

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

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4
5 WILLIAM M. ENDRES,
6 Plaintiff,
7 v.
8 ELENA TOOTELL,
9 Defendant.

NO. C10-3924 TEH

ORDER DENYING MOTION
FOR SUMMARY JUDGMENT
WITHOUT PREJUDICE; ORDER
VACATING TRIAL AND
PRETRIAL DATES; and ORDER
TO SHOW CAUSE

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11 This matter comes before the Court on Defendant Elena Tootell's motion for summary
12 judgment. Plaintiff William Endres filed a timely opposition on January 12, 2012, but
13 Tootell's reply was not filed until January 25 – six days after the January 19 deadline.
14 Moreover, Tootell's counsel, Kay K. Yu, filed a declaration stating that she was unaware of
15 the change in the Civil Local Rules governing the deadline for filing oppositions and replies,
16 but she miscalculated the date even under the old rule. Yu contended that the reply would
17 have been due on January 20, when it actually would have been due on January 23.
18 Nonetheless, Yu did not file the reply until January 25, which would have been late in any
19 event. In addition, when Yu filed the motion, the Court's electronic filing system generated
20 the correct reply deadline of January 19, as reflected in the entry for ECF Docket No. 38.

21 More substantively, Tootell's reply failed to respond to two evidentiary issues raised
22 in Endres's opposition: first, that none of the evidence submitted with the motion was
23 admissible because it was supported only by a declaration of counsel and was therefore not
24 properly authenticated; and, second, that the motion should be denied or continued because
25 Endres has been unable to depose Tootell. The Court agrees with Endres that it would be
26 unfair and improper to grant summary judgment before he has had an opportunity to depose
27 Tootell. Tootell's reply makes this evident: She argues that Endres cannot "point to any
28 facts that show Dr. Tootell knew of should have known about the delay in [his] surgery,"

1 Reply 2, but it is, of course, possible that such evidence could be revealed during Tootell's
2 deposition.

3 Accordingly, with good cause appearing, IT IS HEREBY ORDERED that:

4 1. Tootell's motion for summary judgment is DENIED without prejudice. Tootell
5 may file a new motion for summary judgment after her deposition has been taken.

6 2. The trial and all related pretrial dates are VACATED. The January 10, 2012 Order
7 and Writ of Habeas Corpus Ad Testificandum is also VACATED.

8 3. The parties shall meet and confer and jointly propose: a deadline by which
9 Tootell's deposition will be taken; a date for the mandatory settlement conference (after
10 checking availability with the assigned magistrate judge); and a new trial date. The Court
11 will calculate pretrial dates, including the last day for hearing a motion for summary
12 judgment, based on the new trial date.

13 4. The parties shall file a joint case management conference statement proposing the
14 above dates, and discussing any other relevant matters, before **February 2, 2012, at 12:00**
15 **noon**. The parties shall appear for a case management conference on **February 6, 2012, at**
16 **10:00 AM**, in Courtroom No. 2, 450 Golden Gate Avenue, San Francisco, California.

17 5. Also on **February 6, 2012, at 10:00 AM**, Tootell's counsel shall show cause as to
18 why sanctions should not be imposed against her for her failure to file a timely reply brief
19 and her failure to make her client available for deposition before the December 12, 2011
20 discovery cut-off date. Any written response to this order to show cause shall be filed before
21 **February 2, 2012, at 12:00 noon**.

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23 **IT IS SO ORDERED.**

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25 Dated: 01/27/12

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THELTON E. HENDERSON, JUDGE
UNITED STATES DISTRICT COURT

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