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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ELONZA JESSE TYLER,

Plaintiff,

v.

ALAMEIDA, et al.,

Defendants.

CASE NO. 1:-04-cv-06638-LJO-BAM PC

ORDER DENYING PLAINTIFF’S MOTION FOR ENTRY OF DEFAULT AND MOTION FOR SUMMARY JUDGMENT

(ECF No. 164)

Plaintiff Elonza Jesse Tyler is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Following remand by the Ninth Circuit of Appeal, this action is proceeding against Defendant Smith for deliberate indifference in violation of the Eighth Amendment. On December 29, 2011, an order issued directing the United States Marshall to serve the second amended complaint on Defendant Smith. On December 30, 2011, Plaintiff filed a motion for entry of default and motion for summary judgment.

In this case, the United States Marshal has just been directed to initiate service of process on Plaintiff’s behalf. 28 U.S.C. § 1915(d); Fed. R. Civ. P. 4(c)(2). Until Plaintiff has legally effected service of process of the second amended complaint, Defendant Martinez is under no obligation to respond to the complaint. Fed. R. Civ. P. 4(e). Accordingly, Plaintiff’s motion for entry of default is denied as premature. Fed. R. Civ. P. 55(a).

Federal Rule of Civil Procedure 56 contemplates that, prior to filing a motion for summary judgment, the opposing party should have a sufficient opportunity to discover information essential to its position. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). In other words, the

1 case must be sufficiently advanced in terms of pretrial discovery for the summary judgment target
2 to know what evidence likely can be mustered and be afforded a reasonable opportunity to present
3 such evidence. Portsmouth Square, Inc., v. Shareholders Protective Comm., 770 F.2d 866, 869 (9th
4 Cir.1985). Until such time as Defendant has entered an appearance and had the opportunity to
5 conduct discovery, Plaintiff's motion is premature. Once Defendant files an answer, a discovery
6 order will be entered, and a deadline for the filing of dispositive motions will be set.

7 Accordingly, it is HEREBY ORDERED that Plaintiff's motion entry of default and for
8 summary judgment is DENIED as premature.

9 IT IS SO ORDERED.

10 **Dated: January 5, 2012**

/s/ Barbara A. McAuliffe
UNITED STATES MAGISTRATE JUDGE