UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JORGE ROBLES JAUREGUI,

Plaintiff,

v.

MATTHEW CATE, et al.,

Defendants.

No. 2:10-cv-02283 JAM JFM (PC)

FINDINGS & RECOMMENDATIONS

I. Introduction

Plaintiff is a state prisoner, proceeding without counsel, with a civil rights action pursuant to 42 U.S.C. § 1983. This case is proceeding on the second amended complaint, filed January 3, 2011. ECF No. 11. Plaintiff alleges that defendant Dr. Jerry W. Weiner ("defendant") was deliberately indifferent to his serious medical needs in violation of his Eighth Amendment rights.[1]

Pending before the court is defendant's motion for summary judgment. Defendant moves for summary judgment on the grounds that he was not deliberately indifferent to plaintiff's

[1] In his original complaint, plaintiff named Matthew Cate, D.K. Sisto, Doctors Hospital of Manteca, Jerry W. Weiner, Alvaro Traquina, T. Rallow, M. Hsieh, and Peter Perez as defendants. ECF No. 1. Following the court's dismissal of his complaint, plaintiff changed defendants and named only Jerry W. Weiner, M. Hsieh and Peter Perez. ECF No. 11. On November 8, 2011, the court issued an order granting defendant Peter Perez's motion to dismiss, and dismissing him from this action. ECF No. 46. On June 27, 2013, the district judge adopted the court's findings and recommendations granting defendant Hsieh's motion for summary judgment. ECF No. 87.

medical needs. As explained below, the court recommends that defendant's motion for summary judgment be granted.

II. Plaintiff's Allegations

In his second amended complaint, plaintiff alleges defendant performed an appendectomy, the surgical removal of the appendix, on plaintiff in August 2000, which resulted in surgical clips being left in his body. ECF No. 11 at 8. Plaintiff alleges that for eight years following the surgery he experienced pain and discomfort in his abdomen. Id. at 9. Plaintiff alleges he was informed by every doctor he saw over the course of the eight years that there was no known cause of his pain. Id. Plaintiff alleges that in February 2009 he discovered a medical report stating surgical clips were used during his appendectomy. Id. Plaintiff alleges that the surgical clips may be the cause of his pain and suffering. Id. With regard to defendant, plaintiff alleges that because he was the surgeon who performed plaintiff's appendectomy, he was responsible for informing him of the surgical clips, and for any postoperative care regarding the surgical clips. Id. at 11. Plaintiff alleges defendant was deliberately indifferent to his medical needs because he failed to alleviate his pain and suffering. Id.

III. Facts

For the purpose of the instant motion for summary judgment, the court finds the following facts undisputed, except as otherwise noted.

1. Plaintiff is a state prisoner in the custody of the California Department of Corrections and Rehabilitation ("CDCR"), and is incarcerated at California State Prison-Solano. Statement of Undisputed Facts ("SUF") ¶ 1 (ECF No. 69-2).
2. The incident at issue here took place in August 2000, while plaintiff was incarcerated at Folsom State Prison ("FSP"). SUF ¶ 2.
3. In August 2000, defendant was employed by the surgical department of Doctors Hospital of Manteca, and occasionally performed medical treatments for the CDCR. SUF ¶ 3.
4. On August 7, 2000, plaintiff was transferred from FSP to Doctors Hospital of Manteca where

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he was admitted for care by Dr. Antonio Coiron who diagnosed him with acute appendicitis.[2] SUF ¶¶ 4-6.

5. On August 8, 2000, defendant assumed plaintiff's medical treatment, taking over for Dr. Coiron, and confirmed plaintiff's diagnosis of acute appendicitis. SUF ¶ 7-8.

6. On August 8, 2000, defendant discussed the risks and complications of the appendectomy with plaintiff and plaintiff agreed to proceed with the surgery.[3] SUF ¶ 9.

7. On August 8, 2000, defendant performed an appendectomy on plaintiff following standard procedures. The procedure was completed without complications, and the sponge, needle, and instrument counts were correct. SUF ¶ 10.

8. Plaintiff was discharged from Doctors Hospital of Manteca on August 14, 2000, with instructions to take medication for five days and to refrain from heavy lifting or vigorous activities for two weeks. SUF ¶ 11.

9. Defendant was responsible for plaintiff's medical needs between August 8 and August 9, 2000. Defendant had no contact with plaintiff following the August 8, 2000, appendectomy, and was not responsible for his postoperative care and treatment.[4] SUF ¶ 12, 20.

10. The appendectomy performed by defendant was routine, met the standard of care requested of general surgeons in 2000, and there were no acts or omissions out of the ordinary for this type of procedure.[5] SUF ¶¶ 13-14.

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[2] Dr. Coiron is not a named defendant in this action.

