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10 UNITED STATES DISTRICT COURT
11 EASTERN DISTRICT OF CALIFORNIA
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13 ROBERTO HERRERA,
14 Plaintiff,
15 v.
16 ROUCH,
17 Defendant.
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Case No. 1:13-cv-0289-LJO-MJS (PC)

**ORDER (1) DENYING PLAINTIFF'S
MOTION FOR APPOINTMENT OF
EXPERT (ECF No. 84) (2) DENYING
PLAINTIFF'S MOTION FOR
APPOINTMENT OF COUNSEL (ECF No.
84), AND (3) REQUIRING PLAINTIFF TO
FILE OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT
(ECF No. 81)**

TWENTY-ONE (21) DAY DEADLINE

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

25 Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil
26 rights action brought pursuant to 28 U.S.C. § 1983. (ECF Nos. 7 & 17.) The action
27 proceeds against Defendant Rouch on Plaintiff's Eighth Amendment inadequate
28 medical care claim. (ECF No. 18.)

1 On August 19, 2014, Defendants filed a motion for summary judgment on the
2 ground Plaintiff had failed to exhaust his administrative remedies. (ECF No. 81.) On
3 August 27, 2014, Plaintiff filed a motion for the appointment of an expert to oppose
4 Defendant's summary judgment motion and a motion for appointment of counsel. (ECF
5 No. 84.) Plaintiff has not filed an opposition to Defendant's motion.

6 **I. MOTION FOR APPOINTMENT OF EXPERT**

7 Plaintiff seeks the appointment of an expert on the ground that he will be required
8 to present testimony regarding the standard of care in order to establish his inadequate
9 medical care claim.

10 Defendant has moved for summary judgment on the ground that Plaintiff failed to
11 exhaust his administrative remedies. Plaintiff is not required to present expert medical
12 testimony to rebut Defendant's factual assertions regarding exhaustion.

13 Accordingly, Plaintiff's motion for appointment of an expert to oppose
14 Defendant's summary judgment motion will be denied.

15 **II. MOTION FOR APPOINTMENT OF COUNSEL**

16 Plaintiff does not have a constitutional right to appointed counsel in this action,
17 Rand v. Rowland, 113 F.3d 1520, 1525 (9th Cir. 1997), and the court cannot require an
18 attorney to represent plaintiff pursuant to 28 U.S.C. § 1915(e)(1), Mallard v. United
19 States District Court for the Southern District of Iowa, 490 U.S. 296, 298 (1989).
20 However, in certain exceptional circumstances the court may request the voluntary
21 assistance of counsel pursuant to section 1915(e)(1). Rand, 113 F.3d at 1525.

22 Without a reasonable method of securing and compensating counsel, the court
23 will seek volunteer counsel only in the most serious and exceptional cases. In
24 determining whether "exceptional circumstances exist, the district court must evaluate
25 both the likelihood of success of the merits [and] the ability of the [plaintiff] to articulate
26 his claims pro se in light of the complexity of the legal issues involved." Id. (internal
27 quotation marks and citations omitted).

1 In the present case, the court does not find the required exceptional
2 circumstances. Even if it is assumed that plaintiff is not well versed in the law and that
3 he has made serious allegations which, if proved, would entitle him to relief, his case is
4 not exceptional. This court is faced with similar cases almost daily. Further, at this early
5 stage in the proceedings, the court cannot make a determination that plaintiff is likely to
6 succeed on the merits, and based on a review of the record in this case, the court does
7 not find that plaintiff cannot adequately articulate his claims. Id.

8 Accordingly, Plaintiff's motion for the appointment of counsel will be denied
9 without prejudice.

10 **III. OPPOSITION TO MOTION FOR SUMMARY JUDGMENT**

11 Plaintiff has not filed an opposition or statement of non-opposition to Defendant's
12 motion, and the time for doing so has passed. Local Rule 230(f). The Court will give
13 Plaintiff one further opportunity to respond to the motion: Plaintiff must file an opposition
14 or a statement of non-opposition to Defendants' motion for summary judgment within
15 twenty-one (21) days from the date of service of this Order.

16 Pursuant to Woods v. Carey, 684 F.3d 934 (9th Cir. 2012), Rand v. Rowland,
17 154 F.3d 952 (9th Cir. 1998), and Klinge v. Eikenberry, 849 F.2d 409 (9th Cir. 1988),
18 the Court hereby notifies Plaintiff of the following rights and requirements for opposing
19 the motion:

20 1. Unless otherwise ordered, all motions for summary judgment are briefed
21 pursuant to Local Rule 230(f).

