

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

AUG 19 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MELISSA CALABRESE,

Plaintiff-Appellant,

v.

STATE OF CALIFORNIA; et al.,

Defendants-Appellees.

No. 20-55765

D.C. No.

5:19-cv-02492-CBM-SP

Central District of California,
Riverside

ORDER

Before: SILVERMAN, McKEOWN, and BRESS, Circuit Judges.

A review of the record demonstrates that this court lacks jurisdiction over this appeal because the orders challenged in the appeal are not final or appealable. *See* 28 U.S.C. § 1291; Fed. R. Civ. P. 54(b); *Chacon v. Babcock*, 640 F.2d 221, 222 (9th Cir. 1981) (order is not appealable unless it disposes of all claims as to all parties or judgment is entered in compliance with rule); *see also WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc) (dismissal of complaint with leave to amend is not appealable); *Wilborn v. Escalderon*, 789 F.2d 1328 (9th Cir. 1986) (denial of appointment of counsel in civil case is not appealable). Consequently, this appeal is dismissed for lack of jurisdiction.

DISMISSED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV19-2492-CBM-(SPx) Date January 17, 2020

Title Melissa Calabrese v. State of California et al.

Present: The Honorable CONSUELO B. MARSHALL, UNITED STATES DISTRICT JUDGE

YOLANDA SKIPPER
Deputy Clerk

NOT REPORTED
Court Reporter

Attorneys Present for Plaintiff:
NONE PRESENT

Attorneys Present for Defendants:
NONE PRESENT

Proceedings:

IN CHAMBERS- ORDER RE: APPLICATION FOR AN ORDER GRANTING LEAVE TO FILE A DOCUMENT UNDER SEAL, PETITION FOR VENUE IN RIVERSIDE FEDERAL DISTRICT COURT, APPLICATION FOR PERMISSION FOR ELECTRONIC FILING, AND PETITION FOR APPOINTMENT OF "NEXT FRIEND"

Pending before the Court are the following petitions and applications filed by Dorothy Calabrese, M.D. ("Petitioner"), on behalf of Plaintiff Melissa Calabrese: (1) Application for an Order Granting Leave to File a Document Under Seal (Dkt. No. 1); (2) Petition for Venue in Riverside Federal District Court Under Americans With Disabilities Act (Dkt. No. 5); (3) Application for Permission for Electronic Filing (Dkt. No. 6); and (4) Petition for Appointment of "Next Friend" (Dkt. No. 15).

The Application for an Order Granting Leave to File a Document Under Seal (Dkt. No. 1) is **GRANTED**, and Exhibit A to the Complaint may be filed under seal.

The Complaint was filed on behalf of Plaintiff by Petitioner as Plaintiff's "next friend." Petitioner now seeks to be appointed as Next Friend for Plaintiff pursuant to Federal Rule of Civil Procedure 17(c)(2), which provides: "A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem--or issue another appropriate order--to protect a minor or incompetent person who is unrepresented in an action." "In order to establish standing, the next friend must: (1) provide an adequate explanation—such as inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear on his own behalf to prosecute the action; and (2) be truly dedicated to the best interests of the person on whose behalf he or she seeks to litigate and have some significant relationship with the real party in interest." *Miller ex rel. Jones v. Stewart*, 231 F.3d 1248, 1251 (9th

Cir. 2000); *see also Coal. of Clergy, Lawyers, & Professors v. Bush*, 310 F.3d 1153, 1159–60 (9th Cir. 2002). The Court finds Petitioner has demonstrated Plaintiff's mental incompetence precludes her from appearing on her own behalf in this action, and Petitioner has a significant relationship to Plaintiff (as Plaintiff's mother) and is dedicated to the best interests of Plaintiff. However, "a 'next friend' who is neither an attorney nor represented by one may not bring a lawsuit on behalf of minor or incompetent plaintiffs." *Roe v. Suter*, 165 F.3d 917 (9th Cir. 1998). There is no evidence before the Court demonstrating Petitioner is an attorney or represented by an attorney. Accordingly, the Petition for Appointment of Dorothy Calabrese as "Next Friend" is **DENIED WITHOUT PREJUDICE**.

To the extent Petitioner seeks to proceed in this action as "next friend" for Plaintiff, Petitioner shall obtain counsel and notify the Court re same **no later than February 17, 2020**. Petitioner's failure to obtain representation by counsel and notify the Court re same by that date may result in dismissal of this action without prejudice. *Roe v. Suter*, 165 F.3d 917 (9th Cir. 1998) (affirming dismissal of action without prejudice where next friend was neither an attorney nor represented by counsel).

Having denied without prejudice the Petitioner's Petition for Appointment as "Next Friend," Petitioner's Petition for Venue in Riverside Federal District Court Under Americans With Disabilities Act and Application for Permission for Electronic Filing are **DENIED WITHOUT PREJUDICE**. Petitioner may refile the petition and application upon obtaining counsel for this action.

IT IS SO ORDERED.

cc: all parties

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. ED CV 19-2492-CBM (SPx) Date June 19, 2020

Title Melissa Calabrese v. State of California et al.

