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E-Filed 11/20/12

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

TERRY ALEXANDER,
Plaintiff,
v.
R. REYNOSO,
Defendant.

No. C 12-1175 RS (PR)

**ORDER OF SERVICE;
ORDER DIRECTING DEFENDANTS
TO FILE A DISPOSITIVE MOTION
OR NOTICE REGARDING SUCH
MOTION;
INSTRUCTIONS TO CLERK**

INTRODUCTION

This is a federal civil rights action filed pursuant to 42 U.S.C. § 1983 by a *pro se* state prisoner. Pursuant to the Court's directions, plaintiff has filed an amended complaint. The Court now reviews the amended complaint pursuant to 28 U.S.C. § 1915A(a).

Defendants are directed to file a dispositive motion or notice regarding such motion on or before February 21, 2013, unless an extension is granted. **The Court further directs that defendants are to adhere to the new notice provisions detailed in Sections 2.a and 10 of the conclusion of this order.**

United States District Court
For the Northern District of California

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

A “complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting *Twombly*, 550 U.S. at 556). Furthermore, a court “is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged.” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

B. Legal Claims

Plaintiff alleges that R. Reynoso, a correctional officer at Salinas Valley State Prison, used excessive force against him, in violation of his Eighth Amendment rights. When liberally construed, plaintiff’s allegations appears to state a claim under § 1983. Plaintiff’s other claims regarding his disability and law library access are DISMISSED without prejudice. If plaintiff seeks relief for these dismissed claims, he must file a separate civil

1 rights action.

2 **CONCLUSION**

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

4 1. The Clerk of the Court shall issue summons and the United States
5 Marshal shall serve, without prepayment of fees, a copy of the complaint in this matter, all
6 attachments thereto, and a copy of this order upon R. Reynoso at Salinas Valley State Prison.
7 The Clerk shall also mail courtesy copies of the complaint and this order to the California
8 Attorney General's Office.

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

12 a. If defendants elect to file a motion to dismiss on the grounds plaintiff
13 failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),
14 defendants shall do so in an unenumerated Rule 12(b) motion pursuant to *Wyatt v. Terhune*,
15 315 F.3d 1108, 1119–20 (9th Cir. 2003), cert. denied *Alameida v. Terhune*, 540 U.S. 810
16 (2003).

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

23 3. Plaintiff's opposition to the dispositive motion shall be filed with the Court and
24 served on defendants no later than forty-five (45) days from the date defendants' motion is
25 filed.

26 a. In the event the defendants file an unenumerated motion to dismiss
27 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
2 Federal Rules of Civil Procedure, on the ground you have not exhausted your administrative
3 remedies. The motion will, if granted, result in the dismissal of your case. When a party you
4 are suing makes a motion to dismiss for failure to exhaust, and that motion is properly
5 supported by declarations (or other sworn testimony) and/or documents, you may not simply
6 rely on what your complaint says. Instead, you must set out specific facts in declarations,
7 depositions, answers to interrogatories, or documents, that contradict the facts shown in the
8 defendant’s declarations and documents and show that you have in fact exhausted your
9 claims. If you do not submit your own evidence in opposition, the motion to dismiss, if
10 appropriate, may be granted and the case dismissed.

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

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

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

3 5. 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 6. 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 7. 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 8. 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 9. 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 10. A recent decision from the Ninth Circuit requires that *pro se* prisoner-plaintiffs
18 be given "notice of what is required of them in order to oppose" summary judgment motions
19 at the time of filing of the motions, rather than when the court orders service of process or
20 otherwise before the motions are filed. *Woods v. Carey*, No. 09-15548, slip op. 7871, 7874
21 (9th Cir. July 6, 2012). **Defendants shall provide the following notice to plaintiff when**
22 **they file and serve any motion for summary judgment:**

23 The defendants have made a motion for summary judgment by which they seek
24 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.

25 Rule 56 tells you what you must do in order to oppose a motion for summary
26 judgment. Generally, summary judgment must be granted when there is no
27 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.

1 When a party you are suing makes a motion for summary judgment that is
2 properly supported by declarations (or other sworn testimony), you cannot
3 simply rely on what your complaint says. Instead, you must set out specific
4 facts in declarations, depositions, answers to interrogatories, or authenticated
5 documents, as provided in Rule 56(e), that contradict the facts shown in the
6 defendants' declarations and documents and show that there is a genuine issue
7 of material fact for trial. If you do not submit your own evidence in opposition,
8 summary judgment, if appropriate, may be entered against you. If summary
9 judgment is granted, your case will be dismissed and there will be no trial.

6 *Rand v. Rowland*, 154 F.3d 952, 962–63 (9th Cir. 1998).

7 11. Plaintiff's motion for the appointment of counsel (Docket No. 11) is DENIED
8 for the reasons stated in the Court's order on his prior such request. His motions for a
9 judgment on the pleadings (Docket No. 12), to serve the defendants (Docket No. 14), for
10 emergency relief and a transfer (Docket Nos. 15, 16, 17, 18, and 19), and his motion for
11 summary judgment (Docket No. 20), are DENIED without prejudice. Plaintiff may refile
12 such motions after defendants have filed a dispositive motion.

13 12. The Clerk shall terminate Docket Nos. 11, 12, 15, 16, 17, 18, 19 and 20.

14 13. The Clerk shall amend the docket to reflect that R. Reynoso is the sole
15 defendant in this action. Plaintiff's surviving claim does not allege any wrongdoing by the
16 second defendant, Salinas Valley State Prison. The prison is hereby TERMINATED from
17 this action.

18 **IT IS SO ORDERED.**

19 DATED: November 20, 2012


RICHARD SEEBORG
United States District Judge

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