

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
EASTERN DISTRICT OF CALIFORNIA

HERMAN D. SHEAD,
Plaintiff,
v.
C/O VANG,
Defendant.

Case No. 1:09-cv-00006-AWI-SKO (PC)

ORDER (1) REQUIRING DEFENDANT TO RE-SERVE SUMMARY JUDGMENT MOTION ON PLAINTIFF, WITH *RAND* NOTICE, (2) REQUIRING PLAINTIFF TO FILE OPPOSITION OR STATEMENT OF NON-OPPOSITION WITHIN FORTY-FIVE DAYS AFTER SERVICE, AND (3) REQUIRING PARTIES TO NOTIFY COURT WITHIN TWENTY DAYS REGARDING SETTLEMENT CONFERENCE

(Doc. 97)

_____ /

Plaintiff Herman D. Shead (“Plaintiff”), a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on January 5, 2009. This action for damages is proceeding against Defendant Vang (“Defendant”) for excessive force, in violation of the Eighth Amendment of the United States Constitution.

Plaintiff filed this action pro se. On January 5, 2012, following expiration of the discovery and pretrial dispositive motion deadlines, jury trial was scheduled for October 30, 2012. (Doc. 64.) Prior to trial, Plaintiff retained counsel, and Judge Ishii granted Plaintiff’s motion to modify the scheduling order and vacated the trial date. (Docs. 81, 84.) Pursuant to the modified scheduling order, the parties were permitted to engage in further discovery and Defendant filed a timely motion for summary judgment on September 30, 2013. (Doc. 97.) However, the case was

1 dismissed with prejudice on October 1, 2013, based on Plaintiff's violation of the scheduling order
2 and the settlement conference order, and his failure to respond to an order to show cause and
3 Defendant's motion for terminating sanctions, which was filed on August 29, 2013. Fed. R. Civ.
4 P. 16(f), 41(b). (Doc. 98.)

5 On May 8, 2015, Plaintiff, not through counsel, filed a motion for reconsideration of the
6 dismissal. (Doc. 105.) On August 13, 2015, following further briefing, Judge Ishii granted
7 Plaintiff's motion for relief from judgment based on attorney abandonment, and referred the
8 matter back to the undersigned for further proceedings and scheduling. Fed. R. Civ. P. 60(b)(6).
9 (Docs. 108-110.)

10 The Court has reviewed the docket in this case, and in as much as discovery was closed
11 and this case was set for jury trial at the juncture Plaintiff retained counsel, there is no good cause
12 to modify the scheduling order to permit further discovery. Fed. R. Civ. P. 16(b)(4). Moreover,
13 given that Plaintiff thereafter retained counsel and Defendant timely filed a motion for summary
14 judgment following Plaintiff's successful motion to modify the scheduling order, Defendant is
15 now entitled to consideration of his motion given the reopening of this case. Therefore, Defendant
16 shall re-serve his motion on Plaintiff, who is again proceeding pro se, along with a *Rand* notice.
17 *Woods v. Carey*, 684 F.3d 934, 939-41 (9th Cir. 2012); *Rand v. Rowland*, 154 F.3d 952, 960-61
18 (9th Cir. 1998). Plaintiff has forty-five days from the date of service of the motion to file an
19 opposition or a statement of non-opposition. Local Rule 230(l).

20 If either party believes a settlement conference would be beneficial at this stage in the
21 proceedings, that party shall file a notice so stating within twenty days from the date of service of
22 this order. The Court will set a settlement conference if both parties believe it will be beneficial.¹

23 Accordingly, the Court HEREBY ORDERS as follows:

- 24 1. Defendant shall re-serve his motion for summary judgment, filed on September 30,
25 2013, on Plaintiff along with the requisite *Rand* notice;

26
27
28 ¹ The parties are not precluded from conferring privately regarding settlement but the Court will set a settlement
conference only if both sides believe it will be productive.

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

- 2. Within **forty-five (45) days** from the date of service of this order, Plaintiff shall file an opposition or a statement of non-opposition to the motion; and
- 3. If either party believes a settlement conference will be beneficial, that party shall file a notice within **twenty (20) days** from the date of service of this order.

IT IS SO ORDERED.

Dated: August 14, 2015

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE