UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CARL F. HARRISON,

Plaintiff,

v.

D. DeBOARD, et al.,

Defendants.

No. 2:12-cv-2000 KJM CKD P

FINDINGS & RECOMMENDATIONS

I. Introduction

This pro se prisoner civil rights action pursuant to 42 U.S.C. § 1983 proceeds on the complaint filed July 31, 2013 against defendants DeBoard and Lopez.[1] (ECF No. 1.) Plaintiff claims that defendants were deliberately indifferent to his safety when they failed to protect him from other inmates, thus violating the Eighth Amendment prohibition against cruel and unusual punishment.

Before the court is defendants' April 25, 2014 motion for summary judgment. (ECF No. 84.) Plaintiff has filed an opposition. (ECF No. 90.) Having carefully reviewed the record and the applicable law, the undersigned will recommend that defendants' motion be denied.

[1] Plaintiff's claims against two other defendants were severed and are the subject of a separate action. (ECF No. 46.)

II. Summary Judgment Standard

Summary judgment is appropriate when it is demonstrated 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). A party asserting that a fact cannot be disputed must support the assertion by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials. . ." Fed. R. Civ. P. 56(c)(1)(A).

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. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id.

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 631. 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 the summary judgment motion, 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 587 (citation omitted).

III. Plaintiff's Allegations

In his complaint, plaintiff alleges as follows:

On the morning of March 12, 2009, three inmates returned from breakfast and came to plaintiff's cell, where they began loudly threatening and cursing at plaintiff as he stood in the cell doorway. (ECF No. 1 at 8.) They had been trying to intimidate plaintiff into smuggling drugs for them. (Id.) As the yelling and threats continued, plaintiff looked over at Correctional Officers DeBoard and Lopez, who were at their desk about 35 feet away. (Id.) Plaintiff saw that both were watching the inmates' verbal assault, which went on for at least two minutes, but did not stop it. (Id.)

One inmate hit plaintiff in the face, busting his lip, and hit plaintiff at least three more times in the jaw, nose, and eye. (Id.) Plaintiff fell down, and the three inmates punched and kicked him while he was on the ground. (Id. at 8-9.) This attack went on for approximately two minutes. (Id. at 9.) Afterward, the three inmates walked past DeBoard and Lopez, back to their cells. (Id.) DeBoard and Lopez laughed and gave each other a "high five" knuckle touch. (Id.)

Plaintiff went back to his cell, packed his property, and asked DeBoard to move him out of the building, but he refused. (Id.) Plaintiff waited until the next shift, then told non-defendant Correctional Officer Simpson about the attack. (Id.) Simpson moved plaintiff to a locked shower and reported the incident. (Id.) Plaintiff was placed in administrative segregation pending investigation of the assault. (Id. at 10.)

IV. Facts

The following facts are undisputed[2]:

Plaintiff is a state prisoner who, at all relevant times, was housed at Mule Creek State Prison. On March 12, 2009, Correctional Officers D. DeBoard and R. Lopez worked at MCSP on

[2] See ECF No. 84-1 (Defendants' Statement of Undisputed Facts) and ECF No. 90 at 29-31 (Plaintiff's Statement of Disputed Facts).

second watch (from 6:00 a.m. to 2:00 p.m.). They were assigned as floor officers responsible for maintaining security in Facility A, Building 3.

Sometime around 8:00 a.m., DeBoard and Lopez were overseeing Building 3's inmates returning to the housing unit from breakfast. The officers were at the podium in the center of the dayroom.

At some point during the third watch (from 2:00 to 10 p.m.), plaintiff told Facility A staff that he had been assaulted by three inmates from his housing unit around 10:00 a.m. that morning. Plaintiff told correctional staff that he feared for his safety and wanted to be rehoused in another unit. Medical staff examined plaintiff and noted injuries to his face and mouth. Based on plaintiff's allegations and injuries, plaintiff was removed from Facility A, Building 3 and rehoused in the prison's administrative segregation unit for his safety while the allegations were investigated.

That day, Correctional Officer Simpson worked at MCSP on third watch. He was assigned to conduct a fact-finding inquiry into plaintiff's allegations. Officer Simpson interviewed plaintiff that evening in connection with the allegations and prepared a memorandum that summarized the results of his interview. After describing plaintiff's account of the attack by three inmates, the memorandum continues: "Harrison stated this went on without the floor officers [sic] detections." (ECF No. 84-6 at 4.) Plaintiff's handwritten name appears at the top of the first page of the memorandum, and his handwritten initials at the second page in the lower right hand corner. (Id. at 4-5.) Afterwards, Officer Simpson forwarded the memorandum to his supervisor for review.

