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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GRADY HARRIS,
Plaintiff,
v.
J. MACOMBER, et al.,
Defendants.

No. 2:16-cv-0830 DB P

ORDER

I. Introduction

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff has consented to the jurisdiction of a magistrate judge. (ECF No. 8.) No appearances have been made by any defendants.

Plaintiff initiated this action on April 21, 2016. On April 29, 2016, plaintiff's complaint was screened and dismissed with leave to amend for improper joinder of claims and defendants in violation of Federal Rule of Civil Procedure 20(a).

Plaintiff later filed a motion for guardian ad litem ("GAL"), competency hearing and/or motion to appoint counsel. (ECF No. 9.) He also filed a first amended complaint. (ECF No. 10.) On November 15, 2016, the court denied without prejudice plaintiff's motion for GAL, competency hearing and/or motion to appoint counsel. (ECF No. 12.) Plaintiff was granted leave to renew the motion with proper evidentiary support. (Id.)

1 Before the court are plaintiff's first amended complaint (ECF No. 10), motion for an
2 extension of time to file a motion for GAL with proper evidentiary support (ECF No. 13), and
3 renewed motion to appoint GAL and counsel (ECF No. 14.) The court did not impose a deadline
4 on plaintiff to renew his motion for GAL, so, therefore, a motion for extension of time is
5 unnecessary. Accordingly, the motion for extension of time (ECF No. 13) is denied as moot. For
6 the reasons outlined below, plaintiff's first amended complaint is deemed to state a cognizable
7 claim; however, plaintiff's motion for GAL and for appointment of counsel is again denied
8 without prejudice.

9 **II. Screening of First Amended Complaint**

10 The initial complaint was dismissed on the ground that it pursued two separate claims
11 against different defendants for distinct incidents. (ECF No. 4.) In the screening order, the
12 magistrate judge then-assigned to the case, ordered plaintiff to submit an amended complaint that
13 pursued only one of the two claims and to pursue the other claim in a separate action. (Id.) The
14 first amended complaint complies with these instructions and presents only claims arising from a
15 single alleged incident. (See ECF No. 10.)

16 Plaintiff's amended complaint appears to state cognizable claims for relief pursuant to 42
17 U.S.C. § 1983 and 28 U.S.C. § 1915A(b). If the allegations of the amended complaint are
18 proven, plaintiff has a reasonable opportunity to prevail on the merits of this action.

19 **III. Motion to Appoint Guardian ad Litem and Counsel**

20 **A. Plaintiff's Competency**

21 In his initial motion for GAL, competency hearing and/or motion to appoint counsel,
22 plaintiff contended that he suffers from serious mental disorders that require prescribed
23 psychotropic medications that affect his ability to think, eat, sleep, read and comprehend court
24 orders and requirements in this action. (ECF No. 9.) He also claimed that he relies on other
25 inmates to prepare, serve and file legal pleadings, and to read and explain court orders to him.
26 (Id.) In support of that motion, plaintiff submitted only a November 2007 order issued by the
27 Honorable Jan M. Adler from the Southern District of California in a federal habeas action filed
28 by plaintiff, Harris v. Wong, Case No. 06-cv-1747 JLS JMA (S.D. Cal. Nov. 6, 2007). There,

1 Magistrate Judge Adler granted plaintiff's application for a competency hearing based on
2 evidence that plaintiff's mental health and related medications affected his ability to proceed on
3 his own. (See ECF No. 9 at 6-10.) Judge Adler's order was based on a review of plaintiff's
4 voluminous psychiatric records and the declaration of an inmate assisting plaintiff with his federal
5 filings. In the initial motion, plaintiff did not attach any medical documentation of his mental
6 disorder, evidence of the type and amount of medication he is prescribed, nor a declaration from
7 any inmate stating plaintiff is incapable of prosecuting this action without assistance.

