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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DAVID JOHNSON
Plaintiff,
v.
D. GARREN, I.D. NO. 5945
Defendant.

Case No. 11CV2592- LAB (BLM)
**ORDER (1) DENYING DEFENDANT'S
EX PARTE MOTION FOR
DISCOVERY SANCTIONS
INCLUDING ISSUE PRECLUSION
AND DISMISSAL OF ACTION FOR
PLAINTIFF'S FAILURE TO ATTEND
DEPOSITION, (2) SETTING DATE
CERTAIN FOR PLAINTIFF'S
DEPOSITION, (3) RESETTNG
DATES, AND (4) DENYING
PLAINTIFF'S MOTION TO STRIKE**
[ECF Nos. 13, 17]

Currently before the Court is Defendant's January 2, 2013 Motion for Discovery Sanctions Including Issue Preclusion and Dismissal of Action for Plaintiff's Failure to Attend Deposition [ECF No. 13 (Def.'s Mot.)] and Plaintiff's Motion to Strike Defendant's *Ex Parte* Motion for Discovery Sanctions, Including Issue Preclusion and Dismissal of Action for Plaintiff's Failure to Attend Deposition 2013, which the Court is interpreting as an opposition to Defendant's motion. ECF No. 17 ("Oppo.").

For the reasons set forth below, the Court **RECOMMENDS** that both Plaintiff and Defendant's motions be **DENIED**.

BACKGROUND

On November 7, 2011, Plaintiff David Johnson, currently detained at George Bailey

1 Detention Facility in San Diego, California, and proceeding *pro se*, filed a civil rights action
2 pursuant to 42 U.S.C. § 1983. ECF No. 1. Plaintiff claims a San Diego Police Officer used
3 excessive force during his arrest in April 2011. Id. Defendant answered the complaint through
4 his counsel, Mr. John Riley, on June 5, 2012. ECF No. 7. On June 6, 2012, the Court issued an
5 order finding an Early Neutral Evaluation inappropriate and setting various discovery and pretrial
6 deadlines. ECF No. 8. In the order, the Court warned the parties that “failure to comply with
7 [any] discovery order of the court may result in the sanctions provided for in Fed. R. Civ. P. 37.”
8 Id. at 2. In accordance with the order, the Court convened a Mandatory Settlement Conference
9 (“MSC”) on October 19, 2012 at 1:30 p.m. ECF No. 9. Mr. Riley appeared in person at the MSC
10 with the appropriate representatives from the City of San Diego and Officer Garren and Plaintiff
11 appeared telephonically. At the beginning of the MSC, Plaintiff informed the Court that he was
12 unaware of the MSC and that although no counsel had entered an appearance on the docket,
13 he was represented by counsel, Mr. Raymond Pacello. The Court attempted to call Mr. Pacello
14 during the conference, but he did not answer and the Court left a message asking Mr. Pacello
15 to return its call. The Court then informed Plaintiff that he needed to contact Mr. Pacello and
16 verify that he was representing Plaintiff in this matter. Because Plaintiff claimed to be
17 represented, the Court ended the MSC. After the MSC, the Court issued an Order setting an
18 additional MSC for January 28, 2013. ECF No. 10. Mr. Pacello did not return the Court’s call and
19 did not enter an appearance on behalf of Plaintiff.

20 On December 11, 2012, Mr. Riley filed an *ex parte* motion to schedule the deposition of
21 Plaintiff or, in the alternative, to extend the fact discovery cut-off date. ECF No. 11. In support,
22 Mr. Riley stated that after the October 19, 2012 MSC, he left a message for Mr. Pacello asking
23 about his representation of Plaintiff and Mr. Pacello did not respond. Id. at 2. Mr. Riley noticed
24 the deposition of Plaintiff for December 5, 2012 and appeared at the detention facility to depose
25 Plaintiff with City Investigator Maggio, a court reporter, and a videographer. Id. Plaintiff
26 appeared and refused to be deposed since he claimed to have legal representation. The City
27 Investigator called Mr. Pacello from the detention facility on December 5, 2012. Id. Mr. Riley
28 stated that Mr. Pacello informed him that he was representing Plaintiff and that he had been too

1 busy to call the City before the noticed deposition. Id. Despite several requests from Mr. Riley
2 to Mr. Pacello after the attempted deposition asking Mr. Pacello to file a substitution of counsel
3 and provide a day for Plaintiff's deposition, Mr. Pacello did not respond other than to say that he
4 was in trial and very busy. Id. In light of the lack of response from Mr. Pacello and the failed
5 deposition attempt, Mr. Riley requested that the Court set a date certain for Plaintiff's deposition.
6 Id.

