

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CHRISTOPHER LIPSEY, JR.,

Plaintiff,

v.

REDDY, et al.,

Defendants.

No. 2:17-cv-1434-KJM-EFB P

ORDER AND FINDINGS AND
RECOMMENDATIONS

Plaintiff is a state prisoner proceeding without counsel in this action brought under 42 U.S.C. § 1983. Currently he is proceeding on his fourth amended complaint. Defendants move for judgment on the pleadings as to plaintiff's state law claims for failure of plaintiff to allege facts showing compliance with California's Government Claims Act. ECF No. 42. Plaintiff responds by requesting leave to file a fifth amended complaint, which does allege compliance with the Act. ECF No. 45. Defendants have filed no reply brief nor an opposition to plaintiff's request for leave to amend. For the reasons that follow, plaintiff's request for leave to amend is granted and it is recommended that defendants' motion for judgment on the pleadings be denied as moot.

I. Background

The court found service appropriate for defendants Ortiz, Smith, and Reddy (ECF No. 31) and defendants answered the complaint on March 9, 2020 (ECF No. 41). Shortly after, they filed a motion seeking judgment on the pleadings as to plaintiff's state-law claims. ECF No. 42.

1 Plaintiff responds by arguing that he should be given an opportunity to amend his complaint to
2 cure that deficiency. ECF No. 45. He has submitted a fifth amended complaint that is identical to
3 his fourth amended complaint in all aspects except that it alleges compliance with the claim
4 presentation requirements of California's Government Claims Act. *Id.*

5 II. The Motion for Judgment on the Pleadings and the Motion for Leave to Amend

6 As noted, defendants seek dismissal of the state-law claims "because [plaintiff] failed to
7 comply with the California Government Claims Act's mandatory claims-presentation requirement
8 and allege that he had done so in the Complaint." ECF No. 42 at 4. Plaintiff responds that he did,
9 in fact, comply with that requirement and asks that leave be granted leave to file a fifth amended
10 complaint which includes that allegation. He has appended a copy of that proposed amended
11 complaint to his opposition. *Id.*

12 As no scheduling order has issued in this case setting forth a time limit for amending the
13 pleadings, plaintiff's motion for leave to amend is governed by Federal Rule of Civil Procedure
14 15(a). *AmerisourceBergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946, 952 (9th Cir. 2006). Rule
15 15(a) requires that leave to amend be freely granted when justice so requires. In analyzing
16 whether justice requires that leave to amend be granted, courts consider four factors: (1) bad faith,
17 (2) undue delay, (3) prejudice to the opposing party, and (4) futility of amendment. *Roth v.*
18 *Garcia Marquez*, 942 F.2d 617, 628 (9th Cir. 1991). There is no indication of bad faith, undue
19 delay, prejudice to defendants, or futility in the present situation. In fact, defendants have
20 declined to oppose plaintiff's request or make any presentation against the proposed amendment.
21 Accordingly, plaintiff's request for leave to file a fifth amended complaint is granted. For clarity
22 of the court's docket, the court will direct the Clerk to create a separate docket entry for ECF No.
23 45, pages 4 through 22, entitled "Fifth Amended Complaint."

24 As the fifth amended complaint alleges compliance with California's Government Claims
25 Act, the basis for defendants' motion for judgment on the pleadings has been eliminated.
26 Accordingly, defendant's motion should be denied as moot.

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III. Order and Recommendation

For the foregoing reasons, it is hereby ORDERED that:

1. Plaintiff's motion for leave to file a fifth amended complaint (ECF No. 45) is GRANTED.

2. The Clerk of Court shall create a separate docket entry for the document appearing at ECF No. 45, pages 4 through 22, entitled "Fifth Amended Complaint."

Further, it is RECOMMENDED that defendants' motion for judgment on the pleadings (ECF No. 42) be DENIED as moot.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections within the specified time may waive the right to appeal the District Court's order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED: May 28, 2020.


EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE