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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Eyen Anderson,
Plaintiff,
vs.
G. Fishback, et al.,
Defendants.

No. CV-05-0729-PHX-ROS
ORDER

(PC) Anderson v. Fishback et al

Doc. 36

Before the Court are three matters: Plaintiff's Motion for Appointment of Counsel (Doc. 24), Plaintiff's Motion for Order (Doc. 32), and Defendant Suryadevana's Motion to Dismiss (Doc. 28). For the following reasons, Plaintiff's motions will be denied and additional briefing will be ordered for Defendant's motion.

I. Appointment of Counsel

Plaintiff requests appointment of counsel pursuant to 28 U.S.C. § 1915(e)(1). While admitting there is no constitutional right to appointed counsel in a 42 U.S.C. § 1983 action, Plaintiff argues this case presents exceptional circumstances and thus warrants discretionary appointment of counsel. See Storseth v. Spellman, 654 F.2d 1349, 1353 (9th Cir. 1981) ("[T]here is no constitutional right to appointed counsel for [§] 1983 claims"); Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th Cir. 1986) (counsel may be appointed under § 1915

1 only in "exceptional circumstances"). The Court disagrees. "A finding of exceptional
2 circumstances requires an evaluation of both the likelihood of success on the merits and the
3 ability of the [plaintiff] to articulate his claims *pro se* in light of the complexity of the legal
4 issues involved." Wilborn, 789 F.2d at 1331. With respect to likelihood of success and
5 ability to articulate claims, Plaintiff is in no different position than other *pro se* plaintiffs who
6 have filed similar prisoner civil rights actions. Thus, Plaintiff's circumstances are not
7 exceptional under § 1915(e) and the motion for appointment of counsel will be denied.

8 9 **II. Motion For Order**

10 On August 14, 2008, the U.S. Marshals Service was ordered to serve the Complaint
11 on Defendants Fishback, Martinez and Suryadevana (Doc. 18). On September 16, 2008, the
12 summons for Defendant Fishback, who is deceased, was returned unexecuted (Doc. 21). On
13 October 30, 2008, the summons for Defendant Martinez was returned unexecuted, as there
14 was no record of a J. Martinez employed at the Substance Abuse Treatment Facility in
15 Corcoran, California, where Plaintiff claimed Martinez could be found, and the U.S. Marshal
16 was otherwise unable to identify Martinez from the various J. Martinezes employed
17 elsewhere in the California Department of Corrections (Doc. 22). On December 1, 2008,
18 Defendant Suryadevana waived service (Doc. 27).

19 Plaintiff argues for the "Court to issue an Order directing the Honorable Edmund C.
20 Brown, Jr., Attorney General of the State of California, in his capacity as Attorney for
21 Defendants Martinez and Fishback, as employees of the State of California, to produce the
22 named Defendants before the Court so that they may be Served Notice of this Complaint, or
23 to notify the Court and Plaintiff, Mr. Anderson, of the current whereabouts of the named
24 Defendants" (Doc. 32 at 1). This motion is inappropriate and will be denied.

25 Although the U.S. Marshal was ordered to effect service for Plaintiff, "it is ultimately
26 [P]laintiff's responsibility to provide a name and address for each defendant to be served in
27 order for the Court to direct the Marshal to serve process on a defendant." Lateef v. Jackson,

1 2009 WL 393857, *2 (N.D. Cal. 2009); see also Walker v. Sumner, 14 F.3d 1415, 1422 (9th
2 Cir. 1994), *overruled on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995), (requiring
3 a *pro se* prisoner plaintiff to have "furnished the information necessary to identify the
4 defendant") (internal citation omitted).