7 The Court granted Defendant's request and ordered that Plaintiff's deposition be taken
8 on December 19, 2012. ECF No. 12 at 2. In addition, the Court ordered Mr. Pacello to either
9 enter an appearance or inform Plaintiff, the Court, and Mr. Riley if he was not going to be
10 representing Plaintiff. Id. at 2-3. Mr. Riley did neither. Finally, the Court warned Plaintiff that
11 "[b]ecause Mr. Pacello ha[d] not officially appeared on behalf of Plaintiff despite having plenty
12 of time and notice to do so, and because this case has been pending for more than one year,
13 the case must proceed forward with Plaintiff representing himself." Id. at 2, n. 1. Defendant
14 appeared for the December 19, 2012 deposition and Plaintiff refused to participate without his
15 counsel, Mr. Pacello. Def.'s Mot. at 3.

16 On January 2, 2013, Defendant filed the instant *ex parte* motion for discovery sanctions
17 including issue preclusion and dismissal of action for Plaintiff's failure to attend deposition. Def.'s
18 Mot. In support, Defendant provides a brief history of the case and states that "Plaintiff's failure
19 to submit to deposition on two occasions warrants a sanction whereby Plaintiff is precluded from
20 offering evidence contrary to [Defendant's] defense of reasonable use of force. Similarly, a
21 sanction is warranted whereby Plaintiff's complaint is stricken and this lawsuit dismissed." Def.'s
22 Mot. at 4.

23 On January 25, 2013, Plaintiff filed an opposition to Defendant's motion. Oppo. In
24 support, Plaintiff states that he "was misled by . . . Raymundo Pacello, that he had entered an
25 appearance in this case and was representing the Plaintiff." Id. at 3-4. Plaintiff further states
26 that he would have complied with the orders of this Court "had [he] known [he] was not
27 represented by Mr. Pacello in this case" and that he would have allowed "the Deputy City
28 Attorney to take my deposition." Id. at 5. Plaintiff requests that the Court strike Defendant's

1 motion and set a date certain for his deposition and a MSC. Id. at 4.

2 LEGAL STANDARD

3 The Federal Rules of Civil Procedure state that a court may impose sanctions if “a party
4 [...] fails, after being served with proper notice, to appear for that person’s deposition[.]” Fed.
5 R. Civ. P. 37(d)(1)(A)(I). Under Rule 37, a failure by a party to appear at their deposition will
6 result in sanctions unless the failure “was substantially justified or other circumstances make an
7 award of expenses unjust.” Fed. R. Civ. P. 37(d)(3). Furthermore, in the Case Management
8 Conference Order [ECF No. 8], the Court warned the parties that failure to comply with a
9 “discovery order of the Court may result in the sanctions provided for in Fed. R. Civ. P. 37[.]”
10 ECF No. 8 at 2. Possible Rule 37 sanctions range from “prohibiting the disobedient party from
11 supporting or opposing designated claims or defenses” to payment of expenses and attorney’s
12 fees to dismissal of the action in whole. Fed. R. Civ. P. 37(b)(2)(A).

13 DISCUSSION

14 In light of the confusion surrounding Plaintiff’s representation and Plaintiff’s assurances
15 that he will participate in the deposition and a MSC, the Court finds that the imposition of
16 sanctions against Plaintiff would be unjust and declines to impose sanctions at this time.¹
17 Accordingly, Defendant’s motion is **DENIED**.² However, given the delay due to the missed
18 depositions and Mr. Pacello’s misrepresentations, the Court finds it appropriate to set a date for
19 Plaintiff’s deposition and for a MSC and to reset the remaining deadlines set in the Court’s June
20 6, 2012 Case Management Conference Order Regulating Discovery and Other Pretrial
21 Proceedings [ECF No. 8].

22 The Court **ORDERS** that

23 1. Plaintiff’s deposition will take place on **February 22, 2013** at **8:30 a.m.** in the
24
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26
27 ¹While the Court is appalled by Mr. Pacello’s alleged conduct, the Court is unable to sanction him since he has never appeared in this case.

28 ²Plaintiff does not provide a basis for striking Defendant’s motion which was properly filed. Therefore, Plaintiff’s motion is also **DENIED**.

1 George Bailey County Jail.³

2 2. A Mandatory Settlement Conference shall be conducted on **March 20, 2013** at
3 **2:30 p.m.** in the chambers of Magistrate Judge Barbara L. Major located at **333 West**
4 **Broadway, Suite 1110, San Diego, CA 92101**. All discussions at the Mandatory Settlement
5 Conference will be informal, off the record, privileged, and confidential. Counsel for any non-
6 English speaking party is responsible for arranging for the appearance of an interpreter at the
7 conference.

8 a. **Personal Appearance of Parties Required:** All parties, adjusters for
9 insured defendants, and other representatives of a party having full and complete authority to
10 enter into a binding settlement, as well as the principal attorneys responsible for the litigation,
11 must be present **in person** and legally and factually prepared to discuss settlement of the case.
12 Counsel appearing without their clients (whether or not counsel has been given settlement
13 authority) will be cause for immediate imposition of sanctions and may also result in the
14 immediate termination of the conference.

