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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MONTE L. HANEY,
Plaintiff,
v.
S. JOHNSON, et al.,
Defendants.

No. 2: 16-cv-1173 TLN KJN P

ORDER AND FINDINGS AND
RECOMMENDATIONS

I. Introduction

Plaintiff is a state prisoner, proceeding without counsel, pursuant to 42 U.S.C. § 1983. Pending before the court are defendants’ motions to require plaintiff to post security (ECF No. 28) and for a protective order (ECF No. 34). Defendants request that plaintiff be ordered to post security of \$17,915 before this action proceeds.

For the reasons stated herein, the undersigned recommends that defendants’ motion to require plaintiff to post security be denied without prejudice. Defendants’ motion for a protective order is granted.

II. Plaintiff’s Claims

This action proceeds on the original complaint against defendants Baker, Cross, Fields, Herring, Johnson, Larios, Ramirez and Turner. (ECF No. 1.)

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1 Plaintiff alleges that on October 14, 2015, he was beaten and stabbed by approximately
2 twenty inmates. After the attack, defendant Johnson and other prison staff took plaintiff to
3 medical. Plaintiff alleges that during this time, he heard defendant Johnson say, "My partner told
4 me it was going down today." Plaintiff asked defendant Johnson who told him that "it's going
5 down today." Defendant Johnson refused to talk to plaintiff any further.

6 Plaintiff alleges that approximately ten minutes later, Investigative Services employee
7 defendant Ramirez came to speak to plaintiff at the medical infirmary. Defendant Ramirez told
8 plaintiff that the day before the attack, an inmate confidential informant told defendant Ramirez
9 that inmates planned to attack plaintiff because they thought that he was responsible for six cell
10 phones stolen from the kitchen that belonged to inmates. Plaintiff alleges that defendant Ramirez
11 refused to give him the name of the inmate informant.

12 Plaintiff alleges that before the October 14, 2016 attack, plaintiff noticed everything was
13 closed, i.e., gym, law library, etc., and that all defendants were standing out on the yard as if they
14 were waiting for an incident to occur between inmates. Plaintiff noticed that defendants were
15 looking in the "Bay Area" part of the yard, where plaintiff is required to stay during yard because
16 he is from the Bay Area.

17 Plaintiff alleges that all the defendants knew that he was going to be attacked prior to the
18 attack, but failed to protect him.

19 III. Motion Requesting Plaintiff Post Security

20 Defendants previously filed a motion to revoke plaintiff's in forma pauperis status
21 pursuant to 28 U.S.C. § 1915(g) and for plaintiff to post security. (ECF No. 15.) The
22 undersigned recommended that defendants' motion to revoke plaintiff's in forma pauperis status
23 be granted. (ECF No. 24.) The undersigned declined to address the merits of defendants' motion
24 for plaintiff to post security. (Id.) Instead, the undersigned recommended that defendants'
25 motion requesting that plaintiff be ordered to post security be denied without prejudice to its
26 renewal, if appropriate, following resolution of the motion to revoke plaintiff's in forma pauperis
27 status. (Id.)

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1 The Honorable Troy L. Nunley denied defendants' motion to revoke plaintiff's in forma
2 pauperis status. (ECF No. 27.) Judge Nunley ordered that defendants could re-notice the motion
3 to require plaintiff to post security. (Id.) Pending before the court is defendants' re-noticed
4 motion. (ECF No. 28.)

5 Defendants request an order requiring plaintiff to post security pursuant to Local Rule
6 151(b) of the Eastern District of California. Local Rule 151(b) provides,

7 On its own motion or on motion of a party, the Court may at any
8 time order a party to give a security, bond, or undertaking in such
9 amount as the Court may determine to be appropriate. The
10 provisions of Title 3A, part 2, of the California Code of Civil
11 Procedure, relating to vexatious litigants, are hereby adopted as a
procedural Rule of this Court on the basis of which the Court may
order the giving of a security, bond, or undertaking, although the
power of the Court shall not be limited thereby.

12 Local Rule 151(b).

13 Thus, in ordering a party to give security under Local Rule 151(b), the Court must
14 determine that (1) the party is a vexatious litigant and (2) there is not a reasonable probability that
15 the party will prevail pursuant to California Civil Procedure Code § 391.1, which provides:

16 In any litigation pending in any court of this state, at any time until
17 final judgment is entered, a defendant may move the court, upon
18 notice and hearing, for an order requiring the plaintiff to furnish
19 security or for an order dismissing the litigation pursuant to
20 subdivision (b) of Section 391.3. The motion for an order requiring
the plaintiff to furnish security shall be based upon the ground, and
supported by a showing, that the plaintiff is a vexatious litigant and
that there is not a reasonable probability that he or she will prevail
in the litigation against the moving defendant.

21 Cal. Civ. Proc. § 391.1

22 Defendants argue that plaintiff is a vexatious litigant because in the past seven years, he
23 has commenced at least twenty-four unsuccessful pro se civil rights actions or proceedings in
24 state or federal court.

25 Defendants also argue that there is no reasonable probability that plaintiff will prevail on
26 the merits because 1) he has failed to exhaust administrative remedies as to seven of the eight
27 named defendants; and 2) the complaint fails to state a plausible claim against the eighth
28 defendant, i.e., defendant Johnson.

