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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JOSHUA A. WILLARD,
Plaintiff,
v.
L. MORENO,
Defendant.

Case No. 1:14-cv-00521-JLO-JLT (PC)
FINDINGS AND RECOMMENDATIONS TO
DENY DEFENDANT'S MOTION TO
DISMISS
(Doc. 15)
30-DAY DEADLINE

In this action, Plaintiff is claims Defendant violated the Eighth Amendment claim by acting with deliberate indifference to his serious medical needs. (*See* Doc. 13, Service O.) Now before the Court is Defendant's motion to dismiss which argues that an attachment to the complaint contradicts the allegations made such to warrant a dismissal of the action.

I. Legal Standards

A motion to dismiss brought pursuant to Rule 12(b)(6) tests the legal sufficiency of a claim. Dismissal is proper if there is a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Conservation Force v. Salazar*, 646 F.3d 1240, 1241-42 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 1762 (2012). In resolving a 12(b)(6) motion, a court's review is generally limited to the operative pleading. *Daniels-Hall v. National Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010); *Sanders v. Brown*, 504 F.3d 903, 910 (9th Cir.

1 2007); *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 1003-04 (9th Cir. 2006); *Schneider v.*
2 *California Dept. of Corr.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998).

3 To survive a motion to dismiss, a complaint must contain sufficient factual matter,
4 accepted as true, to state a claim that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678,
5 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)); *Conservation Force*,
6 646 F.3d at 1242; *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009). The Court must
7 accept well-pled factual allegations as true and draw all reasonable inferences in favor of the non-
8 moving party. *Daniels-Hall*, 629 F.3d at 998; *Sanders*, 504 F.3d at 910; *Huynh*, 465 F.3d at 996-
9 97; *Morales v. City of Los Angeles*, 214 F.3d 1151, 1153 (9th Cir. 2000). Prisoners proceeding
10 *pro se* are still entitled to have their pleadings liberally construed and to have any doubt resolved
11 in their favor, *Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir. 2012); *Watison v. Carter*, 668
12 F.3d 1108, 1112 (9th Cir. 2012); *Silva v. Di Vittorio*, 658 F.3d 1090, 1101 (9th Cir. 2011); *Hebbe*
13 *v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010).

14 Further, "[i]f there are two alternative explanations, one advanced by defendant and the
15 other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to
16 dismiss under Rule 12(b)(6)." *Starr v. Baca*, 652 F.3d 1202, 1216-17. "Plaintiff's complaint may
17 be dismissed only when defendant's plausible alternative explanation is so convincing that
18 plaintiff's explanation is *implausible*. The standard at this stage of the litigation is not that
19 plaintiff's explanation must be true or even probable. The factual allegations of the complaint
20 need only 'plausibly suggest an entitlement to relief.'" *Id.*, quoting *Iqbal*, 556 U.S. at 678
21 (emphasis in original). "Rule 8(a) 'does not impose a probability requirement at the pleading
22 stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal
23 evidence' to support the allegations." *Id.*, quoting *Twombly*, 550 U.S. at 556 (emphasis added in
24 *Starr*).

25 **II. Discussion**

26 Defendant argues the complaint should be dismissed because it is contradicted by an
27 exhibit to the Complaint which is found at page 34. (Doc. 15.)

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1 **A. Plaintiff's Allegations**

2 Plaintiff alleges that on October 31, 2013, he sent a request for medical care to Defendant.
3 When he went for dental care on November 1, 2014, he personally gave Defendant another request
4 for medical care and that both of these requests for medical care pertained to serious stomach
5 cramping he was having which caused extreme pain. Plaintiff alleges Defendant did not respond
6 to either request until two weeks later when he called Plaintiff to the medical center on November
7 13, 2013. In that encounter, Plaintiff alleges Defendant asked, "What the fuck" was Plaintiff's
8 problem and when Plaintiff explained he was suffering from stomach cramps and desired to be
9 examined, Defendant did not give him any medical attention and told him he was to come back in
10 two weeks since he was fine. Plaintiff alleges that Defendant never called him back for medical
11 treatment and that he continues to be in severe pain.

12 **B. Defendant's Motion to Dismiss**

13 Defendant asserts that Plaintiff's October 31st and November 4th health care service
14 requests show no indication of ever being received by medical staff and that the November 7th
15 request indicates that it was received by medical staff on November 12th through institutional
16 mail. (Doc. 15, at p. 2.) Defendant argues that Page 34 is the medical record from his November
17 13th exam of Plaintiff, which shows that he "performed a very thorough medical examination and
18 did not find anything wrong" with Plaintiff. (*Id.*, at pp. 1-3:14.) Defendant further argues that
19 Page 34 can and should be considered since it contradicts Plaintiff's allegations and is attached as
20 an exhibit to the Complaint. (*Id.*, at 6.) Defendant also argues that Plaintiff's allegations amount
21 to nothing more than a disagreement with Defendant's diagnosis. (*Id.*, at 7.)

