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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JERRY DILLINGHAM,

Plaintiff,

v.

F. GARCIA,

Defendant.

No. 1:18-cv-00579-DAD-EPG (PC)

ORDER DENYING PLAINTIFF’S MOTION
TO APPOINT COUNSEL AND MOTION TO
APPOINT A GUARDIAN AD LITEM

(Doc. No. 174)

This matter is before the court on the motion to appoint counsel and motion to appoint a guardian *ad litem* filed by plaintiff Jerry Dillingham on February 28, 2022. (Doc. No. 174.) Therein, plaintiff argues that the court should appoint counsel to provide him with representation in this civil action brought pursuant to 42 U.S.C. § 1983 because he is illiterate and suffers from a learning disability. (*Id.* at 2.)

BACKGROUND

As an initial matter, the court finds it pertinent to summarize the efforts that the court has previously taken to provide plaintiff with assistance in this case. First, on June 24, 2019, the court appointed counsel on behalf of plaintiff for the limited purpose of assisting plaintiff in preparing for and participating in a settlement conference that plaintiff had requested in this case. (Doc. No. 51 at 1–2.) Attorney Christian F. Pereira was selected from the court’s Pro Bono

1 Attorney Panel and agreed to undertake plaintiff’s representation as limited purpose counsel.
2 (*Id.*) On July 8, 2019, plaintiff notified the court that he had not heard from the appointed
3 attorney, and he requested the appointment of a different attorney for purposes of settlement and
4 requested that settlement negotiations occur in a “confidential setting without correctional officers
5 listening.” (Doc. No. 55.) On July 11, 2019, the assigned magistrate judge denied plaintiff’s
6 request for appointment of new counsel in light of attorney Pereira’s limited purpose
7 appointment. (Doc. No. 57 at 1.)

8 On August 21, 2019, attorney Pereira filed a notice of submission of plaintiff’s
9 confidential settlement conference statement. (Doc. No. 67.) On August 27, 2019, a court
10 supervised settlement conference was held before then Chief Magistrate Judge (now District
11 Judge) Jennifer L. Thurston. (Doc. No. 68.) The case did not settle at that time. (*Id.*)

12 On December 16, 2019, plaintiff filed a second motion for the appointment of counsel
13 (Doc. No. 89), which he supplemented with additional information on February 24, 2020 (Doc.
14 No. 105). On May 28, 2020, the assigned magistrate judge denied plaintiff’s motion, finding it to
15 be without merit because the case was not particularly complex, plaintiff had demonstrated his
16 ability to effectively litigate this action, and the court could not make a determination at that time
17 that plaintiff was likely to succeed on the merits of his claim. (Doc. No. 112 at 4–5.) Plaintiff
18 filed objections to the assigned magistrate judge’s order. (Doc. No. 115.) On August 20, 2020,
19 this court considered those objections but declined to overturn the magistrate judge’s order,
20 finding that it was “not contrary to law or clearly erroneous.” (Doc. No. 126.)

21 Nevertheless, on September 28, 2020, the court issued an order requiring the parties to
22 participate in a second settlement conference and the court again appointed counsel on behalf of
23 plaintiff for the limited purpose of representing plaintiff in connection with that second court–
24 supervised settlement conference. (Doc. No. 130.) This time, attorney Greg Mullanax¹ was
25 selected from the court’s Pro Bono Attorney Panel to represent plaintiff. (*Id.*) The court set a

26 ¹ Attorney Mullanax is a well-respected member of the bar of this court and a past recipient of
27 the Joe Ramsey Award presented each year at the Eastern District of California’s Annual Night to
28 Honor Service to the attorney who during the given year demonstrated their outstanding
commitment to public service through their participation on the court’s Pro Bono Panel.

