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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ESS'NN A. AUBERT,
Plaintiff,
vs.
E. MADRUGA, et al.,
Defendants.

1:13-cv-01659-GSA-PC
ORDER GRANTING DEFENDANTS'
MOTION TO COMPEL PLAINTIFF'S
DEPOSITION AND FOR SANCTIONS
(ECF No. 22.)
ORDER GRANTING DEFENDANTS'
MOTION TO MODIFY SCHEDULING
ORDER
(ECF. No. 29.)
ORDER RE-OPENING DISCOVERY FOR
LIMITED PURPOSE
ORDER DENYING PLAINTIFF'S MOTION
FOR APPOINTMENT OF COUNSEL
THIRTY-DAY DEADLINE FOR
DEFENDANTS TO SUBMIT
ACCOUNTING
New Discovery Deadline: 09/18/2015
New Dispositive Motions Deadline: 10/09/2015

I. BACKGROUND

Ess'nn A. Aubert ("Plaintiff") is a state prisoner proceeding pro se and in forma pauperis with this civil rights action pursuant to 42 U.S.C. § 1983.

1 This case now proceeds with Plaintiff's original Complaint filed on October 15, 2013,
2 against defendants Correctional Officer (C/O) B. Hobbs and C/O E. Madruga ("Defendants"),
3 for use of excessive force in violation of the Eighth Amendment.¹ (ECF No. 1.) On September
4 4, 2014, the court issued a Discovery and Scheduling Order establishing pretrial deadlines for
5 the parties, including a deadline of May 4, 2015 for completion of discovery, and a deadline of
6 July 16, 2015 for the filing of pretrial dispositive motions. (ECF No. 17.) The deadlines have
7 now expired. On July 10, 2015, Plaintiff filed a motion for summary judgment, which is
8 pending. (ECF No. 28.)

9 On May 4, 2015, Defendants filed a motion to compel Plaintiff's deposition and for
10 sanctions. (ECF No. 22.) On July 16, 2015, Defendants filed a motion to modify the court's
11 Discovery and Scheduling Order. (ECF No. 29.)

12 Defendants' motions to compel and to modify the scheduling order are now before the
13 court.

14 **II. MOTION TO COMPEL DEPOSITION**

15 **A. Legal Standards**

16 **Rule 30 - Oral Depositions**

17 Under Rule 30 of the Federal Rules of Civil Procedure, a party may depose any person,
18 including a party, by oral questions. Fed. R. Civ. P. 30(a).

19 **Court's Scheduling Order**

20 Pursuant to the Court's Scheduling Order issued on September 4, 2014, in this action,
21 "Defendant may depose Plaintiff and any other witness confined in a prison upon condition
22 that, at least fourteen (14) days before such a deposition, Defendant serves all parties with the
23 notice required by Federal Rule of Civil Procedure 30(b)(1)." (ECF No. 17 ¶3.)

24 **Rule 37 - Motions to Compel**

25 Pursuant to Rule 37(a) of the Federal Rules of Civil Procedure, a party propounding
26 discovery or taking a deposition may seek an order compelling responses when an opposing
27

28 ¹ On May 21, 2014, the court issued an order dismissing all other claims and defendants from
this action, for Plaintiff's failure to state a claim. (ECF No. 11.)

1 party has failed to respond or has provided evasive or incomplete responses. Fed. R. Civ. P.
2 37(a)(3)(B). The court, on motion, may order sanctions if a party fails, after being served with
3 proper notice, to attend his own deposition. Fed. R. Civ. P. 37(d)(1). “[A]n evasive or
4 incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or
5 respond.” Fed. R. Civ. P. 37(a)(4). “If the court where the discovery is taken orders a deponent
6 to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as
7 contempt of court.” Fed. R. Civ. P. 37(b)(1). The moving party bears the burden of
8 demonstrating “actual and substantial prejudice” from the denial of discovery. See Hallett v.
9 Morgan, 296 F.3d 732, 751 (9th Cir. 2002) (citations omitted.).

