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E-Filed 9/16/13

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ROLANDO GARZA,

No. C 13-1880 (PR)

Plaintiff,

**ORDER DISMISSING COMPLAINT
WITH LEAVE TO AMEND**

v.

A.J. GARCIA, et al.,

Defendants.

INTRODUCTION

This is a federal civil rights action filed pursuant to 42 U.S.C. § 1983 by a *pro se* state prisoner. The Court now reviews the 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 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)

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

11 **B. Legal Claims**

12 Plaintiff alleges that the negligent actions by correctional officers at High Desert State
13 Prison resulted in his falling and injuring himself. He also alleges that the officers failed to
14 summon medical assistance in a timely manner. Such actions, he contends, violated his
15 rights under the Eighth Amendment.

16 His allegations are insufficient to state claims for relief. The allegations show at worst
17 that defendants were negligent or grossly negligent, neither of which is actionable under §
18 1983. *See Farmer v. Brennan*, 511 U.S. 825, 835-36 & n.4 (1994); *Wood v. Housewright*,
19 900 F.2d 1332, 1334 (9th Cir. 1990).

20 To state a claim under the Eighth Amendment, one must allege facts that show
21 defendants acted with “deliberate indifference.” A determination of “deliberate indifference”
22 involves an examination of two elements: the seriousness of the prisoner’s medical needs
23 and the nature of the defendant’s response to those needs. *McGuckin v. Smith*, 974 F.2d
24 1050, 1059 (9th Cir. 1992) (overruled on other grounds, *WMX Technologies, Inc. v. Miller*,
25 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc)).

26 A prison official is deliberately indifferent if he knows that a prisoner faces a
27 substantial risk of serious harm and disregards that risk by failing to take reasonable steps to
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1 abate it. *Farmer*, 511 U. S. at 837 (equating standard with that of criminal recklessness).
2 The prison official must not only “be aware of facts from which the inference could be drawn
3 that a substantial risk of serious harm exists,” but “must also draw the inference.” *Id.*
4 Consequently, in order for deliberate indifference to be established, there must exist both a
5 purposeful act or failure to act on the part of the defendant and harm resulting therefrom. *See*
6 *McGuckin*, 974 F.2d at 1060. Plaintiff’s allegations do not meet these standards.

7 Accordingly, the complaint is DISMISSED with leave to amend. **Plaintiff shall file**
8 **an amended complaint on or before October 25, 2013.** The first amended complaint must
9 include the caption and civil case number used in this order (13-1880 RS (PR)) and the
10 words FIRST AMENDED COMPLAINT on the first page. Because an amended complaint
11 completely replaces the previous complaints, plaintiff must include in his first amended
12 complaint *all* the claims he wishes to present and *all* of the defendants he wishes to sue,
13 including the excessive force claim found cognizable. *See Ferdik v. Bonzelet*, 963 F.2d
14 1258, 1262 (9th Cir. 1992). Any claims not raised in the amended complaint will be deemed
15 waived. Plaintiff may *not* incorporate material from the prior complaint by reference.
16 Failure to file an amended complaint in accordance with this order will result in dismissal of
17 this action without further notice to plaintiff.

18 It is plaintiff’s responsibility to prosecute this case. Plaintiff must keep the Court
19 informed of any change of address by filing a separate paper with the clerk headed “Notice
20 of Change of Address.” He must comply with the Court’s orders in a timely fashion or ask
21 for an extension of time to do so. Failure to comply may result in the dismissal of this action
22 pursuant to Federal Rule of Civil Procedure 41(b).

23 **IT IS SO ORDERED.**

24 DATED: September 16, 2013


RICHARD SEEBORG
United States District Judge

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