Present: The Honorable CONSUELO B. MARSHALL, UNITED STATES DISTRICT JUDGE

DAISY ROJAS
Deputy Clerk

NOT REPORTED
Court Reporter

Attorneys Present for Plaintiff:

NONE PRESENT

Attorneys Present for Defendants:

NONE PRESENT

Proceedings:

**IN CHAMBERS- ORDER RE: REQUEST FOR SERVICE BY MARSHAL
PURSUANT TO FED. R. CIV. P. 4(C)(3) AND 28 U.S.C. § 1915(D) [48];
MOTION FOR COURT-ASSIGNED PRO BONO COUNSEL [45]; AND
DECLARATION OF DOROTHY CALABRESE, M.D. [46]**

Pending before the Court are the following matters filed by Dorothy Calabrese, M.D. ("Petitioner"), on behalf of Plaintiff Melissa Calabrese: (1) Request for Service by Marshal Pursuant to Fed. R. Civ. P. 4(c)(3) and 28 U.S.C. § 1915(d); (2) Motion for Court-Assigned Pro Bono Counsel; and (3) Declaration of Dorothy Calabrese, M.D., requesting "appointment as Next Friend when Plaintiff has been assigned pro bono counsel." (Dkt. Nos. 45, 46, 48.)

Plaintiff proceeds in this action pro se. However, the pending matters were filed and signed by Dorothy Calabrese, a non-lawyer.¹ Neither Plaintiff nor Dorothy Calabrese are represented by counsel, and Dorothy Calabrese cannot represent Plaintiff. See Local Rule 83-2.2.1 ("Any person representing himself or herself in a case without an attorney must appear *pro se* for such purpose. That representation may not be delegated to any other person -- even a spouse, relative, or co-party in the case. A non-attorney guardian for a minor or incompetent person must be represented by counsel.").

Furthermore, "[a]s a general proposition, a civil litigant has no right to counsel." *Olson v. Smith*, 609 F. App'x 370, 372 (9th Cir. 2015) (citing *Lassiter v. Dept. of Social Servs. of Durham Cty.*, 452 U.S. 18 (1981); *Storseth v. Spellman*, 654 F.2d 1349, 1353 (9th Cir. 1981)). A court may under "exceptional circumstances" appoint counsel for indigent civil litigants pursuant to 28 U.S.C. § 1915(e)(1). *Id.* (citing *Agyeman v. Corrs. Corp. of Am.*, 390 F.3d 1101, 1103 (9th Cir. 2004), *cert. denied sub nom. Gerber v. Agyeman*, 545 U.S. 1128

¹ As set forth in the Court's January 17, January 31, and February 10, 2020 orders, there is no evidence demonstrating Dorothy Calabrese is an attorney or represented by an attorney and therefore she cannot represent Plaintiff. (See Dkt. Nos. 16, 17, 23 (citing *Roe v. Suter*, 165 F.3d 917 (9th Cir. 1998) (a "next friend" who is neither an attorney nor represented by one may not bring a lawsuit on behalf of minor or incompetent plaintiffs).)

(2005)). “When determining whether ‘exceptional circumstances’ exist, a court must consider ‘the likelihood of success on the merits as well as the ability of the petitioner to articulate his claims pro se in light of the complexity of the legal issues involved.’” *Id.* (citing *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983)). Here, Plaintiff has not demonstrated a likelihood of success on the merits² or that complexity of legal issues involved constitute exceptional circumstances for appointment of counsel.

Accordingly, the requested matters are **DENIED** without prejudice.

IT IS SO ORDERED.

² On June 1, 2020, the Court granted Defendants’ Providence St. Joseph Health and Mission Hospital Regional Medical Center’s Motion to Dismiss Complaint with leave to amend no later than June 16, 2020. (Dkt. No. 71.) To date, no amended complaint has been filed.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES - GENERAL

Case No. 5:19-cv-02492-CBM (SPx)

Date June 19, 2020

Title Melissa Calabrese, M.D. v. State of California, et al.

Present: The Honorable CONSUELO B. MARSHALL, UNITED STATES DISTRICT JUDGE

Daisy Rojas
Deputy Clerk

Not Present
Court Reporter

Attorneys Present for Plaintiffs:

Not Present

Attorneys Present for Defendants:

Not Present

Proceedings: IN CHAMBERS-ORDER AND NOTICE TO ALL PARTIES

The Court finds that Plaintiff's Motion for Court-Assigned Pro Bono Counsel [45], Plaintiff's Motion for Appointment of Next Friend [46], and Plaintiff's Request for Service by Marshal Pursuant to Fed.R.Civ.P.4(c)(3) and U.S.C. § 1915(d) [48], currently scheduled for hearing on June 23, 2020, is appropriate for decision without oral argument.

Accordingly, this motions are taken UNDER SUBMISSION and the hearing is vacated. No appearances are necessary on June 23, 2020. A written order will issue.

IT IS SO ORDERED.

cc: all parties