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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BAY MCNEIL,
Plaintiff,
v.
RASHEED KARIM, et al.,
Defendants.

Case No. [16-cv-00418-JD](#)

ORDER OF SERVICE

Plaintiff, a state prisoner, has filed a pro se civil rights complaint under 42 U.S.C. § 1983. He has been granted leave to proceed in forma pauperis.

DISCUSSION

I. 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). In its review, the Court must identify any cognizable claims, and dismiss any claims which 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. *Id.* at 1915A(b)(1),(2). Pro se pleadings must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.” Although a complaint “does not need detailed factual allegations, . . . a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above

1 the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations
2 omitted). A complaint must proffer “enough facts to state a claim to relief that is plausible on its
3 face.” *Id.* at 570. The United States Supreme Court has explained the “plausible on its face”
4 standard of *Twombly*: “While legal conclusions can provide the framework of a complaint, they
5 must be supported by factual allegations. When there are well-pleaded factual allegations, a court
6 should assume their veracity and then determine whether they plausibly give rise to an entitlement
7 to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

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

11 **II. LEGAL CLAIMS**

12 Plaintiff alleges that defendants were deliberately indifferent to his serious medical needs.
13 Deliberate indifference to serious medical needs violates the Eighth Amendment’s proscription
14 against cruel and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *McGuckin v.*
15 *Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on other grounds*, *WMX Technologies, Inc.*
16 *v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc). A determination of “deliberate
17 indifference” involves an examination of two elements: the seriousness of the prisoner’s medical
18 need and the nature of the defendant’s response to that need. *Id.* at 1059.

19 A serious medical need exists if the failure to treat a prisoner’s condition could result in
20 further significant injury or the “unnecessary and wanton infliction of pain.” *Id.* The existence of
21 an injury that a reasonable doctor or patient would find important and worthy of comment or
22 treatment, the presence of a medical condition that significantly affects an individual’s daily
23 activities, or the existence of chronic and substantial pain are examples of indications that a
24 prisoner has a serious need for medical treatment. *Id.* at 1059-60.

25 A prison official is deliberately indifferent if he or she knows that a prisoner faces a
26 substantial risk of serious harm and disregards that risk by failing to take reasonable steps to abate
27 it. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). The prison official must not only “be aware of
28 facts from which the inference could be drawn that a substantial risk of serious harm exists,” but

1 also “must also draw the inference.” *Id.* If a prison official should have been aware of the risk,
2 but did not actually know, the official has not violated the Eighth Amendment, no matter how
3 severe the risk. *Gibson v. County of Washoe*, 290 F.3d 1175, 1188 (9th Cir. 2002). “A difference
4 of opinion between a prisoner-patient and prison medical authorities regarding treatment does not
5 give rise to a § 1983 claim.” *Franklin v. Oregon*, 662 F.2d 1337, 1344 (9th Cir. 1981). In
6 addition “mere delay of surgery, without more, is insufficient to state a claim of deliberate medical
7 indifference.... [Prisoner] would have no claim for deliberate medical indifference unless the
8 denial was harmful.” *Shapely v. Nevada Bd. Of State Prison Comm’rs*, 766 F.2d 404, 407 (9th
9 Cir. 1985).

10 Plaintiff states that in 2010 and 2011 he was treated for glaucoma in both eyes and was
11 informed that he would go blind without eye surgery. His left eye cataract was removed and he
12 received a corneal eye transplant. The treatment was successful and plaintiff was provided
13 prednisolone eye drops. Plaintiff used the prednisolone eye drops from 2010 to 2014. In 2014
14 plaintiff was taken to the hospital due to food poisoning where it was discovered that he had
15 multiple blood clots which were removed. Plaintiff states that the prednisolone eye drops caused
16 the blood clots. Plaintiff alleges that defendants, his eye doctor and treating physicians at his
17 prison, failed to disclose the side effects of the prednisolone eye drops, failed to properly monitor
18 the dosages provided, and failed to tell him that he would need to take the eye drops for the rest of
19 his life. As a result, plaintiff is in fear of having surgery on his right eye and does not believe that
20 he needed any surgery at all and has lost some vision. These allegations are sufficient to proceed.

21 **CONCLUSION**

22 1. The clerk shall issue a summons and the United States Marshal shall serve, without
23 prepayment of fees, copies of the complaint with attachments and copies of this order on the
24 following defendants: Dr. Rasheed Karim, an ophthalmology surgeon and private contractor for
25 CDCR, and Dr. M. Frazee and Dr. F. Von Lintig both at Correctional Training Facility in Soledad,
26 CA.

