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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GREGORY WAYNE QUINN,
Plaintiff,
v.
JOHN M. DOWBAK,
Defendant.

No. 2:17-cv-0992-MCE-EFB P

FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. Defendant moves to dismiss plaintiff’s second amended complaint. ECF No. 32. For the reasons that follow, the motion should be denied.

I. The Second Amended Complaint

Plaintiff alleges that defendant Dowbak, the surgeon who repaired his middle right finger after it was fractured, was deliberately indifferent to plaintiff’s serious medical needs in two ways: (1) by placing two pins in plaintiff’s finger incorrectly and (2) by failing to perform an x-ray on plaintiff’s finger after the surgery to check that the pins were in the correct position and that the finger was healing properly. ECF No. 33 at 1-2. According to plaintiff, this indifferent medical care caused him to suffer and required that he undergo a second surgery on his finger. *Id.* at 2. Plaintiff’s Exhibit A to the second amended complaint is a “Final Report” following an orthopedic consultation, authored by Albert R. Swafford, MD, on June 21, 2018. *Id.* at 6. Dr. Swafford diagnosed plaintiff with stiffness of the middle right finger. *Id.* He noted that:

1 The patient has chronic stiffness of the MP joint of the right total finger post
2 fracture. His fracture has healed satisfactorily. He has had therapy but has not
3 made satisfactory recovery and has persistent stiffness of the middle finger MP
4 joint.

4 *Id.* Accordingly, Dr. Swafford ordered another surgery for plaintiff's finger. *Id.*

5 **II. The Motion to Dismiss**

6 **a. Legal Standard**

7 Defendant moves to dismiss the complaint pursuant to Federal Rule of Civil Procedure
8 12(b)(6). A complaint may be dismissed under that rule for "failure to state a claim upon which
9 relief may be granted." Fed. R. Civ. P. 12(b)(6). To survive such a motion, a plaintiff must
10 allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v.*
11 *Twombly*, 550 U.S. 544, 570 (2007). A claim has "facial plausibility when the plaintiff pleads
12 factual content that allows the court to draw the reasonable inference that the defendant is liable
13 for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550
14 U.S. at 556). The plausibility standard is not akin to a "probability requirement," but it requires
15 more than a sheer possibility that a defendant has acted unlawfully. *Iqbal*, 556 U.S. at 678.

16 For purposes of dismissal under Rule 12(b)(6), the court generally considers only
17 allegations contained in the pleadings, exhibits attached to the complaint, and matters properly
18 subject to judicial notice, and construes all well-pleaded material factual allegations in the light
19 most favorable to the nonmoving party. *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710
20 F.3d 946, 956 (9th Cir. 2013); *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012).

21 Dismissal under Rule 12(b)(6) may be based on either: (1) lack of a cognizable legal
22 theory, or (2) insufficient facts under a cognizable legal theory. *Chubb Custom Ins. Co.*, 710 F.3d
23 at 956. Dismissal also is appropriate if the complaint alleges a fact that necessarily defeats the
24 claim. *Franklin v. Murphy*, 745 F.2d 1221, 1228-1229 (9th Cir. 1984).

25 Pro se pleadings are held to a less-stringent standard than those drafted by lawyers.
26 *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (per curiam). However, the Court need not accept as
27 true unreasonable inferences or conclusory legal allegations cast in the form of factual

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1 allegations. *See Iteito v. Glock Inc.*, 349 F.3d 1191, 1200 (9th Cir. 2003) (citing *Western Mining*
2 *Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981)).

3 **b. Analysis**

4 Defendant argues that plaintiff fails to state facts sufficient to support a claim for
5 deliberate indifference to serious medical needs in violation of the Eighth Amendment. ECF No.
6 32.

7 The Eighth Amendment protects prisoners from inhumane methods of punishment and
8 from inhumane conditions of confinement. *Morgan v. Morgensen*, 465 F.3d 1041, 1045 (9th Cir.
9 2006). Extreme deprivations are required to make out a conditions-of-confinement claim, and
10 only those deprivations denying the minimal civilized measure of life's necessities are
11 sufficiently grave to form the basis of an Eighth Amendment violation. *Hudson v. McMillian*,
12 503 U.S. 1, 9 (1992). "Prison officials have a duty to ensure that prisoners are provided adequate
13 shelter, food, clothing, sanitation, medical care, and personal safety." *Johnson v. Lewis*, 217 F.3d
14 726, 731-32 (9th Cir. 2000) (quotations and citations omitted).

