.
27 Gustaveson's opinion, "the ankle was too badly damaged to be
28 repaired and therefore the proposed surgery was worthless." Id.

1 Plaintiff also alleges that Dr. Gustaveson informed him that he
2 would be "crippled for the rest of his life." Id. This
3 information allegedly caused Plaintiff severe emotional
4 distress. Id.

5 A few months later, Plaintiff met with Dr. Berrien again,
6 and Dr. Berrien told him that he needed reconstructive surgery.
7 Id. ¶ 33. On June 20, 2013, Dr. Berrien performed surgery on
8 Plaintiff's ankle. Id. Plaintiff alleges that "the damage
9 [Plaintiff] sustained to the ankle due to denial of care and
10 forced walking on the fractured, healing ankle diminished his
11 chances for a successful outcome from the second surgery." Id.
12 Plaintiff alleges that his ankle may need amputation in the
13 future. Id.

14 On July 22, 2014, Plaintiff sued Stanislaus County and
15 Sheriff Adam Christianson (Doc. #1). On November 11, 2014, this
16 Court granted Plaintiff leave to amend his complaint (Doc. #10).
17 Plaintiff did not file his amended complaint before the Court
18 issued its scheduling order on December 3, 2014 (Doc. #12). The
19 scheduling order, in relevant part, states the following:

20 SERVICE OF PROCESS

21 All parties defendant to this lawsuit have been
22 served and no further service will be permitted except
23 with leave of court, good cause having been shown.

24 JOINER OF ADDITIONAL PARTIES/AMENDMENTS

25 No further joinder of parties or amendments to
26 pleadings is permitted except with leave of court,
27 good cause having been shown.

28 . . .

1 deadline set forth by the scheduling order to file an amendment
2 or join additional parties has passed, the liberal Federal Rule
3 of Civil Procedure 15 standard for amending a complaint no
4 longer applies. Id. at 607-608. Instead, Rule 16's standards
5 control. Id.

6 Rule 16 requires the Court to enter a scheduling order that
7 limits the time to join other parties and to amend the
8 pleadings. Fed. R. Civ. P. 16(b). "A schedule may be modified
9 only for good cause and with the judge's consent." Id. The
10 Ninth Circuit "has indicated that a party seeking to amend a
11 pleading after the scheduling order deadline has expired should
12 first seek leave to amend the scheduling order." Mays v.
13 Stobie, 2010 WL 5110083, at *3 (D. Idaho Dec. 7, 2010).

14 Here, the Court granted Plaintiff leave to amend his
15 complaint on November 21, 2014 (Doc. #10). On December 3, 2014,
16 the Court issued a scheduling order which indicated that no
17 party could amend their pleadings or join any additional parties
18 without leave of the Court (Doc. #12). Neither Plaintiff nor
19 any of the defendants objected to the scheduling order, and the
20 order became final on December 10, 2014 (Doc. #12).

21 On February 12, 2015, Plaintiff filed the FAC (Doc. #13).
22 The FAC added Correct Care as a defendant. FAC ¶ 13. Plaintiff
23 did not seek permission from the Court either to file an amended
24 complaint after the scheduling order had been issued or to join
25 any additional parties. Defendants Christianson, Maxwell,
26 Holman, Negeley, Nichols, Campbell, Clifton, and Duncan filed an
27 answer to Plaintiff's FAC (Doc. #15). Correct Care did not join
28 in the other defendants' answer or file its own answer. See

1 Answer at 1.

2 Plaintiff's attempted joinder of Correct Care violated the
3 Court's scheduling order. The Court therefore dismisses
4 Plaintiff's claims against Correct Care. The Court declines,
5 however, to dismiss the FAC in its entirety, as Correct Care
6 requested in its motion to dismiss. See Mot. at 2. The
7 answering defendants did not raise the issue of Plaintiff's
8 noncompliance with the Court's scheduling order nor join in
9 Correct Care's motion to dismiss herein.

10 *2. Plaintiff's Motion for Leave to Amend*

11 Together with Plaintiff's opposition to Correct Care's
12 motion to dismiss, Plaintiff brought a motion for leave to amend
13 the FAC to join Correct Care. Opp. at 6-8. As discussed above,
14 when a motion for leave to join a party is filed after the
15 scheduling order deadline, the party seeking to join the new
16 party must show "good cause." Fed. R. Civ. P. 16(b)(4). The
17 good cause standard under Rule 16 "primarily considers the
18 diligence of the party seeking the amendment." Johnson, 975
19 F.2d at 609. To show good cause, the party seeking amendment or
20 joinder of additional parties must show that scheduling
21 deadlines could not be met despite the party's diligence. Id.
22 The possibility of "prejudice to the party opposing modification
23 might supply additional reasons to deny [modification],
24 [however], the focus of the inquiry is upon the moving party's
25 reasons for seeking modification." Id.

26 In Plaintiff's motion for leave to amend, he states that
27 Plaintiff's attorney, Larry Peluso, "read and understood" the
28 Court's December 3, 2014 scheduling order and began writing the

1 FAC. Opp. at 8. The scheduling order clearly indicated that it
2 would become final seven days after the date of the order.

3 Order at 6. The scheduling order also disallowed any additional
4 amendments or joinder of parties without leave of the Court.

5 Id. at 1. After reading the scheduling order, Mr. Peluso should
6 have either objected to the dates in the scheduling order or
7 asked the Court for leave to file an amended complaint and join
8 an additional party. He did neither. Instead, Mr. Peluso ignored
9 the terms of the scheduling order that he had "read and
10 understood" and began drafting the FAC. See Opp. at 8.

11 Mr. Peluso collapsed from liver failure two weeks after
12 reading the scheduling order. Id. Mr. Peluso's law partner,
13 Julia Swanson, completed the FAC for Mr. Peluso. Id. While the
14 Court is sympathetic to Mr. Peluso's health issue, it does not
15 excuse Plaintiff from requesting leave to amend or a change in
16 the scheduling order before filing the amended complaint. As an
17 attorney working on the case, Ms. Swanson had the duty to read
18 the Court's scheduling order and comply with it, even if she was
19 not working on the case when the scheduling order was issued.

20 Fed. R. Civ. P. 16(f); see also Balt. Therapeutic Equip. Co. v.
21 Loredan Biomedical, Inc., 1993 WL 129781, at *17 (E.D. Cal. Feb.
22 19, 1993) ("[A] party's attorney" has the "[d]uty to obey the
23 Court's scheduling orders."). At no time prior to filing the FAC
24 or Plaintiff's opposition to this Motion to Dismiss did Ms.
25 Swanson ask the Court for leave to amend the complaint or to
26 join an additional party.

27 The Court finds that neither of Plaintiff's attorneys acted
28 diligently, and Plaintiff fails to show good cause for leave to

1 amend to join Correct Care. As such, Plaintiff's motion to
2 amend is denied.

3 The parties also dispute whether Plaintiff's claims against
4 Correct Care are barred by statutes of limitations. Because
5 Plaintiff's claims against Correct Care are dismissed for the
6 reasons stated above, the Court need not reach the statute of
7 limitations issue.

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III. ORDER

10 For the reasons set forth above, the Court GRANTS WITH
11 PREJUDICE Correct Care's motion to dismiss and DENIES
12 Plaintiff's motion for leave to amend:

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IT IS SO ORDERED.

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Dated: December 11, 2015

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JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE

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