

DEC 04 2014

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

## NOT FOR PUBLICATION

## UNITED STATES COURT OF APPEALS

## FOR THE NINTH CIRCUIT

TONY ASBERRY,

Plaintiff - Appellant,

v.

PHELPS,

Defendant - Appellee.

No. 13-16899

D.C. No. 2:09-cv-01494-MCE-  
KJN

MEMORANDUM\*

Appeal from the United States District Court  
for the Eastern District of California  
Morrison C. England, Jr., Chief Judge, Presiding

Submitted November 18, 2014\*\*

Before: LEAVY, FISHER, and N.R. SMITH, Circuit Judges.

California state prisoner Tony Asberry appeals pro se from the district court's summary judgment in his 42 U.S.C. § 1983 action alleging violations of his right to equal protection under the Fourteenth Amendment in connection with his prison housing assignments. We have jurisdiction under 28 U.S.C. § 1291. We

---

\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

\*\* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

review de novo, *FDIC v. Henderson*, 940 F.2d 465, 471 (1991), and we affirm.

The district court properly granted summary judgment because Asberry failed to raise a genuine dispute of material fact as to whether defendant intentionally discriminated against him on the basis of race. *See Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (order) (a § 1983 equal protection claim requires showing that the defendant “acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class”); *see also Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1061 (9th Cir. 2011) (“To survive summary judgment, a plaintiff must set forth non-speculative evidence of specific facts, not sweeping conclusory allegations.”).

We do not consider matters not specifically and distinctly raised and argued in the opening brief. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009) (per curiam).

Defendant’s unopposed motion to supplement the record, filed on June 9, 2014, is granted.

**AFFIRMED.**