

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOE VERNON HAY, JR.,

Plaintiff,

vs.

ROBERT SILLEN, et al.,

Defendant(s).

No. C 09-02373 JW (PR)

ORDER OF SERVICE; DIRECTING
DEFENDANTS TO FILE
DISPOSITIVE MOTION OR NOTICE
REGARDING SUCH MOTION;
DENYING MOTION FOR
APPOINTMENT OF COUNSEL;
INSTRUCTIONS TO CLERK

(Docket No. 2.)

Plaintiff, a California inmate, has filed a pro se civil rights action under 42 U.S.C. § 1983 against prison officials at the Correctional Training Facility (“CTF”) in Soledad for allegedly unconstitutional acts. The Court now reviews the complaint pursuant to 28 U.S.C. § 1915A(a).

DISCUSSION

A. Standard of Review

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint “is

1 frivolous, malicious, or fails to state a claim upon which relief may be granted,” or
2 “seeks monetary relief from a defendant who is immune from such relief.” Id. §
3 1915A(b). Pro se pleadings must be liberally construed, however. Balistreri v.
4 Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1990).

5 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two
6 elements: (1) that a right secured by the Constitution or laws of the United States
7 was violated, and (2) that the alleged violation was committed by a person acting
8 under the color of state law. West v. Atkins, 487 U.S. 42, 48 (1988).

9 B. Legal Claims

10 Plaintiff claims that defendants acted with deliberate indifference to his
11 medical needs by denying him eye treatment resulted in his “right eye going blind...
12 in less than 3 months and retinal detachment never being treated.” (Compl. at 3.)
13 Plaintiff alleges that he experienced “cascading blood, eye ball headaches, flashing
14 lights, eye socket numbness, terrible fright, [and] hopelessness.” (Id. at 12.)
15 Plaintiff also claims that he suffered head, neck and back injuries which went
16 untreated for several months. (Id. at 23.) Lastly, plaintiff alleges that he is not
17 receiving any treatment for his Hepatitis C virus. (Id. at 29.) Liberally construed,
18 plaintiff’s claims of defendants’ deliberate indifference to his serious medical needs
19 are cognizable under § 1983 as violations of the Eighth Amendment’s proscription
20 against cruel and unusual punishment. See Estelle v. Gamble, 429 U.S. 97, 104
21 (1976); McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir. 1992); Farmer v.
22 Brennan, 511 U.S. 824, 834 (1994).

23 C. Motion for Appointment of Counsel

24 Plaintiff has filed a motion for appointment of counsel. (Docket No. 2.) The
25 motion is DENIED without prejudice for lack of exceptional circumstances. See
26 Rand v. Rowland, 113 F.3d 1520, 1525 (9th Cir. 1997); Terrell v. Brewer, 935 F.2d
27 1015, 1017 (9th Cir. 1991); Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th Cir.
28 1986).

CONCLUSION

For the foregoing reasons, the Court orders as follows:

1. Defendant California Prison Health Care Receivership Corporation is DISMISSED from this action as plaintiff has not stated any claims against this entity. The clerk shall terminate this defendant from the docket.

2. The clerk of the Court shall issue summons and the United States Marshal shall serve, without prepayment of fees, a copy of the complaint in this matter, all attachments thereto, and a copy of this order upon remaining defendants at the addresses provided by plaintiff. (See Compl. at 2-3.) The clerk shall also mail courtesy copies of the complaint and this order to the California Attorney General's Office.

3. No later than **sixty (60) days** from the date of this order, defendants shall file a motion for summary judgment or other dispositive motion with respect to the claims in the amended complaint found to be cognizable above.

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

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

4. Plaintiff's opposition to the dispositive motion shall be filed with the Court and served on defendants no later than **thirty (30) days** from the date

defendants' motion is filed.

a. In the event the defendants file an unenumerated motion to dismiss under Rule 12(b), plaintiff is hereby cautioned as follows:¹

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

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

The defendants have made a motion for summary judgment by which they seek to have your case dismissed. A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case. Rule 56 tells you what you must do in order to oppose a motion for summary judgment. Generally, summary judgment must be granted when there is no genuine issue of material fact--that is, if there is no real dispute about any fact that would affect the result of your case, the party who asked for summary judgment is entitled to judgment as a matter of law, which will end your case. When a party you are suing makes a motion for summary judgment that is properly supported by declarations (or other sworn testimony), you cannot simply rely on what your complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents, as provided in Rule 56(e), that contradict the facts shown in the defendants' declarations and documents and show that there is a genuine issue of material fact for trial. If you do not submit your own evidence in opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is granted in favor of defendants, your case will be dismissed and there will be no trial.

See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is

¹ The following notice is adapted from the summary judgment notice to be given to pro se prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See Wyatt v. Terhune, 315 F.3d at 1120 n.14.

1 advised to read Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v.
2 Catrett, 477 U.S. 317 (1986) (holding party opposing summary judgment must come
3 forward with evidence showing triable issues of material fact on every essential
4 element of his claim). Plaintiff is cautioned that failure to file an opposition to
5 defendants' motion for summary judgment may be deemed to be a consent by
6 plaintiff to the granting of the motion, and granting of judgment against plaintiff
7 without a trial. See Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir. 1995) (per
8 curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

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

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

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


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

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

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

25 This order terminates Docket No. 2.

26
27 DATED: August 13, 2009


JAMES WARE
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

JOE VERNON HAY JR,
Plaintiff,

Case Number: CV09-02373 JW

CERTIFICATE OF SERVICE

v.

ROBERT SILLEN, et al.,
Defendants.

_____/

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 8/14/2009, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Joe Vernon Hay
7528 Woodley Ave.
Van Nuys, Ca 91406-2928

Dated: 8/14/2009

Richard W. Wieking, Clerk
/s/By: Elizabeth Garcia, Deputy Clerk