1 In support of their argument that plaintiff failed to exhaust administrative remedies,
2 defendants cite plaintiff's administrative grievances attached to the complaint. In essence,
3 defendants argue that plaintiff's failure to exhaust administrative remedies as to seven of the
4 defendants is clear from the face of the complaint. Under these circumstances, defendants are
5 authorized to file a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). See
6 Albino v. Baca, 747 F.3d 1162, 1166 (9th Cir. 2014) (en banc).

7 Local Rule 151(b) is discretionary. See Bradford v. Brooks, 2016 WL 4537900 at *1 (9th
8 Cir. 2016). For the following reasons, the undersigned recommends that the court exercise its
9 discretion to deny the motion to require plaintiff to post security.

10 One purpose of authorizing security for costs is to allow the court to have some control
11 over the administration of a lawsuit. See Chappel v. Perez, 2011 WL 1584581 at *1 (E.D. Cal.
12 2011); citing Illro Prods. Ltd v. Music Fair Enterprises, 94 F.R.D. 76, 78 (S.D.N.Y. 1982). "In
13 determining whether to impose a bond, the court may 'take all the pertinent circumstances into
14 account including the conduct of the litigants and the background and purpose of the litigation.'" Id.,
15 quoting Leighton v. Paramount Pictures Corp., 340 F.2d 859, 861 (2d Cir. 1965).

16 Both of defendants' arguments regarding why plaintiff will not prevail on this action
17 could have been raised in a motion to dismiss pursuant to Federal Rule of Civil Procedure
18 12(b)(6). Therefore, requiring plaintiff to post security for an action that may be dismissed
19 pursuant to Rule 12(b)(6) does not enable court control of this action. Limited court resources are
20 better spent deciding one dispositive motion rather than a dispositive motion and a motion to
21 require plaintiff to pay costs.

22 The undersigned also observes that defendants' proposal that plaintiff pay \$17,915
23 includes time spent by counsel,

24 performing initial investigation of the claims, including review of
25 medical records and other documents; drafting a litigation plan and
26 performing legal research regarding issues addressed in the
27 litigation plan; and researching and preparing this motion and
28 defendants' previous motion to revoke plaintiff's in forma pauperis
status, and supporting documents, including plaintiff's extensive
litigation history, as reflected in defendants' request for judicial
notice.

1 (ECF No. 28-2 at 2.)

2 The undersigned does not fault defense counsel for filing the previous motion to revoke
3 plaintiff's in forma pauperis status. However, if all of plaintiff's claims may be disposed of by a
4 Rule 12(b)(6) motion, then counsel's time spent reviewing plaintiff's medical records and
5 preparing the instant motion does not seem like time well spent. Under these circumstances,
6 requiring plaintiff to post security of \$17, 915 is more punitive than practical.

7 For the reasons discussed above, the undersigned recommends that defendants' motion to
8 require plaintiff to post security be denied without prejudice to its renewal following resolution of
9 a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

10 IV. Motion for Protective Order

11 Defendants request a protective order providing that defendants are not required to
12 respond to discovery until such time as the court opens discovery, and plaintiff serves discovery
13 under that order.

14 The court is vested with broad discretion to manage discovery. Dichter–Mad Family
15 Partners, LLP v. U.S., 709 F.3d 749, 751 (9th Cir.2013) (per curiam). Pursuant to Federal Rule
16 of Civil Procedure 26(c)(1), the court may, for good cause, issue a protective order forbidding or
17 limiting discovery. The avoidance of undue burden or expense is grounds for the issuance of a
18 protective order, Fed.R.Civ.P. 26(c), and a stay of discovery pending resolution of potentially
19 dispositive issues furthers the goal of efficiency for the courts and the litigants, Little v. City of
20 Seattle, 863 F.2d 681, 685 (9th Cir.1988) (stay of discovery pending resolution of immunity
21 issue). The propriety of delaying discovery on the merits of the plaintiff's claims pending
22 resolution of an exhaustion motion was explicitly recognized by the Ninth Circuit. Albino v.
23 Baca, 747 F.3d 1162, 1170–71 (9th Cir.2014) (en banc).

24 Pursuant to the court's standard practice in civil rights cases such as this, the discovery
25 phase opens via the issuance of a discovery and scheduling order. In this case, no
26 discovery/scheduling order has issued. Discovery/scheduling orders are usually issued after
27 defendants answer the complaint.

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1 Good cause appearing, defendants' motion for a protective order is granted. Neither party
2 is required to respond to discovery requests until such time that a discovery/scheduling order is
3 issued.


4 Accordingly, IT IS HEREBY ORDERED that:

- 5 1. Defendants' motion for a protective order (ECF No. 34) is granted;
- 6 2. Neither party is required to respond to discovery requests until such time that a
7 discovery/scheduling order is issued; and

8 IT IS HEREBY RECOMMENDED that defendants' motion to require plaintiff to post
9 security (ECF No. 28) be denied.

10 These findings and recommendations are submitted to the United States District Judge
11 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
12 after being served with these findings and recommendations, any party may file written
13 objections with the court and serve a copy on all parties. Such a document should be captioned
14 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
15 objections shall be filed and served within fourteen days after service of the objections. The
16 parties are advised that failure to file objections within the specified time may waive the right to
17 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

18 Dated: January 19, 2018

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21 KENDALL J. NEWMAN
22 UNITED STATES MAGISTRATE JUDGE

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