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

27 3. A motion for summary judgment is a request for judgment without trial, and in
28 favor of Defendant, on some or all of Plaintiff's claims. Fed. R. Civ. P. 56(a).

1 Defendant's motion sets forth the facts which he contends are not reasonably subject to
2 dispute and that entitle him to judgment as a matter of law. Fed. R. Civ. P. 56(c). This is
3 called the statement of undisputed facts. Local Rule 260(a).

4 Plaintiff has the right to oppose the motion for summary judgment. To oppose the
5 motion, Plaintiff must show proof of his claims. Plaintiff may agree with the facts set
6 forth in Defendants' motion but argue that Defendants are not entitled to judgment as a
7 matter of law. In the alternative, if Plaintiff does not agree with the facts set forth in
8 Defendants' motion, he may show that Defendants' facts are disputed in one or more of
9 the following ways: (1) Plaintiff may rely upon statements made under the penalty of
10 perjury in the complaint or the opposition if (a) the complaint or opposition shows that
11 Plaintiff has personal knowledge of the matters stated and (b) Plaintiff calls to the
12 Court's attention those parts of the complaint or opposition upon which Plaintiff relies;
13 (2) Plaintiff may serve and file declarations setting forth the facts which Plaintiff believes
14 prove his claims;¹ (3) Plaintiff may rely upon written records but Plaintiff must prove that
15 the records are what he claims they are;² or (4) Plaintiff may rely upon all or any part of
16 the transcript of one or more depositions, answers to interrogatories, or admissions
17 obtained in this proceeding. Should Plaintiff fail to contradict Defendant's motion with
18 declarations or other evidence, Defendants' evidence will be taken as truth, and final
19 judgment may be entered without a full trial. Fed. R. Civ. P. 56(e).

20 In opposing Defendant's motion for summary judgment, Local Rule 260(b)
21 requires Plaintiff to reproduce Defendant's itemized facts in the statement of undisputed
22 facts and admit those facts which are undisputed and deny those which are disputed. If
23 Plaintiff disputes (denies) a fact, Plaintiff must cite to the evidence used to support that

25 ¹ 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.

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(c).

denial (e.g., pleading, declaration, deposition, interrogatory answer, admission, or other document). Local Rule 260(b).

4. If discovery has not yet been opened or if discovery is still open and Plaintiff is not yet able to present facts to justify the opposition to the motion, the Court will consider a request to postpone consideration of Defendant's motion. Fed. R. Civ. P. 56(d). Any request to postpone consideration of Defendants' motion for summary judgment must include the following: (1) a declaration setting forth the specific facts Plaintiff hopes to elicit from further discovery, (2) a showing that the facts exist, and (3) a showing that the facts are essential to opposing the motion for summary judgment. Blough v. Holland Realty, Inc., 574 F.3d 1084, 1091 n.5 (9th Cir. 2009); Tatum v. City and County of San Francisco, 441 F.3d 1090, 1100-01 (9th Cir. 2006); State of California v. Campbell, 138 F.3d 772, 779 (9th Cir. 1998). The request to postpone the motion for summary judgment must identify what information is sought and how it would preclude summary judgment. Blough, 574 F.3d at 1091 n.5; Tatum, 441 F.3d at 1100-01; Margolis v. Ryan, 140 F.3d 850, 853 (9th Cir. 1998); Local Rule 260(b).

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

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

III. ORDER

Based on the foregoing, it is HEREBY ORDERED that:

1. Plaintiff's motion for appointment of an expert (ECF No. 84) is DENIED;
2. Plaintiff's motion for appointment of counsel (ECF No. 84) is DENIED;
3. Plaintiff is ordered to file an opposition or statement of non-opposition to Defendant's motion for summary judgment within twenty-one (21) days of the service of this order; and

4. If Plaintiff fails to file an opposition or statement of non-opposition within twenty-one days, the Court will recommend that the action be dismissed, with prejudice, for failure to obey a court order and failure to prosecute.

IT IS SO ORDERED.

Dated: December 11, 2014

/s/ Michael J. Leng
UNITED STATES MAGISTRATE JUDGE