V. Analysis

The Eighth Amendment's prohibition on cruel and unusual punishment imposes on prison officials, among other things, a duty to "take reasonable measures to guarantee the safety of the inmates." Farmer v. Brennan, 511 U.S. 825, 832 (1991) (quoting Hudson v. Palmer, 468 U.S. 517, 526-27 (1984)). "'[P]rison officials have a duty ... to protect prisoners from violence at the hands of other prisoners.'" Id. at 833. "[A] prison official violates the Eighth Amendment when two requirements are met. First, the deprivation alleged must be, objectively, 'sufficiently

serious[.]' For a claim . . . based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm." Id. at 834. Second, "[t]o violate the Cruel and Unusual Punishments Clause, a prison official must have a 'sufficiently culpable state of mind' ... [T]hat state of mind is one of 'deliberate indifference' to inmate health or safety." Id. The prison official will be liable only if "the official knows of and disregards an excessive risk to inmate health and safety; the officials must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Id. at 837.

Here, defendants argue that plaintiff has not created a "genuine" dispute of fact as to whether DeBoard and Lopez witnessed the attack on plaintiff, or had any knowledge that plaintiff was at risk of harm on the morning of March 12, 2009. Plaintiff and defendants give different accounts of these events, and defendants acknowledge that credibility issues must be resolved by the factfinder at trial. However, defendants contend that the instant motion is governed by an exception to the general rules of summary judgment, created by the Supreme Court in Scott v. Harris, 550 U.S. 372 (2007).

In Scott, the Supreme Court considered whether there was a genuine dispute of material fact as to whether respondent, a motorist fleeing a pursuing police car, was driving in such a way as to endanger human life. An "added wrinkle" was that the chase had been caught on videotape (id. at 378), and the tape "so utterly discredited" respondent's version of events "that no reasonable jury could have believed him." Id. at 380. The Court held: "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." Id. See Rutter Group Practice Guide: Federal Civ. Proc. Before Trial, Calif. & 9th Cir. Eds., Chap. 14D § 14:154.5 (2014) (citing Scott for proposition that, where party's claims of disputed evidence are not simply implausible, but are directly and irrefutably contradicted by evidence that clearly shows there is no genuine issue of material fact, summary judgment is proper).

/////

Defendants argue that there "is no evidence (aside from the complaint's unsupported allegations) that either Defendant knew" that plaintiff faced a substantial risk of harm on the morning of March 12, 2009. (ECF No. 84-1.) On the contrary, defendants assert, when Officer Simpson interviewed plaintiff later that day, plaintiff stated that the assault was unseen by correctional staff, then signed and initialed Simpson's memorandum stating as much. Defendants argue that plaintiff's "current rendition of events" is blatantly contradicted by the record and thus, under Scott, does not establish a genuine dispute of fact as to whether defendants knowingly disregarded a substantial risk to plaintiff.

In response, plaintiff contends that he never signed Simpson's memorandum and suggests that his signature and initials were forged. (ECF No. 90 at 4-5.) He submits a sworn declaration stating that defendants watched the attack on him and did nothing to stop it. (Id. at 32-35.) According to plaintiff, the disputed facts include:

> 1. Whether Defendants [DeBoard and Lopez] witnessed plaintiff being assaulted and battered on 3-12-09 . . .
>
> 2. Whether [defendants] witnessed three inmates loudly cussing at plaintiff in front of his cell door in the day room on 3-12-09 . . .
>
> 3. Whether Plaintiff went over to [defendants] directly after the 3-12-09 Assault and Battery and asked them why they did not stop the assault and battery.
>
> 4. Whether C/O Simpson forged . . . state documents which untruthfully stated that plaintiff told him that no officers saw the assault and battery on 3-12-09.
>
> . . .
>
> 7. Whether it is possible for a assault and battery which occurred in view of the tower officer and floor officers [to] go undetected by all officers in building, considering the location of the assault and battery.
>
> . . .
>
> 10. Whether or not [defendants] had a motive to lie about the [incident] on 3/12/09.
>
> 11. Whether or not corroborating evidence proves that [defendants] are credible witnesses.

(ECF No. 90 at 30-31.)

Clearly, Scott would apply in the instant case if a video camera had recorded the attack on plaintiff and defendants' behavior during that time. See Iko v. Shreve, 535 F.3d 225, 230 (4th Cir. 2008) (applying Scott where "the record contains an unchallenged videotape capturing the events in question"). However, the court has not found – and defendants do not cite – a case in which the Scott exception has been applied to a party's prior, unsworn admission as documented in a report. While such an admission makes plaintiff's later, contradictory statements implausible, it does not render them indisputably false.

Moreover, the court need not credit plaintiff's self-serving contention that Simpson forged his signature on the report, in order to find a genuine dispute of material fact. Even if plaintiff stated on that day that no correctional staff witnessed the assault, and signed a report including this statement, these events go to his credibility and should be weighed by the trier of fact.

Accordingly, IT IS HEREBY RECOMMENDED that defendants' motion for summary judgment (ECF No. 84) be denied.

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." 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: February 3, 2015

CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

2 / harr2000.sj