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

CHARLES CORNELIUS JAMES,

Plaintiff,

No. 2:10-cv-1171 LKK DAD P

vs.

DEEPAK MEHTA, et al.,

Defendants.

FINDINGS AND RECOMMENDATIONS

_____/

Plaintiff is a state prisoner proceeding through counsel with an action filed pursuant to 42 U.S.C. § 1983. Pending before the court is defendant Capitano’s motion to set aside default. Plaintiff has opposed the motion, and defendant has filed a reply. This matter came before the court for oral argument on August 24, 2012. For the following reasons, as well as those stated on the record, the undersigned will recommend that defendant’s motion to set aside the default be granted.

BACKGROUND

Plaintiff is proceeding on a second amended complaint against defendants Aguilera, Andreason, Bick, Dhillon, Mehta, Pai, Dr. Williams, and Nurse Williams.¹ Therein,

¹ Counsel on behalf of plaintiff is still attempting to effect service on defendant Uppal.

1 defendant has a meritorious defense. See Franchise Holding II v. Huntington Restaurants Group,
2 375 F.3d 922, 925-26 (9th Cir. 2004). “The court’s discretion is especially broad where, as here,
3 it is entry of default that is being set aside rather than a default judgment.” Mendoza v. Wight
4 Vineyard Mgmt., 783 F.2d 941, 945-46 (9th Cir. 1986).

5 In this case, the court finds good cause to set aside defendant Capitano’s default.
6 Specifically, the court finds that defendant Capitano’s inaction was, at most, negligent and not
7 willful or culpable. See Gregorian v. Izvestia, 871 F.2d 1515, 1525 (9th Cir. 1989) (culpability
8 involves “not simply nonappearance following the receipt of notice of the action, but rather
9 conduct which hindered judicial proceedings . . .”). Defendant Capitano has declared under
10 penalty of perjury that this was the first time she had received personal service of a lawsuit, and
11 she erroneously believed that prison officials from the California Department of Corrections and
12 Rehabilitation would contemporaneously receive notice of the suit and respond to it on her
13 behalf. (Capitano Decl. at 2.) See Mendoza, 783 F.2d at 946 (affirming district court’s decision
14 to set aside default based on defendants’ evidence of confusion regarding service). Moreover, by
15 setting aside the default, plaintiff will not suffer any prejudice at this juncture of the present case.
16 The court only recently issued the discovery and scheduling order, which was based on the
17 parties’ joint motion and proposed scheduling order dates. Defendant Capitano’s attorney stated
18 at the hearing on the motion to set aside default that she was in agreement with that recently
19 issued scheduling order.² In addition, as noted above, counsel for plaintiff is still attempting to
20 effect service on one of the defendants named in this action. Finally, defendant Capitano may
21 have a meritorious defense. She has provided testimony that she treated plaintiff’s shoulder
22 condition within the standard of care. (Capitano Decl. at 2.) To be sure, the defendant’s sworn
23 statement in this regard is rather abbreviated. However, if established, defense counsel is correct

24
25 ² In fact, according to the parties’ joint motion, they chose the proposed schedule for this
26 litigation based in part on the possibility that the court would grant defendant Capitano’s pending
motion. See Order filed August 8, 2012 (Doc. No. 76.)

1 shall be served and filed within fourteen days after service of the objections. The parties are
2 advised that failure to file objections within the specified time may waive the right to appeal the
3 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

4 DATED: August 27, 2012.

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7 _____
8 DALE A. DROZD
9 UNITED STATES MAGISTRATE JUDGE

7 DAD:9
8 jame1171.def

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