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**\*E-FILED - 9/30/09\***

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

KYLE WHELAN AVERY, )  
 )  
 Plaintiff, )  
 v. )  
 )  
 M.S. CHACON, et al., )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

No. C 03-4233 RMW (PR)  
ORDER GRANTING  
DEFENDANTS' MOTION TO  
STAY; DENYING  
PLAINTIFF'S MOTION FOR  
SUBPOENAS; GRANTING  
PLAINTIFF'S REQUEST FOR  
EXTENSION OF TIME

(Docket Nos. 43, 57)

Plaintiff, a state prisoner proceeding pro se, filed a civil rights complaint pursuant to 42 U.S.C. § 1983. On February 12, 2009, the court ordered service of plaintiff's second amended complaint on defendant Thompson, and dismissed the remaining defendants. Pending before the court is defendant's motion to stay discovery. For the reasons stated below, defendant's motion to stay is GRANTED. Plaintiff's motion for subpoenas is DENIED without prejudice to re-filing.

Defendants move for a stay of discovery pending the court's ruling on his motion for summary judgment based on qualified immunity. Plaintiff claims the motion should be denied because he needs to conduct discovery to prove that defendant is not entitled to qualified immunity.

1 “Qualified immunity is ‘an entitlement not to stand trial or face the other burdens of  
2 litigation.’” Saucier v. Katz, 533 U.S. 194, 200 (2001) (quoting Mitchell v. Forsyth, 472 U.S.  
3 511, 526 (1985)). Accordingly, where defendants have filed a motion for summary judgment  
4 based on qualified immunity, a court should stay discovery until that threshold question is  
5 settled. Crawford-El v. Britton, 523 U.S. 574, 598 (1998) (“[i]f the defendant does plead  
6 qualified immunity, the court should resolve that threshold question before permitting  
7 discovery”).

8 On September 15, 2009, defendant Thompson moved for summary judgment based on  
9 qualified immunity. The court has not yet ruled on his motion. Accordingly, defendant is  
10 entitled to a stay of discovery against him.

11 Plaintiff argues that he needs discovery to oppose defendant’s motion for summary  
12 judgment. Under Rule 56(c) of the Federal Rules of Civil Procedure, a motion for summary  
13 judgment should be granted when the pleadings, the discovery and disclosure materials on file,  
14 and any affidavits show that there is no genuine issue as to any material fact. Here, plaintiff is  
15 restricted in his ability to survive the motion for summary judgment based on qualified immunity  
16 because he cannot conduct discovery to show the existence of a genuine issue of material fact  
17 until the question of qualified immunity is resolved. To remedy this tension between the  
18 prohibition on discovery and the standard of review applied by Rule 56, courts have loosened the  
19 rules of admissibility regarding affidavits pending the court’s ruling on the question of qualified  
20 immunity. See Dimartini v. Ferrin, 889 F.2d 922, 927-28 (9th Cir. 1989) (finding summary  
21 judgment inappropriate where discovery has been stayed pending resolution of the qualified  
22 immunity motion if all the facts alleged in the affidavits, taken as true, create a dispute of  
23 material fact). Accordingly, plaintiff’s argument is not well-taken, and the court GRANTS the  
24 motion to stay discovery as to defendant Thompson.

25 Because the court grants the motion to stay discovery, plaintiff’s motion for subpoenas is  
26 DENIED without prejudice to re-filing once the court addresses the issue of qualified immunity.

27 In plaintiff’s opposition, he requests that the court stay ruling on the motion for summary  
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1 judgment because he needs more time to conduct discovery. The court denies plaintiff's request,  
2 but will grant him an extension of time to respond to defendant's motion for summary judgment.  
3 Good cause having been shown, the court GRANTS plaintiff an extension of time to file an  
4 opposition to defendant's motion for summary judgment. Plaintiff shall file his opposition to  
5 defendant's motion for summary judgment within **60 days** from the filing date of this order.  
6 Defendant shall file a reply within **15 days** thereafter.

7 This order terminates docket numbers 43 and 57.

8 IT IS SO ORDERED.

9 DATED: 9/30/09



RONALD M. WHYTE  
United States District Judge

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