[3] Plaintiff disputes whether defendant discussed the use of surgical clips and potential complications that might arise from the procedure. ECF No. 84 at 3. For the purpose of this motion for summary judgment, the court will assume defendant did not discuss the use of surgical clips with plaintiff.

[4] Plaintiff disputes this fact; plaintiff contends defendant was responsible for plaintiff's postoperative care. ECF No. 84 at 4.

[5] Plaintiff also takes issue with these facts, taking the position that he does not have any medical expertise to rely on to dispute these facts. ECF No. 84 at 6. Plaintiff also takes issue with the statement that there were no acts or omissions by defendant that were out of the ordinary due to his lack of postoperative care. Id.

11. Surgical clips are commonly used in appendectomies, and it is standard practice to leave them in place during the procedure.[6] SUF ¶¶ 15-16.

12. Plaintiff has not been told by a physician that the surgical clips are causing his abdominal pain. SUF ¶ 17.

13. Plaintiff was evaluated fourteen times by approximately six physicians between March 2008 and January 2010. All of plaintiff's examinations yielded similar results: the cause of his abdominal pain was unknown and no doctor stated it was related to the surgical clips.[7] SUF ¶¶ 21-22.

14. Defendant did not refuse to treat plaintiff on August 8, 2000, nor did he delay plaintiff's necessary treatment.[8] SUF ¶¶ 25-26.

IV. Legal Standards for Summary Judgment

Summary judgment is appropriate when it is demonstrated that the standard set forth in Federal Rule of Civil procedure 56 is met. "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).[9]

> Under summary judgment practice, the moving party always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

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[6] Plaintiff does not dispute that defendant submitted declarations in support of these facts. Plaintiff disputes whether this is common practice because he has not had to opportunity to investigate these claims. ECF No. 84 at 5.

[7] A detailed summary of plaintiff's medical care was provided in this court's recent findings and recommendations addressing defendant Hsieh's motion for summary judgment. See ECF No. 75 at 3-7. In the findings and recommendations the court notes that plaintiff was seen by numerous doctors and no doctor stated the surgical clips were the cause of his abdominal pain. Id. at 12.

[8] Plaintiff disputes this fact to the extent it purports to state defendant never refused to give plaintiff postoperative treatment. ECF No. 84 at 7.

[9] Federal Rule of Civil Procedure 56 was revised and rearranged effective December 10, 2010. However, as stated in the Advisory Committee Notes to the 2010 Amendments to Rule 56, "[t]he standard for granting summary judgment remains unchanged."

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting then-numbered Fed. R. Civ. P. 56(c).) "Where the nonmoving party bears the burden of proof at trial, the moving party need only prove that there is an absence of evidence to support the non-moving party's case." Nursing Home Pension Fund, Local 144 v. Oracle Corp. (In re Oracle Corp. Sec. Litig.), 627 F.3d 376, 387 (9th Cir. 2010) (citing Celotex Corp., 477 U.S. at 325); see also Fed. R. Civ. P. 56 Advisory Committee Notes to 2010 Amendments (recognizing that "a party who does not have the trial burden of production may rely on a showing that a party who does have the trial burden cannot produce admissible evidence to carry its burden as to the fact"). Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Celotex Corp., 477 U.S. at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. at 323.

Consequently, if the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to establish the existence of such a factual dispute, the opposing party may not rely upon the allegations or denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material in support of its contention that such a dispute exists. See Fed. R. Civ. P. 56(c); Matsushita, 475 U.S. at 586 n.11. The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, see Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual

dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." T.W. Elec. Serv., 809 F.2d at 630. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963 amendments).

In resolving a summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Fed. R. Civ. P. 56(c). The evidence of the opposing party is to be believed. See Anderson, 477 U.S. at 255. All reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party. See Matsushita, 475 U.S. at 587. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 586 (citation omitted).

By notice issued January 30, 2013, plaintiff was advised of the requirements for opposing a motion brought pursuant to Rule 56 of the Federal Rules of Civil Procedure. See Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (en banc); Klingele v. Eikenberry, 849 F.2d 409 (9th Cir. 1988).

V. Discussion

A. Eighth Amendment Deliberate Indifference Standard

"[T]o maintain an Eighth Amendment claim based on prison medical treatment, an inmate must show 'deliberate indifference to serious medical needs.'" Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)). The two prong test for deliberate indifference requires the plaintiff to show (1) "'a serious medical need' by demonstrating that 'failure to treat a prisoner's condition could result in further significant injury

or the unnecessary and wanton infliction of pain,'" and (2) "the defendant's response to the need was deliberately indifferent." Jett, 439 F.3d at 1096 (quoting McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992)). Deliberate indifference is shown by "a purposeful act or failure to respond to a prisoner's pain or possible medical need, and harm caused by the indifference." Jett, 439 F.3d at 1096 (citing McGuckin, 974 F.2d at 1060.) In order to state a claim for violation of the Eighth Amendment, a plaintiff must allege sufficient facts to support a claim that the named defendants "[knew] of and disregard[ed] an excessive risk to [plaintiff's] health . . . ." Farmer v. Brennan, 511 U.S. 825, 837 (1994).