1 settlement conference to take place on October 15, 2020 before Magistrate Judge Kendall J.
2 Newman. (Doc. No. 131.) This settlement conference was rescheduled and eventually held on
3 January 26, 2021, but plaintiff declined to attend “due to pain.” (Doc. No. 137.) The assigned
4 magistrate judge then issued an order requiring plaintiff to show cause why he should not be
5 sanctioned for his failure to appear at the scheduled January 26, 2021 settlement conference.
6 (Doc. No. 141.) On February 25, 2021, plaintiff filed a reply to the order to show cause, arguing
7 that he was in fact suffering from severe pain on the day of the settlement conference, which
8 prevented him from attending, and that he was also afraid of being subjected to a substantial and
9 imminent threat were he to leave his cell. (Doc. No. 144.) On March 3, 2021, the assigned
10 magistrate judge issued an order requesting that the Warden of Kern Valley State Prison
11 (“KVSP”) reply to plaintiff’s response to the order to show cause in order to clarify the
12 conflicting explanations plaintiff provided for his failure to appear at the second settlement
13 conference. (Doc. No. 145.) On March 17, 2021, the Warden of KVSP filed a reply, which
14 contained declarations from prison staff affirming that plaintiff’s stated reason for not attending
15 the second settlement conference was solely that he was in pain on the day in question. (Doc. No.
16 146.) On March 25, 2021, the assigned magistrate judge reset the settlement conference and
17 again appointed attorney Greg Mullanax for the limited purpose of representing plaintiff in
18 connection with the settlement conference before Magistrate Judge Newman. (Doc. No. 147.)
19 The court also warned plaintiff at that time that if he failed to follow the court order requiring him
20 to participate in a settlement conference, this action would be dismissed. (*Id.* at 2–3.) The re-
21 scheduled settlement conference was held on June 29, 2021, and once again no settlement was
22 reached. (Doc. No. 152.)

23 On February 28, 2022, plaintiff filed the pending motion to appoint counsel. (Doc. No.
24 174.) While plaintiff’s latest motion for the appointment of counsel remained pending, the court
25 proceeded to hold a final pretrial conference in this case on March 15, 2022. (Doc. No. 178.) In
26 response to plaintiff’s continued requests during the final pretrial conference that counsel be
27 appointed to assist him at trial, the court addressed whether attorney Greg Mullanax would accept
28 an appointment to serve as stand by counsel for plaintiff to consult with and otherwise provide

1 assistance to plaintiff during the trial of this case. (*Id.*) Specifically, the court stated that it was
2 willing to appoint attorney Mullanax as stand by counsel in light of plaintiff’s representations that
3 he is illiterate, that he suffers with a speech impediment, and that he still wishes to prosecute this
4 case to its conclusion. Attorney Mullanax agreed to accept appointment as standby counsel to
5 provide plaintiff with assistance and advice throughout the trial of this case. After further
6 discussion, however, plaintiff advised the court that he did not wish to have the assistance of
7 attorney Mullanax at trial. (*Id.*) Specifically, plaintiff asserted that he did not want attorney
8 Mullanax’s assistance in any way because plaintiff did not appreciate the way attorney Mullanax
9 approached the prior settlement conferences. Plaintiff stated that he did not trust Mullanax as an
10 attorney and he accused attorney Mullanax of lying to him. However, according to court
11 personnel, at the previous court-supervised settlement conferences in this case, plaintiff refused
12 to communicate with his limited purpose appointed counsel, nor would he communicate with the
13 magistrate judges presiding over those conferences about any possible settlement of the matter,
14 making both settlement conferences completely unproductive and wasteful of both counsels’ and
15 the court’s time.

16 As plaintiff described at the Final Pretrial Conference in his own words, he “kicked Mr.
17 Mullanax to the curb” and would not accept his assistance at trial. In response to plaintiff’s
18 strong statement in this regard, the court noted both that plaintiff was making his own choices as
19 to how he wished to proceed in this case and that the court had tried, and indeed succeeded, in
20 finding an attorney willing to assist plaintiff at trial but plaintiff had refused that lawyer’s
21 assistance, accusing counsel of being a liar with no apparent basis for that accusation.²
22 Accordingly, the court advised plaintiff at the Final Pretrial Conference that there was simply
23 nothing more the court could do to secure the assistance of counsel for him given his failure to
24 cooperate with the *pro bono* lawyers the court had secured for him and that all that was left to do
25 was to move this case forward to trial. To this, plaintiff responded to the court as follows: “I

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27 ² It appears that plaintiff may have been unhappy because attorney Mullanax may have disagreed
28 with plaintiff regarding the potential settlement value of his case.

1 hope you know you [are] going to look like an ass because you got me trying to go in there and
2 represent myself.”

