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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JESSE CANTU,
Plaintiff,
v.
M. A. VELAZQAZ,
Defendant.

Case No. [17-cv-02636-JD](#)

ORDER OF SERVICE

Re: Dkt. No. 14

Plaintiff, a state prisoner, has filed a pro se civil rights complaint under 42 U.S.C. § 1983. His amended complaint was dismissed with leave to amend and he has filed a second amended complaint.

DISCUSSION

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

1 cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above
2 the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations
3 omitted). A complaint must proffer “enough facts to state a claim to relief that is plausible on its
4 face.” *Id.* at 570. The United States Supreme Court has explained the “plausible on its face”
5 standard of *Twombly*: “While legal conclusions can provide the framework of a complaint, they
6 must be supported by factual allegations. When there are well-pleaded factual allegations, a court
7 should assume their veracity and then determine whether they plausibly give rise to an entitlement
8 to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

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

12 **LEGAL CLAIMS**

13 Plaintiff alleges that his legal documents were confiscated and then discarded. Prisoners
14 have a constitutional right of access to the courts. *See Lewis v. Casey*, 518 U.S. 343, 350 (1996);
15 *Bounds v. Smith*, 430 U.S. 817, 821 (1977). To establish a claim for any violation of the right of
16 access to the courts, the prisoner must prove that there was an inadequacy in the prison’s legal
17 access program that caused him an actual injury. *See Lewis*, 518 U.S. at 350-55. To prove an
18 actual injury, the prisoner must show that the inadequacy in the prison’s program hindered his
19 efforts to pursue a non-frivolous claim concerning his conviction or conditions of confinement.
20 *See id.* at 354-55. Destruction or confiscation of legal work may violate an inmate’s right to
21 access to the courts, *see Vigliotto v. Terry*, 873 F.2d 1201, 1202 (9th Cir. 1989), if plaintiff can
22 establish actual injury, *see Sands v. Lewis*, 886 F.2d 1166, 1171 (9th Cir. 1989).

23 During a search of plaintiff’s cell, correctional officers confiscated a pillow case that was
24 full of papers and had a rope tied to the top. Correctional officers believed it was a manufactured
25 weight bag for exercising which was not permitted. Plaintiff states that the bag contained his legal
26 documents. The pillow case and legal documents were not returned and appear to have been
27 discarded. Plaintiff states that he was hindered in his ability to challenge his conviction.
28 Defendant Velazquez conducted the search and defendants Grant and Buchannan decided to hold

1 onto the papers after they were informed that they were legal papers. These allegations are
2 sufficient to proceed against these defendants.

3 Plaintiff alleges that defendants Lants and Wagner did not return the legal papers.
4 However, these defendants did not return the papers because defendant Buchannan instructed that
5 the papers should not be returned. Because Lants and Wagner were not involved in the
6 confiscation or decision to retain the legal papers they are dismissed from this action with
7 prejudice. Plaintiff alleges that defendants Schrag and Ducart denied plaintiff's inmate appeal
8 regarding the legal papers. However, there is no constitutional right to a prison administrative
9 appeal or grievance system. *See Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003); *Mann v.*
10 *Adams*, 855 F.2d 639, 640 (9th Cir. 1988). These defendants are dismissed with prejudice because
11 plaintiff has failed to state a cognizable claim regarding the denied inmate appeals.

12 Plaintiff has also requested the appointment of counsel. The Ninth Circuit has held that a
13 district court may ask counsel to represent an indigent litigant only in "exceptional
14 circumstances," the determination of which requires an evaluation of both (1) the likelihood of
15 success on the merits, and (2) the ability of the plaintiff to articulate his claims pro se in light of
16 the complexity of the legal issues involved. *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir.
17 1991). Plaintiff appears able to present his claims adequately, and the issues are not complex,
18 therefore the request is denied.

19 CONCLUSION

- 20 1. The motion to appoint counsel (Docket No. 14) is **DENIED**.
- 21 2. The clerk shall issue a summons and the United States Marshal shall serve, without
22 prepayment of fees, copies of the second amended complaint (Docket No. 15) with attachments
23 and copies of this order on the following defendants: Correctional Officer M.A. Velasquez,
24 Correctional Officer J. Grant and Correctional Officer/Supervising Lieutenant T. Buchannon all at
25 Pelican Bay State Prison. Defendants Lants, Wagner, Schrag and Ducart are dismissed with
26 prejudice from this action.

1 3. 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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4. 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.

5. 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.

6. 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: November 7, 2017



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
4 JESSE CANTU,
5 Plaintiff,

6 v.

7 M. A. VELAZQAZ,
8 Defendant.

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CERTIFICATE OF SERVICE

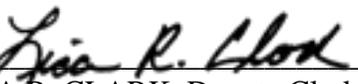
9 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S.
10 District Court, Northern District of California.

11
12 That on November 7, 2017, I SERVED a true and correct copy(ies) of the attached, by
13 placing 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 Jesse Cantu ID: T73021
18 Pelican Bay State Prison
19 P.O. Box 7500
20 Crescent City, CA 95532

21 Dated: November 7, 2017

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