

FILED

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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

WALLACE

No. C 07-3238 CW

Plaintiff,

v.

KIEWIT PACIFIC CO.,

Defendants.

ORDER PROVIDING
NOTICE TO PRO SE
PLAINTIFF OF
REQUIREMENTS FOR
OPPOSING MOTION
FOR SUMMARY
JUDGMENT

Defendants have informed the Court of their intention to file a summary judgment motion in this case. If Defendants choose to file the motion, they must do so by serving Plaintiff with a notice of the motion and a copy of the motion, indicating the time of the scheduled hearing on the motion. They must do so at least 35 days before the date of the hearing. Plaintiff's opposition, including any supporting documents, must be filed by 21 days before the date of the hearing. Defendants' reply to Plaintiff's opposition, should they choose to file one, is due 14 days before the hearing.

The Ninth Circuit in Klinge v. Eikenberry, 849 F.2d 409, 411-12 (9th Cir. 1988), held that when a defendant in a case involving a pro se plaintiff moves for summary judgment, the district court must inform the plaintiff of his or her rights and

For the Northern District of California

1 obligations under Rule 56 of the Federal Rules of Civil Procedure.
2 See also Rand v. Rowland, 154 F.3d 952 (9th Cir. 1998) (*en banc*)
3 (the Klinge notice must be phrased in understandable language
4 aimed at apprising plaintiff of rights and obligations under Rule
5 56).¹

6 Rule 56 of Federal Rule of Civil Procedure governs summary
7 judgment motions. A summary judgment motion is a request for an
8 order of judgment, without a trial, in favor of the party bringing
9 the motion, Defendants here. In such a motion, the party moving
10 for summary judgment presents the facts that are not disputed and
11 argues that these facts entitle it to judgment as a matter of law.
12 In other words, Defendants will be arguing that there does not need
13 to be a trial in the case against it because undisputed facts show

14
15 ¹The advice required by the 9th Circuit in prisoner pro se cases is as
16 follows:

17 The defendants have made a motion for summary judgment by which they
18 seek to have your case dismissed. A motion for summary judgment under
19 Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your
20 case.

21 Rule 56 tells you what you must do in order to oppose a motion for
22 summary judgment. Generally, summary judgment must be granted when there
23 is no genuine issue of material fact--that is, if there is no real dispute
24 about any fact that would affect the result of your case, the party who
25 asked for summary judgment is entitled to judgment as a matter of law,
26 which will end your case. When a party you are suing makes a motion for
27 summary judgment that is properly supported by declarations (or other
28 sworn testimony), you cannot simply rely on what your complaint says.
Instead, you must set out specific facts in declarations, depositions,
answers to interrogatories, or authenticated documents, as provided in
Rule 56(e), that contradict the facts shown in the defendant's
declarations and documents and show that there is a genuine issue of
material fact for trial. If you do not submit your own evidence in
opposition, summary judgment, if appropriate, may be entered against you.
If summary judgment is granted, your case will be dismissed and there will
be no trial.

Rand, 154 F.3d at 963.

1 that they are entitled to a judgment in their favor.

2 The relevant parts of Rule 56 are as follows:

3 (c) Motion and Proceedings Thereon. The motion shall
4 be served at least 10 days before the time fixed for the
5 hearing. The adverse party prior to the day of hearing
6 may serve opposing affidavits. The judgment sought shall
7 be rendered forthwith if the pleadings, depositions,
8 answers to interrogatories, and admissions on file,
9 together with the affidavits, if any, show that there is
10 no genuine issue as to any material fact and that the
11 moving party is entitled to a judgment as a matter of law.
12 A summary judgment, interlocutory in character, may be
13 rendered on the issue of liability alone although there is
14 a genuine issue as to the amount of damages.