3 With this background in mind, the court turns to address the merits of plaintiff’s pending
4 motion.

5 LEGAL STANDARD

6 A. Appointment of Pro Bono Counsel

7 Plaintiff does not have a constitutional right to appointed counsel in this action, *Rand v.*
8 *Rowland*, 113 F.3d 1520, 1525 (9th Cir. 1997), *withdrawn in part on other grounds*, 154 F.3d 952
9 (9th Cir. 1998), and of course the court cannot require an attorney to represent plaintiff pursuant
10 to 28 U.S.C. § 1915(e)(1). *Mallard v. U.S. Dist. Court for the S. Dist. of Iowa*, 490 U.S. 296, 298
11 (1989). However, in certain exceptional circumstances, the court may request the voluntary
12 assistance of counsel pursuant to § 1915(e)(1). *Rand*, 113 F.3d at 1525. The court may consider
13 many factors in determining if exceptional circumstances warrant the appointment of counsel
14 including, but not limited to, proof of indigence, the likelihood of success on the merits, and the
15 ability of the plaintiff to articulate his or her claims *pro se* in light of the complexity of the legal
16 issues involved. *See Davis v. Allison*, No. 1:21-cv-00494-HBK, 2021 WL 2805820, at *1 (E.D.
17 Cal. July 6, 2021) (citing *United States v. McQuade*, 519 F.2d 1180, 1181 (9th Cir. 1978) and
18 *Rand*, 113 F.3d at 1525).

19 B. Appointment of Guardian Ad Litem

20 Under Federal Rule of Civil Procedure 17(c)(2), “[t]he court must appoint a guardian *ad*
21 *litem*—or issue another appropriate order—to protect a minor or incompetent person who is
22 unrepresented in an action.” “Although the court has broad discretion and need not appoint a
23 guardian *ad litem* if it determines the person is or can be otherwise adequately protected, it is
24 under a legal obligation to consider whether the person is adequately protected.” *United States v.*
25 *30.64 Acres of Land, More or Less, Situated in Klickitat Cnty., State of Wash.*, 795 F.2d 796, 805
26 (9th Cir. 1986). “Ordinarily, ‘when a substantial question exists regarding the mental competence
27 of a party proceeding *pro se*, the proper procedure is for the district court to conduct a hearing to
28 determine competence, so a guardian *ad litem* can be appointed, if necessary.’” *Harris v.*

1 *Mangum*, 863 F.3d 1133, 1138 (9th Cir. 2017) (quoting *Allen v. Calderon*, 408 F.3d 1150, 1153
2 (9th Cir. 2005)). If an “incompetent person is unrepresented, the court should not enter a
3 judgment which operates as a judgment on the merits without complying with Rule 17(c).” *Krain*
4 *v. Smallwood*, 880 F.2d 1119, 1121 (9th Cir. 1989).

5 ANALYSIS

6 A. Motion to Appoint Counsel

7 Here, plaintiff has not met his “burden of demonstrating exceptional circumstances”
8 warranting the appointment of counsel on his behalf. *See Palmer v. Valdez*, 560 F.3d 965, 970
9 (9th Cir. 2009) (noting that the burden of demonstrating exceptional circumstances is on the party
10 seeking appointment of counsel); *Jones v. Chen*, No. 1:11-cv-01762-MJS, 2014 WL 12684497, at
11 *1 (E.D. Cal. Jan. 14, 2014).

12 First, plaintiff’s indigence does not qualify “as an exceptional circumstance in a prisoner
13 civil rights case.” *Montano v. Solomon*, No. 2:07-cv-0800-KJN, 2010 WL 2403389, at *2 (E.D.
14 Cal. June 11, 2010); *see also Callender v. Ramm*, No. 2:16-cv-0694-JAM-AC, 2018 WL
15 6448536, at *3 (E.D. Cal. Dec. 10, 2018) (“The law is clear: neither plaintiff’s indigence, nor his
16 lack of education, nor his lack of legal expertise warrant the appointment of counsel.”) (citing
17 *Wood v. Housewright*, 900 F.2d 1332, 1335-36 (9th Cir. 1990) and *Bashor v. Risley*, 730 F.2d
18 1228, 1234 (9th Cir. 1984)).

