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IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN SHEK,

No. C 12-04517 WHA

Plaintiff,

v.

CHILDREN'S HOSPITAL RESEARCH
 CENTER OF OAKLAND,

Defendant.

**ORDER GRANTING PLAINTIFF'S
 MOTION TO PROCEED IN
 FORMA PAUPERIS AND
 DENYING MOTIONS FOR
 MISCELLANEOUS RELIEF**

INTRODUCTION

Upon filing a contemporaneous notice of appeal, plaintiff files four motions on his recently closed wrongful termination case. For the reasons stated below, plaintiff's motion to proceed in forma pauperis is **GRANTED**. All other motions are **DENIED**.

STATEMENT

In August 2012, pro se plaintiff John Shek commenced this action against defendant Children's Hospital Research Center of Oakland because he was allegedly discriminated against for his race, national origin and age, and was wrongfully discharged. After the most recent effort, the undersigned judge denied plaintiff's motion for leave to file a second amended complaint because his discrimination charges were untimely and, as to other potential claims, his proposed amended complaint was inadequate due to insufficient facts (Dkt. No. 99). On April 2, 2013, the undersigned judge closed the case and entered judgment against plaintiff. The state

1 action filed by plaintiff continues (*Shek vs. Children’s Hospital & Research Center at Oakland*
2 *et al.*, Alameda County Superior Court, No. RG12660358).

3 A week later, plaintiff filed a notice of appeal. Three of the instant motions were filed by
4 plaintiff on the same day he filed the notice of appeal, and the fourth was filed after the notice of
5 appeal. On April 15, our court of appeals referred the action to the undersigned judge “for the
6 limited purpose of determining whether in forma pauperis status should continue for this appeal
7 or whether the appeal is frivolous or taken in bad faith” (Dkt. No. 110). The next day, our court
8 of appeals issued an order stating that proceedings would be held in abeyance pending the
9 resolution of plaintiff’s present motions by the undersigned judge (Dkt. No. 114).

10 **ANALYSIS**

11 In the present motions, plaintiff seems to be moving against more than one defendant
12 by his use of *et. al* in the caption. Who that additional defendant might be is a mystery.
13 In plaintiff’s proposed second amended complaint, however, only Children’s Hospital Research
14 Center of Oakland was named as a defendant. This order, thus, will address the motions as it
15 relates only to Children’s Hospital as the sole defendant.

16 Since judgment was entered against plaintiff, he has filed four different motions:
17 (1) a motion for leave to appeal in forma pauperis (Dkt. No. 105), (2) a motion for new trial
18 (Dkt. No. 103), (3) a motion to stay pending appeal (Dkt. No. 104), and (4) a motion to reinstate
19 in forma pauperis status after an order imposed sanction against plaintiff and request for
20 sanctions against defendant (Dkt. No. 113). Each motion will be addressed in turn.

21 **1. MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS**

22 When plaintiff filed a notice of appeal, he also filed a motion for leave to appeal in forma
23 pauperis. Our court of appeals subsequently referred this action to the undersigned judge to
24 determine whether in forma pauperis status should continue.

25 Plaintiff submitted an application to proceed in forma pauperis indicating that he is not
26 presently employed, has not received any money, does not have a bank account, his home was
27 foreclosed, and First United Services Credit Union is suing him (though plaintiff does not
28 provide any information on this other suit). Under these circumstances, plaintiff’s motion for

1 leave to appeal in forma pauperis is **GRANTED**. Moreover, although the appeal is meritless, the
2 Court cannot say it is so frivolous or insincere as to deny in forma pauperis status.

3 **2. MOTION FOR NEW TRIAL**

4 Plaintiff argues that his ADEA and Title VII claims were not time barred because the
5 EEOC “had initiated Different charge numbers when it should be added in one charge numbers”
6 (*sic*) (Dkt. No. 103 at 1). He contends that the subsequent discrimination violations he reported
7 should have been added to the previous charges (*id.* at 2). Plaintiff then goes on to re-assert his
8 discrimination claims.

9 There has been no trial for this case. This case was dismissed in its pleading stage when
10 plaintiff failed to adequately propose a second amended complaint and its motion for leave to file
11 a second amended complaint was denied. Therefore, the motion for a new trial is **DENIED**.

12 **3. MOTION TO STAY PENDING APPEAL**

13 Plaintiff argues that stay is necessary to prevent “the irreparable harm that is certain To
14 occur” (*sic*) (Dkt. No. 104 at 1). Plaintiff then proceeds to argue why his motion for leave to file
15 a second amended complaint should be granted, that the Court’s order imposing sanctions on
16 plaintiff for serving the wrong person was erroneous, that the undersigned judge erroneously
17 denied permission to commence discovery and provide transcripts to plaintiff, and that his
18 discrimination claims were not time barred.

19 Federal Rule of Appellate Procedure 8(a)(1)(A) states that “[a] party must ordinarily
20 move first in the district court for . . . a stay of the judgment or order of a district court pending
21 appeal.” However, a motion to stay is made when there is a likelihood that substantial litigation
22 will take place during the pendency of an appeal. *See Perron v. Hewlett-Packard Co.*, 2011
23 WL 1344221, at *2 (N.D. Cal. Apr. 8, 2011) (Judge Lucy Koh).

24 Here, there is no litigation that will take place during the appeal because there is no
25 current operative complaint. Plaintiff’s motion for leave to file a second amended complaint was
26 denied. There is no litigation to pursue and, thus, there is nothing to stay. Plaintiff’s motion to
27 stay, therefore, is **DENIED**.

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4. REQUEST FOR SANCTIONS AGAINST DEFENDANT.

Plaintiff refers to a hearing that took place on December 6, 2012, in which a Mr. Joseph Robinson who appeared before the undersigned judge with a summons from plaintiff was not the correct Mr. Joseph Robinson who plaintiff intended to serve (Dkt. No. 58), although it *was* who he *did* serve. On that date, an order was issued quashing the summons on Mr. Robinson after he testified under oath that he was *not* the defendant named in the original complaint (Dkt. No. 57).

Plaintiff further refers to an order in which the undersigned judge later requested evidence on whether either party knows if Mr. Joseph Robinson, Sr., and Mr. Joseph Robinson, Jr., were father and son and were living at the same address at the time of improper service (Dkt. No. 87). In response, plaintiff merely filed a motion to serve Mr. Robinson with a written interrogatory (Dkt. No. 93). Defendant filed a sworn declaration by its employee and labor relations manager, Ms. Brenda Husband, who stated that the address on file for its employee Mr. Robinson was *not* the address where plaintiff served the wrong Mr. Robinson (Dkt. No. 94). An order was subsequently issued stating that discovery as to this issue was not necessary because the action was being dismissed due to other issues — timeliness of the discrimination charges (Dkt. No. 99). After judgment was entered against plaintiff, he then filed a sworn declaration attesting that the person he served was the correct Mr. Robinson. This was too little too late.

In the instant motion, plaintiff asserts that Mr. Robinson’s sworn testimony was false and that Ms. Husband’s declaration was also false. Again, this is too little too late and amounts merely to allegations. At all events, an inquiry into whether the correct Mr. Robinson was served remains unnecessary because the case was dismissed for timeliness issues. This motion, therefore, is **DENIED**.


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CONCLUSION

Plaintiff's motion to proceed in forma pauperis is **GRANTED**. For the reasons stated above, plaintiff's other motions are **DENIED**.

IT IS SO ORDERED.

Dated: May 2, 2013.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE