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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DANNY R. GARCIA,
Plaintiff,
v.
C/O HEATH, et al.,
Defendants.

No. 2:13-cv-1952 JAM AC P

ORDER

I. Introduction

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with this civil rights action. Currently pending is plaintiff’s motion to disqualify the undersigned magistrate judge from this action. ECF No. 116. For the reasons that follow, the undersigned denies plaintiff’s motion for disqualification, and provides plaintiff a final opportunity to oppose defendant’s pending motion for summary judgment.

II. Background

On December 27, 2016, all defendants except Mendoza were dismissed from this action due to plaintiff’s failure to exhaust available administrative remedies. See ECF Nos. 78, 68. On October 25, 2017, defendant Mendoza filed a motion for summary judgment on the merits of plaintiff’s only remaining claim for retaliation in violation of the First Amendment. See ECF No. 111. In response to defendant’s motion, plaintiff filed his tenth request for appointment of

1 counsel or, alternatively, dismissal of this action without prejudice. See ECF No. 114. By order
2 filed November 1, 2017, the court denied plaintiff’s request for appointment of counsel, and
3 directed plaintiff to file and serve, within twenty-one days, a response to defendant’s motion or a
4 request that this action be voluntarily dismissed pursuant to Rule 41(a)(2), Federal Rules of Civil
5 Procedure. See ECF No. 115.

6 Plaintiff responded with the pending motion to disqualify the undersigned magistrate
7 judge and a request for additional information on the consequences of a voluntary dismissal. See
8 ECF No. 116.

9 III. Motion to Disqualify

10 A. Plaintiff’s Arguments

11 Plaintiff moves to disqualify the undersigned magistrate judge from this action, pursuant
12 to 28 U.S.C. §§ 144, 455(a), and 455(b), due to “the appearance of impartiality” (sic). ECF No.
13 116 at 1. Plaintiff cites the undersigned’s denials of his requests for appointment of counsel;
14 findings and recommendations on the question of administrative exhaustion; and refusal to allow
15 plaintiff to proceed on his proposed Third Amended Complaint (TAC). Attached to plaintiff’s
16 disqualification motion is a copy of his proposed TAC and exhibits, see id. at 8-238, previously
17 filed and framed as a “Motion for Leave to Amend Complaint and for Admissions and Request
18 for Summons for Additional Defendants,” ECF No. 109 at 1-235. Plaintiff argues that this
19 evidence demonstrates the violation of his constitutional rights by “all 11 defendants,” the
20 complexity of the legal issues involved, the likelihood of success on the merits of his claims, and
21 therefore his entitlement to appointed pro bono counsel. ECF No. 116 at 2. See Palmer v.
22 Valdez, 560 F.3d 965, 970 (9th Cir. 2009) (“exceptional circumstances” warranting the
23 appointment of counsel include the plaintiff’s likelihood of success on the merits of his claims as
24 well as plaintiff’s ability to articulate his claims pro se in light of the complexity of the legal
25 issues involved); see also 28 U.S.C. § 1915(e)(1).

26 B. Legal Standards

27 “Whenever a party to any proceeding in a district court makes and files a timely and
28 sufficient affidavit that the judge before whom the matter is pending has a personal bias or

1 prejudice either against him or in favor of any adverse party, such judge shall proceed no further
2 therein.” 28 U.S.C. § 144. “Any justice, judge, or magistrate judge of the United States shall
3 disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”
4 28 U.S.C. § 455(a). A judge shall disqualify herself if she has “a personal bias or prejudice
5 concerning a party.” 28 U.S.C. § 455(b)(1). Under these recusal statutes, the substantive
6 standard is “whether a reasonable person with knowledge of all the facts would conclude that the
7 judge’s impartiality might reasonably be questioned.” United States v. Studley, 783 F.2d 934,
8 939 (9th Cir. 1986) (quoting Mayes v. Leipziger, 729 F.2d 605, 607 (9th Cir. 1984) (further
9 citations omitted).