19 Second, the court does not find that the issues in this case are “so complex that due
20 process violations will occur absent the presence of counsel.” *Bonin v. Vasquez*, 999 F.2d 425,
21 428–29 (9th Cir. 1993). This case concerns claims brought by plaintiff against a single defendant
22 correctional officer based on plaintiff’s allegations that defendant Garcia threatened plaintiff’s life
23 and told other inmates to attack plaintiff because plaintiff wrote an inmate grievance against the
24 officer. (Doc. No. 112 at 4.) The lack of complexity of plaintiff’s claims is illustrated by
25 comparison to another case, *Pouncil v. Martel*, No. 2:09-cv-1169-LKK-CMK, 2013 WL 1322490
26 (E.D. Cal. April 2, 2013), in which the district court appointed counsel based on the complexity
27 of the legal issues involved. In *Pouncil*, the district court found that the issues presented were
28 complex enough to warrant the appointment of counsel because the case did “not appear to

1 involve disputed facts” and as such was based solely on legal issues, the proper presentation of
2 which would assist the court in making its determinations. *Id.* at *2. Additionally, the district
3 court in *Pouncil* concluded that “plaintiff’s case for appointed counsel is bolstered by the fact that
4 he is not seeking monetary damages.” *Id.* Here, in contrast, plaintiff’s claims are entirely based
5 on a factual dispute, the legal issues presented by his claim are in no way complex, and plaintiff is
6 solely seeking an award of monetary damages. Although plaintiff is proceeding *pro se*, he faces
7 the same obstacles all *pro se* plaintiffs face. Challenges conducting discovery and preparing for
8 trial “are ordinary for prisoners pursuing civil rights claims” and cannot form the basis for
9 appointment of counsel. *Courtney v. Kandel*, No. 2:18-cv-2052-KJM-DMC, 2020 WL 1432991,
10 at *1 (E.D. Cal. Mar. 24, 2020).³

11 Third, plaintiff has clearly shown that he is capable of adequately litigating this matter,
12 expressing his thoughts regarding the case and communicating his concerns to the court.
13 Notably, plaintiff has filed numerous motions in this action. Plaintiff’s filings in this case include
14 a motion to amend (Doc. Nos. 23, 24), an opposition to defendant’s motion to dismiss (Doc. No.
15 42), objections to findings and recommendations (Doc. Nos. 20, 108), and objections to the
16 undersigned’s orders (Doc. Nos. 82, 86, 90). Indeed, even his pending motion to appoint counsel
17 is well-written, organized, and cites precedent. (*See* Doc. No. 174.) The assigned magistrate
18 judge determined earlier in this action that “based on the [c]ourt’s experience, Plaintiff has
19 litigated this case more heavily than most prisoners litigate their cases.” (Doc. No. 112 at 5.) In
20 short, nothing in the procedural history of this case thus far suggests that plaintiff is in fact unable
21 to litigate this action.

22 Fourth, and most importantly, the court has now on three occasions attempted to obtain
23 counsel for plaintiff who are willing to assist him. Specifically, the court appointed counsel for
24 the limited purposes of assisting plaintiff with three separate settlement conferences. After those
25 settlement conferences proved unproductive, the court contacted the Pro Bono Attorney Panel

26 ³ Moreover, the court notes that all discovery and law and motion proceedings are now closed in
27 this case pursuant to the court’s scheduling order. Thus, plaintiff proceeding *pro se* has already
28 proven himself capable of engaging in discovery and successfully prosecuting and advancing his
case to trial.

1 director and sought an attorney to assist plaintiff at trial. The director of the court’s Pro Bono
2 Attorney Panel suggested, in light of the difficulties counsel had experienced in attempting to
3 work with plaintiff, that the court attempt to provide plaintiff with standby counsel to assist and
4 advise him at trial rather than to represent him as counsel of record for all purposes. The
5 undersigned agreed that the appointment of standby counsel would adequately address plaintiff’s
6 expressed concerns that his learning disability and asserted illiteracy would pose an impediment
7 to his ability to present his case at trial. By the same token, in the undersigned’s view, the
8 appointment of standby counsel would avoid a repetition of the court’s previous attempts to
9 provide plaintiff with the assistance of counsel which had proven unsuccessful because plaintiff
10 declined to communicate with those attorneys. However, when the court offered the appointment
11 of attorney Mullanax as standby counsel, plaintiff adamantly refused the court’s offer, as
12 explained above. As has been recognized by other district courts, a plaintiff such as Mr.
13 Dillingham in this case cannot claim that he was denied counsel—even if he was entitled to
14 *demand* counsel—because he has turned down the counsel offered by the court and, of course, he
15 “is not entitled to appointment of counsel of his choice.” *Ashcroft v. Dept. of Corrs.*, No. 05-cv-
16 488, 2008 WL 4367540, at *5 (W.D.N.Y. Sept. 18, 2018) (citing *Lee v. Crouse*, 284 F. Supp.
17 541, 544 (D. Kan. 1967), *aff’d*, 396 F.2d 952 (10th Cir. 1968)). This is, in part, because “[t]here
18 is a cost to the Court in expended good will with the bar in using multiple appointments of
19 counsel on a single case, especially appointment for a difficult litigant.” *Id.* In the undersigned’s
20 view, in this case “the court [has] reached the limits of its authority in attempting to appoint
21 counsel.” *Reynolds v. White*, 357 F. App’x 882, 883 (9th Cir. 2009)⁴ (citing *Mallard*, 490 U.S. at
22 296 (holding that 28 U.S.C. § 1915(d) did not authorize a federal court to require an unwilling
23 attorney to represent an indigent litigant in a civil case)); *cf.* *30.64 Acres of Land*, 795 F.2d at 804
24 (holding that the district court “does not discharge [its] duty [under § 1915(e)(1)] if it makes no
25 attempt to request the assistance of volunteer counsel or, where the record is not otherwise clear,
26 explain its failure to do so”).

