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United States District Court
For the Northern District of California

E-Filed 8/27/10

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SPENCER RAWLINS BRASURE,

No. C 08-1943 RS (PR)

Plaintiff,

ORDER OF SERVICE;

v.

**DIRECTING DEFENDANTS TO FILE
DISPOSITIVE MOTION OR NOTICE
REGARDING SUCH MOTION;**

ROBERT AYERS, et al.,

Defendants.

INSTRUCTIONS TO CLERK

This is a federal civil rights action filed by a *pro se* state prisoner pursuant to 42 U.S.C. §§ 1981, 1983, 1985, and 1986 against defendants, employees of San Quentin State Prison. The Court now reviews the second amended complaint pursuant to 28 U.S.C. § 1915A(a).

DISCUSSION

A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may

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1 be granted or seek monetary relief from a defendant who is immune from such relief. *See id.*
2 § 1915A(b)(1),(2). Pro se pleadings must be liberally construed. *See Balistreri v. Pacifica*
3 *Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988).

4 A “complaint must contain sufficient factual matter, accepted as true, to ‘state a claim
5 to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009)
6 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial
7 plausibility when the plaintiff pleads factual content that allows the court to draw the
8 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting
9 *Twombly*, 550 U.S. at 556). Furthermore, a court “is not required to accept legal conclusions
10 cast in the form of factual allegations if those conclusions cannot reasonably be drawn from
11 the facts alleged.” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994).

12 **B. Legal Claims**

13 Plaintiff alleges that defendants Robert Ayers, D. Dacanay, D. Edwards, Palmer, J.
14 Avila, D. Schlosser, R. Foxx, A. Erickson, and M. Broddrick violated and conspired to
15 violate plaintiff’s (1) First Amendment rights by placing him on property and correspondence
16 restrictions; (2) due process rights by the loss of property taken because of the restrictions;
17 and (3) due process rights by promulgating the policy under which the restrictions were
18 instituted. These claims appear, when liberally construed, to be cognizable in a federal civil
19 rights action.

20 **CONCLUSION**

21 For the foregoing reasons, the Court orders as follows:

22 1. The Clerk of the Court shall issue summons and the United States
23 Marshal shall serve, without prepayment of fees, a copy of the complaint in this matter, all
24 attachments thereto, and a copy of this order upon the following defendants at San Quentin
25 State Prison: Robert Ayers, D. Dacanay, D. Edwards, Palmer, J. Avila, D. Schlosser, R.
26 Foxx, A. Erickson, and M. Broddrick. The Clerk shall also mail courtesy copies of the
27 complaint and this order to the California Attorney General’s Office.

1 3. No later than ninety (90) days from the date of this order, defendants shall file
2 a motion for summary judgment or other dispositive motion with respect to the claims in the
3 amended complaint found to be cognizable above.

4 a. If defendants elect to file a motion to dismiss on the grounds plaintiff
5 failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),
6 defendants shall do so in an unenumerated Rule 12(b) motion pursuant to *Wyatt v. Terhune*,
7 315 F.3d 1108, 1119–20 (9th Cir. 2003), cert. denied *Alameida v. Terhune*, 540 U.S. 810
8 (2003).

9 b. Any motion for summary judgment shall be supported by adequate
10 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of
11 Civil Procedure. Defendants are advised that summary judgment cannot be granted, nor
12 qualified immunity found, if material facts are in dispute. If any defendant is of the opinion
13 that this case cannot be resolved by summary judgment, he shall so inform the Court prior to
14 the date the summary judgment motion is due.

15 4. Plaintiff’s opposition to the dispositive motion shall be filed with the Court and
16 served on defendants no later than forty-five (45) days from the date defendants’ motion is
17 filed.

18 a. In the event the defendants file an unenumerated motion to dismiss
19 under Rule 12(b), plaintiff is hereby cautioned as follows:

20 The defendants have made a motion to dismiss pursuant to Rule 12(b) of the
21 Federal Rules of Civil Procedure, on the ground you have not exhausted your administrative
22 remedies. The motion will, if granted, result in the dismissal of your case. When a party you
23 are suing makes a motion to dismiss for failure to exhaust, and that motion is properly
24 supported by declarations (or other sworn testimony) and/or documents, you may not simply
25 rely on what your complaint says. Instead, you must set out specific facts in declarations,
26 depositions, answers to interrogatories, or documents, that contradict the facts shown in the
27 defendant’s declarations and documents and show that you have in fact exhausted your
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1 claims. If you do not submit your own evidence in opposition, the motion to dismiss, if
2 appropriate, may be granted and the case dismissed.

3 b. In the event defendants file a motion for summary judgment,
4 the Ninth Circuit has held that the following notice should be given to plaintiffs:

5 The defendants have made a motion for summary judgment by which they
6 seek to have your case dismissed. A motion for summary judgment under Rule 56 of the
7 Federal Rules of Civil Procedure will, if granted, end your case.

8 Rule 56 tells you what you must do in order to oppose a motion for summary
9 judgment. Generally, summary judgment must be granted when there is no genuine issue of
10 material fact — that is, if there is no real dispute about any fact that would affect the result
11 of your case, the party who asked for summary judgment is entitled to judgment as a matter
12 of law, which will end your case. When a party you are suing makes a motion for summary
13 judgment that is properly supported by declarations (or other sworn testimony), you cannot
14 simply rely on what your complaint says. Instead, you must set out specific facts in
15 declarations, depositions, answers to interrogatories, or authenticated documents, as provided
16 in Rule 56(e), that contradict the facts shown in the defendants’ declarations and documents
17 and show that there is a genuine issue of material fact for trial. If you do not submit your
18 own evidence in opposition, summary judgment, if appropriate, may be entered against you.
19 If summary judgment is granted in favor of defendants, your case will be dismissed and there
20 will be no trial. *See Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff
21 is advised to read Rule 56 of the Federal Rules of Civil Procedure and *Celotex Corp. v.*
22 *Catrett*, 477 U.S. 317 (1986) (holding party opposing summary judgment must come forward
23 with evidence showing triable issues of material fact on every essential element of his claim).
24 Plaintiff is cautioned that failure to file an opposition to defendants’ motion for summary
25 judgment may be deemed to be a consent by plaintiff to the granting of the motion, and
26 granting of judgment against plaintiff without a trial. *See Ghazali v. Moran*, 46 F.3d 52,
27 53-54 (9th Cir. 1995) (per curiam); *Brydges v. Lewis*, 18 F.3d 651, 653 (9th Cir. 1994).

1 5. Defendants shall file a reply brief no later than fifteen (15) days after plaintiff's
2 opposition is filed.

3 6. The motion shall be deemed submitted as of the date the reply brief is due. No
4 hearing will be held on the motion unless the Court so orders at a later date.

5 7. All communications by the plaintiff with the Court must be served on
6 defendants, or defendants' counsel once counsel has been designated, by mailing a true copy
7 of the document to defendants or defendants' counsel.

8 8. Discovery may be taken in accordance with the Federal Rules of Civil
9 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local
10 Rule 16-1 is required before the parties may conduct discovery.

11 9. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the
12 court informed of any change of address and must comply with the court's orders in a timely
13 fashion. Failure to do so may result in the dismissal of this action for failure to prosecute
14 pursuant to Federal Rule of Civil Procedure 41(b).

15 10. Extensions of time must be filed no later than the deadline sought to be
16 extended and must be accompanied by a showing of good cause.

17 **IT IS SO ORDERED.**

18 DATED: August 26, 2010



RICHARD SEEBORG
United States District Judge

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