10 **B. Defendants’ Motion**

11 Defendants seek an order compelling Plaintiff to appear and participate in his re-
12 scheduled deposition. Defendants assert that despite the fact that they personally served
13 Plaintiff with notice of his video deposition, Plaintiff refused to attend his deposition, alleging
14 that he was not served with notice of the deposition. Defendants also seek reimbursement of
15 costs and attorneys’ fees associated with the deposition.

16 Defendants assert that on April 16, 2015, defense counsel personally served Plaintiff
17 with a notice of taking his deposition by videoconference, set for May 1, 2015 at 9:00 a.m. at
18 California State Prison, Corcoran, located in Corcoran, California. (Declaration of Erick J.
19 Rhoan, ¶2 & Exh. A.) On May 1, 2015, defense counsel attempted to conduct Plaintiff’s
20 deposition by videoconference. (Id. ¶3.) Defense counsel was informed by Correctional
21 Officer B. Resendez that Plaintiff was refusing to attend the deposition. (Id.) Defense counsel
22 conducted a brief examination of Officer Resendez to verify on the record that Plaintiff was not
23 attending the deposition. (Id. & Exh. B.) The deposition was recorded and transcribed by
24 Cheri Fike, CSR # 6200. (Id.)

25 **C. Plaintiff’s Opposition**

26 Plaintiff argues that Defendants failed to provide him with prior notice of his May 4,
27 2015 deposition. Plaintiff objects to Defendants’ evidence of Officer Brenda Resendez’s
28 deposition testimony, as impermissible hearsay. Plaintiff alleges that Defendants served

1 Plaintiff with their motion to compel at his former Tehachapi address, which counsel knew to
2 be incorrect, delaying Plaintiff's receipt of the motion until June 5, 2015, (Pltf's Decl., ECF
3 No. 24 ¶6), causing Plaintiff's opposition to the motion to compel to be untimely. Plaintiff
4 requests court-appointed counsel to assist him.

5 Plaintiff declares under penalty of perjury that on April 14, 2015, he was transferred
6 from the prison in Tehachapi to Corcoran State Prison, and all of his personal property was
7 held until May 12, 2015, due to prison policies. (Id. ¶2.) On May 1, 2015, while Plaintiff was
8 in his assigned housing, floor officers came to his door, explaining that he had a deposition to
9 attend. (Id.) Plaintiff told the officer that he had no prior notice of a deposition hearing and he
10 did not have his property. (Id.) Plaintiff claims that he was never served by mail or in person
11 by Corcoran employees on April 16, 2015, and that he never signed for legal mail. (Id. ¶¶4, 5.)

12 **D. Defendants' Reply**

13 Defendants reply that Plaintiff's opposition to the motion to compel was untimely
14 according to Local Rule 230(*l*), because it was due by May 26, 2015 but was not filed until
15 June 12, 2015, and therefore Plaintiff waived any opposition to the granting of the motion to
16 compel. L.R. 230(*l*). In response to Plaintiff's assertion that his opposition was filed late
17 because Defendants served him at his former address, Defendants argue that it was Plaintiff's
18 fault because he failed to notify the court of his new address, and Defendants properly relied on
19 the court record.

20 Defendants argue that Plaintiff's assertion that he was not personally served with notice
21 of the deposition is not supported by any evidence, "notwithstanding the clear statement" in the
22 proof of service that Plaintiff was personally served with the deposition notice by Romero,
23 signed under penalty of perjury. (ECF No. 27 at 3:14; ECF No. 24.) Defendants also argue
24 that Officer Resendez's testimony does not qualify as inadmissible hearsay, because Plaintiff's
25 statement to Officer Pruneda that he was not coming to his deposition is exempted from the
26 hearsay rule as an admission by party opponent under Federal Rule of Evidence 801(d)(2), and
27 Pruneda's relay of information to Resendez minutes after Plaintiff personally informed Pruneda
28

1 of his refusal to leave his cell qualifies as a present sense impression under Federal Rule of
2 Evidence 803(1).

