

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

TONY PHELPS, Sr.,

Plaintiff,

V.

MARGARET MIMMS, JERRY DYER.

Defendants.

1:14-cv-251- AWI-BAM

**SECOND INFORMATIONAL ORDER
FOR MOTION TO DISMISS AND
MOTION FOR SUMMARY JUDGMENT**

Plaintiff is proceeding pro se in this civil action. Parties to this litigation shall take note of the following requirements :

1. Defendants¹ must reply to the complaint within the time provided by the applicable provisions of Fed. R. Civ. P. 12(a).

2. Unless otherwise ordered, all motions to dismiss, motions for summary judgment, motions concerning discovery, motions pursuant to Rules 7, 11, 12, 15, 41, 55, 56, 59 and 60 of the Federal Rules of Civil Procedure, and motions pursuant to Local Rule 110 shall be briefed pursuant to Local Rule 230(1).

3. At some point in the litigation, defendant(s) may file a motion to dismiss, a motion for summary judgment, or other type of motion. Plaintiff is required to file an opposition

¹ The term “defendants” as used in this order, means multiple defendants or an individual defendant.

1 or a statement of non-opposition to the motion. Local Rule 230(l). Plaintiff is advised that
2 failure to timely file a written opposition, or a statement of non-opposition to a motion may result
3 in dismissal of the action for failure to prosecute. The written opposition or the statement of non-
4 opposition must be filed not more than 21 days, after the date of service of the motion.
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6 4. At some point in the litigation, the defendants may move for summary judgment as to
7 some or all of plaintiff's claims. Pursuant to Woods v. Carey, 684 F.3d 934, 940 (9th Cir. 2012),
8 Rand v. Rowland, 154 F.3d 952 (9th Cir. 1998), and Klingele v. Eikenberry, 849 F.2d 409 (9th
9 Cir. 1988), the Court hereby notifies Plaintiff of the following rights and requirements for
10 opposing the motion:

11 a. Unless otherwise ordered, all motions for summary judgment are briefed pursuant to
12 Local Rule 230(l).

13 b. As noted above, Plaintiff is required to file an opposition or a statement of non-
14 opposition to Defendants' motion for summary judgment. Local Rule 230(l). If Plaintiff fails to
15 file an opposition or a statement of non-opposition to the motion, this action may be dismissed,
16 with prejudice, for failure to prosecute. The opposition or statement of non-opposition must be
17 filed not more than 21 days after the date of service of the motion. Id.

18 c. A motion for summary judgment is a request for judgment on some or all of Plaintiff's
19 claims in favor of Defendants without trial. Fed. R. Civ. P. 56(a). Defendants' motion sets forth
20 the facts which they contend are not reasonably subject to dispute and that entitle them to
21 judgment as a matter of law. Fed. R. Civ. P. 56(c). This is called the Statement of Undisputed
22 Facts. Local Rule 260(a).

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

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

21 d. If discovery has not yet been opened or if discovery is still open and Plaintiff is not yet
22 able to present facts to justify the opposition to the motion, the Court will consider a request to

23 ²A declaration is a written statement setting forth facts (1) which are admissible in evidence, (2) which are based on
24 the personal knowledge of the person giving the statement, and (3) to which the person giving the statement is
25 competent to testify. 28 U.S.C. § 1746; Fed. R. Civ. P. 56(c)(4). A declaration must be dated and signed under
26 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.

27 ³ Sworn or certified copies of all papers referred to in the declaration must be included and served on the opposing
28 party. Fed. R. Civ. P. 56(e).

1 postpone consideration of Defendants' motion. Fed. R. Civ. P. 56(d). Any request to postpone
2 consideration of Defendants' motion for summary judgment must include the following: (1) a
3 declaration setting forth the specific facts Plaintiff hopes to elicit from further discovery, (2) a
4 showing that the facts exist, and (3) a showing that the facts are essential to opposing the motion
5 for summary judgment. Blough v. Holland Realty, Inc., 574 F.3d 1084, 1091 n.5 (9th Cir. 2009);
6 Tatum v. City and County of San Francisco, 441 F.3d 1090, 1100-01 (9th Cir. 2006); State of
7 California v. Campbell, 138 F.3d 772, 779 (9th Cir. 1998). The request to postpone the motion
8 for summary judgment must identify what information is sought and how it would preclude
9 summary judgment. Blough, 574 F.3d at 1091 n.5; Tatum, 441 F.3d at 1100-01; Margolis v.
10 Ryan, 140 F.3d 850, 853 (9th Cir. 1998); Local Rule 260(b).

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

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

18 IT IS SO ORDERED.

19 Dated: November 18, 2014

/s/ Barbara A. McAuliffe
20 UNITED STATES MAGISTRATE JUDGE

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