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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

SANTOS RENE FLORES,
Plaintiff,
v.
CDCR, et al.,
Defendants.

No. 2:18-cv-2770 KJN P

ORDER AND FINDINGS AND
RECOMMENDATIONS

Plaintiff is a state prisoner, proceeding without counsel. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983, and has requested leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915. This proceeding was referred to this court pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 302.

Plaintiff submitted a declaration that makes the showing required by 28 U.S.C. § 1915(a). Accordingly, the request to proceed in forma pauperis will be granted.

Plaintiff is required to pay the statutory filing fee of \$350.00 for this action. 28 U.S.C. §§ 1914(a), 1915(b)(1). By this order, plaintiff will be assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C. § 1915(b)(1). By separate order, the court will direct the appropriate agency to collect the initial partial filing fee from plaintiff’s trust account and forward it to the Clerk of the Court. Thereafter, plaintiff will be obligated to make monthly payments of twenty percent of the preceding month’s income credited to plaintiff’s prison trust

1 account. These payments will be forwarded by the appropriate agency to the Clerk of the Court
2 each time the amount in plaintiff's account exceeds \$10.00, until the filing fee is paid in full. 28
3 U.S.C. § 1915(b)(2).

4 The court is required to screen complaints brought by prisoners seeking relief against a
5 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The
6 court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally
7 "frivolous or malicious," that fail to state a claim upon which relief may be granted, or that seek
8 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1), (2).

9 A claim is legally frivolous when it lacks an arguable basis either in law or in fact.
10 Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th
11 Cir. 1984). The court may, therefore, dismiss a claim as frivolous when it is based on an
12 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,
13 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully
14 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th
15 Cir. 1989), superseded by statute as stated in Lopez v. Smith, 203 F.3d 1122, 1130-31 (9th Cir.
16 2000) ("[A] judge may dismiss [in forma pauperis] claims which are based on indisputably
17 meritless legal theories or whose factual contentions are clearly baseless."); Franklin, 745 F.2d at
18 1227.

19 Rule 8(a)(2) of the Federal Rules of Civil Procedure "requires only 'a short and plain
20 statement of the claim showing that the pleader is entitled to relief,' in order to 'give the
21 defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atlantic
22 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).
23 In order to survive dismissal for failure to state a claim, a complaint must contain more than "a
24 formulaic recitation of the elements of a cause of action;" it must contain factual allegations
25 sufficient "to raise a right to relief above the speculative level." Id. However, "[s]pecific facts
26 are not necessary; the statement [of facts] need only 'give the defendant fair notice of what the . .
27 . claim is and the grounds upon which it rests.'" Erickson v. Pardus, 551 U.S. 89, 93 (2007)
28 (quoting Bell Atlantic Corp., 550 U.S. at 555) (citations and internal quotations marks omitted).

1 In reviewing a complaint under this standard, the court must accept as true the allegations of the
2 complaint in question, id., and construe the pleading in the light most favorable to the plaintiff.
3 Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds, Davis v. Scherer, 468
4 U.S. 183 (1984).

5 Named as defendants are the California Department of Corrections and Rehabilitation
6 (“CDCR”), Sergeant Franco and Correctional Officer Johnson. Plaintiff alleges that on October
7 10, 2017, defendants Franco and Johnson sexually assaulted him while he was housed at
8 California State Prison-Solano (“CSP-Solano”). Plaintiff alleges that defendant Franco sexually
9 assaulted him again on January 8, 2018, while he was housed at San Quentin State Prison.
10 Plaintiff has stated potentially colorable claims for relief against defendants Franco and Johnson.
11 However, the complaint does not contain a demand for the relief sought, i.e, money damages,
12 injunctive or declaratory relief, as required by Federal Rule of Civil Procedure 8(a)(3). For this
13 reason, the claims against defendants Franco and Johnson are dismissed with leave to amend. If
14 plaintiff files an amended complaint, he shall include a demand for relief.