In applying this standard, the Ninth Circuit has held that before it can be said that a prisoner's civil rights have been abridged, "the indifference to his medical needs must be substantial. Mere 'indifference,' 'negligence,' or 'medical malpractice' will not support this cause of action." Broughton v. Cutter Laboratories, 622 F.2d 458, 460 (9th Cir. 1980) (citing Estelle, 429 U.S. at 105-06.) A complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Even gross negligence is insufficient to establish deliberate indifference to serious medical needs. See Wood v. Housewright, 900 F.2d 1332, 1334 (9th Cir. 1990). A difference of opinion between medical professionals concerning the appropriate course of treatment generally does not amount to deliberate indifference to serious medical needs. Toguchi v. Chung, 391 F.3d 1051, 1058 (9th Cir. 2004); Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989). Also, "a difference of opinion between a prisoner-patient and prison medical authorities regarding treatment does not give rise to a[§]1983 claim." Franklin v. Oregon, 662 F.2d 1337, 1344 (9th Cir. 1981).

B. Analysis

Plaintiff argues that defendant was deliberately indifferent to his medical needs because of his use of surgical clips during his appendectomy, and because he failed to conduct any postoperative care of plaintiff. On the other hand, defendant argues that the use of surgical clips during an appendectomy is standard procedure, and defendant was not responsible for plaintiff's

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postoperative care. The court finds summary judgment should be granted in favor of defendant.[10]

With regard to the use of the surgical clips, defendant provided the declaration of expert witness Dr. Gregg Adams. ECF No. 69-3. Dr. Adams found that defendant met the standard of care for a surgeon performing an appendectomy. Adams Decl. ¶ 9. Dr. Adams further states that "[t]he use of surgical clips during an appendectomy were common at the time of the surgery and that practice is still prevalent today[,]" and "[i]t is standard practice to leave the surgical clips in place." Id. ¶ 11. Plaintiff did not provide any evidence to counter defendant's expert, other than to state that "the surgical clips left in plaintiff's body may be the proximate cause of the years of injury plaintiff has suffered."[11] ECF No. 83 at 2. However, even if plaintiff were to argue that the use of surgical clips was not a standard medical practice, this allegation would merely amount to either a difference of opinion or an allegation of medical malpractice or negligence. These arguments would still fail to establish an Eighth Amendment claim. Sanchez, 891 F.2d at 242 (prisoner's mere disagreement with diagnosis or treatment does not support a claim of deliberate indifference); Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996) (to establish that a difference of opinion amounted to deliberate indifference, a plaintiff must show that defendant's course of treatment was medically unacceptable and in conscious disregard of an excessive risk to plaintiff's health); Toguchi, 391 F.3d at 1060 ("Deliberate indifference is a high legal standard. A showing of medical malpractice or negligence is insufficient to establish a constitutional deprivation under the Eighth Amendment.").

With regard to plaintiff's allegations that defendant was deliberately indifferent to his medical needs by failing to conduct any postoperative care, the court finds these allegations are not supported by the record. As noted above, "a prison official cannot be found liable under the Eighth Amendment . . . unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn

[10] Because the court concludes that plaintiff fails to raise a triable issue of fact regarding whether defendant violated his Eighth Amendment rights, the court will not address defendant's alternative argument regarding a state medical malpractice claim.

[11] Plaintiff also notes that he did not have the ability to investigate these claims. ECF No. 84 at 5.

that a substantial risk of serious harm exists, and he must also draw the inference." Farmer, 511 U.S. at 837. "In other words, a plaintiff must show that the official was (a) subjectively aware of the serious medical need and (b) failed adequately to respond." Simmons v. Navajo County, Ariz., 609 F.3d 1011, 1017-18 (9th Cir. 2010) (internal quotation and citation omitted). Here, plaintiff has produced no evidence showing that defendant knew of his alleged abdominal pain following his appendectomy on August 8, 2000. Without being subjectively aware of plaintiff's alleged serious medical need, defendant cannot be found liable for deliberate indifference under the Eighth Amendment. Farmer, 511 U.S. at 837.

Therefore, the court finds that plaintiff has failed to establish a material dispute of fact as to whether defendant was deliberately indifferent to his serious medical needs in violation of his Eighth Amendment rights.

VI. Conclusion

Accordingly, IT IS HEREBY RECOMMENDED that defendants' motion for summary judgment (ECF No. 69) be granted, and the Clerk's Office be directed to close this case.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any response to the objections shall be filed and served within fourteen days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: July 29, 2013

KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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