

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

ANTHONY L. MORENO,  
Plaintiff,  
v.  
JOSHUA PEFFLEY, et al.,  
Defendants.

Case No. [22-cv-04520-VKD](#)

**ORDER DENYING REQUEST FOR  
APPOINTMENT OF COUNSEL; *SUA  
SPONTE* EXTENDING DEADLINE TO  
OPPOSE SUMMARY JUDGMENT  
MOTION**

Re: Dkt. No. 23

On March 28, 2024, pro se plaintiff Anthony Moreno filed a third request for appointment of counsel. Dkt. No. 23. At the Court’s direction, defendants filed an opposition addressing three issues raised in Mr. Moreno’s request. Dkt. No. 27; *see* Dkt. No. 26 at 2. Mr. Moreno did not file a reply. For the reasons explained below, the Court denies Mr. Moreno’s request for appointment of counsel.

**I. BACKGROUND**

In his current request for appointment of counsel, Mr. Moreno argues, among other things, that (1) he has been hindered from accessing the law library and computer while in restricted housing, (2) his transfer to another facility will bar his access to witnesses and documents he needs to litigate this matter, and (3) prison staff seized his documents and property, preventing him from complying with defendants’ discovery requests. Dkt. No. 23. Defendants dispute Mr. Moreno’s arguments. They rely on the declarations of Deputy Attorney General A. Vicas, E. Galvan (Litigation Coordinator at Correctional Training Facility (“CTF”)), J. Perez-Pantoja (property officer in the restricted housing unit (“RHU”) at CTF), M. Martinez (librarian at CTF), and V.

1 Martinez (Litigation Coordinator at California State Prison, Solano), along with exhibits. Dkt.  
2 Nos. 27-1 through 27-5.

3 **II. DISCUSSION**

4 **A. Legal Standard**

5 There is no constitutional right to counsel in a civil case unless an indigent litigant may  
6 lose his physical liberty if he loses the litigation. *See Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18,  
7 25 (1981); *Rand v. Rowland*, 113 F.3d 1520, 1525 (9th Cir. 1997) (no constitutional right to  
8 counsel in § 1983 action), *withdrawn in part on other grounds on reh'g en banc*, 154 F.3d 952  
9 (9th Cir. 1998) (en banc). While a court may decide to appoint counsel to represent an indigent  
10 litigant in the exercise of its discretion, a request to appoint counsel generally requires a showing  
11 of "exceptional circumstances." *See* 28 U.S.C. § 1915(e)(1); *Franklin v. Murphy*, 745 F.2d 1221,  
12 1236 (9th Cir. 1984). In making this determination, the court must consider the likelihood of a pro  
13 se plaintiff's success on the merits and evaluate his ability to articulate his claims in light of the  
14 complexity of the legal issues involved. *See Agyeman v. Corrections Corp. of America*, 390 F.3d  
15 1101, 1103 (9th Cir. 2004); *Rand*, 113 F.3d at 1525; *Wilborn v. Escalderon*, 789 F.2d 1328, 1331  
16 (9th Cir. 1986).

17 **B. Prior Requests for Appointment of Counsel**

18 Mr. Moreno has requested that the Court appoint counsel to represent him on two prior  
19 occasions. *See* Dkt. No. 1 at 12; Dkt. No. 6 at 12. On both occasions, he asked for counsel solely  
20 because he is a "lay-person and unskilled at law." *Id.* The Court considered the nature and  
21 complexity of Mr. Moreno's claims and concluded that he identified no "exceptional  
22 circumstances" that warrant appointment of counsel; the Court denied these earlier requests  
23 without prejudice. *See* Dkt. No. 5 at 6; Dkt. No. 7 at 5.

24 As noted above, Mr. Moreno makes some new arguments in his current motion for  
25 appointment of counsel. The Court addresses each of these new arguments below. However, the  
26 Court also specifically considers Mr. Moreno's likelihood of success on the merits and his ability  
27 to articulate his claims in light of the complexity of the issues involved. With respect to likelihood  
28 of success, defendants contend that Mr. Moreno's claims are barred because he failed to

