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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MICHAEL ANTHONY VICTORY,

Plaintiff,

v.

BARBER, et al.,

Defendants.

CASE NO. 1:05-CV-01578-LJO-DLB PC

ORDER GRANTING PLAINTIFF’S MOTION
FOR DEFENDANTS TO RE-SERVE
MOTION FOR SUMMARY JUDGMENT

(DOC. 113)

RE-SERVICE DUE WITHIN 5 DAYS

_____ /

Plaintiff Michael Anthony Victory (“Plaintiff”) is a prisoner in the custody of the California Department of Corrections and Rehabilitation (“CDCR”). Plaintiff is proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. This action is proceeding against Defendants Barber, Bresler, Kushner, Neubarth, Ortiz, Sacks, Salazar, and Smith for violation of the Eighth Amendment. On December 22, 2010, Defendants filed their motion for summary judgment. Doc. 111. On January 3, 2011, Plaintiff filed a motion entitled “Motion to Order Defendants to Complete Service of Motion for Summary Judgment and Related Exhibits.” Doc. 113.

Plaintiff declares that he received an incomplete, disorganized copy of Defendants’ motion for summary judgment on December 24, 2010. *Id.* Plaintiff attaches a copy of all the documents he received to his motion. Plaintiff moves for the Court to order Defendants to re-serve their motion and insure that it is delivered complete and organized.

The Court finds that Plaintiff will be unable to properly oppose Defendants’ motion unless Defendants serve a complete, organized copy on Plaintiff. Accordingly, the Court will

1 grant Plaintiff's motion.

2 The Court provides the following additional instructions for Plaintiff in opposing the
3 motion for summary judgment. A motion for summary judgment is a request for judgment on
4 some or all of the plaintiff's claims in favor of the defendants without trial. Fed. R. Civ. P.
5 56(b). The defendants' motion will set forth the facts which the defendants contend are not
6 reasonably subject to dispute and that entitle the defendants to judgment as a matter of law. Fed.
7 R. Civ. P. 56(c). This is called the Statement of Undisputed Facts. Local Rule 260(a).

8 The plaintiff has the right to oppose a motion for summary judgment. To oppose the
9 motion, the plaintiff must show proof of his or her claims. The plaintiff may agree with the facts
10 set forth in the defendants' motion but argue that the defendants are not entitled to judgment as a
11 matter of law.

12 In the alternative, if the plaintiff does not agree with the facts set forth in the defendants'
13 motion, the plaintiff may show the defendants' facts are disputed in one or more of the following
14 ways: (1) the plaintiff may rely upon statements made under the penalty of perjury in the
15 complaint or the opposition if (a) the complaint or opposition shows that the plaintiff has
16 personal knowledge of the matters stated and (b) the plaintiff calls to the court's attention those
17 parts of the complaint or opposition upon which plaintiff relies; (2) the plaintiff may serve and
18 file declarations setting forth the facts which the plaintiff believes prove the plaintiff's claims;¹
19 (3) the plaintiff may rely upon written records but the plaintiff must prove that the records are
20 what the plaintiff claims they are;² or (4) the plaintiff may rely upon all or any part of the
21 transcript of one or more depositions, answers to interrogatories, or admissions obtained in this
22 proceeding. Should the plaintiff fail to contradict the defendants' motion with declarations or
23

24 ¹A declaration is a written statement setting forth facts (1) which are admissible in evidence, (2) which are
25 based on the personal knowledge of the person giving the statement, and (3) to which the person giving the statement
26 is competent to testify. 28 U.S.C. § 1746; Fed. R. Civ. P. 56(e). A declaration must be dated and signed under
27 penalty of perjury as follows: "I declare (or certify, verify or state) under penalty of perjury that the foregoing is true
28 and correct. Executed on (date). (Signature)." 28 U.S.C. § 1746.

² Sworn or certified copies of all papers referred to in the declaration must be included and served on the
opposing party. Fed. R. Civ. P. 56(e).

1 other evidence, the defendants' evidence will be taken as truth, and final judgment may be
2 entered without a full trial. Fed. R. Civ. P. 56(e).

3 If defendants file a motion for summary judgment and the plaintiff files an opposition to
4 the motion, Local Rule 260(b) requires the plaintiff to reproduce the defendants' itemized facts in
5 the Statement of Undisputed Facts and admit those facts which are undisputed and deny those
6 which are disputed. If the plaintiff disputes (denies) a fact, the plaintiff must cite to the evidence
7 used to support that denial (e.g., pleading, declaration, deposition, interrogatory answer,
8 admission, or other document). Local Rule 260(b).

9 Plaintiff is to serve an opposition to Defendants' motion for summary judgment within
10 **twenty-one (21) days** from the date of re-service.

11 Based on the foregoing, it is HEREBY ORDERED that:

- 12 1. Plaintiff's motion, filed January 3, 2011, is GRANTED;
- 13 2. Defendants are to re-serve their motion for summary judgment on Plaintiff within
14 **five (5) days** from the date of service of this order;
- 15 3. Defendants are to insure that the motion is served in a complete, organized format
16 to Plaintiff;
- 17 4. Defendants are to file a status update with the Court after proper service of the
18 motion for summary judgment; and
- 19 5. If Defendants fail to properly serve Plaintiff with their motion for summary
20 judgment, the Court may construe such failure as a waiver of filing any motion for
21 summary judgment.

22 IT IS SO ORDERED.

23 **Dated: January 7, 2011**

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE