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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

RUBEN J. RUIZ,

No. C 07-326 MHP (pr)

Plaintiff,

**ORDER**

v.

EVERETT W. FISCHER; et al.,

Defendants.

In this action, plaintiff complains about decisions that led to him being placed in administrative segregation based on a determination that he was a validated associate of a prison gang. Most of the claims have been resolved against plaintiff. The only claim remaining for adjudication is the claim against defendant Harrison that the evidence used to validate plaintiff violated his right to due process because it was insufficient and unreliable.

On June 10, 2010, defendant filed a motion for summary judgment and a motion to file three exhibits and one paragraph of a declaration under seal. On July 2, 2010, the court granted the motion to file document under seal. A couple of weeks later, plaintiff filed a belated opposition to the motion to file documents under seal as well as a motion for appointment of counsel, a motion to continue the summary judgment motion, and a motion for extension of time to oppose the motion for summary judgment. This order addresses plaintiff's several motions, as well as defendant's motion to stay discovery.

United States District Court  
For the Northern District of California

1 A. The Sealed Documents

2 Plaintiff filed his opposition to defendant's motion to seal documents five weeks after  
3 the motion was filed and almost two weeks after the court had granted it. The opposition  
4 was late. Nonetheless, the court has read and considered the arguments asserted therein.  
5 Upon due consideration of those arguments, the court declines to disturb its earlier decision  
6 to seal the documents.

7 Prison gangs generally are understood to be “committed to fear and violence as a  
8 means of disciplining their own members and their rivals” and “seek nothing less than to  
9 control prison life and to extend their power outside prison walls.” Wilkinson v. Austin, 545  
10 U.S. 209, 227 (2005). The materials the defendant sought to have sealed include detailed  
11 information about a prison gang and plaintiff’s connection to it. As the court earlier found,  
12 defendant demonstrated that the confidential information in the documents and the  
13 declaration, if disclosed, would create a severe risk to the safety of other prisoners and  
14 institutional security. Plaintiff has not shown otherwise.

15 Plaintiff requested that the court consider issuance of a protective order that would  
16 allow him (and his counsel, if counsel was appointed) access to the documents with the name  
17 of any informant and information that would identify the informant redacted. This proposal  
18 is utterly unworkable for these particular documents because the documents have informant-  
19 identifying and gang information throughout them. So much of the documents (especially  
20 exhibits C and F) would have to be redacted that they would be of no value to plaintiff.  
21 There are bits of information – e.g., informant and gang affiliates' names, descriptions of  
22 events, descriptions of the places where events occurred, and the other inmates incriminated  
23 – throughout the documents that are like pieces of a puzzle for someone trying to figure out  
24 who the informant is as well as what prison officials know about the gang. The court is not  
25 saying that plaintiff intends to use the information that way, but it also is unwilling to say  
26 that such use is not a possibility. Because of the possibility of misuse of the information and  
27 the danger that would follow, the evidence will not be disclosed to plaintiff. The court notes  
28 further that plaintiff is already in prison for life, making this a case in which the court’s

1 contempt powers of little value in enforcing any protective order.

2 Plaintiff also argued that, without seeing the documents, he could not dispute their  
3 accuracy and present evidence controverting statements in the documents. The "some  
4 evidence" test that will be applied does not call for the wide-ranging debate plaintiff  
5 contemplates. See Superintendent v. Hill, 472 U.S. 445, 455 (1985); Bruce v. Ylst, 351 F.3d  
6 1283, 1287 (9th Cir. 2003) ("Under Hill, we do not examine the entire record, independently  
7 assess witness credibility, or reweigh the evidence; rather, 'the relevant question is whether  
8 there is any evidence in the record that could support the conclusion").

9 The documents will remain sealed and not available to plaintiff to view. Plaintiff  
10 will have to prepare his opposition to the motion for summary judgment without the use of  
11 the sealed documents.

12 B. Motion To Appoint Counsel

13 Ruiz has moved for appointment of counsel to represent him in this matter. A district  
14 court has the discretion under 28 U.S.C. §1915(e)(1) to designate counsel to represent an  
15 indigent civil litigant in exceptional circumstances. See Wilborn v. Escalderon, 789 F.2d  
16 1328, 1331 (9th Cir. 1986). This requires an evaluation of both the likelihood of success on  
17 the merits and the ability of the plaintiff to articulate his claims pro se in light of the  
18 complexity of the legal issues involved. See id. Neither of these factors is dispositive and  
19 both must be viewed together before deciding on a request for counsel under section  
20 1915(e)(1). At this stage of the proceedings, it appears that there is not a likelihood of  
21 success on the merits and it appears that plaintiff is able articulate his claims and arguments  
22 well. The fact that sealed documents well be considered does not require that counsel be  
23 appointed in light of the limited inquiry made under the some evidence test. The motion for  
24 appointment of counsel is DENIED. (Docket # 92.)

