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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

JAMES MILLNER,) Case No.: 1:16-cv-01209-SAB (PC)
)
Plaintiff,) ORDER DENYING DEFENDANTS’ MOTION
) FOR SUMMARY JUDGMENT, WITHOUT
v.) PREJUDICE
) [ECF No. 38]
DR. WOODS, et al.,)
) ORDER DENYING IN PART PLAINTIFF’S
Defendants.) MOTION TO STRIKE MOTION FOR SUMMARY
) JUDGMENT
) [ECF No. 41]
)
) ORDER DENYING PLAINTIFF’S MOTION TO
) APPOINT COUNSEL
) [ECF No. 40]
)
) ORDER DENYING PLAINTIFF’S MOTION FOR
) JURY TRIAL
) [ECF No. 42]
)
) **TEN-DAY DEADLINE**
)

**I.
INTRODUCTION**

Plaintiff James Millner is appearing pro se in this civil rights action pursuant to 42 U.S.C. § 1983. This action proceeds on Plaintiff’s claim against Defendants Woods and Hashem, in their individual capacities, for deliberate indifference to a serious dental need in violation of the Eighth Amendment. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

Currently before the Court are Plaintiff’s motions for the appointment of counsel, (ECF No. 39), and motion for a jury trial, (ECF No. 42), both filed on September 24, 2018.

1 Defendants filed a motion for summary judgment in this case on September 7, 2018. (ECF No.
2 38.) Plaintiff has now filed an opposition to that motion, which also includes a motion to strike
3 Defendants' summary judgment motion. (ECF No. 41.) The Court addresses each of Plaintiff's
4 motions in turn.

5 **II.**

6 **MOTION TO APPOINT COUNSEL**

7 Plaintiff seeks the appointment of counsel, stating that he cannot afford to hire an attorney, his
8 imprisonment and disabilities limits his ability to litigate, he has no legal training, and that the issues
9 are complex and evidence would be better presented by a lawyer.

10 Plaintiff does not have a constitutional right to appointed counsel in this action, Rand v.
11 Rowland, 113 F.3d 1520, 1525 (9th Cir. 1997), and the court cannot require any attorney to represent
12 plaintiff pursuant to 28 U.S.C. § 1915(e)(1), Mallard v. United States District Court for the Southern
13 District of Iowa, 490 U.S. 296, 298 (1989). However, in certain exceptional circumstances the court
14 may request the voluntary assistance of counsel pursuant to section 1915(e)(1). Rand, 113 F.3d at
15 1525. Without a reasonable method of securing and compensating counsel, the Court will seek
16 volunteer counsel only in the most serious and exceptional cases. In determining whether
17 "exceptional circumstances exist, the district court must evaluate both the likelihood of success on the
18 merits [and] the ability of the [plaintiff] to articulate his claims pro se in light of the complexity of the
19 legal issues involved." Id. (internal quotation marks and citations omitted).

20 In the present case, the Court does not find the required exceptional circumstances. Even if it
21 assumed that Plaintiff is not well versed in the law and that he has made serious allegations which, if
22 proved, would entitle him to relief, his case is not exceptional. The legal issues present in this action
23 are not complex, and Plaintiff has thoroughly set forth his allegations in his pleading. In addition, the
24 Court cannot determine that Plaintiff is likely to succeed on the merits. Circumstances common to
25 most prisoners, such as lack of legal education and limited law library access, do not establish
26 exceptional circumstances that would warrant a request for voluntary assistance of counsel.

27 Therefore, Plaintiff's motion for the appointment of counsel will be denied, without prejudice.

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1 **III.**

2 **MOTION FOR A JURY TRIAL**

3 In support of Plaintiff's motion for a jury trial, he asserts that this case involves complex
4 medical records that require an expert witness. He further asserts that he believes Defendants have
5 destroyed or altered records, although he does not wish for the Court to compel those records.
6 Therefore, he seeks for a jury trial to be set so that the evidence can be evaluated. He states that he
7 will file separate motions seeking appointment of an unbiased expert, and to amend his complaint.

8 The Court denies Plaintiff's motion for a jury trial, as premature. As noted above, this case is
9 at the summary judgment stage, and it has not yet been determined whether there is a triable dispute of
10 material fact. The Court will set a trial in the regular course, if appropriate, and no motion by the
11 parties will be necessary.

12 The Clerk of the Court has docketed Plaintiff's motion to amend his complaint, which the
13 Court will rule upon when fully briefed. See Local Rule 230(I). No motion seeking the appointment
14 of any neutral expert witness is pending.

15 **IV.**

16 **MOTION TO STRIKE**

17 Finally, the Court addresses motion to strike Defendants' motion for summary judgment, set
18 forth in his opposition brief. (ECF No. 41.) Plaintiff asserts that Defendants' motion for summary
19 judgment is procedurally defective for failure to provide a sufficient Rand notice.

20 In Woods v. Carey, 684 F.3d 934, 939 (9th Cir. 2012), the Ninth Circuit held that a pro se
21 prisoner plaintiff must be provided with "fair notice" of the requirements for opposing a motion for
22 summary judgment at the time the motion is brought. Review of Defendants' summary judgment
23 motion filed on September 7, 2018 (ECF No. 38) shows that Defendants did not provide Plaintiff with
24 a sufficient Rand notice. See Rand v. Rowland, 154 F.3d 952 (9th Cir. 1998). The Rand notice must
25 be on a separate form, containing all the Rand requirements independent of the summary judgment
26 motion or papers filed in support thereof. Rand, 154 F.3d at 960. In addition, the notice must advise
27 Plaintiff of the contents of any applicable Eastern District of California Local Rule requirements, i.e.
28 Local Rule 260. Id. at 961.

1 The Court does not find it appropriate to strike Defendants' summary judgment motion.
2 Instead, the motion shall be denied, without prejudice. Defendants shall file their motion for summary
3 judgment and serve it, along with an appropriate Rand notice, upon Plaintiff within ten (10) days of
4 this order.

5 Within twenty-one (21) days of the filing and service of Defendants' motion for summary
6 judgment and separate Rand notice, Plaintiff shall provide written notice to the Court whether he
7 intends to stand upon his opposition filed on September 24, 2018, or he may file a new opposition.
8 Within seven (7) days of the filing in CM/ECF of Plaintiff's opposition or notice that he intends to
9 stand upon his prior opposition, Defendants may file a reply brief. Local Rule 230(l).

10 V.

11 CONCLUSION

12 For the reasons explained above, it is HEREBY ORDERED that:

13 1. Defendants' motion for summary judgment, filed on September 7, 2018 (ECF No. 38)
14 is denied, without prejudice;

15 2. Defendants shall file their motion for summary judgment within ten (10) days of this
16 order, and shall provide Plaintiff with the appropriate Rand notice;

17 3. Plaintiff's motion to appoint counsel, filed on September 24, 2018 (ECF No. 39) is
18 denied, without prejudice;

19 4. Plaintiff's motion for jury trial, filed on September 24, 2018 (ECF No. 42), is denied, as
20 premature.

21
22 IT IS SO ORDERED.

23 Dated: September 28, 2018



UNITED STATES MAGISTRATE JUDGE