15 Unless there is good cause, persons required to attend the conference pursuant to this
16 Order shall not be excused from personal attendance. **Requests for excuse from attendance**
17 **for good cause shall be made in writing at least three (3) court days prior to the**
18 **conference.** Failure to appear **in person** at the Mandatory Settlement Conference will be
19 grounds for sanctions.

20 b. **Full Settlement Authority Required:** In addition to counsel who will try
21 the case, a party or party representative with full settlement authority⁴ must be present for the
22 conference. In the case of a corporate entity, an authorized representative of the corporation
23

24 ³If defense counsel needs to move this date, he may do so by filing an *ex parte* motion.

25 ⁴ "Full settlement authority" means that the individuals at the settlement conference must be authorized to
26 explore settlement options fully and to agree at that time to any settlement terms acceptable to the parties. Heileman
27 Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 653 (7th Cir. 1989). The person needs to have "unfettered discretion
28 and authority" to change the settlement position of a party. Pitman v. Brinker Int'l, Inc., 216 F.R.D. 481, 485-86 (D.
Ariz. 2003). The purpose of requiring a person with unlimited settlement authority to attend the conference
contemplates that the person's view of the case may be altered during the face to face conference. Id. at 486. A
limited or a sum certain of authority is not adequate. See Nick v. Morgan's Foods, Inc., 270 F.3d 590, 595-97 (8th
Cir. 2001).

1 who is not retained outside counsel must be present and must have discretionary authority to
2 commit the company to pay an amount up to the amount of Plaintiff's prayer (excluding punitive
3 damages prayers). The purpose of this requirement is to have representatives present who can
4 settle the case during the course of the conference without consulting a superior. Counsel for
5 a government entity may be excused from this requirement so long as the government attorney
6 who attends the Mandatory Settlement Conference (1) has primary responsibility for handling
7 the case, and (2) may negotiate settlement offers which the attorney is willing to recommend
8 to the government official having ultimate settlement authority.

9 c. **Confidential Settlement Statements Required:** No later than **March**
10 **13, 2013**, the parties shall submit directly to Magistrate Judge Major's chambers (via hand
11 delivery or email address efile_major@casd.uscourts.gov) confidential settlement statements no
12 more than five (5) pages in length. **These confidential statements shall not be filed or**
13 **served on opposing counsel.** Each party's confidential statement must include the following:

14 (i) A brief description of the case, the claims and/or counterclaims
15 asserted, and the applicable defenses or position regarding the asserted claims;

16 (ii) A specific and current demand or offer for settlement addressing all
17 relief or remedies sought. If a specific demand or offer for settlement cannot be made at the
18 time the brief is submitted, then the reasons therefore must be stated along with a statement
19 as to when the party will be in a position to state a demand or make an offer; and

20 (iii) A brief description of any previous settlement negotiations, mediation
21 sessions, or mediation efforts.

22 General statements that a party will "negotiate in good faith" is not a specific demand or
23 offer contemplated by this Order. It is assumed that all parties will negotiate in good faith.

24 d. **Requests to Continue a Mandatory Settlement Conference:** Any
25 request to continue the Mandatory Settlement Conference or request for relief from any of the
26 provisions or requirements of this Order must be sought by a **written ex parte application.**

27 The application must (1) be supported by a declaration of counsel setting forth the reasons and
28 justifications for the relief requested, (2) confirm compliance with Civil Local Rule 83.3(h), and

1 (3) report the position of opposing counsel or any unrepresented parties subject to the Order.
2 **Absent good cause, requests for continuances will not be considered unless**
3 **submitted in writing no fewer than (7) days prior to the scheduled conference.**

4 **If the case is settled in its entirety before the scheduled date of the conference,**
5 **counsel and any unrepresented parties must still appear in person, unless a written**
6 **joint notice confirming the complete settlement of the case is filed no fewer than**
7 **twenty-four (24) hours before the scheduled conference.**

8 If Plaintiff is incarcerated in a penal institution or other facility, Plaintiff's presence is not
9 required at conferences before Magistrate Judge Major, and Plaintiff may appear by telephone.
10 In that case, defense counsel is to coordinate Plaintiff's appearance by telephone.

11 3. All pretrial motions must be filed on or before **March 29, 2013**. Motions will not
12 be heard or calendared unless counsel for the moving party has obtained a motion hearing date
13 from the law clerk of the judge who will hear the motion. Failure to timely request a motion date
14 may result in the motion not being heard. Motions will not be heard unless you have obtained
15 a date from the judge's law clerk.

16 Briefs or memoranda in support of or in opposition to any pending motion shall not exceed
17 twenty-five (25) pages in length without leave of the judge who will hear the motion. No reply
18 memorandum shall exceed ten (10) pages without such leave of court. Briefs and memoranda
19 exceeding ten (10) pages in length shall have a table of contents and a table of authorities cited.

20 4. The dates and times set forth herein will not be modified except for good cause
21 shown.

22 **IT IS SO ORDERED.**

23
24 DATED: February 8, 2013

25 

26 BARBARA L. MAJOR
27 United States Magistrate Judge