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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

WONDIYRAD KABEDE,)	1:15-cv-00635-BAM (PC)
)	
Plaintiff,	)	ORDER GRANTING IN PART AND
	)	DENYING IN PART PLAINTIFF’S
v.	)	MOTION TO REVERSE JUDGMENT, RE-
	)	SERVE COURT ORDER AND APPOINT
PLEASANT VALLEY STATE PRISON	)	COUNSEL
WARDEN, et al.,)	
	)	(ECF No. 22)
Defendants.)	
	)	ORDER DIRECTING CLERK OF COURT
	)	TO VACATE THE DISMISSAL ORDER,
	)	REOPEN ACTION, AND RE-SERVE
	)	AUGUST 3, 2015 ORDER ON PLAINTIFF
)	
	)	(ECF Nos. 20, 21)
)	
)	

Plaintiff Wondiyrad Kabede (“Plaintiff”), a state prisoner proceeding pro se in this civil rights action pursuant to 42 U.S.C. § 1983, initiated this action on August 13, 2013. (ECF No. 1.) On July 6, 2015, Plaintiff consented to the jurisdiction of a Magistrate Judge. (ECF No. 19.)

On August 3, 2015, the Court dismissed Plaintiff’s complaint with leave to amend within thirty days, and advised him that his failure to comply with that order would result in the action being dismissed. (ECF No. 20.) On September 16, 2015, having received nothing in response to its order from Plaintiff, the Court dismissed this action based on his failure to obey a court order, failure to prosecute, and failure to state a claim,. (ECF No. 21.)

On September 30, 2015, Plaintiff filed the instant motion seeking to have the Court’s judgment reversed. (ECF No. 22.) The Court construes Plaintiff’s motion to be a request for

1 relief from judgment, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. In his
2 papers, Plaintiff alleges that he never received the Court's August 3, 2015 order dismissing his
3 complaint with leave to amend. (Id. at 1.) In support, he submits a document purporting to be a
4 report from the mailroom supervisor at his institution, stating that according to the mail log
5 Plaintiff did not receive any legal mail in the month of August. (Id. at 3.)

6 Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, “[o]n motion and just
7 terms, the court may relieve a party or its legal representative from a final judgment, order, or
8 proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . .
9 . or (6) any other reason that justifies relief.” Plaintiff seeks reconsideration on the basis of
10 excusable neglect, based on his lack of receipt of the Court's August 3, 2015 order. Considering
11 Plaintiff's moving papers and his prompt, good-faith attempts to re-engage in this action upon
12 receipt of the Court's September 16, 2015 order dismissing this action, the Court chooses to
13 credit his allegations, and finds it appropriate to grant relief under Rule 60(b). Plaintiff should
14 not be penalized for failure to obey a court order that he did not receive, and he should be
15 provided with a copy of that order so that he can attempt to comply with it in a timely manner.

16 Finally, Plaintiff's motion also seeks to have counsel appointed, on the basis that he has a
17 “hard time thinking and writing this motion.” (ECF No. 22, p. 2). He also states that he is older
18 and physically and mentally disabled. (Id.) Plaintiff does not have a constitutional right to
19 appointed counsel in this action, Rand v. Rowland, 113 F.3d 1520, 1525 (9th Cir. 1997), and the
20 court cannot require an attorney to represent plaintiff pursuant to 28 U.S.C. § 1915(e)(1).
21 Mallard v. United States District Court for the Southern District of Iowa, 490 U.S. 296, 298, 109
22 S.Ct. 1814, 1816 (1989). However, in certain exceptional circumstances the court may request
23 the voluntary assistance of counsel pursuant to section 1915(e)(1). Rand, 113 F.3d at 1525.

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

1 The Court has considered Plaintiff's moving papers, but does not find the required
2 exceptional circumstances here. Generally, a plaintiff that shows at least some ability to
3 articulate his claims is not entitled to appointment of counsel, regardless of whether he has
4 mental and physical health problems or is incarcerated. See, e.g., Warren v. Harrison, 244 Fed.
5 Appx. 831, 832 (9th Cir. 2007) (holding that an inmate plaintiff who had alleged mental illness
6 did not qualify for appointment of counsel because he competently presented his claims and
7 attached three pertinent exhibits). In this case, despite Plaintiff's allegations of trouble thinking
8 and difficulty drafting his motion, he adequately articulated his position and provided pertinent
9 evidence, such that the Court has decided to grant him some relief. Furthermore, at this early
10 stage in the proceedings, the Court cannot make a determination that Plaintiff is likely to succeed
11 on the merits.

12 Accordingly, it is HEREBY ORDERED as follows:

13 1. Plaintiff's motion requesting to reverse judgment, to re-serve an order, and to
14 appoint counsel (ECF No. 22), is GRANTED IN PART and DENIED IN PART;

15 2. The Clerk of the Court is directed to VACATE the dismissal order entered on
16 September 16, 2015 (ECF No. 21), and reopen this action;

17 3. The Clerk of the Court is further directed to RE-SERVE the August 3, 2015
18 screening order (ECF No. 20) on Plaintiff, at his current address of record;

19 4. Plaintiff is GRANTED thirty (30) days from the date of service of the Court's
20 August 3, 2015 order in which to file an amended complaint, in compliance with that order; and

21 5. Plaintiff's request for the appointment of counsel is DENIED without prejudice.
22

23 IT IS SO ORDERED.

24 Dated: October 16, 2015

25 /s/ Barbara A. McAuliffe
26 UNITED STATES MAGISTRATE JUDGE
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