

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

ROBERTO HERRERA,

Plaintiff,

Y

ROUCH,

**Defendant.**

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

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. 7 & 17.) The action proceeds against Defendant Rouch on Plaintiff's Eighth Amendment inadequate 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(l). 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 Klingele 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(l).

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(l). 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 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;<sup>1</sup> (3) Plaintiff may rely upon written records but Plaintiff must prove that  
15 the records are what he claims they are;<sup>2</sup> 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  
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25 <sup>1</sup> 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.

<sup>2</sup> 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 denial (e.g., pleading, declaration, deposition, interrogatory answer, admission, or other  
2 document). Local Rule 260(b).

3 4. If discovery has not yet been opened or if discovery is still open and Plaintiff is  
4 not yet able to present facts to justify the opposition to the motion, the Court will  
5 consider a request to postpone consideration of Defendant's motion. Fed. R. Civ. P.  
6 56(d). Any request to postpone consideration of Defendants' motion for summary  
7 judgment must include the following: (1) a declaration setting forth the specific facts  
8 Plaintiff hopes to elicit from further discovery, (2) a showing that the facts exist, and (3)  
9 a showing that the facts are essential to opposing the motion for summary judgment.

10 Blough v. Holland Realty, Inc., 574 F.3d 1084, 1091 n.5 (9th Cir. 2009); Tatum v. City  
11 and County of San Francisco, 441 F.3d 1090, 1100-01 (9th Cir. 2006); State of  
12 California v. Campbell, 138 F.3d 772, 779 (9th Cir. 1998). The request to postpone the  
13 motion for summary judgment must identify what information is sought and how it would  
14 preclude summary judgment. Blough, 574 F.3d at 1091 n.5; Tatum, 441 F.3d at 1100-  
15 01; Margolis v. Ryan, 140 F.3d 850, 853 (9th Cir. 1998); Local Rule 260(b).

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

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

22 **III. ORDER**

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

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

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

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5           IT IS SO ORDERED.

6           Dated: December 11, 2014

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8           /s/ *Michael J. Seng*

9           UNITED STATES MAGISTRATE JUDGE

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