15

16 (e) Form of Affidavits; Further Testimony; Defense
17 Required. Supporting and opposing affidavits shall be
18 made on personal knowledge, shall set forth such facts as
19 would be admissible in evidence, and shall show
20 affirmatively that the affiant is competent to testify to
21 the matters stated therein. Sworn or certified copies of
22 all papers or parts thereof referred to in an affidavit
23 shall be attached thereto or served therewith. The court
24 may permit affidavits to be supplemented or opposed by
25 depositions, answers to interrogatories, or further
26 affidavits. When a motion for summary judgment is made
27 and supported as provided in this rule, an adverse party
28 may not rest upon the mere allegations or denials of the
adverse party's pleading, but the adverse party's
response, by affidavits or as otherwise provided in this
rule, must set forth specific facts showing that there is
a genuine issue for trial. If the adverse party does not
so respond, summary judgment, if appropriate, shall be
entered against the adverse party.

29

30 (g) Affidavits Made in Bad Faith. Should it appear
31 to the satisfaction of the court at any time that any of
32 the affidavits presented pursuant to this rule are
33 presented in bad faith or solely for the purpose of delay,
34 the court shall forthwith order the party employing them
35 to pay to the other party the amount of the reasonable
36 expenses which the filing of the affidavits caused the
37 other party to incur, including reasonable attorney's
38 fees, and any offending party or attorney may be adjudged
39 guilty of contempt.

40 Rule 56 (emphasis added).

1 Although the actual text of Rule 56, cited above, controls in
2 any dispute as to its interpretation, the Court provides the
3 following brief explanation of Plaintiff's rights and obligations
4 under the Rule: If Plaintiff does not file an opposition
5 supported by evidence, the Court may enter summary judgment in
6 favor of Defendants. If Plaintiff does not contradict the
7 Defendants' evidence with evidence of his or her own, the Court
8 might take Defendants' evidence as true and enter judgment against
9 Plaintiff on his or her claims against Defendants. Under Federal
10 Rule of Civil Procedure 56(e), the following types of evidence may
be submitted:

- 11 1. Statements made in the complaint if the complaint (a)
12 was signed under penalty of perjury and (b) shows
13 personal knowledge (i.e., "first-hand" or "non-hearsay"
14 knowledge) of the matters stated;
- 15 2. Affidavits or declarations. Any person signing
16 an affidavit or declaration must have personal knowledge
17 of the facts stated. At the end of a declaration or
18 affidavit, the document must state, "I declare under
19 penalty of perjury that the foregoing is true and
20 correct," and be signed by the individual who has the
21 required personal knowledge. Any declarations or
22 affidavits that are unsigned will not be considered.
- 23 3. Copies of documents so long as they are submitted with
24 proof that the records are what they purport to be.
25 Specifically, Plaintiff must declare under penalty of
26 perjury that the documents are true and correct copies
27 of the documents, and must specify how the documents
28 were obtained; and

1 4. Transcripts of depositions, answers to interrogatories,
2 or admissions obtained in this proceeding.


3 To defeat a summary judgment motion, Plaintiff must present
4 evidence that, when viewed together with Defendants' evidence,
5 convinces the Court that his or her claims should go to trial.

6 If Plaintiff has a good reason why facts are not available to
7 him or her at the time required to oppose the summary judgment
8 motion, the Court may consider a request to postpone ruling on the
9 Court and opposing counsel with an affidavit or declaration
10 (signed under penalty of perjury) setting forth the reasons the
11 facts are unavailable and indicating how those facts would support
12 his or her claims.

13 Plaintiff is reminded that if he or she does not file and
14 serve a written opposition with supporting documents or a request
15 to postpone with a supporting affidavit or declaration, the Court
16 may deem this failure to act to be consent to the granting of
17 Defendants' summary judgment motion.

18 This notice shall constitute the only such notice from the
19 Court concerning the Defendants' summary judgment motion. The
20 Court will not provide any further information regarding the
21 interpretation of Federal Rule of Civil Procedure 56 and will not
22 answer unsolicited questions about the applicable rules of
23 procedure.

24 Dated: 10/7/08


25 CLAUDIA WILKEN
26 United States District Judge

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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

DAVID WALLACE,
Plaintiff,

Case Number: CV07-03238 CW

CERTIFICATE OF SERVICE

v.

KIEWIT PACIFIC CO. et al,
Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on October 8, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

David Wallace
890 Midway Ave.
San Leandro, CA 94577

Dated: October 8, 2008

Richard W. Wieking, Clerk
By: Sheilah Cahill, Deputy Clerk