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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

Rafik Vartanpour,

Plaintiff

v.

D.W. Neven, et al.,

Defendants

2:15-cv-00951-JAD-CWH

**Order Denying Plaintiff's Motion for  
Summary Judgment**

[ECF No. 61]

10 Nevada state-prison inmate Rafik Vartanpour sues multiple prison officials and unnamed  
11 prison mailroom staff members under 42 U.S.C. § 1983 for illegally opening and mishandling his  
12 legal mail outside of his presence.<sup>1</sup> Vartanpour now moves for summary judgment.<sup>2</sup> I deny his  
13 motion because it was submitted more than 60 days after the dispositive-motion deadline and  
14 because Vartanpour acknowledges that there are genuine issues of material fact regarding  
15 whether his mail was—and was properly identified as—legal mail.

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**Background**

Vartanpour sues defendants Warden D.W. Neven, Associate Warden Hawell, Caseworker  
Calderwood, Sgt. Joseph (mailroom), and three John Doe mailroom staff members<sup>3</sup> under a First  
Amendment theory for repeatedly mishandling mail from the Consulate General Netherlands, an  
embassy he claims is acting as his legal representative.<sup>4</sup> He alleges that this mail is legal mail

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<sup>1</sup> ECF No. 1.

<sup>2</sup> ECF No. 61.

<sup>3</sup> Neven, Hawell, and Calderwood have been served. Plaintiff's deadline to serve Sgt. Joseph and the John Doe mailroom staff members has been extended. *See* ECF No. 67.

<sup>4</sup> ECF No. 1-1 at 3–4.

1 that prison staff illegally opened, scanned, copied, and read.<sup>5</sup>

2 The scheduling order in this case set January 10, 2017, as the deadline to file motions for  
3 summary judgment.<sup>6</sup> Defendants filed their motion for summary judgment on January 10, 2017,<sup>7</sup>  
4 Vartanpour responded,<sup>8</sup> defendants replied,<sup>9</sup> and Vartanpour filed an unauthorized surreply<sup>10</sup> that  
5 I struck before denying defendants' summary-judgment motion.<sup>11</sup> Vartanpour filed the instant  
6 motion for summary judgment on March 23, 2017.<sup>12</sup>

### 7 Discussion

#### 8 **A. Vartanpour's summary-judgment motion is untimely.**

9 Vartanpour's motion for summary judgment was filed on March 23, 2017, more than 60  
10 days after the January 10, 2017, deadline for dispositive motions. Vartanpour claims that his  
11 summary-judgment motion was timely filed, however, because it was originally dispatched on  
12 January 7, 2017,<sup>13</sup> and because he has "no control or say as [a] pro se [prisoner] . . . for securing  
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14 <sup>5</sup> *Id.*

15 <sup>6</sup> ECF No. 33 at 3.

16 <sup>7</sup> ECF No. 52.

17 <sup>8</sup> ECF No. 55.

18 <sup>9</sup> ECF No. 56.

19 <sup>10</sup> ECF No. 57.

20 <sup>11</sup> ECF No. 60. The stricken document is entitled "Plaintiff's reply in support of his motion for  
21 summary judgment," but I determined that it was a surreply because no motion for summary  
22 judgment by Vartanpour was received by that time. Because Vartanpour did not move for leave  
23 of court to file his surreply, I granted defendants' motion to strike it.

24 <sup>12</sup> ECF No. 61.

25 <sup>13</sup> ECF No. 61-2 at 1. Vartanpour states that his "first [summary-judgment motion] was send  
26 [*sic*] at [*sic*] 7th [of] January 2017." However, he also states that he filed his motion "before  
27 10/1/2017." Considering that: (1) ECF No. 61-2 is dated March 23, 2017, a date well before  
28 October 1, 2017; (2) the due date for dispositive motions was January 10, 2017; (3) most  
countries follow the date format of day/month/year; and (4) I am required to liberally construe

1 [that] his “legal mail” is sent out after it is delivered to prison administration.<sup>14</sup> Vartanpour  
2 asserts that his only proof that he timely dispatched his motion is a “brass slip,” which is “no  
3 where [*sic*] to be found.”<sup>15</sup>

4 While some courts have held that a motion is “filed” when it is given to a prison authority  
5 to be placed in the outgoing mail, “a large body of lower court authority has rejected the general  
6 argument [known as the mailbox rule] that a [pro se prisoner’s outgoing mail] is filed at the  
7 moment it is placed in the mail addressed to the clerk of the court—this on the ground that  
8 *receipt* by the district court is required.”<sup>16</sup> Though I am sympathetic that pro se prisoners lack  
9 some control over their outgoing mail, in this instance, I am not persuaded to depart from the  
10 general rule and apply the mailbox rule. Vartanpour offers no prison mail-log entry or any other  
11 evidence to corroborate that he gave his summary-judgment motion to prison authorities on  
12 January 7, 2017, as alleged. So, I decline to apply the mailbox rule in this case.

