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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

TSHOMBE M. KELLEY,  
Plaintiff,  
v.  
A. HERRERA, et al.,  
Defendants.

No. 2:16-cv-01894 JAM CKD P

ORDER

Plaintiff is a state prisoner proceeding pro se in this civil rights action pursuant to 42 U.S.C. § 1983. The complaint is proceeding on an Eighth Amendment use of excessive force and/or a failure to intervene in the use of excessive force claim against five prison officials at California State Prison-Sacramento (“CSP-Sacrament”). See ECF No. 1, 4 (complaint and screening order).

Currently pending before the court is defendants’ motion for civil contempt proceedings against a non-party inmate or, in the alternative, a motion to exclude his testimony for refusing to appear at a deposition. ECF No. 27. Plaintiff has not filed an opposition, but has filed a motion for partial summary judgment. See ECF No. 30. Also pending, but not yet fully briefed, is defendants’ motion for summary judgment. See ECF Nos. 37, 42 (summary judgment motion, plaintiff’s opposition).

The events giving rise to the instant civil rights suit occurred on the exercise yard at CSP-

1 Sacramento on February 17, 2015. During the course of discovery, defendants identified several  
2 inmate-witnesses who were present on the exercise yard on the date in question. See ECF No.  
3 27-1 at 1. One of these inmate-witnesses was Kevin Craig. Id. Mr. Craig refused to speak with  
4 defense counsel and also refused to attend his properly-noticed deposition on August 18, 2017.  
5 ECF Nos. 27 at 2; 27-1 at 2, 6-7, 10.

6 Based on his failure to cooperate, defendants filed a motion seeking to exclude Mr.  
7 Craig's testimony at any stage in the litigation pursuant to the court's inherent discovery  
8 management authority. See ECF No. 27 at 2-3 (citing Unigard Sec. Ins. Co. v. Lakewood Eng'g  
9 & Mfg. Corp., 982 F.2d 363, 368 (9th Cir. 1992)). Defendants are not requesting any civil  
10 contempt remedies such as a fine or imprisonment because Mr. Craig is already serving a life  
11 sentence in the California Department of Corrections and Rehabilitation. ECF No. 27 at 3.  
12 Defendants contend that they "will be unfairly prejudiced by inmate Craig's refusal to testify at  
13 his deposition because inmate Craig may surprise Defendants with testimony at summary  
14 judgment or trial." Id.

15 The court has reviewed plaintiff's motion for partial summary judgment as well as his  
16 opposition to defendants' motion for summary judgment and finds that Mr. Craig has not  
17 provided any testimony at the summary judgment stage of this case. See ECF Nos. 30, 42.  
18 Therefore, defendants' motion is moot. Furthermore, in reviewing defendants' own evidence  
19 submitted in support of their motion for summary judgment, Mr. Craig was pepper-sprayed,  
20 handcuffed, and was sitting with his back turned to plaintiff during the events giving rise to the  
21 instant lawsuit. See ECF No. 39 (Notice of Lodging Video). So it is unclear to the court how Mr.  
22 Craig would have any relevant testimony to provide at any trial of this matter.

23 Accordingly, IT IS HEREBY ORDERED that defendants' motion for civil contempt  
24 proceedings, ECF No. 27, is denied without prejudice to renewal as a motion in limine prior to  
25 trial in the event that plaintiff submits a witness list which includes Mr. Craig.

26 Dated: January 5, 2018

27   
28 CAROLYN K. DELANEY  
UNITED STATES MAGISTRATE JUDGE