10 Historically, “[t]he alleged bias and prejudice to be disqualifying must stem from an
11 extrajudicial source and result in an opinion on the merits on some basis other than what the judge
12 learned from his participation in the case.” United States v. Grinnell Corporation, 384 U.S. 563,
13 583 (1966) (citing Berger v. United States, 255 U.S. 22, 31 (1921)). This standard dictates that
14 “bias or prejudice which can be urged against a judge must be based upon something other than
15 rulings in the case.” Berger, 255 U.S. at 31. The standard has been expanded to include bias
16 arising from what the judge has learned from her participation in a case, only when such bias “is
17 so extreme as to display clear inability to render fair judgment.” Liteky v. United States, 510
18 U.S. 540, 551 (1994).

19 C. Analysis

20 1. Court’s Failure-to-Exhaust Findings and Recommendations

21 Plaintiff contends this court erred, due to the undersigned’s bias or prejudice, in
22 recommending that defendants’ failure-to-exhaust summary judgment motion be granted. This
23 contention is without merit. The undersigned initially ruled in December 2014 that plaintiff had
24 stated potentially cognizable claims in his First Amended Complaint against six defendants
25 (Mendoza, Heath, Bradley, Vallery, Torres, and Perez). See ECF No. 18. The subsequent
26 findings and recommendations on defendants’ failure-to-exhaust motion were detailed, thorough,
27 and carefully reasoned. Knowing the significant impact that a failure-to-exhaust decision can
28 have on a plaintiff, the court analyzed all of the evidence, particularly plaintiff’s relevant

1 administrative grievances and his allegations that his efforts to exhaust had been thwarted. See
2 ECF No. 68. The findings and recommendations were based on review of the factual record and
3 governing legal principles, and reflect no personal animosity toward any party. Accordingly, the
4 findings and recommendations on the question of administrative exhaustion provide no basis for
5 recusal or disqualification.

6 2. Denial of Plaintiff's Requests for Appointment of Counsel

7 Plaintiff contends that the undersigned's alleged bias or prejudice is demonstrated by the
8 denials of plaintiff's several motions for appointment of counsel. This contention is also without
9 merit.

10 Prior to the undersigned's findings and recommendations on defendants' failure-to-
11 exhaust motion, plaintiff made five requests for appointment of counsel. The June 4, 2015 denial
12 of plaintiff's fifth request (ECF No. 30) relied on the same reasoning set forth in the April 22,
13 2015 denial of his fourth request (ECF No. 28). Specifically:

14 [T]he court again finds that plaintiff has not demonstrated
15 exceptional circumstances warranting appointment of counsel at
16 this time. Plaintiff's physical health appears to be stabilized and he
17 is receiving medication for his depression. While plaintiff asserts
18 that his claims are complex, he is pursuing the same claim against
19 all six defendants – that defendants violated plaintiff's First
20 Amendment rights by retaliating against him for filing
21 administrative grievances. Plaintiff is proceeding on a solid
22 operative complaint and appears to possess substantial evidence in
23 support of his claims. The wording of plaintiff's request for
24 appointment of counsel and "reply brief" indicate that he is capable
25 of identifying additional evidence that would support his claims,
26 and formulating his discovery requests accordingly. Plaintiff also
27 appears capable of adequately responding to defendants' discovery
28 requests to the extent that plaintiff possesses the requested evidence
or can easily obtain it (e.g., from his central file). Plaintiff has
already shared substantial evidence with defendants by filing it with
the court, and defendants should circumscribe their discovery
requests accordingly. Thereafter, on or before October 2, 2015,
plaintiff may move for summary judgment in his favor, with all of
his supporting evidence; plaintiff must also timely oppose any
motion for summary judgment filed by defendants. The court will
then examine the merits of his plaintiff's claims and evidence. [¶]
Based on the court's assessment that plaintiff appears capable of
proceeding effectively in this action on his own, at this time, his
request for appointment of counsel will again be denied.

ECF No. 28 at 2-4 (fn. omitted).

1 Plaintiff filed three more requests for appointment of counsel while the findings and
2 recommendations were pending, before the district judge ruled. See ECF Nos. 69, 72, 76. Due to
3 the pendency of the findings and recommendations, plaintiff's requests were denied. See ECF
4 Nos. 74, 77. After the district judge adopted the findings and recommendations, plaintiff filed an
5 interlocutory appeal to the Ninth Circuit, which was dismissed for lack of jurisdiction.
6 Following issuance of the Ninth Circuit's mandate on March 23, 2017, the court set a settlement
7 conference and appointed counsel for the limited purpose of assisting plaintiff at the conference,
8 thus granting his ninth request for appointment of counsel. See ECF No. 93, 95. However, the
9 case did not settle.

