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

KENNETH GIBBS,

Plaintiff,

v.

CARSON, et al.,

Defendants.

No. C-13-0860 TEH (PR)

ORDER GRANTING PLAINTIFF'S
MOTIONS FOR LEAVE TO FILE
SECOND AMENDED COMPLAINT;
GRANTING PLAINTIFF'S MOTION TO
REINSTATE DEFENDANT ACOSTA;
DENYING WITHOUT PREJUDICE
DEFENDANTS' MOTIONS TO DISMISS;
SERVING UNSERVED DEFENDANTS

(Doc. nos. 44, 81, 83, 87, 89)

_____ /

United States District Court
For the Northern District of California

On February 26, 2013, Plaintiff Kenneth Gibbs, an inmate at California State Prison-Sacramento (CSP-SAC), filed this civil rights action under 42 U.S.C. § 1983 raising twenty-three claims against forty defendants who worked at Pelican Bay State Prison (PBSP), where Plaintiff was formerly incarcerated. On April 24, 2013, the Court issued an Order dismissing the complaint with leave to amend and, on May 8, 2013, Plaintiff filed a first amended complaint (FAC).

On May 16, 2013, the Court ordered service of eight cognizable claims against twelve defendants. The claims found to be

1 cognizable were: (1) an Eighth Amendment claim for deliberate
2 indifference to serious medical needs against Dental Assistant
3 Tupman; (2) an Eighth Amendment claim for deliberate indifference to
4 serious medical needs against Dr. Crinklaw and Dr. Malo-Clines;
5 (3) a First Amendment retaliation claim against Lt. Diggle for
6 issuing a Rules Violation Report (RVR) against Plaintiff; (4) a
7 First Amendment retaliation claim against Warden Lewis and Capt.
8 Wood for transferring Plaintiff in order to force him to withdraw an
9 administrative appeal; (5) a First Amendment retaliation claim
10 against Counselor Royal, Officer Milton, and Capt. Wood for placing
11 Plaintiff on C status in retaliation for Plaintiff's filing
12 administrative appeals; (6) a due process claim against Lt. Anthony
13 for denying Plaintiff's right to a witness at a disciplinary
14 hearing; (7) an Eighth Amendment claim against Sgt. Acosta and
15 Officer Castellaw for cruel and unusual punishment for leaking
16 information about Plaintiff to other inmates; and (8) an Eighth
17 Amendment claim against Officer Evans for using excessive force
18 against Plaintiff.

19 On July 22, 2013, the Court received a letter from
20 Plaintiff stating that Sgt. Acosta did not use excessive force
21 against him. The Court construed this as Plaintiff's motion to
22 voluntarily dismiss the claims against Sgt. Acosta and, on August 1,
23 2013, dismissed Sgt. Acosta from the action.

24 Plaintiff has filed two motions for leave to amend the
25 complaint as well as a motion to reinstate Defendant Sgt. Acosta.
26 Also before the Court are: a motion to dismiss filed by Defendants
27 Evans, Royal, Lewis, Milton, Diggle, and Wood; and a separate motion
28

1 to dismiss filed by Defendants Anthony, Castellaw, and Tupman.

2 I

3 Plaintiff seeks leave to file a second amended complaint
4 (SAC) adding Dr. Thomas J. Martinelli as a defendant on his Eighth
5 Amendment claim for deliberate indifference to serious medical
6 needs. In his proposed SAC, Plaintiff alleges that on April 25,
7 2008, Dr. Martinelli performed a colonoscopy on Plaintiff at Sutter
8 Coast Hospital. Plaintiff further alleges that Dr. Martinelli used
9 contaminated and unsanitary instruments during the procedure,
10 causing Plaintiff to become infected with herpes. These claims,
11 liberally construed, state a claim of deliberate indifference
12 against Dr. Martinelli.

