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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

VICENTE ARRAIGA ALVAREZ,

Plaintiff,

v.

DR. S. KO, M.D., et al.,

Defendants.

Case No.: 16-cv-1302-CAB-NLS

**ORDER DENYING PLAINTIFF’S
MOTION FOR APPOINTMENT
OF COUNSEL**

(ECF No. 46)

Plaintiff Vicente Alvarez (“Plaintiff”), a prisoner proceeding *pro se* and *in forma pauperis*, filed this civil rights action against Defendants Dr. Ko, Dr. McCabe, Dr. Sangha, and Deputy Director Lewis. He alleges claims under the Eighth Amendment for deliberate indifference to his medical needs. ECF No. 1. This is Plaintiff’s second request for appointment of pro bono counsel. *See*, ECF Nos. 34, 46.

I. Plaintiff’s Request for Appointment of Counsel

Plaintiff asks this Court to appoint him counsel from the Court’s pro bono panel. ECF No. 46. He argues the Court should appoint counsel because (1) he cannot afford counsel, (2) the case is complex, (3) does not have ready access to a

1 law library and (4) he lacks legal training in the law. *Id.* at 1-2.¹ Plaintiff concedes
2 he has a good grasp of basic litigation procedure, but argues that he has articulated
3 his claim thus far at great cost and due to his high school education and will not be
4 able to effectively present his case through the course of the discovery and pre-trial.
5 *Id.* at 13, 19. Plaintiff argues that his survival of the pleading challenges
6 demonstrates a likelihood of success on the merits. *Id.* at 18. Plaintiff also raises
7 concern regarding expert retention and believes appointed counsel would be able to
8 retain a medical expert, which Plaintiff argues will help his case. *Id.* at 19.

9 **II. Legal Standard**

10 “[T]here is no absolute right to counsel in civil proceedings.” *Hedges v.*
11 *Resolution Trust Corp.*, 32 F.3d 1360, 1363 (9th Cir. 1994) (citation omitted). In
12 *pro se* and *in forma pauperis* proceedings, district courts do not have the authority
13 “to make coercive appointments of counsel.” *Mallard v. United States District*
14 *Court*, 490 U.S. 296, 310 (1989). But they do have discretion to request that an
15 attorney represent indigent civil litigants upon a showing of “exceptional
16 circumstances.” 28 U.S.C. § 1915(e)(1); *Agyeman v. Corrs. Corp. of Am.*, 390 F.3d
17 1101, 1103 (9th Cir. 2004).

18 “A finding of exceptional circumstances requires an evaluation of both the
19 ‘likelihood of success on the merits and the ability of the plaintiff to articulate his
20 claims *pro se* in light of the complexity of the legal issues involved.’ Neither of
21 these issues is dispositive and both must be viewed together before reaching a
22 decision.” *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991), *quoting Wilborn*
23 *v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986).

24 **III. Discussion**

25 Here, there has not been a substantial change in circumstances from the
26 previous request for appointment of counsel, which was decided by the Court just 3

27 ¹ Page citations are to the ECF heading page numbers.
28

1 months ago following the Magistrate’s Judge’s Recommendation that the
2 Defendants’ motion to dismiss be denied. ECF No. 36. Since that time, the only
3 change is that the District Judge has adopted that recommendation and the case
4 entered the discovery phase.

5 **A. Likelihood of Success on the Merits**

6 A plaintiff that provides no evidence of his likelihood of success at trial fails
7 to satisfy the first factor of the *Wilborn* test. *Bailey v. Lawford*, 835 F. Supp. 550,
8 552 (S.D. Cal. 1993).

9 As before, there is very little before the Court regarding the merits of
10 Plaintiff’s case other than the allegations in the Complaint, which Plaintiff re-states
11 in substantial part. *See* ECF No. 46 at 7-10. Plaintiff primarily points to the
12 Court’s order denying the Defendants’ motion to dismiss as indicative of a
13 likelihood of success.² *Id.* at 15-17. Plaintiff also offers several exhibits for the
14 Court’s review to support his position, including Dr. Ko’s notes and dictations as
15 well as EKG/ECG readings. *Id.*, Exs. A-D.

16 The exhibits provided by Plaintiff cut both ways with respect to likelihood of
17 success. Dr. Ko’s notes and dicatations indicate, as Plaintiff suggests, that Dr. Ko
18 recommended continuation of the same treatment plan despite Plaintiff’s protests
19 that it was not effective for his pain. *Id.* at 16, Exs. A-B. However, Dr. Ko’s notes
20 and dictations also indicate that Plaintiff’s condition was improving; that Plaintiff
21 was not following the treatment plan; and that Dr. Ko ordered and reviewed the
22 EKG’s and found them to be “unremarkable.” *Id.* at Exs. A-B. The evidence
23

24 ² A motion to dismiss assumes all the allegations of the complaint are true for the
25 purposes of the motion to dismiss. Fed. R. Civ. P. 12(b); *Barnett v. Centoni*, 31
26 F.3d 813, 816 (9th Cir. 1994) (holding that to determine whether a complaint states
27 a claim, the court takes “all allegations of material fact” as true and construes them
28 in the light most favorable to the plaintiff.) The same standard is not applicable
when analyzing the likelihood of success on the merits.

1 presented is conflicting, and so Plaintiff does not demonstrate a likelihood of
2 success at trial based on this limited evidence. The first *Wilborn* factor is not
3 satisfied.