15 To succeed on an Eighth Amendment claim predicated on the denial of adequate medical
16 care, a plaintiff must establish that: (1) he had a serious medical need and (2) the defendant's
17 response to that need was deliberately indifferent. *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir.
18 2006); *see also Estelle v. Gamble*, 429 U.S. 97, 106 (1976). A serious medical need exists if the
19 failure to treat the condition could result in further significant injury or the unnecessary and
20 wanton infliction of pain. *Jett*, 439 F.3d at 1096. A defendant's response to the need is
21 deliberately indifferent when she (a) purposefully acted or failed to respond to the prisoner's pain
22 or possible medical need and (b) thereby caused harm. *Id.* A deliberately indifferent response
23 may be shown by the denial, delay or intentional interference with medical treatment or by the
24 way in which medical care was provided. *Hutchinson v. United States*, 838 F.2d 390, 394 (9th
25 Cir. 1988). To act with deliberate indifference, a prison official must both be aware of facts from
26 which the inference could be drawn that a substantial risk of serious harm exists, and he must also
27 draw the inference. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

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1 Thus, a defendant will be liable for violating the Eighth Amendment if he knows that
2 plaintiff faces “a substantial risk of serious harm and disregards that risk by failing to take
3 reasonable measures to abate it.” *Id.* at 847. “[I]t is enough that the official acted or failed to act
4 despite his knowledge of a substantial risk of serious harm.” *Id.* at 842.

5 Defendant argues that plaintiff’s allegations, at most, state a claim for professional
6 negligence. *Id.* at 5. Defendant points out that, in the exhibit attached to the complaint, Dr.
7 Swafford noted that plaintiff’s fracture had “healed satisfactorily.” ECF No. 33 at 6. Defendant
8 is correct that medical negligence itself cannot establish a violation of the Eight Amendment. But
9 defendant’s argument understates the allegations of the complaint.

10 At this stage of the proceedings, the court must liberally construe plaintiff’s complaint and
11 take his allegations as true. Plaintiff claims that defendant placed the pins in his finger incorrectly
12 and then failed to do a post-surgical x-ray and that these failures amounted to deliberate
13 indifference. He also alleges that this conduct was “deficient to the extent it was obvious to
14 [another] physician that the plaintiff needed another surgery.” *Id.* at 2. Resolution of whether
15 such conduct was reasonable or, at most, negligent (as defendant claims), or so deficiently
16 obvious that an inference of knowledge for purposes of deliberate indifference (as plaintiff
17 claims) appears to be a factual issue that requires consideration of facts and the review of
18 evidence which is beyond the face of the complaint. Defendant’s argument may ultimately be
19 found correct but it cannot be determined from the face of the complaint. Thus, while defendant
20 may well prevail on the question in the context and standards applicable to a summary judgment
21 motion, the court must accept as true the facts alleged in the complaint and draw all permissible
22 inferences in plaintiff’s favor. This includes any inference of knowledge from facts indicating
23 that the risk of harm was obvious. *See Farmer v. Brennan*, 511 U.S. 825, 842, 114 S.Ct. 1970,
24 128 L.Ed.2d 811 (1994) (“[A] factfinder may conclude that a prison official knew of a substantial
25 risk from the very fact that the risk was obvious .”); *Lolli v. Cty. of Orange*, 351 F.3d 410, 420–
26 21 (9th Cir. 2003) (“[D]eliberate indifference to medical needs may be shown by circumstantial
27 evidence when the facts are sufficient to demonstrate that a defendant actually knew of a risk of
28 harm.”).

1 It is possible that further evidence will show that defendant's conduct was acceptable or
2 simply negligent; it is also possible that further evidence will show that the placement of the pins
3 and/or failure to do an x-ray after the surgery were so grossly deficient as to amount to deliberate
4 indifference. The court notes that, while Dr. Swafford wrote that the fracture had healed
5 satisfactorily, he also wrote that plaintiff had not made a satisfactory recovery and suffered
6 persistent stiffness in the finger. Further development of Dr. Swafford's observations on the
7 point may prove dispositive. But the exhibit, itself, is not.

8 **III. Conclusion and Recommendation**

9 For the reasons set forth above, it is hereby RECOMMENDED that defendant's October
10 16, 2018 motion to dismiss (ECF No. 32) be DENIED.

11 These findings and recommendations are submitted to the United States District Judge
12 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
13 after being served with these findings and recommendations, any party may file written
14 objections with the court and serve a copy on all parties. Such a document should be captioned
15 "Objections to Magistrate Judge's Findings and Recommendations." Failure to file objections
16 within the specified time may waive the right to appeal the District Court's order. *Turner v.*
17 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

18 Dated: April 29, 2019.

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20 EDMUND F. BRENNAN
21 UNITED STATES MAGISTRATE JUDGE
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