13 Plaintiff correctly points out he originally filed his
14 claim against Dr. Martinelli in Case. No. C. 13-02529 TEH (PR).
15 This Court found the claims duplicative of the claims asserted in
16 the instant action and dismissed Case. No. C. 13-02529. The Court,
17 however, specifically granted Plaintiff leave to file an SAC in the
18 instant action to add Dr. Martinelli as a defendant. (See Case. No.
19 C. 13-02529 TEH (PR) at Dkt. 6.) Accordingly, Plaintiff's proposed
20 SAC is proper, and his pending motions for leave to file the SAC are
21 GRANTED.¹

22 Because the SAC does not add new claims or new defendants
23

24 ¹ In its June 20, 2013 Order dismissing Case No. C. 13-02529
25 TEH (PR), the Court directed Plaintiff to file an SAC in this action
26 within twenty-one days, i.e., by July 10, 2013. Plaintiff states that
27 he attempted to file his SAC in July 2013, but that it was returned
28 to him. There is no record of an SAC filed in July 2013. The Court
will, however, accept as true Plaintiff's representation that he
attempted to file a timely SAC.

1 other than Dr. Martinelli, the Court will not issue a new screening
2 order. Rather, the action will proceed on the eight claims found
3 cognizable in the Court's order of May 16, 2013 as well as the
4 Eighth Amendment deliberate indifference claim against Dr.
5 Martinelli, found cognizable herein.

6 II

7 Plaintiff has filed a motion to reinstate Defendant Sgt.
8 Acosta in which Plaintiff clarifies that his July 22, 2013 letter
9 was not intended as a voluntary dismissal of Defendant Acosta.
10 Plaintiff states that his letter was intended to notify the Court of
11 an error in the Court's May 6, 2013 Service Order. Specifically, in
12 the body of the Order, the Court found that Plaintiff had stated a
13 cognizable Eighth Amendment claim against Defendant Acosta for cruel
14 and unusual punishment for leaking information about Plaintiff to
15 other inmates. In the conclusion section of the Order, however, the
16 Court incorrectly stated that the claim against Defendant Acosta was
17 an Eighth Amendment excessive force claim.

18 Plaintiff is correct. Accordingly, Plaintiff's motion to
19 reinstate Defendant Acosta is GRANTED. The Court VACATES its August
20 1, 2013 Order dismissing Defendant Acosta from the action.
21 Plaintiff's Eighth Amendment claim against Defendant Acosta for
22 cruel and unusual punishment will proceed.²

23 III

24 Defendants Evans, Royal, Lewis, Milton, Diggle, and Wood
25

26 ² The conclusion section of the Order also omitted the fact that
27 the cruel and unusual punishment claim was cognizable against
28 Defendant Castellaw in addition to Defendant Acosta.

1 have filed a motion to dismiss Plaintiff's FAC based on failure to
2 exhaust administrative remedies and failure to file within the
3 statute of limitations. Defendants Anthony, Castellaw, and Tupman
4 have filed a separate motion to dismiss Plaintiff's FAC based on
5 improper joinder of unrelated claims against different defendants.

6 As discussed above, the Court has granted Plaintiff leave
7 to file a second amended complaint. Therefore, the SAC is now the
8 operative pleading herein. Accordingly, defendants' motions to
9 dismiss are DENIED without prejudice to filing a renewed motion or
10 motions addressing the claims in the SAC.

11 In light of the Ninth Circuit's recent opinion in Albino
12 v. Baca, No. 10-55702, slip op. 1, 4 (9th Cir. Apr. 3, 2014) (en
13 banc), the parties are advised that "an unenumerated motion under
14 Rule 12(b) is not the appropriate procedural device for pretrial
15 determination of whether administrative remedies have been
16 exhausted." If Defendants seek to renew their arguments regarding
17 Plaintiff's purported failure to exhaust administrative remedies,
18 they must do so by way of a motion for summary judgment. See id.

19 IV

20 For the foregoing reasons, the Court hereby orders as
21 follows:

22 1. Plaintiff's motions for leave to file a second amended
23 complaint are GRANTED. Docket. Nos. 83, 89. The Clerk shall file
24 Plaintiff's SAC. (Dkt. 89-1.) The Clerk is further directed to add
25 Dr. Thomas J. Martinelli as a defendant on the docket in this
26 action.

27 2. Plaintiff's motion to reinstate Defendant Sgt. Acosta
28

1 is GRANTED. Docket No. 81. The Court's August 1, 2013 Order
2 dismissing Defendant Acosta is VACATED.

