

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jun 03, 2020

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

GEORGE PHILIP HERTZOG, JR.,

Plaintiff,

v.

SPOKANE EYE CLINIC and ONE
JOHN DOE DOCTOR,

Defendants.

No. 2:20-cv-00009-SMJ

ORDER DISMISSING ACTION

1915(g)

Before the Court is Plaintiff George Philip Hertzog, Jr.’s First Amended Complaint, ECF No. 18. Plaintiff also filed a letter containing supplemental information. ECF No. 22. Plaintiff, a prisoner at the Monroe Correctional Complex-Washington State Reformatory (“Monroe”), is proceeding *pro se* and *in forma pauperis*. Plaintiff served Defendants without the Court’s directing service of the Complaint, and attorneys appeared on behalf of four Defendants. *See* ECF Nos. 7, 8; *see also* ECF No. 13 (giving notice that the Court was screening the Complaint).

Generally, an amended complaint supersedes the original complaint and renders it without legal effect. *Lacey v. Maricopa County*, 693 F.3d 896, 927 (9th Cir. 2012). Therefore, “[a]ll causes of action alleged in an original complaint which

1 are not alleged in an amended complaint are waived.” *King v. Atiyeh*, 814 F.2d 565,
2 567 (9th Cir. 1987) (citing *London v. Coopers & Lybrand*, 644 F.2d 811, 814 (9th
3 Cir. 1981)), *overruled in part by Lacey*, 693 F.3d at 928 (holding any claims
4 voluntarily dismissed are considered to be waived if not repleaded). Furthermore,
5 defendants not named in an amended complaint are no longer defendants in the
6 action. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992). Therefore,
7 Defendants Dr. Kimberly Dobson, P.A. and two John Doe D.O.C. Agents have been
8 terminated from this action. *See* ECF No. 18. On May 12, 2020, Washington
9 Assistant Attorney General Joseph Ehle filed a Notice of Withdrawal of Counsel,
10 ECF No. 24.

11 **FIRST AMENDED COMPLAINT**

12 In his First Amended Complaint, Plaintiff states that his retina detached in
13 April 2008 and a John Doe doctor performed eye surgery at the Spokane Eye Clinic
14 in Spokane, Washington. ECF No. 18 at 5–6. Plaintiff asserts that he recovered in
15 the infirmary of the Airway Heights Corrections Center, and the day after the
16 surgery, the surgeon allegedly removed the bandage and commented, “it looks
17 good.” *Id.* at 6.

18 In his supplemental letter, Plaintiff asserts that a specialist at a Laser Eye
19 Clinic in Richland, Washington, after treating Plaintiff in 2012 and 2013, informed
20 Plaintiff in March 2019 that the Spokane Eye Clinic “did it wrong.” ECF No. 18

1 at 2. Plaintiff complains that when this specialist contacted the Spokane Eye Clinic
2 in mid-March 2019, and asked them to remove a “carpol buckle,” they allegedly
3 refused. *Id.* Plaintiff indicates that on March 30, 2019, he received the needed
4 surgery at the Harborview Medical Center in Seattle, Washington, along with
5 follow-up visits. *Id.* Plaintiff complains that in 2008, the Spokane Eye Clinic
6 neglected to provide monthly checkups which he claims led to eye problems
7 requiring seven eye surgeries in 2012 and 2013, the 2019 surgery at Harborview
8 Medical Center, and possible future surgeries if his retina again detaches. *Id.* at 5;
9 ECF No. 22 at 2–4. Plaintiff seeks \$100,000.00 for pain and suffering. ECF No. 18
10 at 9.

11 Liberally construing the First Amended Complaint in the light most favorable
12 to Plaintiff, the Court finds that it does not cure the deficiencies of the initial
13 Complaint and fails to state a claim upon which relief may be granted. Once again,
14 in the absence of any basis for equitable tolling, Plaintiff’s assertions concerning a
15 surgery and follow-up appointments in 2008 are time-barred. *See RK Ventures, Inc.*
16 *v. City of Seattle*, 307 F.3d 1045, 1058 (9th Cir. 2002); *Bagley v. CMC Real Estate*
17 *Corp.*, 925 F.2d 758, 760 (9th Cir. 1991). Furthermore, Plaintiff presents no facts
18 from which the Court could infer that the Spokane Eye Clinic or the John Doe
19 doctor were “persons” acting under color of state law in 2019 who deprived Plaintiff
20 of a constitutionally protected right. *Chudacoff v. Univ. Med. Cntr. of S. Nev.*, 649

1 F.3d 1143, 1149 (9th Cir. 2011).

2 Plaintiff admits that in 2019, approximately two weeks after a specialist
3 asked the Spokane Eye Clinic to remove a “carpol buckle,” it was removed at a
4 hospital. ECF No. 22 at 3. The Court cannot infer from the facts presented that
5 persons acting under color of state law were deliberately indifferent to Plaintiff’s
6 serious medical needs. *See Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006);
7 *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1139 (9th Cir. 2012). Although granted
8 the opportunity to do so, Plaintiff has failed to state a Section 1983 claim upon
9 which relief may be granted against Spokane Eye Clinic and one John Doe Doctor.

10 Therefore, **IT IS ORDERED** this action is **DISMISSED WITH**
11 **PREJUDICE** for failure to state a claim upon which relief may be granted under
12 28 U.S.C. §§ 1915(e)(2) and 1915A(b)(1).

13 Pursuant to 28 U.S.C. § 1915(g), enacted April 26, 1996, a prisoner who
14 brings three or more civil actions or appeals that are dismissed as frivolous,
15 malicious, or for failure to state a claim will be precluded from bringing any other
16 civil action or appeal *in forma pauperis* “unless the prisoner is under imminent
17 danger of serious physical injury.” 28 U.S.C. § 1915(g). **Plaintiff is advised to read**
18 **the statutory provisions under 28 U.S.C. § 1915. This dismissal of Plaintiff’s**
19 **complaint may count as one of the three dismissals allowed by 28 U.S.C.**
20 **§ 1915(g) and may adversely affect his ability to file future claims.**