10 On June 29, 2017, the court issued a further discovery and scheduling order. ECF No.
11 102. A few days before expiration of the discovery deadline, plaintiff filed his tenth request for
12 appointment of counsel or, in the alternative, dismissal of his case without prejudice together with
13 instructions on the applicable statute of limitations. ECF No. 114. In response, the court set forth
14 the general legal standards for assessing the statute of limitations in prisoner civil rights cases,
15 without dismissing the case, and denied plaintiff's request for appointment on the following
16 grounds:

17 [P]laintiff's instant request is premised on the alleged importance of
18 the original issues presented in this action ("conspiracy of
19 harassment" by all defendants) to "hundreds of other inmates who
are too afraid to defend themselves," and the need for this court to
again "view all of the evidence." ECF No. 114 at 2-3.

20 . . . For the reasons previously stated by the undersigned, the court
21 again finds that plaintiff has failed to demonstrate "exceptional
22 circumstances" warranting the appointment of counsel. See ECF
23 No. 77 and prior orders cited therein. Significantly, the court did
24 appoint counsel for plaintiff for the limited purpose of representing
25 him at a settlement conference on June 5, 2017. See ECF No. 95.
26 However, the case did not settle. Thereafter, the court authorized
27 an additional period of discovery specific to enable plaintiff to fully
develop his narrowed case against defendant Mendoza. See ECF
No. 102. Plaintiff's continuing efforts to "restart" this case with the
previously dismissed defendants remain unavailing, both in
substance and as a rationale for obtaining appointment of counsel.
Accordingly, plaintiff's instant request for appointment of counsel
will be denied.

28 ECF No. 115 at 2-3.

1 Plaintiff has been an active, articulate and assertive litigant in this case, who has submitted
2 (and resubmitted) all the evidence which he believes is relevant. Plaintiff has capably expressed
3 his positions and legal arguments notwithstanding the relative complexities of this case.
4 Moreover, the complexities of this case were significantly reduced by the dismissal of all but one
5 of the defendants. The undersigned considered each of plaintiff's requests for appointment of
6 counsel according to the standards set forth in Palmer. These decisions were reached without
7 prejudice or bias, and provide no basis for disqualification or recusal.

8 3. Denial of Request to Proceed on Third Amended Complaint

9 Plaintiff's also contends that the undersigned ignored critical evidence when denying his
10 request for leave to proceed on his proposed Third Amended Complaint. The court provides the
11 following background as context for the ruling.

12 The court issued a scheduling order in March 2015, after the initial six defendants were
13 served process. ECF No. 24. Three months later, near the close of discovery, plaintiff sought
14 leave to proceed on a proposed Second Amended Complaint (SAC), which the court denied. See
15 ECF Nos. 33, 39. The court found that the proposed SAC failed to state cognizable claims
16 against five newly named defendants, Reaves, Knipp, Artis, Lozano and J.H., and, in any case,
17 that amendment so close to the discovery deadline would be unduly prejudicial to defendants.
18 See ECF No. 39 at 3-6.

19 Following the court's December 2016 dismissal of all defendants except Mendoza on
20 failure-to-exhaust grounds, see ECF Nos. 68, 78, and issuance of a new scheduling order, ECF
21 No. 79, the case was staying pending resolution of plaintiff's interlocutory appeal filed in the
22 Ninth Circuit Court of Appeals. ECF Nos. 80-84. The appeal was denied for lack of jurisdiction.
23 ECF Nos. 85, 89.

