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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JULIUS ANDERSON,
Plaintiff,

2:08-cv-2480 CTB

v.

ORDER DIRECTING SERVICE BY
THE UNITED STATES MARSHAL
WITHOUT PREPAYMENT OF COSTS

O. TOWNE; et al.,
Defendants.

_____ /

Plaintiff Anderson is proceeding in forma pauperis pursuant to 28 U.S.C. § 1915. By order entered March 12, 2010, the court determined that Plaintiff's complaint states a cognizable Eighth Amendment claim for relief against Defendants Towne, Zepeda, Swan, and Brida, and states a cognizable state law negligence claim against Defendants Towne, Zepeda, Swan, Brida, Manderville, Veal, and Hubbard. The court ordered Plaintiff to provide information for service of process on form USM-285, a completed summons, sufficient copies of the complaint for service, and a notice of compliance. Plaintiff has filed the required papers. Accordingly, IT IS HEREBY ORDERED that:

1. The Clerk of the Court is directed to forward the instructions for service of process, the completed summons, copies of the complaint, and copies of this order to the United States Marshal.

2. Within ten days from the date of this order, the United States Marshal is directed to notify Defendants Towne, Zepeda, Swan, Brida,

1 Manderville, Veal, and Hubbard of the commencement of this action and to request
2 a waiver of service of summons in accordance with the provisions of Fed. R. Civ.
3 P. 4(d) and 28 U.S.C. § 566(c).

4 3. The United States Marshal is directed to retain the sealed summons
5 and a copy of the complaint in their file for future use.

6 4. The United States Marshal shall file returned waivers of service of
7 summons as well as any requests for waivers that are returned as undelivered as
8 soon as they are received.

9 5. If a waiver of service of summons is not returned by a Defendant
10 within sixty days from the date of mailing the request for waiver, the United States
11 Marshal shall:

12 a. Personally serve process and a copy of this order upon
13 Defendants pursuant to Rule 4 of the Federal Rules of Civil
14 Procedure and 28 U.S.C. § 566(c) and shall command all
15 necessary assistance from the California Department of
16 Corrections and Rehabilitation (CDC) to execute this order.
17 The United States Marshal shall maintain the confidentiality of
18 all information provided by the CDC pursuant to this order.

19 b. Within ten days after personal service is effected, the United
20 States Marshal shall file the return of service for Defendants,
21 along with evidence of any attempts to secure a waiver of
22 service of summons and of the costs subsequently incurred in
23 effecting service on said Defendant. Said costs shall be
24 enumerated on the USM-285 form and shall include the costs
25 incurred by the Marshal's office for photocopying additional
26 copies of the summons and complaint and for preparing new

1 USM-285 forms, if required. Costs of service will be taxed
2 against the personally served Defendant in accordance with the
3 provisions of Fed. R. Civ. P. 4(d)(2).

4 6. Defendants shall reply to the complaint within the time provided
5 by the applicable provisions of Fed. R. Civ. P. 12(a).

6 7. Unless otherwise ordered, all motions to dismiss, motions for
7 summary judgment, motions concerning discovery, motions pursuant to Rules 7,
8 11, 12, 15, 41, 55, 56, 59 and 60 of the Federal Rules of Civil Procedure, and
9 motions pursuant to Local Rule 11-110 shall be briefed pursuant to Local Rule 78-
10 230(m). Failure to oppose such a motion timely may be deemed a waiver of
11 opposition to the motion. Opposition to all other motions need be filed only as
12 directed by the court.

13 8. If Plaintiff is released from prison at any time during the pendency
14 of this case, any party may request application of other provisions of Local Rule
15 78-230 in lieu of Local Rule 78-230(m). In the absence of a court order granting
16 such a request, the provisions of Local Rule 78-230(m) will govern all motions
17 described in #7 above regardless of Plaintiff's custodial status. See Local Rule 1-
18 102(d).

