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

BRANDON MEEKS,

Plaintiff,

vs.

A. NUNEZ, et al.,

Defendant.

CASE NO. 13cv973-GPC(BGS)

**ORDER DENYING PLAINTIFF'S
SIXTH MOTION FOR
APPOINTMENT OF COUNSEL**

[Dkt. No. 222.]

Before the Court is Plaintiff's sixth motion for appointment of counsel.¹ (Dkt. No. 215.) Based on the reasoning below, the Court DENIES Plaintiff's motion for appointment of counsel.

Background

On April 23, 2013, Plaintiff filed a 42 U.S.C. § 1983 complaint against the defendants for constitutional violations for an incident occurring on April 25, 2011. (Dkt. No. 1.)

On October 15, 2013, Plaintiff filed his first motion to appoint counsel.² (Dkt.

¹The Court notes that most recently, on January 4, 2017, Plaintiff filed a motion to appoint counsel which the Magistrate Judge denied on January 19, 2017. (Dkt. Nos. 215, 217.)

²In that motion, Plaintiff requested appointment of counsel due to the following: (1) he cannot afford to hire a lawyer; (2) he cannot conduct an investigation or discovery; (3) the case involves complex legal issues; (4) he is not sufficiently trained in legal matters; (5) his access to the law library and legal resources is limited; and (6) he has clubbed fingers that make extensive writing burdensome.

1 No. 17.) On November 5, 2013, Magistrate Judge Skomal denied Plaintiff's motion
2 to appoint counsel. (Dkt. No. 21.) Subsequently, Defendants filed a motion to dismiss
3 for failure to exhaust administrative remedies pursuant to Federal Rule of Civil
4 Procedure 12(b). (Dkt. Nos. 12, 18.) A report and recommendation granting
5 Defendants' motion to dismiss was filed; however, due to a recent Ninth Circuit
6 decision,³ the Court declined to adopt the report and recommendation and denied
7 Defendants' motion to dismiss. (Dkt. No. 45.)

8 Defendants then filed a motion for summary judgment on June 6, 2014. (Dkt.
9 No. 47, 48.) Plaintiff filed an opposition on July 21, 2014. (Dkt. No. 50.) A reply was
10 filed on July 29, 2014 and July 31, 2014. (Dkt. Nos. 51, 52.) On August 26, 2014,
11 Magistrate Judge Bernard G. Skomal issued a report and recommendation granting all
12 Defendants' motion for summary judgment for failure to exhaust and also granted
13 Defendant Wilborn's motion to dismiss with prejudice. (Dkt. No. 53.)

14 On September 29, 2014, Plaintiff filed another motion to appoint counsel which
15 the Court construed as a motion for reconsideration. (Dkt. Nos. 56, 62.) In that
16 motion, Plaintiff sought appointment of counsel in order to conduct discovery and an
17 evidentiary hearing and claimed to have a disability under the Americans with
18 Disabilities Act ("ADA") making it hard for him to read, write, and understand
19 materials regarding his case. (Dkt. No. 56.) The Court concluded that "[b]esides
20 general allegations that he has a disability under the ADA, Plaintiff does not provide
21 any evidence to support his disability or the nature of his disability" and his complaint
22 contained facts sufficient to survive the sua sponte screening under 28 U.S.C. §§
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25 ³In a recent decision, the Ninth Circuit overruled Wyatt v. Terhune, 315 F.3d
26 1108 (9th Cir. 2003) concerning the proper procedural device to raise the issue of
27 administrative exhaustion. Albino v. Baca, 747 F.3d 1162, 1168-69 (9th Cir. 2014).
28 The court in Albino held that exhaustion should be raised either through 1) a motion
to dismiss pursuant to Rule 12(b)(6), in the rare occasion that failure to exhaust is clear
on the face of the complaint; or 2) a motion for summary judgment. Id. An
unenumerated Rule 12(b) motion, as held in Wyatt, is no longer the procedural method
to raise the exhaustion issue. Id.

1 1915(e)(2) and 1915A(b). (Dkt. No. 62 at 3.) The Court concluded that to date,
2 “Plaintiff has prosecuted this case without delay and has been able to articulate relief
3 in his pleadings.” (Id.)

4 Subsequently, on January 6, 2015, the Court adopted in part and declined to
5 adopt in part the Magistrate Judge’s report and recommendation. The Court denied
6 Defendants’ motion for summary judgment and granted Plaintiff leave to file a first
7 amended complaint. (Dkt. No. 66.) On March 16, 2015, after seeking leave to amend,
8 Plaintiff filed a first amended complaint. (Dkt. No. 74.) Defendants then filed another
9 motion to dismiss and after briefing and a report and recommendation, on September
10 16, 2015, the Court adopted the Magistrate Judge’s R&R and granted Defendant
11 Wilborn’s motion to dismiss. (Dkt. No. 102.)

