NOT FOR PUBLICATION

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GREGORY BENTON,

Plaintiff-Appellant,

v.

LEGACY HEALTH,

Defendant-Appellee,

and

LEGACY HEALTH SYSTEM CPC, LLC; CITY OF PORTLAND; CHRISTOPHER MCDONALD; PHYLLIS C. BENTON; JOHN DOE, 1 and 2,

Defendants.

No. 18-36088

D.C. No. 3:13-cv-00613-YY

MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Youlee Yim You, Magistrate Judge, Presiding

Submitted December 2, 2022**
San Francisco, California

Before: BADE, LEE, and KOH, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Gregory Benton, proceeding pro se, appeals from the district court's entry of judgment in favor of Legacy Health following a jury trial. Benton asserted federal claims under 42 U.S.C. § 1983 and a battery claim under Oregon law. After dismissing Benton's federal claims, the court exercised supplemental jurisdiction over the remaining state-law battery claim. On appeal, Benton challenges the district court's denial of his motions to appoint counsel, reopen discovery, and for a continuance. He also challenges the court's failure to sua sponte declare a mistrial. We have jurisdiction under 28 U.S.C. § 1291. We affirm.

We review for abuse of discretion the district court's denial of Benton's motion to appoint counsel under 28 U.S.C. § 1915. *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009). Appointment of counsel is only appropriate under "exceptional circumstances," when considering "the likelihood of success on the merits as well as the ability of the petitioner to articulate his claims *pro se* in light of the complexity of the legal issues involved." *Id*. (internal quotation marks omitted). The district court did not abuse its discretion when it denied Benton's request to appoint another attorney after his appointed counsel withdrew. Benton has not shown the existence of exceptional circumstances, especially considering that he had received assistance from previous counsel and had shown that he could adequately represent himself on the sole remaining claim. *See Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986) (holding that the need to conduct

discovery was not "exceptional" because "a pro se litigant will seldom be in a position to investigate easily the facts necessary to support the case").

We review for abuse of discretion the refusal to reopen discovery. *Panatronic USA v. AT & T Corp.*, 287 F.3d 840, 846 (9th Cir. 2002); *see also Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002) (explaining that the trial court has "broad discretion" over discovery (alteration, citation, and internal quotation marks omitted)). We hold that the district court properly exercised its discretion.[1]

We review the denial of a requested continuance for an abuse of discretion. *See United States v. Flynt*, 756 F.2d 1352, 1358 (9th Cir. 1985) ("The decision to grant or deny a requested continuance . . . will not be disturbed on appeal" unless "the denial was arbitrary or unreasonable."). Considering the relevant factors, we conclude that the denial was not arbitrary or unreasonable. *See id.* at 1359–61 (discussing relevant factors).

We review for plain error the district court's failure to sua sponte declare a mistrial. *United State v. Banks*, 514 F.3d 959, 973–74 (9th Cir. 2008) (setting forth plain error standard). Benton has not identified any error, let alone plain error, in the district court's failure to sua sponte declare a mistrial. Benton experienced a

[1] The case had been pending for over five years, the parties had engaged in extensive discovery, and Benton failed to show that he was prejudiced from the denial of his request to reopen discovery to seek discovery from unnamed witnesses and regarding an incident unrelated to his claim.

"medical event," which took place outside the presence of the jury. The court took a recess and resumed trial after Benton advised the court that he was ready to proceed. Benton fails to show that the district court erred. *See id.* at 974 (noting the court's broad discretion).

We decline to consider Benton's contention that Legacy committed fraud at trial because he failed to raise this issue before the district court. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009) (per curiam) (declining to consider arguments and allegations raised for the first time on appeal).

AFFIRMED.