

1  
2  
3  
4  
5 **UNITED STATES DISTRICT COURT**  
6 **EASTERN DISTRICT OF CALIFORNIA**  
7

8 **EUGENE E. FORTE,**

9 **Plaintiff**

10 **v.**

11 **TOMMY JONES, an individual and**  
12 **DOES 1 - 100,**

13 **Defendants.**

**CASE NO. 1:11-CV- 0718 AWI BAM**

**ORDER ON PLAINTIFF'S *EX PARTE***  
**REQUEST TO CONTINUE TRIAL AND**  
**STAY PRETRIAL ORDERS**

**Doc. # 132**

14  
15 Currently before the court is a request by plaintiff Eugene Forte (“Plaintiff”) to continue  
16 the date currently set for trial and to vacate all associated pretrial orders. The trial in this action is  
17 currently set for June 3, 2014, and the date currently set for trial conformation and consideration of  
18 motions in limine is May 20, 2014. “The decision to grant or deny a requested continuance lies  
19 within the broad discretion of the district court.” United States v. Flint, 756 F.2d 1352, 1358 (9th  
20 Cir. 1985). The factors considered by a district court are: (1) the extent of the diligence in his  
21 efforts to ready himself for the trial prior to the date set for its commencement; (2) what needs of  
22 the moving party will go unmet if the continuance is not granted; (3) inconvenience to the court or  
23 to the opposing party, including any witnesses; and (4) prejudice to the applicant likely to result  
24 from denial. See id. at 1359 (listing factors in the context of appeal of denial of continuance);  
25 Maciel v. Rowland, 5 F.3d 537, 1993 WL 339829 (9th Cir. 1993) at \*4 (applying same factors in  
26 the context of appeal of denial of continuance in action pursuant to 42 U.S.C. § 1983).

27 //

28 //

1           **A. Diligence**

2           The term “diligence” in this context refers to the diligence with which Plaintiff has pursued  
3 his claims in *this* case. This case was removed to this court on May 5, 2011, and the first  
4 scheduling order was issued on February 10, 2012. Each of Plaintiff’s three claims were tested by  
5 way of a motion for summary judgment by defendant Tommy Jones (“Defendant”). Plaintiff’s  
6 claim for abridgment of his rights under the First Amendment in violation of 42 U.S.C. § 1983  
7 withstood the challenge while claims for defamation and intentional infliction of emotional  
8 distress were dismissed. Doc. # 43, filed March 20, 2013. Defendant’s first pretrial statement,  
9 filed on March 25, 2013, Doc. # 44, raised the issue of Plaintiff’s prior adjudication of  
10 incompetence to stand trial in a criminal case in Merced District Court. As Defendant had  
11 declared an intent to raise that issue in his defense, the court found it necessary to hold a hearing  
12 on the issue and rule in advance on whether Defendant would be allowed to raise the issue of  
13 competence in the instant proceeding. All dates relating to the trial, which was then set for May  
14 14, 2013, were vacated and further briefing was ordered and a hearing set on the issue of  
15 Plaintiff’s competency to represent himself was set. Doc. # 50, filed March 26, 2013.

16           There followed a spate of motions and requests including motion for appointment of  
17 counsel, motions for clarification, motion for continuance, motion for issuance of subpoenas and  
18 others. Plaintiff also filed an appeal, which was denied for lack of appellate jurisdiction. The  
19 hearing on the issue was held on September 5, 2013. The court determined Plaintiff was  
20 competent to proceed in the instant matter, that Defendant would not be allowed to raise the issue  
21 of Plaintiff’s competence and ordered that any stay previously imposed in this action be lifted. On  
22 November 5, 2013, the Magistrate Judge set new dates for the trial and pretrial conference. Doc. #  
23 121. The instant motion to continue trial date was filed by Plaintiff on April 28, 2014.

24           An examination of the Docket report in this action reveals that Plaintiff has been diligent in  
25 prosecuting his remaining claim. So far as the court is aware, all aspects of the proceeding that  
26 would normally precede trial, including discovery and legal testing of the sufficiency of the claims  
27 has been completed. While continuances have been occasionally been requested and granted,  
28 there is nothing to suggest Plaintiff has been dilatory in his litigation of this action.

1  
2           **B. Needs of the Moving Party**

3           Significantly, Plaintiff’s request to continue does not reference needs arising from this  
4 action, other than the generalized need to not impinge on time needed to attend to perceived needs  
5 in other actions currently pending in this court and in the state appellate court. Plaintiff states he is  
6 “currently involved in trying to stop the ‘fraud upon the court’ in the Merced County Appellate  
7 Court that this court has been made aware of in the underlying criminal cases of the *People v.*  
8 *Forte*, Merced Superior Case No. CRL001412 and CRL003409 and has needed, in order to protect  
9 his interests, [to] file a Request to Stay Appeal.”<sup>1</sup> Plaintiff contends that, because of the time  
10 commitments necessary to preserve his rights in his other cases, he is without the time to prepare  
11 motions in limine and to otherwise prepare for trial in this case.

12           Several considerations militate against Plaintiff with regard to needs that will not be met if  
13 continuance is not granted. First, the issue on trial is extraordinarily simple – did Defendant  
14 *intend* to deprive Plaintiff of his right to free speech when Defendant switched off Plaintiff’s  
15 microphone three minutes prior to the expiration of Plaintiff’s allotted time? While Plaintiff  
16 alleges a connection between this case and the other cases pending in this court, there is no legal  
17 connection between this case and the others and the sole issue to be tried (other than damages)  
18 remains very simple and straightforward.