25 C. Stay of Discovery

26 Defendant has moved to stay discovery pending a ruling on his motion for summary  
27 judgment that raises the qualified immunity defense. The U.S. Supreme Court has made it  
28 abundantly clear that a district court should stay discovery until the threshold question of

1 qualified immunity is settled. See Crawford-El v. Britton, 523 U.S. 574, 598 (1998);  
2 Anderson v. Creighton, 483 U.S. 635, 646 n.6 (1987); Harlow v. Fitzgerald, 457 U.S. 800,  
3 818 (1982). The motion to stay discovery is GRANTED. (Docket # 86.) Discovery is now  
4 stayed until the court rules on the pending motion for summary judgment. Plaintiff must  
5 prepare his opposition to the motion for summary judgment without benefit of any further  
6 discovery from defendant.

7 D. Requests For Continuance and Extension Of Time

8 Plaintiff has requested Rule 56(f) continuance of the motion for summary judgment  
9 opposition deadline until 35 days after he received the court's ruling, the sealed evidence and  
10 some discovery.

11 Under limited circumstances, consideration of a summary judgment motion may be  
12 delayed so that a non-movant may gather evidence for his opposition. The court may deny or  
13 continue a motion to enable affidavits to be obtained, depositions to be taken, or other  
14 discovery to be undertaken "[i]f a party opposing the motion shows by affidavit that, for  
15 specified reasons, it cannot present facts essential to justify its opposition." Fed. R. Civ. P.  
16 56(f). The party requesting the continuance must "identify by affidavit the specific facts that  
17 further discovery would reveal, and explain why those facts would preclude summary  
18 judgment." Tatum v. City and County of San Francisco, 441 F.3d 1090, 1100 (9th Cir.  
19 2006).

20 A denial or continuance of the motion for summary judgment is not appropriate here  
21 because plaintiff does not make the requisite showing. The court has determined that the  
22 sealed documents will not be made available to plaintiff even in redacted form. Plaintiff  
23 does not identify a particular document or piece of evidence that is essential to his opposition  
24 but instead wants discovery in hopes of finding something that might help him ward off  
25 summary judgment. Plaintiff has received responses to several of his discovery requests,  
26 although there is now outstanding (and therefore subject to the stay of discovery) a set of  
27 requests for admissions to defendant. Those requests for admissions largely seek to learn the  
28 substance of the confidential information used against plaintiff.

1 Plaintiff has not shown that a continuance should be granted because he has not  
2 shown that evidence exists that will (not merely might) enable him to present facts essential  
3 to justify his opposition to summary judgment. See Tatum, 441 F.3d at 1100; Chance v. Pac-  
4 Tel Teletract, Inc., 242 F.3d 1151, 1161 n.6 (9th Cir. 2001). Requiring discovery which has  
5 only the possibility of eventually leading to evidence that might enable plaintiff to avoid  
6 summary judgment also would undermine the purpose of qualified immunity, which provides  
7 "immunity from suit rather than a mere defense to liability; . . . it is effectively lost if a case  
8 is erroneously permitted to go to trial." Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). For  
9 all these reasons, the Rule 56(f) motion is DENIED. (Docket # 90.)

10 E. New Deadlines

11 Plaintiff filed a request for a 30-day extension of time to file his opposition to the  
12 motion for summary judgment. Upon due consideration, the court GRANTS the requested  
13 30-day extension of the current deadline. (Docket # 89.) The court sets the following new  
14 deadlines for briefing on defendant's motion for summary judgment.

15 a. No later than **August 27, 2010**, plaintiff must file and serve upon  
16 defendant's counsel his opposition to the summary judgment. Plaintiff must bear in mind the  
17 notice and warning regarding summary judgment from the order of service as he prepares his  
18 opposition to any summary judgment motion. No further extensions of this deadline will be  
19 permitted. If the opposition is not filed by this deadline, the motion will be deemed  
20 unopposed.

21 b. If defendant wishes to file a reply brief, the reply brief must be filed and  
22 served no later than **September 13, 2010**.

23 Finally, plaintiff stated that he "filed" his request for an extension of time when he  
24 gave it to prison officials to photocopy and mail. He misunderstood the prisoner mailbox

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1 rule. A document is deemed filed when it is given to prison officials to mail to the court, not  
2 when it is given to prison officials to take some other action (such as photocopying it) and  
3 then mail it to the court. Plaintiff thus is cautioned that his future filings must be put in the  
4 prison mail – not given to prison officials to first photocopy and then mail -- by the deadline.

5 IT IS SO ORDERED.

6 Dated: July 22, 2010

  
Marilyn Hall Patel  
United States District Judge

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