8 In the renewed motion for GAL, plaintiff has attached some medical records, as well as
9 declarations from a former treating psychiatrist and an inmate who purports to prepare plaintiff's
10 legal filings in this case. (ECF No. 14 at 4-20.) The medical records indicate that plaintiff
11 suffered from numerous mental health ailments and that, for at least some period of time, he was
12 forcibly medicated under a court order. (Id.) However, the attached medical records and
13 declaration from the psychiatrist are all dated between three and nine years ago; the only
14 documentation of plaintiff's current mental health status (or at least of plaintiff's current ability to
15 proceed with litigation) is a declaration from another inmate who claims that plaintiff cannot keep
16 up with this litigation on his own because of mental health impairments. (Id.)

17 Federal Rule of Civil Procedure 17(c) requires a court to "appoint a guardian ad litem-or
18 issue another appropriate order—to protect a minor or incompetent person who is unrepresented
19 in an action." Fed. R. Civ. P. 17(c)(2). "A party proceeding pro se in a civil lawsuit is entitled to
20 a competency determination when substantial evidence of incompetence is presented." Allen v.
21 Calderon, 408 F.3d 1150, 1153 (9th Cir. 2005). In determining whether substantial evidence of
22 incompetence is presented, the district court may consider sworn declarations from the pro se
23 party or other inmates, sworn declarations or letters from treating psychiatrists or psychologists,
24 and his medical history. Id. at 1152-54.

25 A person's capacity to sue is measured by the standard of the law of his domicile, Fed. R.
26 Civ. P. 17(b)(1), here California state law. "In California, a party is incompetent if he or she
27 lacks the capacity to understand the nature or consequences of the proceeding, or is unable to
28 assist counsel in the preparation of the case." Golden Gate Way, LLC v. Stewart, 2012 WL

1 4482053, at *2 (N.D. Cal. Sept. 28, 2012) (citing In re Jessica G., 93 Cal. App. 4th 1180, 1186
2 (2001); Cal. Civ. Proc. Code § 372; and In re Sara D., 87 Cal. App. 4th 661, 666-67 (2001)).

3 The records that are before the court indicate that plaintiff suffered from severe mental
4 impairments that, at one time, required him to be forcibly medicated and, for which, another court
5 deemed plaintiff incompetent in a separate proceeding. (ECF Nos. 9 at 6-10; 14 at 4-20.)

6 However, as noted above, none of these records attest to plaintiff's **current** mental health status.

7 While the documentary evidence is helpful to establish that plaintiff endured mental health
8 ailments that could impact his ability to prosecute a civil action in the past, these documents do
9 not provide sufficient information concerning plaintiff's current situation. The only evidence
10 concerning plaintiff's present condition is a declaration signed by a prisoner attesting to the fact
11 that plaintiff takes medications that impact his ability to prosecute the suit and meet court-
12 imposed deadlines. (ECF No. 10 at 19-20.) The prisoner suggests that it would be appropriate to
13 appoint legal counsel to help prosecute this case. (Id.) While this declaration supports the
14 contention that plaintiff needs assistance to prosecute this case, it provides insufficient insight
15 into plaintiff's current mental health status and capacity from a professional medical perspective.

16 Thus, at this time, the record is still incomplete as to whether plaintiff "lacks the capacity
17 to understand the nature or consequences of the proceeding, or is unable to assist counsel in the
18 preparation of the case." Golden Gate Way, LLC, 2012 WL 4482053, at *2. In addition to
19 providing insufficient factual support to establish his mental incapacity, the court recognizes that
20 plaintiff has so far prosecuted this case competently, as evidenced by the above screening of the
21 first amended complaint, which corrected the issues identified by the court in the initial screening
22 and presented a cognizable claim on which this case will proceed. Thus, at this time, plaintiff
23 appears to be sufficiently handling the rigors of this litigation.

24 Accordingly, the motion for appointment of GAL is again denied without prejudice.
25 Plaintiff may file a renewed motion for GAL accompanied by sufficient evidentiary support
26 concerning his current mental health status.

27 However, in recognizing that plaintiff has a documented history of mental illness, that he
28 has been deemed incompetent in official proceedings in the past, and that this current case is

1 being prosecuted with the assistance of another inmate, the court will also order the Office of the
2 California Attorney General to inquire into the status plaintiff's mental health and to ensure that
3 he has sufficient access to his medical records, so that, if he so chooses, he can file a renewed
4 motion for GAL with more recent evidentiary support.