19           It is the court’s understanding that Plaintiff is of the opinion that Defendant’s act of  
20 shutting off his microphone during the city council meeting was part of an overall pattern of  
21 retaliation by officials against Plaintiff for reporting their misdeeds in his publication, the Badger  
22 Flats Gazette. While the court is not going to make any decisions regarding admissible evidence in  
23 this order, the general rule is that evidence that is removed in time and distance from the act giving  
24 rise to the claim must be shown to be both relevant and non-prejudicial in order to be admissible.

25 \_\_\_\_\_  
26 <sup>1</sup> The “Request to Stay Appeal” refers to an appeal brief that was prepared by Plaintiff’s appointed appellate  
27 counsel in the criminal proceedings in the Superior Court following the dismissal of Plaintiff’s criminal case.  
28 Apparently the appeal seeks to remedy the Superior Court’s determination that Plaintiff was mentally incompetent to  
aid his attorney in his defense because the Superior Court’s determination resulted in Plaintiff being prohibited from  
ownership of firearms. It is Plaintiff’s contention that the dismissal of his criminal case is appealable to remove the  
impediment. The stay was requested by Plaintiff because his appointed counsel’s brief failed to emphasize Plaintiff’s  
claim of ineffective assistance of his criminal counsel.

1 For this reason, it may be assumed that the bulk of the evidence that will be permitted will be  
2 evidence of conduct that occurred at the meeting itself and that most, if not all, evidence of past  
3 conflicts between Plaintiff and Defendant and past allegations against Defendant by Plaintiff will  
4 not be allowed because they are either irrelevant or more prejudicial than probative. It follows that  
5 the presentation of evidence at trial can be anticipated to be short, simple and straightforward. The  
6 court cannot see any extraordinary need for preparation of testimony or for preparation of motions  
7 in limine.

8 The second consideration that militates against Plaintiff arises from Plaintiff's marked  
9 tendency in this action and in the other cases pending before the court to unnecessarily multiply  
10 the complexity of each of the cases by repeated motions for clarification, motions for  
11 reconsideration and the like. The court has reviewed Plaintiff's pleadings regarding his request for  
12 stay of appeal and finds that what is really at issue is nothing more than a disagreement as to style  
13 and emphasis. There is nothing in Plaintiff's effort to stay his appeal in his superior court case  
14 that is of such substance and importance that it would warrant any continuation in this case. More  
15 importantly, given Plaintiff's demonstrated penchant for attempting to make a substantive issue of  
16 every decision he disagrees with, there is little basis to believe that if the continuance were  
17 granted, Plaintiff would be feeling any less under pressure from the other cases he is involved in  
18 that he feels now. In short, Plaintiff stands to gain nothing he needs in this action by continuing  
19 the trial and would likely benefit from bringing this action to a conclusion to clear time to devote  
20 to his other cases.

### 21 **C. Inconvenience to the Court and Other Parties**

22 As the court has made clear on several occasions, it operates with the highest per-judge  
23 workload of any district court in the United States. As a consequence, trial time is at a premium  
24 and it is common for the court to double and triple book trials in the hope that the court will be  
25 able to accommodate those cases that actually go to trial. The court has given priority to  
26 Plaintiff's action during the time scheduled and it would be no small inconvenience to the court or  
27 to other litigants also awaiting available trial time to continue Plaintiff's trial into another time  
28 slot.

1 In addition, this action has been in process for a longer time than would normally be the  
2 case for an action of such simplicity. While Plaintiff has been diligent, his diligence has not  
3 necessarily served the purpose of timely and efficient resolution of the action. In particular, the  
4 court notes that the time period between the court's decision on September 5, 2013, that Plaintiff  
5 was competent to represent himself, and the Magistrate Judge's order November 5, 2013, setting  
6 the trial date, Plaintiff had a two-month period in which to make final preparations for trial and  
7 instead chose to file pointless motions arguing with various aspects of the court's determination  
8 that Plaintiff was competent and that any stays previously imposed were lifted. See Doc. # 106,  
9 ("Motion for More Definite Statement [ . . . ] and Request for Grand Jury Investigation of Abuse of  
10 Psychology"). The court also notes that Plaintiff declared his unavailability for the month of  
11 February 2014, during which time Plaintiff was specifically counseled that his obligations to meet  
12 the deadlines imposed by scheduling orders would not be excused due to his non-availability. At  
13 this point, the court feels Plaintiff has been afforded adequate time to prepare himself for trial  
14 whether or not he has used the time for that purpose and the Defendants and their witnesses are  
15 now entitled to timely resolution of this action.

#### 16 **D. Potential Prejudice**

17 The fourth factor, prejudice to the applicant, is applied normally retrospectively by an  
18 appellate court in reviewing the denial of a continuance of a trial date by a district court. From the  
19 district court's perspective, the consideration of prejudice to the applicant is forward looking and  
20 is essentially a determination of the potential prejudice arising from the denial of the applicant's  
21 stated needs as identified in the second factor. As previously noted, the court is of the opinion that  
22 no aspect of this action will suffer as a result of the denial of Plaintiff's request for continuance  
23 and it is more likely in the court's opinion that Plaintiff will actually benefit from the timely  
24 resolution of this action because his time will be freed up for other pursuits.

25  
26 The court, having considered each of the required factors, finds that Plaintiff has not stated  
27 sufficient cause for continuance of the trial date currently set for June 3, 2014. Plaintiff's *ex parte*  
28 application for continuance is therefore DENIED.

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

IT IS SO ORDERED.

Dated: May 7, 2014

  
\_\_\_\_\_  
SENIOR DISTRICT JUDGE