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- 1 2. In order to expedite the resolution of this case, the Court orders as follows:
- 2 a. No later than sixty days from the date of service, defendant shall file a
- 3 motion for summary judgment or other dispositive motion. The motion shall be supported by
- 4 adequate factual documentation and shall conform in all respects to Federal Rule of Civil
- 5 Procedure 56, and shall include as exhibits all records and incident reports stemming from the
- 6 events at issue. If defendant is of the opinion that this case cannot be resolved by summary
- 7 judgment, he shall so inform the Court prior to the date his summary judgment motion is due. All
- 8 papers filed with the Court shall be promptly served on the plaintiff.
- 9 b. At the time the dispositive motion is served, defendant shall also serve, on a
- 10 separate paper, the appropriate notice or notices required by *Rand v. Rowland*, 154 F.3d 952, 953-
- 11 954 (9th Cir. 1998) (en banc), and *Wyatt v. Terhune*, 315 F.3d 1108, 1120 n. 4 (9th Cir. 2003).
- 12 *See Woods v. Carey*, 684 F.3d 934, 940-941 (9th Cir. 2012) (*Rand* and *Wyatt* notices must be
- 13 given at the time motion for summary judgment or motion to dismiss for nonexhaustion is filed,
- 14 not earlier); *Rand* at 960 (separate paper requirement).
- 15 c. Plaintiff's opposition to the dispositive motion, if any, shall be filed with
- 16 the Court and served upon defendant no later than thirty days from the date the motion was served
- 17 upon him. Plaintiff must read the attached page headed "NOTICE -- WARNING," which is
- 18 provided to him pursuant to *Rand v. Rowland*, 154 F.3d 952, 953-954 (9th Cir. 1998) (en banc),
- 19 and *Klinge v. Eikenberry*, 849 F.2d 409, 411-12 (9th Cir. 1988).
- 20 If defendant files a motion for summary judgment claiming that plaintiff failed to exhaust
- 21 his available administrative remedies as required by 42 U.S.C. § 1997e(a), plaintiff should take
- 22 note of the attached page headed "NOTICE -- WARNING (EXHAUSTION)," which is provided
- 23 to him as required by *Wyatt v. Terhune*, 315 F.3d 1108, 1120 n. 4 (9th Cir. 2003).
- 24 d. If defendant wishes to file a reply brief, he shall do so no later than fifteen
- 25 days after the opposition is served upon him.
- 26 e. The motion shall be deemed submitted as of the date the reply brief is due.
- 27 No hearing will be held on the motion unless the Court so orders at a later date.
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3. All communications by plaintiff with the Court must be served on defendant, or defendant’s counsel once counsel has been designated, by mailing a true copy of the document to defendants or defendants’ counsel.

4. Discovery may be taken in accordance with the Federal Rules of Civil Procedure. No further Court order under Federal Rule of Civil Procedure 30(a)(2) is required before the parties may conduct discovery.

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

IT IS SO ORDERED.

Dated: April 19, 2016



JAMES DONATO
United States District Judge

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NOTICE -- WARNING (SUMMARY JUDGMENT)

If defendants move for summary judgment, they are seeking 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 defendant's 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, your case will be dismissed and there will be no trial.

NOTICE -- WARNING (EXHAUSTION)

If defendants file a motion for summary judgment for failure to exhaust, they are seeking to have your case dismissed. If the motion is granted it will end your case.

You have the right to present any evidence you may have which tends to show that you did exhaust your administrative remedies. Such evidence may be in the form of declarations (statements signed under penalty of perjury) or authenticated documents, that is, documents accompanied by a declaration showing where they came from and why they are authentic, or other sworn papers, such as answers to interrogatories or depositions.

If defendants file a motion for summary judgment for failure to exhaust and it is granted, your case will be dismissed and there will be no trial.

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA

3 BAY MCNEIL,
4 Plaintiff,
5 v.
6 RASHEED KARIM, et al.,
7 Defendants.
8

Case No. [16-cv-00418-JD](#)

CERTIFICATE OF SERVICE

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

11
12 That on April 19, 2016, I SERVED a true and correct copy(ies) of the attached, by placing
13 said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by
14 depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery
15 receptacle located in the Clerk's office.
16

17 Bay McNeil ID: #38906
18 California Medical Facility J-1 Dorm 5 134u
19 P.O. Box 2500
20 Vacaville, CA 95696

21 Dated: April 19, 2016

22
23 Susan Y. Soong
24 Clerk, United States District Court

25
26 By: 
27 LISA R. CLARK, Deputy Clerk to the
28 Honorable JAMES DONATO

United States District Court
Northern District of California