12 On November 30, 2015, Plaintiff filed another motion to appoint counsel which
13 the Magistrate Judge denied. (Dkt. Nos. 114, 116.) Plaintiff’s arguments were no
14 different than his prior requests for appointment of counsel. Plaintiff states that he
15 cannot afford to hire a lawyer (ECF No. 114 ¶ 1), he cannot conduct an investigation
16 and discovery (id. at ¶ 2), the case involves complex legal issues (id. at ¶ 3), and his
17 access to the law library and legal resources is limited (id. at ¶7). He made these exact
18 arguments in his first request for appointment of counsel, which this Court denied on
19 November 5, 2013. The Magistrate Judge noted that an examination of the docket
20 indicates that Plaintiff has participated in the discovery process, the meet and confer
21 process, and has filed over nineteen documents with the Court citing Dkt. Nos. 17, 23,
22 31, 33, 36, 38, 50, 56, 58, 61, 63, 72, 74, 80, 83, 88, 90, 94, 100. (Dkt. No. 116 at 4.)

23 On July 20, 2016, Plaintiff filed yet another motion to appoint counsel. (Dkt.
24 No. 177.) The Magistrate Judge denied his fourth motion to appoint counsel on August
25 15, 2016 as the reasons for appointment of counsel were no different than his previous
26 motions. (Dkt. No. 182.) As such, the court found “that neither the interests of justice
27 nor exceptional circumstances warrant the appointment of counsel.” (Id. at 3-4.)

28 On January 4, 2017, Plaintiff filed his fifth motion to appoint counsel. He

1 declares that he has a disability covered under Title II of the ADA which makes it
2 difficult to him to read, write and understand materials and writes “Schizoaffective
3 Disorder.” (Dkt. No. 215 at 6.) He also states that his fingers are clubbed and that he
4 does not fully understand the court’s most recent report and recommendation filed on
5 November 9, 2016. (Id.) On January 12, 2017, the Magistrate Judge overruled
6 Plaintiff’s objection to its prior order denying his request for counsel, (Dkt. No. 192),
7 and denied Plaintiff’s motion to appoint counsel concluding that Plaintiff has not
8 presented any new facts justifying such extraordinary relief. (Dkt. No. 216 at 5.)

9 The instant motion is titled, “Inmate Request for Assistance From the Court” and
10 Plaintiff essentially seeks appointment of counsel due to his claimed disability of
11 “Mental Disorder: Schizoaffective Disorder.” (Dkt. No. 222 at 2.)

12 Discussion

13 “[T]here is no absolute right to counsel in civil proceedings.” Hedges v.
14 Resolution Trust Corp. (In re Hedges), 32 F.3d 1360, 1363 (9th Cir. 1994) (citation
15 omitted). Under 28 U.S.C. § 1915(e)(1), however, district courts are granted discretion
16 to appoint counsel for indigent persons under “exceptional circumstances.” Terrell v.
17 Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991). “A finding of exceptional circumstances
18 requires an evaluation of both the ‘likelihood of success on the merits and the ability
19 of the plaintiff to articulate [her] claims pro se in light of the complexity of the legal
20 issues involved.’ Neither of these issues is dispositive and both must be viewed
21 together before reaching a decision.” Id. (quoting Wilborn v. Escalderon, 789 F.2d
22 1328, 1331 (9th Cir. 1986)); Wood v. Housewright, 900 F.2d 1332, 1335 (9th Cir.
23 1990).

24 Here, the Court has denied Plaintiff’s numerous requests for appointment of
25 counsel presenting the same arguments. In this motion, Plaintiff attaches an “Inmate
26 Request for Assistance From the Court”, a form to advise the court that the inmate is
27 claiming a disability and requesting reasonable accommodations under the ADA. (Dkt.
28 No. 222.) The form requires a CDCR employee to assist an inmate in completing the

1 form. (Id.) Dr. Jeffrey Prestler, a forensic psychologist, assisted Plaintiff by listing his
2 claimed disability as: “Mental Disorder: Schizoaffective Disorder.” (Id. at 2.) The
3 requested accommodation for his alleged disability is “Assignment of Counsel.” (Id.)
4 The Court construes the "Inmate Request for Assistance From the Court" as a motion
5 for appointment of counsel.

