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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

STEPHEN DWAYNE LESTER,
Plaintiff,
v.
SCOTT NEU, et al.,
Defendants.

Case No. [13-cv-01120-JD](#)

**ORDER DENYING MOTION TO
DISMISS**

Re: Dkt. No. 28

Plaintiff, a former prisoner proceeding pro se, has brought a civil rights action under 42 U.S.C. § 1983. This action proceeds on the second amended complaint (Docket No. 24) alleging that defendants Neu and Tilton used excessive force against plaintiff on June 4, 2010. Defendants have filed a motion to dismiss asserting that the complaint is untimely. Plaintiff has filed an opposition, and defendants have filed a reply.

Plaintiff previously proceeded in another case with the same allegations, but only against defendant Neu. *See Lester v. Nue*, 10-cv-5365-WHA. Case 10-cv-5365-WHA was dismissed without prejudice on January 4, 2013, due to plaintiff's repeated failure to follow Court orders and the Federal Rules of Civil Procedure with respect to a deposition. The case was dismissed without prejudice to plaintiff's refiling his claims in a new action. *See* Docket No. 73 in 10-cv-5365-WHA. Plaintiff filed this new action on March 12, 2013.

While this action would be untimely based on the applicable statute of limitations, the previous action was timely and both actions contain the same underlying claim. Because plaintiff relied on and followed the Court's instructions in filing a new case, the Court finds this action to be timely. However, should plaintiff continue his pattern of obstructing defendants' attempts to

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depose him, this case will be dismissed with prejudice.¹

CONCLUSION

1. The motion to dismiss (Docket No. 28) is **DENIED**.
2. Within 60 days of the date this Order is filed, defendants shall either file a motion for summary judgment or a notice that the case cannot be resolved by such a motion. All other provisions of the Court's June 25, 2014, Order (Docket No. 27), that are not in conflict with this Order, remain in effect including the provisions governing a motion for summary judgment, discovery, and the keeping the Court updated on any changes in the parties' addresses.

IT IS SO ORDERED.

Dated: March 26, 2015



JAMES DONATO
United States District Judge

¹ Defendants many attempts to depose plaintiff were discussed in detail in Docket No. 73 in 10-cv-5365-WHA.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 3/26/2015, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Stephen Dwayne Lester ID: 4907982
P.O. Box 883922
San Francisco, CA 94188

Dated: 3/26/2015

Richard W. Wieking
Clerk, United States District Court

By: *Lisa R. Clark* _____
LISA R. CLARK, Deputy Clerk to the
Honorable JAMES DONATO