13 Vartanpour did not file a motion to extend the dispositive-motion deadline so that I can  
14 consider his belated motion.<sup>17</sup> Instead, he argues in his reply in support of his motion for  
15 summary judgment that he was not aware of the need to file a motion to extend the dispositive-  
16 motion deadline because he did not know that his motion was not received by the court.<sup>18</sup> I find  
17 this argument unpersuasive. Ten days before Vartanpour filed his instant summary-judgment

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19 pro se motions (*see Bernhardt v. L.A. Cnty.*, 339 F.3d 920, 925 (9th Cir. 2003)), I base my  
20 analysis on Vartanpour’s statement that he dispatched his summary-judgment motion on January  
21 7, 2017.

22 <sup>14</sup> ECF No. 64 at 1.

23 <sup>15</sup> *Id.*

24 <sup>16</sup> *Houston v. Lack*, 487 U.S. 266, 274 (1988).

25 <sup>17</sup> *See* Fed. R. Civ. P. 6(b)(1)(B) (allowing the court to extend the time for filing a motion  
26 beyond the deadline “on motion made after the time has expired if the party failed to act because  
27 of excusable neglect”). *See also* LR IA 6-1 (detailing the requirements for “a motion or  
stipulation to extend time . . .”).

28 <sup>18</sup> ECF No. 64 at 1–2.

1 motion, I stated in my order denying defendants’ motion for summary judgment and striking  
2 plaintiff’s surreply that “Vartanpour did not file a motion for summary judgment, and the  
3 deadline for doing so has expired.”<sup>19</sup> Vartanpour was thus on notice that his motion had not been  
4 received and that the deadline for filing it had passed. While the court must construe pro se  
5 motions and pleadings liberally in the pro se litigant’s favor, “pro se litigants are bound by the  
6 rules of procedure.”<sup>20</sup> Because Vartanpour did not comply with the rules to extend the deadline,  
7 his motion for summary judgment is untimely, and I could deny it on that basis alone.

8 **B. Genuine issues of material fact preclude summary judgment.**

9 Even if I overlook the untimeliness of Vartanpour’s motion, I would deny it on its merits  
10 because genuine issues of material fact remain. Perhaps misunderstanding the role of and  
11 requirements for the summary-judgment procedure, Vartanpour offers a “Statement of Disputed  
12 Facts” with a “list of genuine . . . material fact[s] that require the denial of defendant’s [sic]  
13 [already-denied summary-judgment] motion.”<sup>21</sup> In it, he oppugns as “false” sworn statements by  
14 defendants about the mail labeling, and he offers a version of events that contradicts the one  
15 proffered by the defendants.<sup>22</sup> He further argues that his motion should be granted because “there  
16 *is* a genuine issue of material facts [sic] against defendant [sic] that they violated” his First  
17 Amendment rights.<sup>23</sup>

18 Because the plaintiff bears the burden of proof at trial, before the court can grant  
19 Vartanpour’s motion for summary judgment, he “must establish ‘beyond controversy every  
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23 <sup>19</sup> See ECF No. 60 at 3 n.10.

24 <sup>20</sup> *Ghazali v. Moran*, 46 F.3d 52, 54 (9th Cir. 1995).

25 <sup>21</sup> See ECF No. 61 at 6.

26 <sup>22</sup> *Id.* at 10–11.

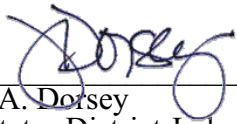
27 <sup>23</sup> ECF No. 64 at 2 (emphasis added); see also ECF No. 61 at 16 (“there is a genuine issue of  
28 material facts to each point. . .”).

1 element of” his claim.<sup>24</sup> The existence of genuine, disputed facts on any element requires the  
2 court to deny the motion and let the jury decide which version of the facts to believe.<sup>25</sup> I already  
3 denied summary judgment in defendants’ favor because I found that “whether communications  
4 from the consulate constitute legal mail and . . . were properly marked to notify prison staff that  
5 the communications were protected is at least genuinely disputed.”<sup>26</sup> Vartanpour’s filings and  
6 repeated representations that this case is rife with genuine and disputed issues only bolster that  
7 conclusion. Accordingly, I deny Vartanpour’s motion for summary judgment because it is late  
8 and because genuine issues of material fact preclude the entry of summary judgment at this time.

9 **Conclusion**

10 Accordingly, IT IS HEREBY ORDERED that **Rafik Vartanpour’s motion for**  
11 **summary judgment [ECF No. 61] is DENIED.**

12 DATED: July 13, 2017.

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14 Jennifer A. Dorsey  
United States District Judge

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25 <sup>24</sup> *S. California Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003) (quoting  
26 William W. Schwarzer, et al., California Practice Guide: Federal Civil Procedure Before Trial §  
14:124–127 (2001)).

27 <sup>25</sup> *Id.*

28 <sup>26</sup> ECF No. 60 at 4.