3 **E. Discussion**

4 Defendants are correct that Plaintiff was required to keep the court apprised of his
5 current address. Pursuant to Local Rule 183(f), “[e]ach appearing attorney and pro se party is
6 under a continuing duty to notify the Clerk and all other parties of any change of address or
7 telephone number of the attorney or the pro se party [and a]bsent such notice, service of
8 documents at the prior address of the attorney or pro se party shall be fully effective.” L.R.
9 183(f). There is no evidence that Defendants knowingly served the motion to compel at an
10 incorrect address. Therefore, the court finds that Plaintiff is responsible for the untimely filing
11 of his opposition because of events stemming from his failure to notify the court of his current
12 address. However, because Plaintiff appears to have filed his opposition within a week of the
13 date he received the motion to compel, the court finds that Plaintiff did not waive his
14 opposition.

15 With respect to Plaintiff’s hearsay objections to some of Defendants’ evidence, if the
16 court refers to any of the evidence in this order, by implication the objections to that evidence
17 are overruled.

18 Besides his personal assertion, Plaintiff submits no evidence that he was not properly
19 served with notice of his May 1, 2015 deposition. Plaintiff has not disputed the authenticity of
20 Defendants’ proof of service showing that Plaintiff was personally served with the deposition
21 notice on April 16, 2015, (ECF No. 22-3 at 4). Further, correctional staff testified that Plaintiff
22 was served on April 16, 2015. (Deposition Testimony, ECF No. 22-3 at 10:17-22.) The
23 weight of the evidence shows that Plaintiff was properly served with notice of the deposition
24 but failed to appear. Therefore, Defendants’ motion to compel shall be granted. Defendants
25 shall be granted time to re-schedule Plaintiff’s deposition, and Plaintiff shall be required to
26 attend the re-scheduled deposition and cooperate in discovery by answering the questions posed
27 to him, to the best of his knowledge. Defendants are permitted to take Plaintiff’s deposition by
28 videoconference.

1 **III. MOTION FOR SANCTIONS**

2 Defendants seek reimbursement by Plaintiff of their costs and attorneys' fees associated
3 with preparing for Plaintiff's deposition and filing the motion to compel, for Plaintiff's refusal
4 to attend the deposition, pursuant to Federal Rule of Civil Procedure 37. Defendants also
5 request that Plaintiff bear the costs of the re-scheduled deposition.

6 **A. Monetary Sanctions**

7 Rule 37(a)(5)(A) provides:

8 "If [a] motion [to compel] is granted- or if the disclosure or
9 requested discovery is provided after the motion was filed- the
10 court must, after giving an opportunity to be heard, require the
11 party or deponent whose conduct necessitated the motion, the
12 party or attorney advising that conduct, or both to pay the
13 movant's reasonable expenses incurred in making the motion,
14 including attorney's fees. But the court must not order this
15 payment if:

- 16 (i) the movant filed the motion before attempting in good faith to obtain the
17 disclosure or discovery without court action;
18 (ii) the opposing party's nondisclosure, response, or objection was
19 substantially justified; or
20 (iii) other circumstances make an award of expenses unjust."

21 Fed. R. Civ. P. 37(a)(5)(A).

22 Rule 37(d) provides that sanctions may be imposed, even in the absence of a prior court
23 order, if a party fails to appear for deposition after being served with proper notice. Fed. R.
24 Civ. P. 37(d)(1)(A)(i).

25 Defendants argue that sanctions should be imposed because Plaintiff's refusal to attend
26 his deposition impedes and delays their ability to investigate and evaluate the factual
27 allegations and legal claims against them, and frustrates their ability to defend this case.
28 Defendants argue that Plaintiff's failure to appear is not substantially justified given that he was
personally served with the deposition notice within the fourteen day time period given by the
court. Defense counsel estimates his expenses for preparing to take Plaintiff's deposition to be
\$2,473.00, as follows.

