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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NORRIAN B. PHILLIPS,
Plaintiff,
v.
HOYT, et al.,
Defendants.

Case No. [17-cv-01219-JCS](#) (PR)

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

INTRODUCTION

Plaintiff alleges in this 42 U.S.C. § 1983 suit that his jailors denied him his First Amendment right of access to the courts. The complaint (Dkt. No. 1) states a cognizable First Amendment claim against one defendant. Therefore, in response to the complaint, defendant is directed to file a dispositive motion or notice regarding such motion on or before **February 5, 2018**. The Court further directs that defendant adhere to the notice provisions detailed in Sections 2.a and 10 of the conclusion of this order.

DISCUSSION

A. Standard of Review

In its initial review of this pro se complaint, this Court must dismiss any claim that is frivolous or malicious, or fails to state a claim on which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief. *See* 28 U.S.C. § 1915(e). 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

1 claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)
2 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial
3 plausibility when the plaintiff pleads factual content that allows the court to draw the
4 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting
5 *Twombly*, 550 U.S. at 556). Furthermore, a court “is not required to accept legal
6 conclusions cast in the form of factual allegations if those conclusions cannot reasonably
7 be drawn from the facts alleged.” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55
8 (9th Cir. 1994).

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

13 **B. Legal Claims**

14 Plaintiff alleges that Captain Hoyt, a commander at the Santa Clara County Jail, and
15 an unnamed booking administrator violated his First Amendment right of access to the
16 courts by failing to forward legal filings related to criminal proceedings against plaintiff
17 that were pending in the Washington state courts. When liberally construed, plaintiff has
18 stated a First Amendment claim against Captain Hoyt. The claim against the booking
19 administrator is DISMISSED without prejudice because plaintiff has not provided the
20 name of this person. Plaintiff may move for leave to file an amended complaint if he can
21 provide the name of this person.

22 **CONCLUSION**

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

- 24 1. The Clerk of the Court shall issue summons and a Magistrate Judge
25 jurisdiction consent form and the United States Marshal shall serve these forms, without
26 prepayment of fees, along with a copy of the complaint in this matter (Dkt. No. 1), all
27 attachments thereto, and a copy of this order upon Captain Hoyt at the Santa Clara County
28 Jail. The Clerk shall also mail courtesy copies of the complaint and this order to the

1 California Attorney General's Office.

2 2. On or before **February 5, 2018**, defendant shall file a motion for summary
3 judgment or other dispositive motion with respect to the claim(s) in the complaint found to
4 be cognizable above.

5 a. If defendant elects to file a motion to dismiss on the grounds plaintiff
6 failed to exhaust his available administrative remedies as required by 42 U.S.C.
7 § 1997e(a), defendant shall do so in a motion for summary judgment, as required by
8 *Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014).

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. Defendant is advised that summary judgment cannot be granted, nor
12 qualified immunity found, if material facts are in dispute. If any defendant is of the
13 opinion that this case cannot be resolved by summary judgment, he shall so inform the
14 Court prior to the date the summary judgment motion is due.

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

18 4. Defendant shall file a reply brief no later than fifteen (15) days after
19 plaintiff's opposition is filed.

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

22 6. All communications by the plaintiff with the Court must be served on
23 defendant, or defendant's counsel once counsel has been designated, by mailing a true
24 copy of the document to defendant or defendant's counsel.

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

28 8. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the

1 Court informed of any change of address and must comply with the Court’s orders in a
2 timely fashion. Failure to do so may result in the dismissal of this action for failure to
3 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

4 9. Extensions of time must be filed no later than the deadline sought to be
5 extended and must be accompanied by a showing of good cause.

6 10. A decision from the Ninth Circuit requires that pro se prisoner-plaintiffs
7 be given “notice of what is required of them in order to oppose” summary judgment
8 motions at the time of filing of the motions, rather than when the court orders service of
9 process or otherwise before the motions are filed. *Woods v. Carey*, 684 F.3d 934, 939–41
10 (9th Cir. 2012). Defendant shall provide the following notice to plaintiff when they file
11 and serve any motion for summary judgment:

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

16 Rule 56 tells you what you must do in order to oppose a motion for
17 summary judgment. Generally, summary judgment must be granted when
18 there is no genuine issue of material fact — that is, if there is no real
19 dispute about any fact that would affect the result of your case, the party
20 who asked for summary judgment is entitled to judgment as a matter of
21 law, which will end your case. When a party you are suing makes a motion
22 for summary judgment that is properly supported by declarations (or other
23 sworn testimony), you cannot simply rely on what your complaint says.
24 Instead, you must set out specific facts in declarations, depositions, answers
25 to interrogatories, or authenticated documents, as provided in Rule 56(e),
26 that contradict the facts shown in the defendants’ declarations and
27 documents and show that there is a genuine issue of material fact for trial.
28 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.

Rand v. Rowland, 154 F.3d 952, 962-963 (9th Cir. 1998).

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11. Plaintiff has consented to magistrate judge jurisdiction. (Dkt. No. 5.)

IT IS SO ORDERED.

Dated: October 27, 2017



JOSEPH C. SPERO
Chief Magistrate Judge

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CERTIFICATE OF SERVICE

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 October 27, 2017, 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.

Norrian B. Phillips ID: EDU-157/15050851
Santa Clara County Jail
Main Jail Complex
150 W. Hedding Street
San Jose, CA 95110

Dated: October 27, 2017

Susan Y. Soong
Clerk, United States District Court

By: Karen L. Hom
Karen Hom, Deputy Clerk to the
Honorable JOSEPH C. SPERO