1 administratively exhaust them prior to filing suit as required under the Prison Litigation Reform  
2 Act. Dkt. No. 24. Failure to exhaust all available administrative remedies prior to filing suit may  
3 be grounds for dismissal. *See Albino v. Baca*, 747 F.3d 1162, 1172 (9th Cir. 2014). Mr. Moreno  
4 has not responded to defendants’ arguments on this point, so it is difficult for the Court to assess  
5 his likelihood of success. However, with respect to the complexity of the issues involved, the  
6 Court reaffirms its earlier assessment that the issues presented by Mr. Moreno’s claims are not  
7 particularly complex—he asserts that defendants falsified evidence of his association with a prison  
8 gang in violation of his Fourteenth Amendment rights to due process and equal protection, and in  
9 violation of CDCR’s regulations for gang validation. Mr. Moreno has demonstrated an ability to  
10 articulate his claims in this litigation, including by filing an amended complaint that adequately  
11 stated his claims for relief. On the question of exhaustion, Mr. Moreno may demonstrate that he  
12 filed grievances and pursued the available administrative remedies with respect to these claims by  
13 filing his records and/or a declaration with the Court when responding to defendants’ summary  
14 judgment motion.

15 **C. Access to Legal Resources**

16 Mr. Moreno asserts that he has been prevented from going to the law library on occasion  
17 and from accessing its computers. Dkt. No. 23 ¶ 3. He also says that when he is given the  
18 opportunity to go to the library, “[he] is put in a stand-up cage with a monitor that does not give  
19 [him] access to conduct research.” *Id.*

20 The record before the Court shows that Mr. Moreno was placed in a restricted housing unit  
21 on May 17, 2023, pending an investigation into a suspected gang-related homicide at the prison.  
22 Dkt. No. 23 at 11; Dkt. No. 27-2 ¶ 7, Ex. A (Galvan Decl.). According to defendants, prisoners in  
23 the RHU are allowed both physical access to CTF’s central library and in-cell access to its legal  
24 materials. Dkt. No. 27-3 ¶¶ 3-4 (Perez-Pantoja Decl.); Dkt. No. 27-4 ¶ 5 (Martinez Decl.).  
25 Prisoners are escorted from the RHU to the library and placed in a temporary holding cell for  
26 safety reasons. *Id.* In the holding cell, a prisoner can conduct legal research on touch screen  
27 computers. Dkt. No. 27-4 ¶ 5. If the touch screen is not working, a prisoner may request printed  
28 research, document copies, and other legal supplies brought to his holding cell. *Id.* ¶ 4.

1 Defendants submit records from the library and the RHU showing that Mr. Moreno  
2 frequented CTF’s Central Library during his RHU term. He was on the RHU library schedule on  
3 eight occasions during February, March, and April 2024, and sign-in sheets confirm that he visited  
4 the law library at least four times in the last few months. Dkt. No. 27-3 ¶ 6, Ex. C (Perez-Pantoja  
5 Decl.); Dkt. No. 27-4 ¶ 4, Ex. A (Martinez Decl.). Defendants attest that while in the RHU, Mr.  
6 Moreno was able to conduct research in the library holding cell, and requested document copies,  
7 research, and other legal supplies, as well as legal materials and research from the library for in-  
8 cell use. Dkt. No. 27-4 ¶¶ 4-5, Exs. B, C. Lastly, defendants point out that the two occasions on  
9 which Mr. Moreno says he was not permitted access to the library was when the library was  
10 closed. Dkt. No. 27 at 4, citing Dkt. No. 23 at 3.

11 On the record presented, the Court finds no basis for concluding that Mr. Moreno has been  
12 denied access to legal resources such that appointment of counsel is necessary for him to litigate  
13 this matter.

14 **D. Transfer to Higher Security Prison**

15 Mr. Moreno asserts that his transfer to another prison will hinder his ability to access  
16 witnesses and documents necessary to litigate this matter, and that he requires the assistance of  
17 counsel to preserve his access to these sources of evidence. Dkt. No. 23 ¶ 5.

18 Defendants respond that on May 17, 2023, Mr. Moreno became the subject of an ongoing  
19 homicide investigation and was placed in restricted housing. Dkt. No. 27-2 ¶ 7, Ex. A at 1. After  
20 disciplinary proceedings, he was found guilty of possessing a deadly weapon. *Id.* According to  
21 defendants, the finding that Mr. Moreno possessed a deadly weapon raised his security  
22 classification at the prison from a level II to a level III custody designation. *Id.* At a classification  
23 hearing on April 4, 2024, the Institution Classification Committee concluded that Mr. Moreno’s  
24 presence at CTF posed a potential threat to institutional safety and security and to the integrity of  
25 the ongoing homicide investigation. *Id.*, Ex. A at 5-6. The committee recommended his transfer  
26 to level III facilities at Richard J. Donovan Correctional Facility or California State Prison, Solano  
27 (“CSP Solano”). Mr. Moreno was transferred to CSP Solano on April 10, 2024. Dkt. No. 27-2  
28 ¶ 8.