4 **B. Plaintiff's Ability to Articulate His Claims**

5 Where a *pro se* civil rights plaintiff shows he has a good grasp of basic
6 litigation procedure and has been able to articulate his claims adequately, he does
7 not demonstrate the exceptional circumstances required for the appointment of
8 counsel. See *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009). As another
9 court in this district noted, there is “no doubt [that] most *pro se* litigants find it
10 difficult to articulate their claims and would be better served with the assistance of
11 counsel.” *Garcia v. Cal. Dep't of Corrections & Rehab.*, 2013 WL 485756, at *1
12 (S.D. Cal. Feb. 6, 2013). But it is for this reason that federal courts employ
13 procedures that protect a *pro se* litigant's rights. See *Haines v. Kerner*, 404 U.S.
14 519, 520 (1972). In *pro se* civil rights cases, a court must construe the pleadings
15 liberally and afford the plaintiff any benefit of the doubt. *Karim-Panahi v. Los*
16 *Angeles Police Dep't*, 839 F.2d 621, 623 (9th Cir. 1988). Thus, where a *pro se*
17 plaintiff can articulate his claims in light of their relative complexity, there are no
18 exceptional circumstances to justify appointment of counsel. *Garcia*, 2013 WL
19 485756, at *1, citing *Wilborn*, 789 F.2d at 1331.

20 Here, Plaintiff continues to demonstrate a good grasp on litigation procedure,
21 as evidenced by his pleadings and submissions. Plaintiff has filed several motions
22 and pleadings, and demonstrates no difficulty articulating his claim. Plaintiff's
23 submissions present cogent arguments supported by references to case law, albeit
24 from various circuits. See ECF No. 46. He recently properly and timely requested
25 an enlargement of time for expert designation. See ECF No. 48. The second
26 *Wilborn* factor is not satisfied.

1 Plaintiff argues counsel is needed to engage in discovery and potentially
2 secure expert testimony, but this does not necessarily amount to exceptional
3 circumstances. *Wilborn*, 789 F.2d at 1331 (“Most actions require development of
4 further facts during litigation and a *pro se* litigant will seldom be in a position to
5 investigate easily the facts necessary to support the case. If all that was required to
6 establish successfully the complexity of the relevant issues was a demonstration of
7 the need for development of further facts, practically all cases would involve
8 complex legal issues.”); *Rand v. Rowland*, 113 F.3d 1520, 1525 (9th Cir. 1997)
9 (finding no abuse of discretion under 28 U.S.C. § 1915(e) when district court
10 denied appointment of counsel despite fact that *pro se* prisoner “may well have
11 fared better - particularly in the realm of discovery and the securing of expert
12 testimony,” because that is not the applicable test). Similarly, Plaintiff’s assertion
13 that he has limited access to the law library is common to many prisoners and also
14 does not amount to exceptional circumstances. *See, e.g., Wood v. Housewright*,
15 900 F.2d 1332, 1335-36 (9th Cir. 1990) (upholding denial of appointment of
16 counsel where plaintiff complained that he had limited access to law library and
17 lacked a legal education).

18 Plaintiff also argues that issues of supervisory liability and qualified immunity
19 raise the complexity of the case and weigh in favor of appointment of counsel. The
20 Court disagrees. All—or nearly all—prisoner claims based upon civil rights
21 violations pursuant to 42 U.S.C. § 1983 involve defenses of qualified immunity and
22 issues of supervisory liability. The presence of these issues does not present
23 extraordinary circumstances or affect the complexity of the case such that
24 appointment of counsel is necessary.

25 Finally, it is unlikely that Plaintiff’s ability to secure expert testimony will be
26 affected by the appointment of counsel. The *in forma pauperis* (“IFP”) statute, 28
27 U.S.C. § 1915, does not waive the requirement of the payment of fees or expenses
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1 for witnesses in a § 1983 prisoner civil rights action. *Dixon v. Ylst*, 990 F.2d 478,
2 480 (9th Cir. 1993). Plaintiff asserts he is indigent. ECF No. 46 at 3, ¶ 7. Under
3 the IFP statute he would have pay for his own expert, and does not demonstrate he
4 has the means to do so. Appointment of pro bono counsel would not alter this
5 circumstance. The lack of an expert would not be fatal to Plaintiff's claim. To
6 prevail on his Eighth Amendment claim for deliberate indifference, Plaintiff must
7 show that Defendants acted with deliberate indifference to his serious medical
8 needs. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1983). Deliberate indifference has
9 a subjective component because it requires the court to "consider the seriousness of
10 the prisoner's medical need and the nature of the defendant's response to that
11 need." *Levi v. Dir. Of Corr.*, 2006 WL 845733 at *3 (E.D. Cal. 2006) (citation
12 omitted). In the context of such a claim, "the question of whether the prison
13 officials displayed deliberate indifference to [Plaintiff's] serious medical needs
14 [does] not demand that the jury consider probing, complex questions concerning
15 medical diagnosis and judgment." *Id.*

16 **IV. Conclusion**

17 For the foregoing reasons, the Court thus does not find the "exceptional
18 circumstances" required for appointment of counsel under 28 U.S.C. § 1915(e)(1).
19 Accordingly, Plaintiff's request for appointment of counsel at this time is
20 **DENIED**. Should the circumstances of the case materially change, Plaintiff may
21 resubmit his request and/or the Court may decide to reconsider the request *sua*
22 *sponte*.

23 **IT IS SO ORDERED.**

24 Dated: July 24, 2017

25 

26 Hon. Nita L. Stormes
27 United States Magistrate Judge
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