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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT ELLIS,

Plaintiff,

v.

C/O BERGSEN,

Defendant.

No. 2:14-CV-2985 AC P

ORDER TO SHOW CAUSE

Plaintiff is a state prisoner proceeding pro se. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983 and has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1). Because this lawsuit may be subject to summary dismissal, plaintiff will not be assessed the statutory filing fee at this time. Accordingly, the request to proceed in forma pauperis will be held in abeyance.

Duplicative Complaints

The current complaint, filed December 29, 2014, alleges that defendant C/O Bergsen violated plaintiff’s Due Process rights when he took plaintiff’s “working cassette radio.” Complaint (ECF No. 1) at 3. The complaint alleges that although defendant claimed that the radio “didn’t work,” in fact it did work. Id. The complaint also alleges that despite plaintiff’s “constitutional right under the First Amendment to view nude magazines with artistic value, C/O

1 Bergsen also violated this right” by taking the magazine “during a cell search.” Id.

2 Previously, on March 17, 2014, plaintiff filed a complaint against the same defendant,
3 C/O Bergsen, over what appears to be the same incidents. Ellis v. C/O Bergsen, 2:14-cv-0705
4 (E.D. Cal.) (Brennan, M.J.). In that case, plaintiff alleges that C/O Bergsen violated his Due
5 Process rights when he “took the cassette player and stated it didn’t work which is untrue.” Id.,
6 ECF No. 1 at 3. The complaint further alleges that “‘C/O Bergsen also took adult material stating
7 that it’s illegal to possess nude adults.” Id. This earlier-filed complaint was dismissed on the
8 merits without leave to amend, as “the deficiencies in plaintiff’s claims cannot be cured by further
9 amendment.”

10 Discussion

11 It facially appears that the current action is duplicative of the earlier-filed action.
12 “Plaintiffs generally have no right to maintain two separate actions involving the same subject
13 matter at the same time in the same court and against the same defendant.” Adams v. California
14 Dept. of Health Services, 487 F.3d 684, 688 (9th Cir.) (internal quotation marks omitted), cert.
15 denied, 552 U.S. 1076 (2007). The determination of whether the actions are duplicative is subject
16 to the test set forth in Adams:

17 To ascertain whether successive causes of action are the same, we
18 use the transaction test, developed in the context of claim
19 preclusion. “Whether two events are part of the same transaction or
20 series depends on whether they are related to the same set of facts
21 and whether they could conveniently be tried together.” Western
Sys., Inc. v. Ulloa, 958 F.2d 864, 871 (9th Cir. 1992) (citing
22 Restatement (Second) of Judgments § 24(1) (1982)). In applying
23 the transaction test, we examine four criteria:

- 24 (1) whether rights or interests established in the prior
25 judgment would be destroyed or impaired by
26 prosecution of the second action; (2) whether
27 substantially the same evidence is presented in the two
28 actions; (3) whether the two suits involve infringement
of the same right; and (4) whether the two suits arise
out of the same transactional nucleus of facts.
Costantini v. Trans World Airlines, 681 F.2d 1199,
1201-02 (9th Cir. 1982). “The last of these criteria is
the most important.” Id. at 1202.

Adams, 487 F.3d at 689-90.

1 Plaintiff is advised that the Court may dismiss as frivolous a complaint that merely repeats
2 pending or previously litigated claims. 28 U.S.C. § 1915A; see Cato v. United States, 70 F.3d
3 1103, 1105 n.2 (9th Cir. 1995); Adams, 487 F.3d at 688 (“After weighing the equities of the case,
4 the district court may exercise its discretion to dismiss a duplicative later-filed action, to stay that
5 action pending resolution of the previously filed action, to enjoin the parties from proceeding with
6 it, or to consolidate both actions.”). Plaintiff is further admonished that, if he fails to file a timely
7 response to this Order to Show Cause, such failure may be deemed as consent to the dismissal of
8 the instant action.

9 In accordance with the above, IT IS HEREBY ORDERED that:

- 10 1. Plaintiff shall SHOW CAUSE within thirty days why this case should not be
11 summarily dismissed as duplicative of Case No. 2:14-cv-0705 EFB; and
- 12 2. Plaintiff’s application to proceed in forma pauperis is HELD IN ABEYANCE,
13 pending resolution of this Order To Show Cause.

14 DATED: January 11, 2015

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16 ALLISON CLAIRE
17 UNITED STATES MAGISTRATE JUDGE
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