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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

EARL WARNER,

Plaintiff,

v.

P. VELARDI, et al.,

Defendants.

Case No.: 16-cv-1924-LAB (DHB)

**ORDER DENYING MOTION FOR
APPOINTMENT OF COUNSEL
WITHOUT PREJUDICE [ECF No.
40]**

On February 9, 2018, Plaintiff filed a Request for Appointment of Counsel *nunc pro tunc* to February 7, 2018. (ECF No. 40.) Plaintiff, who is proceeding *pro se* and *in forma pauperis*, argues that appointment is appropriate because this case involves substantial and complex legal and factual questions. (*Id.* at 3.) Plaintiff also argues that he is unable to properly investigate and litigate his case while he is incarcerated. (*Id.* at 3-5)

Generally, a person has no right to counsel in civil actions. *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009). Districts courts have discretion pursuant to 28 U.S.C. § 1915(e)(1), to “request” that an attorney represent indigent civil litigants upon a showing of exceptional circumstances. *Id*; *see also Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991). “When determining whether ‘exceptional circumstances’ exist, a court must

1 consider ‘the likelihood of success on the merits as well as the ability of the petitioner to
2 articulate his claims *pro se* in light of the complexity of the legal issues involved.’” *Id.*
3 (quoting *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983)). “Neither of these
4 considerations is dispositive and instead must be viewed together.” *Id.* (citing *Wilborn v.*
5 *Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)).

6 Here, Plaintiff has litigated this case for a year and a half without assistance of
7 counsel. In that time, Plaintiff has demonstrated a more than sufficient ability to articulate
8 his claims and understand the arguments, as shown by his amended complaint, various
9 motions, and memorandum in support of his current request. (*See* ECF Nos. 26, 28, 33, 40
10 at 3-5, 6-9.) Although the legal issues in this case are not complex, Plaintiff’s difficulty to
11 examine medical experts, prison hospital staff, and fellow inmates has made prosecuting
12 the case somewhat more complicated. (*Id.* at 6-9.) However, Plaintiff’s filings and the
13 docket demonstrate his ability to distinguish his claims against the defendants and to apply
14 relevant law to the facts. (*Id.*) Thus, Plaintiff has demonstrated the ability to articulate his
15 claims *pro se* in light of the complexity of the legal issues involved.

16 Further, Plaintiff has not demonstrated a likelihood of success on the merits.
17 Plaintiff’s claims have not yet survived a motion for summary judgment on the merits. *See*
18 *Garcia v. Smith*, No. 10cv1187 AJB(RBB), 2012 WL 2499003, at *4 (S.D. Cal. June 27,
19 2012) (denying motion to appoint counsel, finding that although three of the plaintiff’s
20 claims survived a motion to dismiss, “it is too early to determine the likelihood of success
21 on the merits,” and “[w]ithout more, it is not certain whether any of [the plaintiff’s] causes
22 of action will survive summary judgment”). Here, Plaintiff requests appointment of
23 counsel simply to assist him in discovery and present his claim at trial, if reached, in order
24 to raise his credibility before a yet-to-be-empaneled jury. (*See* ECF No. 40 at 6-9.) No
25 summary judgment pleadings have been filed in this case yet. Nonetheless, Plaintiff is in
26 no different position than many *pro se* prisoner litigants. Accordingly, the Court finds that
27 Plaintiff has not demonstrated the “exceptional circumstances” required for the Court to
28 appoint counsel.

1 In light of Plaintiff's demonstrated ability to articulate his claims and failure to
2 demonstrate a likelihood of success on the merits at this stage, Plaintiff's Motion for
3 Appointment of Counsel is DENIED without prejudice.

4
5 IT IS SO ORDERED.

6 Dated: February 12, 2018

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8 Hon. Mitchell D. Dembin
9 United States Magistrate Judge

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