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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

ESTER BURNETT,  
CDCR #V-35245,

Plaintiff,

vs.

DUGAN; KINJI L. HAWTHORNE;  
BROWN; FRAZE; D. KHATRI;  
VICTOR ALMAGER; BARRERAS,

Defendants.

Civil No. 08-1324 L (PCL)

**ORDER DENYING PLAINTIFF'S  
MOTION FOR PRELIMINARY  
INJUNCTION PURSUANT  
TO FED.R.CIV.P. 65**

**[Doc No. 45]**

**I. PROCEDURAL HISTORY**

Currently before the Court is Plaintiff's Motion for Emergency Restraining Order and Preliminary Injunctive Relief pursuant to FED.R.CIV.P. 65 [Doc No. 45].

Ester Burnett ("Plaintiff"), is a prisoner proceeding *in pro se* and *in forma pauperis* pursuant to 42 U.S.C. § 1983. Among the allegations in his Complaint, Plaintiff claims that prison officials at California State Prison, Centinela ("CEN") have violated his Eighth Amendment rights by failing to provide him with adequate medical care and failing to accommodate his disability. The Court sua sponte screened Plaintiff's Complaint and initially dismissed it for failing to state a claim upon which § 1983 relief could be granted. (*See* Sept.

08cv1324

1 29, 2008 Order at 6-7.) Plaintiff filed his First Amended Complaint (“FAC”) on November 24,  
2 2008 [Doc. No. 11]. The Court once again screened Plaintiff’s FAC and found that the  
3 allegations in Plaintiff’s FAC survived the sua sponte screening process required by 28 U.S.C.  
4 §§ 1915(e)(2) and 1915A(b). (See Dec. 10, 2008 Order at 2.) The Court further found that  
5 Plaintiff was entitled to U.S. Marshal service on his behalf. (*Id.*)

6 On March 19, 2009, Plaintiff filed a Motion for Temporary Restraining Order and  
7 Preliminary Injunction [Doc. No. 25]. The Court deemed Plaintiff’s motion as a motion for  
8 preliminary injunction and issued a briefing schedule. After reviewing all documents submitted  
9 by both parties, the Court found that Plaintiff was able to show that he was exposed to  
10 irreparable harm and ordered Defendants to comply with medical directions issued by Samuel  
11 Ko, M.D. on January 21, 2009. (See May 6, 2009 Order at 8.)

12 Plaintiff was later transferred to California State Prison, Sacramento. (See Notice of  
13 Change of Address, Doc. No. 37). On August 5, 2009, Plaintiff filed another request for  
14 “Emergency Order Granting Temporary Restraining Order” to which Defendants filed a  
15 response on August 31, 2009.

16 **II. FACTUAL ALLEGATIONS**

17 In his most recent motion, Plaintiff claims that prison officials at California State Prison,  
18 Sacramento (“CSP-SAC”) have failed to follow his medical chronos and he has been denied  
19 adequate law library access. (Pl.’s Mot. for TRO at 1-4.)

20 **III. LEGAL STANDARD**

21 In order to demonstrate the need for preliminary injunctive relief a party must show “that  
22 he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence  
23 of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the  
24 public interest.” *Stormans, Inc. v. Selecky*, 571 F.3d 960, 978 (9th Cir. 2009) (quoting *Winter*  
25 *v. NRDC, Inc.*, \_\_\_ U.S. \_\_\_, 129 S.Ct. 365, 374 (2008)).

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1 **IV. APPLICATION TO PLAINTIFF’S CASE**

2 Under the first test for a preliminary injunction, the moving party must demonstrate “high  
3 probability of success on the merits” of the case. *See Associated Gen. Contractors of California,*  
4 *Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991).

5 Here, Plaintiff claims that he does not have adequate access to the prison law library at  
6 CSP-SAC. To the extent that Plaintiff may or may not have an access to courts claim against  
7 individuals at CSP-SAC, he would have to bring those claims in a separate action after he  
8 properly exhausted his administrative remedies pursuant to 42 U.S.C. § 1997e. He could not  
9 bring an access to courts claim in this action as that cause of action has arisen after he filed his  
10 Complaint. Even if Plaintiff were able to bring such a claim in this action, he has failed to state  
11 an access to courts claim. In order to establish a violation of the right to access to the courts, a  
12 prisoner must allege facts sufficient to show that: (1) a nonfrivolous legal attack on his  
13 conviction, sentence, or conditions of confinement has been frustrated or impeded, and (2) he  
14 has suffered an actual injury as a result. *Lewis v. Casey*, 518 U.S. 343, 353-55 (1996). An  
15 “actual injury” is defined as “actual prejudice with respect to contemplated or existing litigation,  
16 such as the inability to meet a filing deadline or to present a claim.” *Id.* at 348. Here, Plaintiff  
17 has not shown any “actual injury” and even if he were able to show such an injury, he would  
18 have to bring that claim in a separate action.

19 In addition, Plaintiff claims that prison officials at CSP-SAC have failed to provide him  
20 with the amount of physical therapy required by Dr. Calvin which “presents a substantial risk  
21 of permanent disability” and “permanent nerve damage.” (*See Pl.’s Mot.* at 3.) In support of  
22 their Opposition, Defendants submit the Declaration of Travis H. Calvin, M.D., who is the  
23 physician that performed Plaintiff’s back surgery and provided the initial housing  
24 recommendations. (*See Defs.’ Opp’n*, Declaration of Travis H. Calvin, M.D.) In this  
25 Declaration, Dr. Calvin declares that he has been informed of Plaintiff’s current housing  
26 situation along with the amount of exercise Plaintiff is receiving at CSP-SAC. (Travis Decl. at  
27 ¶ 5.) Dr. Calvin opines that Plaintiff’s housing situation is “reasonable.” (*Id.*) In addition, Dr.  
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1 Calvin disagrees with Plaintiff's assertions that he is at risk of suffering "permanent nerve  
2 damage" or "permanent disability." (*Id.*) Dr. Calvin states that Plaintiff is "progressing well  
3 following his operation and I would not expect any risk of irreparable physical harm associated  
4 with being assigned to the [Outpatient Housing Unit]." (*Id.*)

5 Having reviewed Plaintiff's application and supporting documents in support of his  
6 request for a temporary restraining order and preliminary injunction, as well as Defendants'  
7 Opposition and supporting documents, the Court finds that Plaintiff has failed to demonstrate  
8 either an immediate, irreparable injury or a likelihood of success on the merits. Accordingly,  
9 based on the foregoing, the Court hereby **DENIES**, without prejudice, Plaintiff's Motion for  
10 Preliminary Injunction pursuant to FED. R. CIV. P. 65.

11 **V. CONCLUSION AND ORDER**

12 Based on the foregoing, **IT IS HEREBY ORDERED** that:

13 Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction is  
14 **DENIED** without prejudice pursuant to Fed.R.Civ.P. 65 [Doc. No. 45].

15 **IT IS SO ORDERED.**

16 DATED: September 8, 2009

17   
18 M. James Lorenz  
United States District Court Judge

19 COPY TO:

20 HON. PETER C. LEWIS  
21 UNITED STATES MAGISTRATE JUDGE

22 ALL PARTIES/COUNSEL  
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