5 **B. Appointment of Counsel**

6 Insofar as plaintiff seeks the appointment of counsel, district courts lack authority to
7 require counsel to represent indigent prisoners in section 1983 cases. Mallard v. United States
8 Dist. Court, 490 U.S. 296, 298 (1989). In exceptional circumstances, the court may request an
9 attorney to voluntarily represent such a plaintiff. See 28 U.S.C. § 1915(e)(1). Terrell v. Brewer,
10 935 F.2d 1015, 1017 (9th Cir. 1991); Wood v. Housewright, 900 F.2d 1332, 1335-36 (9th Cir.
11 1990). When determining whether "exceptional circumstances" exist, the court must consider
12 plaintiff's likelihood of success on the merits as well as the ability of the plaintiff to articulate his
13 claims pro se in light of the complexity of the legal issues involved. Palmer v. Valdez, 560 F.3d
14 965, 970 (9th Cir. 2009) (district court did not abuse discretion in declining to appoint counsel).
15 The burden of demonstrating exceptional circumstances is on the plaintiff. Id. Circumstances
16 common to most prisoners, such as lack of legal education and limited law library access, do not
17 establish exceptional circumstances that warrant a request for voluntary assistance of counsel.
18 Additionally, plaintiff's claim that he currently suffers from a mental health condition is
19 unsupported by the evidence on the record. Having considered the factors under Palmer, the court
20 finds that plaintiff has failed to meet his burden of demonstrating exceptional circumstances
21 warranting the appointment of counsel at this time.

22 **III. Conclusion**

23 Based on the foregoing, IT IS HEREBY ORDERED as follows:

- 24 1. Service of the amended complaint is appropriate for the following defendants: K.
25 Rose; J. Munoz; M. Fong; S. Williamson; D. Calderon; M. Thompson; E. Cervantes; T. Fuller;
26 and D. Leavitt.
- 27 2. Defendants Jeff Macomber, Bobbala, and L. Daciois shall be terminated from this
28 action.

1 2. The Clerk of the Court shall send plaintiff 9 USM-285 forms, one summons, an
2 instruction sheet, and a copy of the amended complaint filed May 25, 2016.

3 3. Within thirty days from the date of this order, plaintiff shall complete the attached
4 Notice of Submission of Documents and submit all of the following documents to the court at the
5 same time:

- 6 a. The completed, signed Notice of Submission of Documents;
- 7 b. One completed summons;
- 8 c. One completed USM-285 form for each defendant listed in number 1 above;

9 and

- 10 d. 10 copies of the endorsed amended complaint filed May 25, 2016.

11 4. Plaintiff shall not attempt to effect service of the amended complaint on defendants or
12 request a waiver of service of summons from any defendant. Upon receipt of the above-described
13 documents, the court will direct the United States Marshal to serve the above-named defendants
14 pursuant to Federal Rule of Civil Procedure 4 without payment of costs.

15 5. Plaintiff's motion for an extension of time (ECF No. 13) is denied as moot.

16 6. Plaintiff's renewed motion for GAL and to appoint counsel (ECF No. 14) is denied
17 without prejudice to its renewal with proper evidentiary support.

18 7. The Office of the California Attorney General is instructed to:

- 19 a. Contact the CSP-Sac Litigation Coordinator to determine:
 - 20 i. Whether plaintiff currently has access to his mental health records;
 - 21 ii. Whether plaintiff has access to sufficient current medical

22 documentation so that he can properly file a motion for GAL with evidentiary support.

23 b. Within twenty days after the filing date of this order, file and serve a
24 statement reflecting the findings of such inquiry, including all appropriate declarations.

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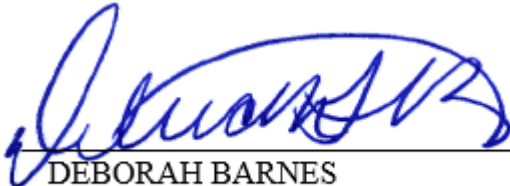
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8. The Clerk of the Court is directed to serve a copy of this order on Ms. Monica Anderson, Supervising Deputy Attorney General.

Dated: July 7, 2017



DEBORAH BARNES
UNITED STATES MAGISTRATE JUDGE

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