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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

HOANG MINH TRAN,

Plaintiff,

v.

WILLIAM D. GORE, Sheriff, et al.,

Defendants.

Case No. 10cv2457 BTM(WVG)

**ORDER ADOPTING IN PART
REPORT AND
RECOMMENDATION; GRANTING
MOTION TO COMPEL; DENYING
WITHOUT PREJUDICE MOTION
FOR SANCTIONS; DENYING
MOTION TO DISMISS; DENYING
MOTION FOR RELIEF**

In a Report and Recommendation (R&R) filed on April 29, 2013, Magistrate Judge Gallo recommends that terminating sanctions be imposed against Plaintiff and that Plaintiff's case be dismissed in its entirety with prejudice. Plaintiff filed an objection to the Report and Recommendation. The Court has conducted a de novo review, and for the reasons discussed below, the Court **ADOPTS** in part the report and recommendation and grants Plaintiff 30 days within which to either respond to the outstanding discovery or file a request for dismissal.

Magistrate Judge Gallo found that Plaintiff's failure to respond to Defendants' discovery requests was not justified, despite his medical issues, and that failure to comply with his discovery obligations called for the ultimate sanction of dismissal. Plaintiff objects to the R&R, arguing that he provided sufficient evidence to Judge Gallo that he is incompetent and is unable to

1 litigate this case without assistance.

2 Previously, Plaintiff filed a motion for a competency hearing (Doc. 38)
3 and submitted medical records in support of his motion. (Doc. 46 & 54.) Judge
4 Gallo reviewed these records and determined that the medical records did not
5 establish that Plaintiff was so impaired that he was unable to understand and
6 respond to court orders. (Order Denying Plaintiff's Motion Requesting
7 Competency Hearing, Doc. No. 55.) Judge Gallo also observed that when
8 Plaintiff appeared before him for a show cause hearing, Plaintiff was very
9 articulate and coherent and had no difficulty communicating with the Court.
10 Accordingly, Judge Gallo denied Plaintiff's motion for a competency hearing
11 and denied a motion filed by Allan Tracy Gilmore to be appointed next friend
12 for Plaintiff.

13 The Court agrees with Judge Gallo that Plaintiff did not make the showing
14 required for a competency hearing. A court must conduct a competency
15 hearing when "a substantial question exists regarding the mental competence
16 of a party proceeding pro se." Allen v. Calderon, 408 F.3d 1150, 1153 (9th Cir.
17 2005). A person is mentally incompetent if he suffers from a mental illness that
18 prevents him from being able to understand and respond to the court's orders.
19 Id. at 1152.

20 The medical records submitted by Plaintiff showed that he suffered from
21 mental illness as well as physical ailments but did not reveal impairment rising
22 to the level of incompetence. Indeed, mental status examinations on different
23 dates indicated that Plaintiff was alert, oriented, coherent, and cooperative, with
24 appropriate judgment and insight. (Doc. 46 at 14, 44; Doc. 54 at 2-5.) One
25 doctor's note stated, "English is a little broken but can advocate for self very
26 well." (Doc. 46 at 34.)

27 Furthermore, Judge Gallo observed Plaintiff's demeanor and conduct and
28 did not find evidence of incompetence. Similarly, Magistrate Judge Major in

1 another case filed by Plaintiff observed Plaintiff during a hearing and did not
2 see any behavior or statements indicating mental incompetence. (Tran v.
3 Gore, 10cv2682 BTM(BLM), Doc. 56 at 9.) Judge Major found that Plaintiff's
4 responses were appropriate to the Court's questions and indicated that he
5 clearly understood the proceedings. (Id.)

6 Plaintiff has submitted additional evidence in connection with his
7 objection to the R&R. This evidence consists of declarations by Plaintiff, Mr.
8 Gilmore, and Plaintiff's father, Minh Ky Tran, as well as additional medical
9 records. Plaintiff, Mr. Gilmore, and Plaintiff's father conclude that due to
10 Plaintiff's chronic pain and mental instability, Plaintiff cannot effectively
11 understand the Court's orders and cannot litigate this action by himself.
12 (Doc.64 at 21, 37, 39.) However, these conclusions are not supported by facts.
13 Plaintiff's father recounts episodes where Plaintiff experienced psychosis,
14 impulsive aggression and/or depression/suicidal thoughts. But these episodes
15 do not show that Plaintiff was generally incapable of understanding and
16 following Court orders.

17 Like the previously submitted medical records, the supplemental medical
18 records do not establish severe impairment rising to the level of incompetence.
19 For example, the mental health examination on September 25, 2012, showed
20 that Plaintiff was alert, oriented, coherent, cooperative, with normal speech,
21 normal memory, and average intellect, although limited judgment and insight.
22 (Doc. 64 at 17.) Grace Ning, Psy. D., stated that Plaintiff's symptoms, including
23 poor sleep, anxiety, depressed mood, poor concentration, auditory
24 hallucinations, frequent headaches and dizziness, and chronic pain, "have led
25 to impairment in Mr. Tran's social and occupational functioning." (Doc. 66 at
26 4.) However, Dr. Ning does not provide any opinion regarding the *extent* of
27 impairment - that Plaintiff is impaired to some degree is not questioned by the
28 Court.

1 The Court finds that Plaintiff has not shown that a substantial question
2 exists regarding his mental competence. Therefore, Magistrate Judge Gallo
3 did not err in denying his motion for a competency hearing and holding that
4 Plaintiff's mental impairments did not excuse his failure to respond to
5 Defendants' discovery requests. Therefore, the Court **ADOPTS** the Report and
6 Recommendation to the extent that it finds that Plaintiff's failure to respond to
7 Defendants' discovery was not justified.

8 Plaintiff previously moved to dismiss this case due to his physical and
9 mental impairments, but the Court deferred ruling on the motion until after
10 resolution of the competency issue. Now that the Court has dealt with the
11 competency issue, Plaintiff must decide whether to go forward with this action
12 representing himself or whether he still wishes to dismiss the action. Because
13 Plaintiff moved to dismiss before resolution of the competency issue, his motion
14 is **DENIED** without prejudice to refiling as set forth below.

15 **Within 30 days of this Order, Plaintiff must either (1) respond to**
16 **Defendants' discovery requests and file a declaration with the Court that**
17 **he has done so, or (2) file a new request for dismissal. Failure to do**
18 **either will result in dismissal of this case with prejudice. If Plaintiff files**
19 **a new request for dismissal, Defendants shall, within 10 days of the filing**
20 **of the request, file a response which indicates whether Defendants object**
21 **to dismissal without prejudice.**

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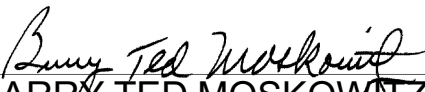
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1 The Court **GRANTS** Defendants' motion to compel discovery [Doc. 31]
2 and **DENIES WITHOUT PREJUDICE** Defendants' motion for sanctions. If
3 Plaintiff chooses to go forward with this action, Defendants may renew their
4 motion for sanctions. The Court also **DENIES WITHOUT PREJUDICE**
5 Plaintiff's motion to dismiss [Doc. 41] and **DENIES** Plaintiff's motion for relief.
6 [Doc. 46].

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IT IS SO ORDERED.

DATED: August 30, 2013


BARRY TED MOSKOWITZ, Chief Judge
United States District Court