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28 ⁴ Citation to this unpublished Ninth Circuit opinion is appropriate pursuant to Ninth Circuit Rule 36-3(b).

1 For these reasons, the court believes that due to plaintiff's own conduct in this case the
2 court has no viable remaining option but to deny plaintiff's renewed motion (Doc. No. 174) for
3 the appointment of counsel on his behalf.⁵

4 **B. Motion to Appoint Guardian *Ad Litem***

5 In the alternative, plaintiff again requests the appointment of a guardian *ad litem*, his third
6 such request. (Doc. No. 174 at 4.) Plaintiff's first motion for appointment of a guardian *ad litem*
7 was denied by the then-assigned district judge because "[p]laintiff has not submitted substantial
8 evidence of incompetence," and "[a]t most, [p]laintiff's evidence shows that he has a low TABE
9 score, and that he is in the disability placement program." (Doc. Nos. 21 at 3; 89 at 20.)
10 Plaintiff's second motion seeking appointment of a guardian *ad litem* was denied on May 28,
11 2020 by the assigned magistrate judge, who agreed with the district judge's previous assessment.
12 (Doc. No. 112.) Plaintiff's now pending request for appointment of a guardian *ad litem* on his
13 behalf is largely identical to his previous motions and relies on similar evidence. Specifically,
14 plaintiff has submitted a patient summary that lists him as suffering from a learning disability.
15 (Doc. No. 174 at 9.) But that evidence is plainly insufficient to demonstrate that plaintiff is
16 incompetent. Moreover, the court's interactions with plaintiff have demonstrated both his ability
17 to understand the court's rulings and his ability to communicate his requests to the court, as
18 evidenced by his many filings in this action. Accordingly, although it appears that plaintiff may
19 suffer from a physical disability and a learning disability, he has once again failed to submit
20 substantial evidence of his incompetence.

21 Moreover, plaintiff's interest in this case appears to be adequately protected. As described
22 above, plaintiff has been heavily litigating this case throughout its pendency and he continues to
23 do so. Further, the court has issued orders to protect plaintiff's interest in this case, including
24 directing defendant to "send Plaintiff the leading cases or statutes setting forth the central law
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26 ⁵ It is also worth noting that plaintiff independently requested assistance from the Civil Rights
27 Clinic at the University of California Davis Law School. (*See* Doc. No. 19 at 18.) That request
28 appears to clearly set out the history of this case and plaintiff's claims against defendant. (*Id.*)
Nevertheless, given the clinic's lack of response, it too appears to have declined to represent
plaintiff in this action.

1 relied upon in all motions filed by defendant” (Doc. No. 38 at 3) and limiting written discovery
2 (Doc. No. 75 at 1–2).

3 Accordingly, plaintiff’s renewed motion for a guardian *ad litem* will be denied.

4 **CONCLUSION**

5 For all of the reasons set forth above,

- 6 1. Plaintiff’s motion for appointment of counsel (Doc. No. 174) is denied;
- 7 2. Plaintiff’s motion for appointment of a guardian *ad litem* (Doc. No. 174) is denied;
- 8 3. This action remains scheduled for jury trial before the undersigned on May 17,
9 2022 at 8:30 a.m. on the 7th Floor of the Robert E. Coyle Federal Courthouse
10 located at 2500 Tulare Street, Fresno, CA 93721.

11 IT IS SO ORDERED.

12 Dated: April 6, 2022

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15 UNITED STATES DISTRICT JUDGE
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