22 Plaintiff counters that he alleges that he hand delivered his November 1st health care
23 services request to Defendant, but that Defendant did not call him to be examined until two weeks
24 after that and when he did see Plaintiff, Defendant did nothing more than chide him and tell him to
25 come back in two weeks, but never called Plaintiff back for a two week follow-up. (Doc. 16, pp.
26 2-3.) Plaintiff alleged as much in the Complaint. (*See* Doc. 1, pp. 3-4.)

27 Plaintiff counters Defendant's argument that the note on the November 7th health care
28 services request (seems to show it was received by medical staff via institutional mail on

1 November 12th) is false and incorrect as these forms are not mailed, but are picked up by the LVN
2 during medication dispersal. Plaintiff explains that it was during medical dispersal when he gave
3 Defendant his request on November 1st. (Doc. 16, at p.3.) Plaintiff further argues that the
4 contents of Page 34 are false and incorrect to the extent it shows Defendant examined him. (*Id.*, at
5 p.3.)

6 When and how Plaintiff's health care services requests were received is important to the
7 issue of when Defendant first had notice that Plaintiff was experiencing a serious medical issue for
8 which he desired treatment. However, the crux of Plaintiff's claim is that he was denied medical
9 care by Defendant. To this end, Defendant argues that he is exonerated by Page 34 and that this
10 entire action should be dismissed since its contents contradict Plaintiff's allegations.

11 Although generally the scope of review on a motion to dismiss for failure to state a claim is
12 limited to the Complaint, a court may consider evidence on which the "complaint 'necessarily
13 relies' if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's
14 claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion."
15 *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir.2006) (quoting *Branch v. Tunnell*, 14 F.3d 449, 453–
16 54 (9th Cir.1994)). Plaintiff's Complaint does not "necessarily rely" on Page 34, nor is it central to
17 Plaintiff's claim -- to the contrary, Plaintiff's alleges and argues that this exam never took place.
18 Further, while the Complaint refers to Page 34, it only does so generally as part of "Exhibit A" to
19 support his response under the section of the complaint form that inquires whether administrative
20 remedies have been exhausted. (Doc. 1, p. 2.) Neither Page 34, nor any other page of Exhibit A
21 are mentioned or referred to in Plaintiff's factual allegations. Finally, Plaintiff (both by his
22 allegations and his opposition to the motion to dismiss which is signed under penalty of perjury)
23 clearly questions the authenticity and reliability of the contents of Page 34. Thus, Page 34 should
24 not be treated as part of the Complaint for purposes of Defendant's motion to dismiss for failure to
25 state a claim.

26 Further, Defendant asserts that Page 34 shows he "performed a very thorough medical
27 examination and did not find anything wrong with [Plaintiff]." (Doc.15-1, 1:22-25.) Yet Plaintiff
28 asserts that he presented to Defendant, but that Defendant merely chided him and told him to

1 return in two weeks, but then never called for Plaintiff to return for the follow-up exam. (Doc. 1,
2 pp. 3-4; Doc. 16, p. 2.) Unfortunately, this Court has seen a number of lawsuits filed by prisoners
3 that allege they appeared for medical attention only that was not given despite that the records
4 show otherwise, so it cannot be said that Plaintiff's explanation of events is implausible. The
5 Court cannot determine at this stage whether Plaintiff's version is more credible than Defendant's
6 but because both Plaintiff's allegations are not facially implausible, the motion to dismiss must be
7 denied. *Starr*, 652 F.3d at 1216-17.

8 Finally, Defendant's argument that Plaintiff's allegations amount to a mere difference of
9 opinion—and are, therefore, not cognizable—falls short as well. Plaintiff's allegations, as
10 discussed above, do not indicate that he disagreed with Defendant's care, treatment, or
11 recommendation therefore, but rather that Defendant *refused* to examine Plaintiff despite knowing
12 he was suffering painful abdominal cramps. Thus, Defendant's motion to dismiss Plaintiff's
13 Complaint per Rule 12(b)(6) for failure to state a cognizable claim should be denied.

14 **IV. Recommendations**

15 Based on the foregoing, it is HEREBY RECOMMENDED that Defendants' motion to
16 dismiss for Plaintiff's failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), filed
17 on September 12, 2014 (Doc. 15), be DENIED.

18 These Findings and Recommendations will be submitted to the United States District
19 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). **Within 30**
20 **days** after being served with these Findings and Recommendations, the parties may file written
21 objections with the Court. The document should be captioned "Objections to Magistrate Judge's
22 Findings and Recommendations." The parties are advised that failure to file objections within the
23 specified time may result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834,
24 839 (9th Cir. 2014) (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

25
26 IT IS SO ORDERED.

27 Dated: July 9, 2015

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE

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