15 Plaintiff alleges that defendant CDCR violated his Fourteenth and Eighth Amendment
16 rights by not investigating his claims. The Eleventh Amendment prohibits federal courts from
17 hearing suits brought against a non-consenting state. Brooks v. Sulphur Springs Valley Elec. Co.,
18 951 F.2d 1050, 1053 (9th Cir. 1991). This includes suits against state agencies. See Natural
19 Resources Defense Council v. California Dep’t of Transp., 96 F.3d 420, 421 (9th Cir. 1996);
20 Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989) (concluding that Nevada Department of
21 Prisons was a state agency entitled to Eleventh Amendment immunity). Because CDCR is a state
22 agency, it is immune to plaintiff’s claims under the Eleventh Amendment. Accordingly,
23 plaintiff’s claims against defendant CDCR should be dismissed.

24 Plaintiff has attached 191 pages of exhibits to his complaint. Plaintiff is not required to
25 attach exhibits to the amended complaint. If plaintiff files an amended complaint, he may not
26 rely on exhibits to state his claims.

27 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the conditions
28 about which he complains resulted in a deprivation of plaintiff’s constitutional rights. See, e.g.,

1 West v. Atkins, 487 U.S. 42, 48 (1988). Also, the complaint must allege in specific terms how
2 each named defendant is involved. Rizzo v. Goode, 423 U.S. 362, 371 (1976). There can be no
3 liability under 42 U.S.C. § 1983 unless there is some affirmative link or connection between a
4 defendant's actions and the claimed deprivation. Rizzo, 423 U.S. at 371; May v. Enomoto, 633
5 F.2d 164, 167 (9th Cir. 1980); Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978). Furthermore,
6 vague and conclusory allegations of official participation in civil rights violations are not
7 sufficient. Ivey v. Bd. of Regents, 673 F.2d 266, 268 (9th Cir. 1982).

8 In addition, plaintiff is informed that the court cannot refer to a prior pleading in order to
9 make plaintiff's amended complaint complete. Local Rule 220 requires that an amended
10 complaint be complete in itself without reference to any prior pleading. This requirement exists
11 because, as a general rule, an amended complaint supersedes the original complaint. See Ramirez
12 v. County of San Bernardino, 806 F.3d 1002, 1008 (9th Cir. 2015) ("an 'amended complaint
13 supersedes the original, the latter being treated thereafter as non-existent.'" (internal citation
14 omitted)). Once plaintiff files an amended complaint, the original pleading no longer serves any
15 function in the case. Therefore, in an amended complaint, as in an original complaint, each claim
16 and the involvement of each defendant must be sufficiently alleged.

17 In accordance with the above, IT IS HEREBY ORDERED that:

18 1. Plaintiff's request for leave to proceed in forma pauperis is granted.

19 2. Plaintiff is obligated to pay the statutory filing fee of \$350.00 for this action. Plaintiff
20 is assessed an initial partial filing fee in accordance with the provisions of 28 U.S.C.
21 § 1915(b)(1). All fees shall be collected and paid in accordance with this court's order to the
22 Director of the California Department of Corrections and Rehabilitation filed concurrently
23 herewith.

24 3. Plaintiff's complaint is dismissed.

25 4. Within thirty days from the date of this order, plaintiff shall complete the attached
26 Notice of Amendment and submit the following documents to the court:

27 a. The completed Notice of Amendment; and

28 b. An original and one copy of the Amended Complaint.

1 Plaintiff's amended complaint shall comply with the requirements of the Civil Rights Act, the
2 Federal Rules of Civil Procedure, and the Local Rules of Practice. The amended complaint must
3 also bear the docket number assigned to this case and must be labeled "Amended Complaint."

4 Failure to file an amended complaint in accordance with this order may result in the
5 dismissal of this action;

6 5. The Clerk is directed to assign a district judge to this case; and

7 IT IS HEREBY RECOMMENDED that defendant CDCR be dismissed.

8 These findings and recommendations are submitted to the United States District Judge
9 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
10 after being served with these findings and recommendations, plaintiff may file written objections
11 with the court and serve a copy on all parties. Such a document should be captioned
12 "Objections to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that
13 failure to file objections within the specified time may waive the right to appeal the District
14 Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

15 Dated: November 8, 2018

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18 KENDALL J. NEWMAN
19 UNITED STATES MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT
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NOTICE OF AMENDMENT

Plaintiff hereby submits the following document in compliance with the court's order
filed _____.

DATED: _____ Amended Complaint

Plaintiff