3 3. Defendants' motions to dismiss are DENIED without
4 prejudice. Docket Nos. 44, 87.

5 4. Defendant Martinelli has not been served.
6 Accordingly, the Clerk shall issue summons and the United States
7 Marshal shall serve, without prepayment of fees, a copy of the SAC
8 in this matter, a copy of the Court's May 16, 2013 Service Order,
9 and a copy of this Order on Dr. Thomas J. Martinelli at Sutter Coast
10 Hospital in Crescent City, California.

11 5. The Court also notes that Defendants Dr. Malo-Clines
12 and Dr. Crinklaw remain unserved. On September 6, 2013, the PBSP
13 Litigation Coordinator provided forwarding addresses for these two
14 Defendants. (See Dkt. 41.) Accordingly, the Clerk shall re-issue
15 summons and the United States Marshal shall serve, without
16 prepayment of fees, a copy of the SAC in this matter, a copy of the
17 Court's May 16, 2013 Service Order, and a copy of this Order upon
18 said Defendants at:

19 Dr. Malo-Clines
20 PO Box 7289
21 516 Redwood Street
22 Brookings, OR 97415

23 Dr. Crinklaw
24 1485 W. Frontier Street
25 Apache Junction, AZ 85220

26 Counsel for Defendants is directed to inform the Court no
27 later than thirty (30) days from the date of this order whether she
28 will also represent Defendants Martinelli, Malo-Clines, and
Crinklaw.

1 6. In order to expedite the resolution of this case, the
2 Court orders as follows:

3 a. No later than sixty-three (63) days from the
4 date this order is filed, Defendants must file and serve a motion
5 for summary judgment or other dispositive motion. A motion for
6 summary judgment also must be accompanied by a Rand notice so that
7 Plaintiff will have fair, timely, and adequate notice of what is
8 required of him in order to oppose the motion. Woods v. Carey, 684
9 F.3d 934, 939 (9th Cir. 2012) (notice requirement set out in Rand v.
10 Rowland, 154 F.3d 952 (9th Cir. 1998), must be served concurrently
11 with motion for summary judgment). If Defendants renew their
12 argument that Plaintiff failed to exhaust administrative remedies,
13 Defendants should also incorporate a modified Wyatt notice in light
14 of Albino. See Wyatt v. Terhune, 315 F.3d 1108, 1120, n.14 (9th
15 Cir. 2003); Stratton v. Buck, 697 F.3d 1004, 1008 (9th Cir. 2012).

16 b. Plaintiff's opposition to the summary judgment
17 or other dispositive motion must be filed with the Court and served
18 upon Defendants no later than thirty-five (35) days from the date
19 the motion is filed.

20 c. Defendants shall file a reply brief no later
21 than fourteen (14) days after the date the opposition is filed. The
22 motion shall be deemed submitted as of the date the reply brief is
23 due. No hearing will be held on the motion.

24 7. Any motion for an extension of time must be filed no
25 later than the deadline sought to be extended and must be
26 accompanied by a showing of good cause.

27 8. Pursuant to the Court's Orders of April 24, 2013 and
28

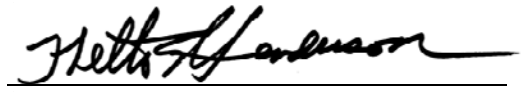
1 May 16, 2013, the Clerk shall terminate the following Defendants
2 from this action: Carson, Huges, M. Davis, Arcuri, Rush, P. Butter,
3 Gonzales, F. Andrade, D. Davis, D. Forkner, D. McDonald, C.
4 Rippetoe, A. Schavone, J. Whitlaw, G. Pope, J. Clemons, V. Ryan, F.
5 Flowers, C. Ducart, Turner, J. Barneburs, D. James, K. Osborne,
6 Pepiot, K, Cruse, Feimer, and Hilton.

7 9. Finally, the Clerk is directed to correct the spelling
8 of the name of Defendant Tupman on the docket by substituting
9 "Tupman" for "Tubman."

10 This Order terminates docket numbers 44, 81, 83, 87, and
11 89.

12 IT IS SO ORDERED.

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15 DATED 05/13/2014



THELTON E. HENDERSON
United States District Judge

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