19 9. Pursuant to Wyatt v. Terhune, 315 F.3d 1108, 1120 n.14 (9th Cir.
20 2003), Plaintiff is advised of the following requirements for opposing a motion to
21 dismiss for failure to exhaust administrative remedies made by Defendants
22 pursuant to Federal Rule of Civil Procedure 12(b). Such a motion is a request for
23 dismissal of unexhausted claims without prejudice. Defendants may submit
24 affidavits or declarations under penalty of perjury and admissible documentation to
25 support the motion to dismiss. To oppose the motion, Plaintiff may likewise file
26 declarations under penalty of perjury and admissible documentation. Plaintiff may

1 rely upon statements made under the penalty of perjury in the complaint if the
2 complaint shows that Plaintiff has personal knowledge of the matters stated and
3 Plaintiff calls to the court's attention those parts of the complaint upon which
4 Plaintiff relies. Plaintiff may serve and file one or more affidavits or declarations
5 by other persons who have personal knowledge of relevant matters. Plaintiff may
6 also rely upon written records, but Plaintiff must prove that the records are what
7 Plaintiff claims they are. If Plaintiff fails to contradict Defendants' evidence with
8 admissible evidence, the court may rely on Defendants' evidence. In the event
9 both sides submit matters outside the pleadings, the court may look beyond the
10 pleadings and decide disputed issues of fact. If Plaintiff does not serve and file a
11 written opposition to the motion, the court may consider the failure to act as a
12 waiver of opposition to Defendants' motion. If Defendants' motion to dismiss,
13 whether opposed or unopposed, is granted, Plaintiff's unexhausted claims will be
14 dismissed without prejudice.

15 10. Pursuant to Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998)
16 (en banc), cert. denied, 527 U.S. 1035 (1999), and Klinge v. Eikenberry, 849
17 F.2d 409 (9th Cir. 1988), Plaintiff is advised of the following requirements for
18 opposing a motion for summary judgment made by Defendants pursuant to Rule
19 56 of the Federal Rules of Civil Procedure. Such a motion is a request for an order
20 for judgment in favor of Defendants without trial. Defendants' motion for
21 summary judgment will set forth the facts that Defendants contend are not
22 reasonably subject to dispute and that entitle Defendants to judgment. To oppose a
23 motion for summary judgment, Plaintiff must show proof of his or her claims.
24 Plaintiff may do this in one or more of the following ways. Plaintiff may rely upon
25 statements made under the penalty of perjury in the complaint if the complaint
26 shows that Plaintiff has personal knowledge of the matters stated and Plaintiff calls

1 to the court's attention those parts of the complaint upon which Plaintiff relies.
2 Plaintiff may serve and file one or more affidavits or declarations setting forth the
3 facts that Plaintiff believes prove Plaintiff's claims; the person who signs an
4 affidavit or declaration must have personal knowledge of the facts stated. Plaintiff
5 may rely upon written records, but Plaintiff must prove that the records are what
6 Plaintiff claims they are. Plaintiff may rely upon all or any part of the transcript of
7 one or more depositions, answers to interrogatories, or admissions obtained in this
8 proceeding. If Plaintiff fails to contradict Defendants' evidence with
9 counteraffidavits or other admissible evidence, Defendants' evidence may be taken
10 as the truth and Defendants' motion for summary judgment granted. If there is
11 some good reason why such facts are not available to Plaintiff when required to
12 oppose a motion for summary judgment, the court will consider a request to
13 postpone considering Defendants' motion. If Plaintiff does not serve and file a
14 written opposition to the motion or a request to postpone consideration of the
15 motion, the court may consider the failure to act as a waiver of opposition to
16 Defendants' motion. If Defendants' motion for summary judgment, whether
17 opposed or unopposed, is granted, judgment will be entered for Defendants without
18 a trial and the case will be closed.

19 11. A motion or opposition supported by unsigned affidavits or
20 declarations will be stricken.

21 12. Each party shall keep the court informed of a current address at
22 all times while the action is pending. Any change of address must be reported
23 promptly to the court in a separate document captioned for this case and entitled
24 "Notice of Change of Address." A notice of change of address must be properly
25 served on other parties. Pursuant to Local Rule 83-182(f), service of documents at
26 the record address of a party is fully effective. Failure to inform the court of a

1 change of address may result in the imposition of sanctions including dismissal of
2 the action.

3 13. The Clerk of the Court shall serve upon Plaintiff a copy of the
4 Local Rules of Court.

5 14. The failure of any party to comply with this order, the Federal
6 Rules of Civil Procedure, or the Local Rules of Court may result in the imposition
7 of sanctions including, but not limited to, dismissal of the action or entry of
8 default. Fed. R. Civ. P. 11; Local Rule 11-110.

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10 DATED: March 24, 2010

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Hon. Carlos T. Bea
U.S. Court of Appeals for the Ninth
Circuit, sitting by designation