6 In Allen v. Calderon, the Ninth Circuit held that a party “proceeding pro se in
7 a civil lawsuit is entitled to a competency determination when substantial evidence of
8 incompetence is presented .” Allen v. Calderon, 408 F.3d 1150, 1153 (9th Cir. 2005)
9 (addressing Rule 17(c) whether a guardian ad litem should be appointed, not whether
10 counsel should be appointed for the underlying proceeding). The Ninth Circuit reversed
11 the district court’s dismissal of petitioner’s habeas petition for failing to prosecute. In
12 Allen, the pro se petitioner as well as another inmate submitted a sworn declaration that
13 the petitioner was mentally ill and did not understand the court’s instructions. Id. at
14 1152. Allen also included a letter from the prison psychiatrist whose care he was under
15 stating his diagnosis as “Chronic Undifferentiated Schizophrenia” and that the
16 petitioner was taking psychotropic medications. Id. at 1152-53. The court held that
17 the district court erred in dismissing the petition without evaluating his claims of
18 incompetence concluding that when substantial evidence of incompetence is presented,
19 a pro se party is entitled to a competency determination. Id. at 1153.

20 An incapacitating mental disability may be grounds for appointment of counsel
21 in some cases, but a plaintiff making that argument must present substantial evidence
22 of incompetence. See McElroy v. Cox, Civil No. 08–1221 JM (AJB), 2009 WL
23 4895360 at *2 (E.D. Cal. Dec. 11, 2009). In McElroy, the plaintiff, a pro se prisoner
24 in a § 1983 case, presented documents, similar to those provided in Allen to support
25 his mental disability; however, the court found “there is no nexus between his mental
26 disorder and his ability to articulate his claims.” Id. at *3. The court found that his
27 ability to articulate his claim was not affected by his mental disorder. Id. The plaintiff
28 had successfully survived screening, successfully opposed Defendants’ motion to

1 dismiss by presenting legal arguments with documentary support, and his motions for
2 appointment of counsel were drafted with clarity and proper arguments. Id. Medical
3 records also showed that he functions well when properly medicated. Id. The court
4 denied Plaintiff’s motion to appoint counsel because he had not shown that the interests
5 of justice or exceptional circumstances warranted appointment of counsel. Id.

6 Despite filing an “Inmate Request for Assistance from the Court” asserting a
7 mental impairment of “Schizoaffective Disorder” signed by a forensic psychologist,
8 Plaintiff has not submitted any medical records to support his diagnosis and has not
9 submitted any documents, such as a treating physician’s notes, to demonstrate the
10 effects of his diagnosis on the prosecution of this case. See West v. Dizon, No.
11 12cv1293 DAD P, 2014 WL 114659, at *4 (E.D. Cal. Jan. 9, 2014) (denying
12 appointment of counsel because plaintiff merely alleged a mental disability without any
13 evidence detailing its nature or effects which inmate has surmounted with the help of
14 other inmates). In fact, to date, Plaintiff has successfully litigated this case. He has
15 survived sua sponte screening, survived a motion for summary judgment on the issue
16 of exhaustion by filing not only an opposition but also an objection to the report and
17 recommendation. He has also responded to Defendants’ motion to dismiss along with
18 filing an objection to the report and recommendation on the motion to dismiss.
19 Plaintiff’s filings are replete with facts, supporting law and supporting documentation.
20 As noted by the Magistrate Judge in the most recent order denying his motion to
21 appoint counsel, Plaintiff “has filed over forty (sic) motions or objections with the
22 Court, including a response to a motion for terminating sanctions. (*See e.g.*, ECF Nos.
23 17, 23, 31, 33, 36, 38, 50, 56, 58, 61, 63, 72, 74, 80, 83, 88, 90, 94, 100, 105, 114, 118,
24 129, 135, 140, 141, 155, 157, 169, 173, 177, 180, 185, 188, 192, 195, 198, 200, 212,
25 215.)”. (Dkt. No. 216 at 5.)

26 Plaintiff’s alleged mental disability has not affected his ability to articulate his
27 arguments and prosecute the case. Thus, the Court concludes that Plaintiff has not
28 demonstrated “exceptional circumstances” to warrant appointment of counsel, and the

1 Court DENIES Plaintiff's request for assignment of counsel.

2 **Conclusion**

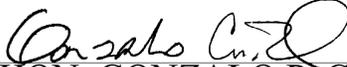
3 Accordingly, the Court DENIES Plaintiff's motion to appoint counsel.

4 IT IS SO ORDERED.

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6 DATED: February 6, 2017

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HON. GONZALO P. CURIEL
United States District Judge

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