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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CLARENCE A. GIPBSIN,
Plaintiff,
v.
SCOTT KERNAN, et al.,
Defendants.

No. 2:12-cv-0556 KJM DB P

ORDER

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with a civil rights action under 42 U.S.C. § 1983. Plaintiff alleges defendants failed to transfer him to a mental health facility in a timely fashion pursuant to an order from the Lassen County Superior Court in violation of his Eighth Amendment rights. In this order the court will address several motions filed by plaintiff as well as issues related to the initial appearance of several defendants in this action.

I. Motion for Scheduling Order

Plaintiff requests “a scheduling order be issued in regards to status conferences, trial dates, pretrial dates, summary judgment decisions, and or settlement conference to move this case along.” (ECF No. 228.) By order dated September 21, 2017, the undersigned found plaintiff’s third amended complaint stated potentially cognizable claims against defendants Kernan, Ehle,

1 Felker, Wong, Peddacour, Gamez,¹ Perez, Grannis, Zamora, Jackson, Wagner, Schmollinger,
2 Grimes, McCann, and Safi who were named in previous incarnations of the complaint. (ECF No.
3 171.) The court additionally found the third amended complaint stated potentially cognizable
4 claims against fifteen additional defendants: Murray, Kelly, Krause, French, Boretz, Morrow,
5 Sloan, William, St. Laurent, Wright, Norgaard, Lyons, Dahl, Ledesma, and Neal. (Id.)

6 Defendants Boretz, Ehle, Felker, French, Grannis, Jackson, Kelly, Kernan, Krause,
7 Ledesma, Lyons, McCann, Morrow, Murray, Norgaard, Peddacour, Perez, Safi, Schmollinger,
8 Sloan, St. Laurent, Wagner, William, Wright, and Zamora have filed a third amended answer to
9 the third amended complaint. (ECF No. 240.)

10 Due to the appearance of several new defendants in this action for the first time the court
11 will by separate order allow for additional discovery and extend the deadline for filing dispositive
12 motions. Discovery will be reopened for the newly served defendants only. Additionally, the
13 court will deny the pending motion for summary judgment (ECF Nos. 198, 204)² without
14 prejudice to its renewal at the close of the amended pretrial motion deadline. Further, the court
15 will deny as moot plaintiff's motion for scheduling order in light of the modification to the
16 discovery schedule and pretrial motion deadline.

17 **II. Service Unexecuted as to Defendant Neal**

18 Although the court has twice ordered the United States Marshal to effect service of
19 plaintiff's complaint on defendant Neal (ECF Nos. 178, 224), the Marshal has been unable to do
20 so based on the information plaintiff has provided the court on form USM-285. (See ECF No.
21 233.) Under these circumstances, the court finds that plaintiff cannot show good cause for failure
22 to effect service on defendant Neal. The court has provided plaintiff with more than sufficient
23 time to discover and provide to the court the correct address for this defendant, but plaintiff has

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25 ¹ Plaintiff was unable to show good cause for failure to effect service on Gamez and he was
26 dismissed from this action. (See ECF No. 143 and 150.)

27 ² Counsel for defendants filed a second motion for summary judgment (ECF No. 204) on behalf
28 of defendant Krause (previously identified incorrectly as "Rause") stating he moved for summary
judgment on the same basis as the other defendants in the motion filed December 18, 2017 (ECF
No. 198).

1 been unable to do so to date. Accordingly, the court will recommend dismissal of this defendant
2 pursuant to Rule 4(m).

3 **III. Motion for Status Conference and Settlement Conference**

4 Plaintiff has requested the court hold a status conference and a settlement conference.
5 (ECF No. 221.)

6 Plaintiff is advised that the court typically does not hold status conferences in cases where
7 a prisoner is proceeding pro se. See L.R. 240(c)(8). In terms of the status of this action, plaintiff
8 is advised that now that the all the defendants who have been properly served and have appeared
9 in this action have filed an amended answer, the court will issue an amended discovery and
10 scheduling order for this matter. At this time, no status conference is warranted. Accordingly,
11 the court will deny plaintiff's requests for a status conference.

12 Plaintiff has also moved for a settlement conference. Plaintiff is advised that, unless both
13 parties in this case request this court to conduct a settlement conference, this court will not order a
14 court-supervised settlement conference until after it has ruled on any forthcoming dispositive
15 motions. Accordingly, his motion for a settlement conference will be denied without prejudice.

16 **IV. Motion to Appoint Counsel**

17 Plaintiff has requested the appointment of counsel. (ECF No. 222.) In support of his
18 motion he argues the court should appoint counsel because he is indigent and proceeding in this
19 action in forma pauperis.

20 The United States Supreme Court has ruled that district courts lack authority to require
21 counsel to represent indigent prisoners in § 1983 cases. Mallard v. United States Dist. Court, 490
22 U.S. 296, 298 (1989). In certain exceptional circumstances, the district court may request the
23 voluntary assistance of counsel pursuant to 28 U.S.C. § 1915(e)(1). Terrell v. Brewer, 935 F.2d
24 1015, 1017 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir. 1990).

25 The test for exceptional circumstances requires the court to evaluate the plaintiff's
26 likelihood of success on the merits and the ability of the plaintiff to articulate his claims pro se in
27 light of the complexity of the legal issues involved. See Wilborn v. Escalderon, 789 F.2d 1328,
28 1331 (9th Cir. 1986); Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983). Circumstances

1 common to most prisoners, such as lack of legal education and limited law library access, do not
2 establish exceptional circumstances that would warrant a request for voluntary assistance of
3 counsel. In the present case, the court does not find the required exceptional circumstances.

4 Plaintiff's only argument in support of his motion is that he is unable to afford counsel.
5 However, circumstances common to most prisoners, such as the inability to afford counsel, does
6 not warrant the appointment of voluntary counsel. Accordingly, the court will deny plaintiff's
7 motion to appoint counsel without prejudice.

8 **V. Motion for Sanctions**

9 Plaintiff moves for sanctions arguing he is entitled to payment from defendants under
10 Federal Rule of Civil Procedure 37 for failure to obey court orders to transport him to Atascadero
11 State Hospital ("ASH"). (ECF No. 234.) Defendants filed an opposition to plaintiff's motion in
12 which they argue that plaintiff is not entitled to sanctions under Rule 37 and has failed to identify
13 any conduct on the part of defendants that would be subject to sanction. (ECF No. 236.)

14 Plaintiff appears to believe he is entitled to sanctions under Rule 37 based on his
15 underlying claim in this action, that defendants violated his rights by failing to comply with a
16 court order to transfer him to ASH. Rule 37 authorizes "a wide range of sanctions" for a party's
17 failure to comply with discovery rules or court orders enforcing them. Wyle v. R.J. Reynolds
18 Industries, Inc., 709 F.2d 585, 589 (9th Cir. 1983). However, plaintiff has not stated that
19 defendants failed to comply with a discovery rule or a court order enforcing a discovery rule.

20 Plaintiff is not entitled to sanctions pursuant to Rule 37 based on his underlying claims in
21 this action and has not specified any other basis for the imposition of sanctions. Accordingly, the
22 court will deny plaintiff's motion for sanctions.

23 **VI. Conclusion**

24 Accordingly, IT IS HEREBY ORDERED that

- 25 1. Defendant's motion for summary judgment (ECF Nos. 198, 204) is denied without
26 prejudice to its renewal at the close of the amended pretrial motion deadline;
- 27 2. Plaintiff's motion for a scheduling order (ECF No. 228) is denied as moot;

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