5 Here Plaintiff provided the first initial, last name, and place of occupation for each
6 Defendant (Docs. 21-22, 27). With this information, Defendants Fishback, who is deceased,
7 and Suryadevana, who waived service, were located (Docs. 21, 27). However, Defendant
8 Martinez was unable to be located (Doc. 22). Having pursued and exhausted the information
9 provided by Plaintiff, neither the Marshal nor the Court is permitted to offer further
10 assistance in determining the whereabouts of Martinez. See e.g. DeRoche v.
11 Funkhouser, 2008 WL 4277659, *1 (D. Ariz. 2008) ("[N]either the Marshal Service nor the
12 Court may engage in investigatory efforts on behalf of the parties to a lawsuit as this would
13 improperly place the Court in the role of an advocate." (citing Hall v. Bellmon, 935 F.2d
14 1106, 1110 (10th Cir.1991)). Plaintiff now has two choices; he may provide additional
15 information with which the Marshal may attempt to identify and serve Martinez or wait until
16 the proceedings enter the discovery stage, assuming that stage is reached, and subpoena third
17 parties for information concerning Martinez's whereabouts. The Court will not order the
18 California Attorney General to aid Plaintiff in litigating this case and thus the motion will be
19 denied.

20 21 **III. Motion to Dismiss**

22 Defendant Suryadevana has filed a motion to dismiss for failure to state a claim and
23 exhaust administrative remedies (Doc. 28). It is noted that Plaintiff has not received the
24 required warning, per Wyatt v. Terhune, 315 F.3d 1108 (9th Cir. 2003), without which the
25 proceedings cannot move forward. See 315 F.3d at 1119-20 & n.14 ("In deciding a motion
26 to dismiss for a failure to exhaust nonjudicial remedies, the court may look beyond the
27 pleadings and decide disputed issues of fact . . . if the district court looks beyond the
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1 pleadings to a factual record in deciding the motion . . . then the court must assure that
2 [Plaintiff] has fair notice of his opportunity to develop a record."). Accordingly, the warning
3 is set forth below and the parties will be given an opportunity for supplemental briefing.

4 Plaintiff is on notice:

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6 Defendant Suryadevana has filed a motion to dismiss this action for failure to state a
7 claim and exhaust administrative remedies. A failure to exhaust administrative remedies is
8 subject to an unenumerated Rule 12(b) motion to dismiss. See Wyatt, 315 F.3d at 1119
9 (citing Ritza v. Int'l Longshoremen's & Warehousemen's Union, 837 F.2d 365, 368 (9th Cir.
10 1988) (*per curiam*)). "In deciding a motion to dismiss for failure to exhaust nonjudicial
11 remedies, the court may look beyond the pleadings and decide disputed issues of fact." Id.
12 at 1119-20 (quoting Ritza, 837 F.2d at 368). If it is concluded the prisoner has not exhausted
13 administrative remedies, the case will be dismissed without prejudice. See Id. at 1120. This
14 means that the case will end. If Plaintiff exhausts administrative remedies at a later date, the
15 case may be re-filed as a new action.

16 When responding to a motion to dismiss for failure to exhaust administrative
17 remedies, Plaintiff may not simply rely on allegations in the Complaint. Instead, Plaintiff
18 must oppose the motion by setting forth specific facts in declaration(s) and other evidence
19 regarding the exhaustion of administrative remedies. See Fed. R. Civ. P. 43(c);¹ Ritza, 837
20 F.2d at 369 ("The distinction between summary judgment and dismissal for matters in
21 abatement bears on the district court's authority to resolve factual disputes").² If Plaintiff
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Formerly Fed. R. Civ. P. 43(e).

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26 See also Devereaux v. Abbey, 263 F.3d 1070, 1076 (9th Cir. 2001) (when the non-moving
27 party bears the burden of proof at trial, the moving party's summary judgment motion need
28 only highlight the absence of evidence supporting the non-moving party's claims and the
burden then shifts to the non-moving party who must produce evidence sustaining a genuine
issue of disputed material fact).

1 does not submit evidence in opposition, the Court may conclude Plaintiff has not exhausted
2 administrative remedies and the case will be dismissed.

3 At some point in the litigation, one or more Defendant may move for summary
4 judgment concerning some or all of Plaintiff's claims. Pursuant to Klinge v. Eikenberry,
5 849 F.2d 409 (9th Cir. 1988) and Rand v. Rowland, 154 F.3d 952 (9th Cir. 1998), Plaintiff
6 is advised of the following requirements for opposing a motion for summary judgment made
7 pursuant to Rule 56 of the Federal Rules of Civil Procedure.