"I spent 9.5 hours preparing to take Plaintiff's deposition,
drafting an outline of deposition questions, conducting legal

1 research into Plaintiff's claims, and participating in the
2 deposition. Following the deposition, I spent 3.5 hours drafting
3 the instant motion to compel, supporting declaration, and
4 conducting legal research. Attorneys in the Office of the Attorney
5 General bill an hourly rate of \$170.00. Defendants have thus
6 incurred \$2,210 in attorneys' fees. In addition, the services for
the Court Reporter to attend the deposition and to provide me
with an expedited copy of the transcript cost \$263.00. A true and
correct copy of the invoice is attached as Exhibit C. Therefore,
the total expenses associated with Plaintiff's failure to appear at
his deposition total \$2,473.00."

7 (Declaration of Erick J. Rhoan, ECF No. 22-2 ¶4.)

8 Plaintiff argues that he should not be charged fees or costs incurred, because of
9 "Defense Counsel's blunders and total disregard for the Federal Rules of Civil Procedure and
10 Evidence." (ECF No. 24 at 2:19-22.) Plaintiff argues that Defendants' motion to compel is
11 frivolous, wasting tax dollars and resources. Plaintiff also argues that defense counsel should
12 be sanctioned for frustrating the fair examination of deponent Resendez. Plaintiff contends that
13 he was entitled to cross-examine Resendez and place objections on the record. Plaintiff argues
14 that defense counsel should bear his own costs or personally reimburse the state \$2,473.00 for
15 his own blunders and failure to follow federal rules.

16 In light of the fact that the court has granted Defendants' motion to compel, the court
17 finds that Defendants are entitled under Rule 37(a)(5)(A) to their costs and attorney's fees for
18 defense counsel's attendance at the deposition and preparation of the motion to compel.
19 Defense counsel is entitled to fees for the time spent between 9:00 to 9:02 a.m. attending and
20 participating in the videoconference deposition, for 3.5 hours spent preparing the motion to
21 compel, and \$263.00 for the court reporter's services. Counsel is not entitled to reimbursement
22 of fees and costs for the 9.5 hours spent preparing to take Plaintiff's deposition, drafting an
23 outline of deposition questions, and conducting legal research into Plaintiff's claims, because
24 counsel's knowledge and work product can be used in preparation for the re-scheduled
25 deposition. Counsel is not entitled to fees and costs for the re-scheduled deposition.

26 Thus, Defendants' motion for sanctions shall be granted for the allowed costs and fees
27 discussed above. Within thirty days, Defendants shall submit to the court an accounting of the
28 allowed costs and attorney fees. The monetary award shall be deducted from Plaintiff's

1 damages award if he is successful at trial, or shall be assessed as part of Defendants' costs if
2 they prevail at trial.

3 **IV. MOTION TO MODIFY SCHEDULING ORDER**

4 Defendants request modification of the court's Scheduling Order of September 4,
5 2014. Modification of a scheduling order requires a showing of good cause, Fed. R. Civ. P.
6 16(b), and good cause requires a showing of due diligence, Johnson v. Mammoth Recreations,
7 Inc., 975 F.2d 604, 609 (9th Cir. 1992). To establish good cause, the party seeking the
8 modification of a scheduling order must generally show that even with the exercise of due
9 diligence, they cannot meet the requirement of the order. Id. The court may also consider the
10 prejudice to the party opposing the modification. Id. If the party seeking to amend the
11 scheduling order fails to show due diligence the inquiry should end and the court should not
12 grant the motion to modify. Zivkovic v. Southern California Edison, Co., 302 F.3d 1080, 1087
13 (9th Cir. 2002). A party may obtain relief from the court's deadline date for discovery by
14 demonstrating good cause for allowing further discovery. Fed. R. Civ. P. 16(b)(4).

15 Defendants request a ninety-day extension of time following the court's ruling on the
16 motion to compel, to conduct Plaintiff's deposition, review the transcript, and prepare a motion
17 for summary judgment. Defendants have shown good cause for modification of the Scheduling
18 Order. Discovery shall be reopened until **September 18, 2015** for the sole purpose of re-
19 scheduling and conducting Plaintiff's deposition. The dispositive motions deadline shall be
20 extended to **October 9, 2015**. Should any party require additional time, the party should file a
21 motion before the prior deadline expires.

