

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

EARL WARNER,
Plaintiff,
v.
M. CATE, et al.,
Defendants.

Case No. 1:12-cv-1146-LJO-MJS (PC)

**ORDER REQUIRING PLAINTIFF TO
FILE OPPOSITION TO DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

(ECF No. 99)

**NOTICE AND WARNING OF
REQUIREMENTS FOR OPPOSING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

TWENTY-ONE (21) DAY DEADLINE

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action brought pursuant to 28 U.S.C. § 1983. (ECF Nos. 1 & 7.) The action proceeds against Defendants Walker, Davis,¹ Prokop, Spralding, and Fellows on Plaintiff's Eighth Amendment failure to protect claim. (ECF No. 12.)

On March 7, 2016, Defendants filed a motion for summary judgment. (ECF No. 99.) Plaintiff has not filed an opposition or statement of non-opposition to Defendants'

¹ Formerly Defendant D. McGaha.

1 motion, and the time for doing so has passed. Local Rule 230(/).

2 The Court will give Plaintiff one further opportunity to respond to the motion:
3 Plaintiff must file an opposition or a statement of non-opposition to Defendants' motion
4 for summary judgment within twenty-one (21) days from the date of service of this
5 Order.

6 Pursuant to Woods v. Carey, 684 F.3d 934 (9th Cir. 2012), Rand v. Rowland,
7 154 F.3d 952 (9th Cir. 1998), and Klinge v. Eikenberry, 849 F.2d 409 (9th Cir. 1988),
8 the Court hereby notifies Plaintiff of the following rights and requirements for opposing
9 the motion:

10 1. Unless otherwise ordered, all motions for summary judgment are briefed
11 pursuant to Local Rule 230(/).

12 2. Plaintiff is required to file an opposition or a statement of non-opposition to
13 Defendants' motion for summary judgment. Local Rule 230(/). If Plaintiff fails to file an
14 opposition or a statement of non-opposition to the motion, this action may be dismissed,
15 with prejudice, for failure to prosecute. The opposition or statement of non-opposition
16 must be filed not more than twenty one (21) days from the date of service of this order. Id.

17 3. A motion for summary judgment is a request for judgment without trial, and in
18 favor of Defendants, on some or all of Plaintiff's claims. Fed. R. Civ. P. 56(a).
19 Defendants' motion sets forth the facts which he contends are not reasonably subject to
20 dispute and that entitle him to judgment as a matter of law. Fed. R. Civ. P. 56(c). This is
21 called the statement of undisputed facts. Local Rule 260(a).

22 Plaintiff has the right to oppose the motion for summary judgment. To oppose the
23 motion, Plaintiff must show proof of his claims. Plaintiff may agree with the facts set
24 forth in Defendants' motion but argue that Defendants are not entitled to judgment as a
25 matter of law. In the alternative, if Plaintiff does not agree with the facts set forth in
26 Defendants' motion, he may show that Defendants' facts are disputed in one or more of
27 the following ways: (1) Plaintiff may rely upon statements made under the penalty of
28 perjury in the complaint or the opposition if (a) the complaint or opposition shows that

1 Plaintiff has personal knowledge of the matters stated and (b) Plaintiff calls to the
2 Court's attention those parts of the complaint or opposition upon which Plaintiff relies;
3 (2) Plaintiff may serve and file declarations setting forth the facts which Plaintiff believes
4 prove his claims;² (3) Plaintiff may rely upon written records but Plaintiff must prove that
5 the records are what he claims they are;³ or (4) Plaintiff may rely upon all or any part of
6 the transcript of one or more depositions, answers to interrogatories, or admissions
7 obtained in this proceeding. Should Plaintiff fail to contradict Defendants' motion with
8 declarations or other evidence, Defendants' evidence will be taken as truth, and final
9 judgment may be entered without a full trial. Fed. R. Civ. P. 56(e).

10 In opposing Defendants' motion for summary judgment, Local Rule 260(b)
11 requires Plaintiff to reproduce Defendants' itemized facts in the statement of undisputed
12 facts and admit those facts which are undisputed and deny those which are disputed. If
13 Plaintiff disputes (denies) a fact, Plaintiff must cite to the evidence used to support that
14 denial (e.g., pleading, declaration, deposition, interrogatory answer, admission, or other
15 document). Local Rule 260(b).

16 4. If discovery has not yet been opened or if discovery is still open and Plaintiff is
17 not yet able to present facts to justify the opposition to the motion, the Court will
18 consider a request to postpone consideration of Defendants' motion. Fed. R. Civ. P.
19 56(d). Any request to postpone consideration of Defendants' motion for summary
20 judgment must include the following: (1) a declaration setting forth the specific facts
21 Plaintiff hopes to elicit from further discovery, (2) a showing that the facts exist, and (3)
22 a showing that the facts are essential to opposing the motion for summary judgment.
23 Blough v. Holland Realty, Inc., 574 F.3d 1084, 1091 n.5 (9th Cir. 2009); Tatum v. City

24 _____

25 ² A declaration is a written statement setting forth facts (1) which are admissible in evidence, (2)
26 which are based on the personal knowledge of the person giving the statement, and (3) to which the
27 person giving the statement is competent to testify. 28 U.S.C. § 1746; Fed. R. Civ. P. 56(c)(4). A
28 declaration must be dated and signed under penalty of perjury as follows: "I declare (or certify, verify or
state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)." 28
U.S.C. § 1746.

³ 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(c).

1 and County of San Francisco, 441 F.3d 1090, 1100-01 (9th Cir. 2006); State of
2 California v. Campbell, 138 F.3d 772, 779 (9th Cir. 1998). The request to postpone the
3 motion for summary judgment must identify what information is sought and how it would
4 preclude summary judgment. Blough, 574 F.3d at 1091 n.5; Tatum, 441 F.3d at 1100-
5 01; Margolis v. Ryan, 140 F.3d 850, 853 (9th Cir. 1998); Local Rule 260(b).

6 5. Unsigned declarations will be stricken, and declarations not signed under penalty
7 of perjury have no evidentiary value.

8 6. The failure of any party to comply with this Order, the Federal Rules of Civil
9 Procedure, or the Local Rules of the Eastern District of California may result in the
10 imposition of sanctions including but not limited to dismissal of the action or entry of
11 default.

12 Based on the foregoing, Plaintiff is HEREBY ORDERED to file an opposition or
13 statement of non-opposition to Defendants' motion for summary judgment within twenty-
14 one (21) days of the service of this order. **If Plaintiff fails to file an opposition or**
15 **statement of non-opposition within twenty-one days, the Court will recommend**
16 **that the action be dismissed for failure to obey a court order and failure to**
17 **prosecute.**

18
19 IT IS SO ORDERED.

20 Dated: April 15, 2016

21 /s/ Michael J. Seng
22 UNITED STATES MAGISTRATE JUDGE
23
24
25
26
27
28