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9 Such a motion is a request for an order for judgment on some or all of Plaintiff's
10 claims in favor of Defendants without trial. See Fed. R. Civ. P. 56(b). Defendants' motion(s)
11 will set forth the facts which Defendants contend are not reasonably subject to dispute and
12 entitle Defendants to judgment as a matter of law. See Fed. R. Civ. P. 56(c).

13 Plaintiff has the right to oppose a motion for summary judgment. To oppose the
14 motion, Plaintiff must show proof of his claims. Plaintiff may agree with the facts set forth
15 in Defendants' motion(s) but argue that Defendants are not entitled to judgment as a matter
16 of law. Plaintiff may show Defendants' facts are disputed in one or more of the following
17 ways: (1) Plaintiff may rely upon statements made under penalty of perjury in the Complaint
18 if the Complaint shows Plaintiff has personal knowledge of the matters stated and if Plaintiff
19 calls attention to those parts of the Complaint upon which Plaintiff relies; (2) Plaintiff may
20 also serve and file affidavits or declarations³ setting forth the facts which Plaintiff believes
21 prove Plaintiff's claims (the person who signs the affidavit or declaration must have personal
22 knowledge of the facts stated); (3) Plaintiff may also rely upon written records but Plaintiff
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25 An affidavit is a written declaration or statement of facts, made voluntarily, and confirmed
26 by the oath or affirmation of the party making it, taken before an officer having authority to
27 administer such oath. An unsworn declaration has the same effect as an affidavit, provided
28 that it is dated and signed under penalty of perjury, as follows: "I declare under penalty of
perjury that the foregoing is true and correct." 28 U.S.C. § 1746. Affidavits and declarations
must be made on personal knowledge and must set forth facts as would be admissible in
evidence. See Fed. R. Civ. P. 56(e).

1 must prove that the records are what Plaintiff claims they are;⁴ (4) Plaintiff may also rely
2 upon all or any part of the transcript of one or more depositions, answers to interrogatories,
3 or admissions obtained in this proceeding. Should Plaintiff fail to contradict Defendants'
4 motion(s) with affidavits, declarations, or other evidence, Defendants' evidence will be taken
5 as true, and final judgment may be entered without a full trial. See Fed. R. Civ. P. 56(e).

6 If there is a good reason why such facts are not available to Plaintiff when required
7 to oppose, a request to postpone considering Defendants' motion(s) will be considered. See
8 Fed. R. Civ. P. 56(f). If Plaintiff does not serve and file a request to postpone consideration
9 or written opposition, Plaintiff's failure to act may be considered a waiver of opposition.
10 Plaintiff's waiver of opposition to Defendants' motion(s) may result in the entry of summary
11 judgment. A motion supported by affidavits or declarations that are unsigned will be
12 stricken.

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14 The failure of any party to comply with this Order, the Federal Rules of Civil
15 Procedure, or the Local Rules of Court, may result in the imposition of sanctions including,
16 but not limited to, dismissal of the action or entry of default.

17 Accordingly,

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19 **IT IS ORDERED** Plaintiff's Motion for Appointment of Counsel (Doc. 24) **IS**
20 **DENIED.**

21 **FURTHER ORDERED** Plaintiff's Motion for Order (Doc. 32) **IS DENIED.**

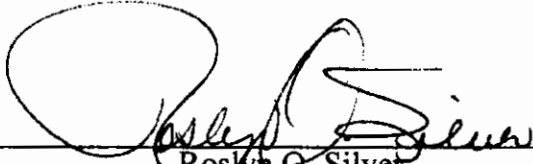
22 **FURTHER ORDERED** Plaintiff, if he so chooses, has **THIRTY (30) DAYS** from
23 this Order to file a supplemental response to Defendant Suryadevana's Motion to Dismiss.
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28 Sworn or certified copies of all papers referred to in an affidavit must be attached to the
affidavit and served on the opposing party. See Fed. R. Civ. P. 56(e).

1 Defendant may file a supplemental reply to Plaintiff's supplemental response **WITHIN**
2 **FIFTEEN (15) DAYS** of receipt.

3 DATED this 24th day of April, 2009.

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9 Roslyn O. Silver
United States District Judge

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