22 **V. PLAINTIFF'S MOTION FOR APPOINTMENT OF COUNSEL**

23 Plaintiff has requested court-appointed counsel. Plaintiff does not have a constitutional
24 right to appointed counsel in this action, Rand v. Rowland, 113 F.3d 1520, 1525 (9th Cir.
25 1997), and the court cannot require an attorney to represent plaintiff pursuant to 28 U.S.C. §
26 1915(e)(1). Mallard v. United States District Court for the Southern District of Iowa, 490 U.S.
27 296, 298, 109 S.Ct. 1814, 1816 (1989). However, in certain exceptional circumstances the
28

1 court may request the voluntary assistance of counsel pursuant to section 1915(e)(1). Rand,
2 113 F.3d at 1525.

3 Without a reasonable method of securing and compensating counsel, the court will seek
4 volunteer counsel only in the most serious and exceptional cases. In determining whether
5 “exceptional circumstances exist, the district court must evaluate both the likelihood of success
6 of the merits [and] the ability of the [plaintiff] to articulate his claims *pro se* in light of the
7 complexity of the legal issues involved.” Id. (internal quotation marks and citations omitted).

8 In the present case, the court does not find the required exceptional circumstances.
9 While the court has found that Plaintiff states a claim against defendants Madruga and Hobbs
10 for use of excessive force, this finding is not a determination that Plaintiff is likely to succeed
11 on the merits and at this juncture, the court cannot find that Plaintiff is likely to succeed on the
12 merits. A review of the record in this case shows that Plaintiff is responsive, adequately
13 communicates, and is able to articulate his claims. The court notes that Plaintiff has filed other
14 cases *pro se* and appears able to navigate the federal court system. The legal issue in this case –
15 whether defendants used excessive force against plaintiff – is not complex, and this court is
16 faced with similar cases almost daily. Accordingly, Plaintiff’s motion for the appointment of
17 counsel shall be denied, without prejudice.

18 **VI. CONCLUSION**

19 Based on the foregoing, IT IS HEREBY ORDERED that:

- 20 1. Defendants’ motion to compel Plaintiff’s deposition and for sanctions, filed on
21 May 4, 2015, is GRANTED;
- 22 2. Defendants are granted leave to re-schedule Plaintiff’s deposition, and Plaintiff
23 shall be required to attend the re-scheduled deposition and cooperate in
24 discovery by answering the questions posed to him, to the best of his
25 knowledge;
- 26 3. Defendants are permitted to take Plaintiff’s deposition by videoconference;
- 27 4. Plaintiff shall be assessed Defendants' reasonable expenses and attorney fees
28 incurred for preparation of their motion to compel and for conducting the

1 deposition of May 1, 2015, as discussed above, and the monetary award shall be
2 deducted from Plaintiff's damages award if he is successful at trial, or assessed
3 as part of Defendants' costs if they prevail at trial;

4 5. Within thirty days of the date of service of this order, Defendants shall submit to
5 the court an accounting of the expenses and attorney fees allowed by the court,
6 as discussed above in this order;

7 6. Defendants' motion to modify the court's Discovery and Scheduling Order, filed
8 on July 16, 2015, is GRANTED;

9 7. Discovery is now re-opened until **September 18, 2015**, for the sole purpose of
10 re-scheduling and conducting Plaintiff's deposition;

11 8. The new deadline for the parties to file pretrial dispositive motions is **October 9,**
12 **2015**;

13 9. All other provisions of the court's September 4, 2014 Discovery and Scheduling
14 Order remain the same;

15 10. Plaintiff's motion for appointment of counsel is DENIED, without prejudice;
16 and

17 11. Plaintiff's failure to attend and participate in his re-scheduled deposition may
18 result in the imposition of further sanctions deemed appropriate by this court, up
19 to and including dismissal of this action.

20
21 IT IS SO ORDERED.

22 Dated: **July 24, 2015**

/s/ Gary S. Austin
23 UNITED STATES MAGISTRATE JUDGE