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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOSH THOMAS,
Plaintiff,
v.
BRIAN ROBERTS, et al.,
Defendants.

No. 2:16-cv-0724 CKD P

ORDER AND
FINDINGS AND RECOMMENDATIONS

Plaintiff is a California prisoner proceeding pro se with an action for violation of civil rights under 42 U.S.C. § 1983. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1). Plaintiff has consented to have all matters in this action before a United States Magistrate Judge. See 28 U.S.C. § 636(c).

On June 1, 2017, the court dismissed this case because plaintiff failed to file an amended complaint within the time allotted. On February 23, 2018, the Ninth Circuit reversed and remanded pursuant to Williams v. King, 875 F.3d 500 (9th Cir. 2017) in which the Ninth Circuit held that a magistrate judge does not have the authority to dismiss a case unless all persons or entities identified as a defendant in the operative pleadings have either consented to having all matters before a magistrate judge or been dismissed. In this case, at the time of dismissal, no defendant had been dismissed, nor had any consented. This is because dismissal was entered after the court screened plaintiff's complaint pursuant to 28 U.S.C. § 1915A, and any defendants

1 named in complaint are generally not served prior to screening and are not required to take any
2 action until the court has determined through the screening process that the complaint states an
3 actionable claim against them.

4 Following remand, the court has reviewed the entire docket in this matter and finds that
5 dismissal of this case is still warranted for reasons which follow. Therefore, the court will direct
6 the Clerk of the Court to assign a district court judge to this case and this court will recommend
7 dismissal.

8 On June 9, 2017, the court issued an order addressing what the court construed as a
9 request by plaintiff that judgment be vacated:

10 On October 21, 2016, plaintiff's complaint was dismissed with
11 leave to amend. The deadline for filing an amended complaint was
12 May 17, 2017. On June 1, 2017, the court dismissed this action for
13 plaintiff's failure to file an amended complaint. [Footnote omitted.]
A review of the court's docket reveals that the court received
14 plaintiff's amended complaint on May 30, 2017, but the complaint
15 was not docketed until after the court issued its dismissal order.

16 In the amended complaint, plaintiff asserts he placed it in the legal
17 mail collection system at the California Medical Facility on May
18 20, 2017. Court documents submitted by prisoners are generally
19 deemed filed for the purposes of federal court deadlines on the day
20 the document is given to a prison official for mailing. See Houston
21 v. Lack, 487 U.S. 266, 270-71 (1988). So, while plaintiff's
22 amended complaint was actually filed before this action was
23 dismissed, it was not timely-filed.

24 Pursuant to Federal Rule of Civil Procedure 6(b) the court can only
25 extend a court deadline after it has expired based upon a showing of
26 excusable neglect. Plaintiff does not explain why he filed his
27 amended complaint three days late, nor does he seek an extension
28 of time.

In any case, granting plaintiff an extension of time to file an
amended complaint would be futile because plaintiff's amended
complaint fails to state a claim upon which relief can be granted.
As plaintiff was informed in the court's October 21, 2016 order, the
court is required to screen complaints brought by prisoners seeking
relief against a governmental entity or officer or employee of a
governmental entity. 28 U.S.C. § 1915A(a). The court must
dismiss a complaint or portion thereof if the prisoner has raised
claims that are legally "frivolous or malicious," that fail to state a
claim upon which relief may be granted, or that seek monetary
relief from a defendant who is immune from such relief. 28 U.S.C.
§ 1915A(b)(1),(2).

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Plaintiff’s original complaint was dismissed for failure to state a claim under federal law. In the dismissal order, plaintiff was informed of the deficiencies in his claims and given an opportunity to correct them in an amended complaint. The court has reviewed plaintiff’s amended complaint and finds that it is not different in any material respect from his original complaint and still does not state a claim upon which plaintiff could proceed in this court.¹ At this point, granting leave to amend a second time would be futile.

For the reasons articulated in the court’s June 9, 2017 order, dismissal is still appropriate, and dismissal will be the recommendation of this court.

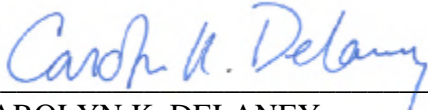
Accordingly, IT IS HEREBY ORDERED that the Clerk of the Court assign a district court judge to this case.

IT IS HEREBY RECOMMENDED that:

- 1. Plaintiff’s amended complaint be dismissed; and
- 2. This case be closed.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days after being served with these findings and recommendations, plaintiff may file written objections with the court. The document should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” Plaintiff is advised that failure to file objections within the specified time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: March 23, 2018



 CAROLYN K. DELANEY
 UNITED STATES MAGISTRATE JUDGE

¹
thom0724.frs

¹ It appears that in his amended complaint, plaintiff asserts for the first time, that he was subjected to ineffective assistance of counsel at parole proceedings. This does not implicate a federal right as the Sixth Amendment only guarantees assistance of counsel “[i]n . . . criminal prosecutions.”