1 Defendants assert that CSP Solano has the same legal resources as CTF. Dkt. No. 27-1  
2 ¶ 10 (Vicas Decl.); Dkt. No. 27-5 ¶¶ 3-4 (V. Martinez Decl.). According to defendants, Mr.  
3 Moreno is housed in the prison’s general population and recently confirmed that he “has  
4 everything that was issued to him.” Dkt. No. 27-5 ¶ 3. With regard to access to witnesses,  
5 defendants’ counsel asserts that Mr. Moreno did not identify any witnesses when asked to respond  
6 to defendants’ interrogatories on this point. Dkt. No. 27-1 ¶ 7 (Vicas Decl.). Counsel asserts that  
7 it is therefore unclear what documents, witnesses, and research Mr. Moreno requires to oppose  
8 defendants’ summary judgment motion or to prosecute his claims that he does not already have.  
9 *Id.* at ¶ 9. Defendants advise that they do not oppose an extension of time for Mr. Moreno to  
10 respond to defendants’ summary judgment motion, if necessary, in view of his transfer, as he may  
11 need time to familiarize himself with CSP Solano’s law library. Dkt. No. 27 at 5.

12 On the record presented, the Court finds no basis for concluding that Mr. Moreno has been  
13 denied access to the relevant sources of evidence or that appointment of counsel is necessary to  
14 address his inability to access such evidence, particularly where Mr. Moreno has not identified any  
15 specific witness to whom he requires access in order to oppose defendants’ summary judgment  
16 motion or to prosecute his claims.

17 **E. Access to Documents and Property**

18 Mr. Moreno asserts that the seizure of his documents and property has prevented him from  
19 complying with defendants’ discovery requests, a problem he says he made defense counsel aware  
20 of at his deposition, and he seeks assistance of appointed counsel for this purpose also. Dkt. No.  
21 23 ¶ 7.

22 Defendants respond that Mr. Moreno requested and received his allowable personal and  
23 legal property on multiple occasions. Dkt. No. 27-3 ¶ 7, Exs. D, E (Perez-Pantoja Decl.). Defense  
24 counsel attests that Mr. Moreno brought a large stack of documents with him to his deposition,  
25 and that he searched through, referred to, and read from these documents during the deposition  
26 (but apparently did not produce them). Dkt. No. 27-1 ¶ 5 (Vicas Decl.). Mr. Moreno apparently  
27 stated that his correctional counselor printed some of these documents for him prior to his  
28 deposition, and it appeared to counsel that Mr. Moreno had these documents since *at least*

1 November 30, 2023. *Id.* ¶¶ 5, 7. Counsel advises that these documents are the only documents  
2 defendants earlier moved to compel. Dkt. No. 27 at 5.

3 On the record presented, the Court finds no basis for concluding that Mr. Moreno has been  
4 prevented from accessing his documents and property, such that he was unable to comply with  
5 defendants' discovery requests.

6 **III. CONCLUSION**

7 Based on the foregoing, the Court finds no exceptional circumstances and declines to  
8 appoint counsel for Mr. Moreno. Accordingly, Mr. Moreno's motion for appointment of counsel  
9 is **DENIED**. Dkt. No. 23.

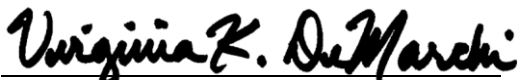
10 Defendants filed their summary judgment motion on March 29, 2024. Dkt. No. 24.  
11 According to the Court's briefing schedule, Mr. Moreno's opposition was due twenty-eight days  
12 later, i.e., by April 26, 2024. Mr. Moreno did not file an opposition. However, in the interest of  
13 justice, the Court *sua sponte* grants Mr. Moreno an extension of time to file an opposition to  
14 defendants' summary judgment motion. Mr. Moreno's opposition shall be filed **no later than**  
15 **June 3, 2024**. Defendants shall file a reply no later than **fourteen (14) days** after Mr. Moreno's  
16 opposition is filed.

17 This order terminates Docket No. 23.

18 **IT IS SO ORDERED.**

19 Dated: May 7, 2024

20  
21  
22  
23  
24  
25  
26  
27  
28

  
VIRGINIA K. DEMARCHI  
United States Magistrate Judge