24 Thereafter, as earlier noted, the court set a settlement conference before another
25 magistrate judge, appointed counsel to confer with plaintiff and represent him at the conference,
26 and issued a writ ad testificandum directing plaintiff's presence at the conference. The
27 conference was convened on June 5, 2017, but the case did not settle. ECF No. 99. The court
28 issued yet another scheduling order on June 29, 2017, extending the discovery deadline to

1 September 29, 2017, and the dispositive motion deadline to December 15, 2017. ECF No. 102.

2 On September 27, 2017, shortly before expiration of the extended discovery deadline,
3 plaintiff filed a motion for leave to proceed on a proposed Third Amended Complaint (TAC).
4 See ECF No. 109. By order filed October 11, 2017, the court denied plaintiff's request. See ECF
5 No. 110. The court reasoned that "[f]ive of the ten proposed defendants – Bradley, Health, Perez,
6 Torres, Vallery – were dismissed from this action pursuant to defendants' failure-to-exhaust
7 motion. The court rejected plaintiff's prior request to include the remaining five proposed
8 defendants – Reaves, Artis, Knipp, Lazano (or Lozano), and J.H. Colley (previously identified as
9 'J.H.') – when it denied plaintiff's prior motion to file a proposed Second Amended Complaint."
10 Id. at 2 (internal citations omitted). The court rejected plaintiff's argument that he needed to
11 include all of the putative defendants to prove their alleged conspiracy. As previously noted,
12 "[p]laintiff's continuing efforts to 'restart' this case with the previously dismissed defendants
13 remain unavailing, both in substance and as a rationale for obtaining appointment of counsel."

14 In plaintiff's present motion to disqualify the undersigned, plaintiff relies on the same
15 evidence and arguments presented in support of his motion to proceed on his proposed TAC.
16 Attached to plaintiff's disqualification motion is a copy of his proposed TAC (without the title
17 page) and exhibits, see ECF No. 116 at 8-238, previously filed and framed as his motion for leave
18 to proceed on the proposed TAC, see ECF No. 109 at 1-235. The same assessment applies. See
19 ECF No. 110 at 2-3 (discussed supra). Then, as now, plaintiff does not explain which of his
20 exhibits were previously unavailable or how they might alter the court's prior analyses. More
21 importantly at this juncture, plaintiff does not demonstrate how the court's denial of plaintiff's
22 motion for leave to proceed on his TAC demonstrates any prejudice or bias by the undersigned.

23 4. Summary

24 The undersigned has considered every matter in this case without influence from any
25 extrajudicial source. Every ruling has been based on the facts and legal arguments presented by
26 the parties, and has not been influence by any bias or prejudice against plaintiff personally. To
27 the extent the undersigned may have made erroneous factual determinations or incorrectly applied
28 the law, such errors are grounds for appeal but not disqualification. For these reasons, plaintiff's

1 motion for disqualification will be denied.

2 IV. Request for Voluntary Dismissal/Extended Time to Oppose Defendant's Motion

3 This court declines to make plaintiff's decision on voluntary dismissal. As the
4 undersigned previously explained to plaintiff, the decision is his alone. The court previously
5 informed plaintiff of the legal standards for assessing the statute of limitations in prisoner civil
6 rights cases, without opining on their applicability to this case. ECF No. 115. No additional
7 guidance will be provided. Instead, the court will accord plaintiff extended time to file an
8 opposition to defendant's pending motion for summary judgment. If plaintiff fails to timely
9 oppose the motion within this extended period, the undersigned will recommend that this case be
10 dismissed without prejudice for failure to abide by court orders. See Fed. R. Civ. P. 41(b).

11 V. Conclusion

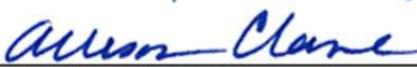
12 Accordingly, for the foregoing reasons, IT IS HEREBY ORDERED that:

13 1. Plaintiff's motion to disqualify the undersigned magistrate judge from this action, ECF
14 No. 116, is denied.

15 2. Plaintiff may file and serve his opposition to defendant's pending motion for summary
16 judgment within twenty-one days after the filing date of this order; *no further extensions of time*
17 *will be granted absent extraordinary circumstances.*

18 3. Failure of plaintiff to timely oppose defendant's motion will result in the undersigned's
19 recommendation to the district judge that this action be dismissed without prejudice pursuant to
20 Rule 41(b), Federal Rules of Civil Procedure.

21 DATED: December 7, 2017

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23 ALLISON CLAIRE
24 UNITED STATES MAGISTRATE JUDGE
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