

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

SHANE PERRY,  
Plaintiff,

No. C 09-05461 PJH (PR)

vs.  
SAN FRANCISCO COUNTY JAIL,  
et al.,  
Defendant.

**ORDER OF PARTIAL  
DISMISSAL AND FOR  
SERVICE**

**United States District Court**  
For the Northern District of California

Plaintiff initially wrote to the court describing problems at the San Francisco County Jail. In an effort to protect plaintiff's rights, the letter was treated as an attempt to open a new case. The court reviewed the letter, concluded that it did not state a claim as it did not identify specific defendants and specific claims. The letter was dismissed with leave to amend to file a complaint. Plaintiff's amended complaint was also dismissed with leave to amend as it was again not clear what facts supported plaintiff's claims. Plaintiff has now filed a second amended complaint.

**DISCUSSION**

**A. 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).

1 Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of  
2 the claim showing that the pleader is entitled to relief." "Specific facts are not necessary;  
3 the statement need only "give the defendant fair notice of what the . . . claim is and the  
4 grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citations  
5 omitted). Although in order to state a claim a complaint "does not need detailed factual  
6 allegations, . . . a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief'  
7 requires more than labels and conclusions, and a formulaic recitation of the elements of a  
8 cause of action will not do. . . . Factual allegations must be enough to raise a right to relief  
9 above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)  
10 (citations omitted). A complaint must proffer "enough facts to state a claim to relief that is  
11 plausible on its face." *Id.* at 570. The United States Supreme Court has recently explained  
12 the "plausible on its face" standard of *Twombly*: "While legal conclusions can provide the  
13 framework of a complaint, they must be supported by factual allegations. When there are  
14 well-pleaded factual allegations, a court should assume their veracity and then determine  
15 whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662,  
16 679 (2009). Complaints in pro se prisoner cases, such as this one, must be liberally  
17 construed in favor of the plaintiff when applying the *Twombly/Iqbal* pleading standard.  
18 *Hebbe v. Pliier*, 627 F.3d 338, 341-42 (9th Cir. 2010).

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

23 **B. Legal Claims**

24 Plaintiff alleges that defendants, Sheriffs Deputies Sanchez, Gatman and Domingo  
25 used excessive force against him in violation of the Eighth Amendment. These claims are  
26 sufficient to proceed.

27 The remainder of plaintiff's second amended complaint consists of forty-four pages  
28 of allegations against fifteen other named defendants and several unidentified defendants.

1 Plaintiff describes the medical care he received, but other than providing a diary like  
2 recounting, fails to set forth any specific claim that demonstrates a constitutional violation.  
3 As noted above, one element of a section 1983 claim is that a right secured by the  
4 Constitution or laws of the United States was violated. *Id.* Medical claims like this one are  
5 actionable under section 1983 only if plaintiff is able to allege facts plausibly asserting that  
6 he was the victim of deliberate indifference to a serious medical need, a violation of the  
7 Eighth Amendment's proscription against cruel and unusual punishment. *See Estelle v.*  
8 *Gamble*, 429 U.S. 97, 104 (1976); *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992),  
9 *overruled on other grounds, WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th  
10 Cir. 1997) (en banc). A claim of medical malpractice or negligence is insufficient to make  
11 out a violation of the Eighth Amendment. *See Toguchi v. Chung*, 391 F.3d 1051, 1060-61  
12 (9th Cir. 2004). Simply describing months of medical appointments and stating it was  
13 deficient is insufficient to set forth a cognizable claim. Moreover, many of the actions are  
14 attributed to unidentified defendants. As plaintiff has already been provided multiple  
15 opportunities to plead facts that would plausibly give rise to an entitlement to relief, and has  
16 not done so, the remaining claims and defendants are dismissed.

### 17 CONCLUSION

18 1. Plaintiff's claims against all defendants are **DISMISSED** with prejudice except for  
19 the excessive force claims against defendants Sanchez, Gatman and Domingo.

20 2. The clerk shall issue summons and the United States Marshal shall serve,  
21 without prepayment of fees, copies of the complaint with attachments and copies of this  
22 order on the following defendants: Sheriff Sanchez, Sheriff Gatman and Sheriff Domingo of  
23 the San Francisco Sheriff's Department, San Bruno Facility.

24 3. In order to expedite the resolution of this case, the court orders as follows:

25 a. No later than sixty days from the date of service, defendants shall file a  
26 motion for summary judgment or other dispositive motion. The motion shall be supported  
27 by adequate factual documentation and shall conform in all respects to Federal Rule of  
28 Civil Procedure 56, and shall include as exhibits all records and incident reports stemming

1 from the events at issue. If defendants are of the opinion that this case cannot be resolved  
2 by summary judgment, they shall so inform the court prior to the date their summary  
3 judgment motion is due. All papers filed with the court shall be promptly served on the  
4 plaintiff.

5           b. At the time the dispositive motion is served, defendants shall also serve,  
6 on a separate paper, the appropriate notice or notices required by *Rand v. Rowland*, 154  
7 F.3d 952, 953-954 (9th Cir. 1998) (en banc), and *Wyatt v. Terhune*, 315 F.3d 1108, 1120 n.  
8 4 (9th Cir. 2003). See *Woods v. Carey*, 684 F.3d 934, 940-941 (9th Cir. 2012) (*Rand*  
9 and *Wyatt* notices must be given at the time motion for summary judgment or motion  
10 to dismiss for nonexhaustion is filed, not earlier); *Rand* at 960 (separate paper  
11 requirement).

12           c. Plaintiff's opposition to the dispositive motion, if any, shall be filed with the  
13 court and served upon defendants no later than thirty days from the date the motion was  
14 served upon him. Plaintiff must read the attached page headed "NOTICE -- WARNING,"  
15 which is provided to him pursuant to *Rand v. Rowland*, 154 F.3d 952, 953-954 (9th Cir.  
16 1998) (en banc), and *Klinge v. Eikenberry*, 849 F.2d 409, 411-12 (9th Cir. 1988).

17           If defendants file an unenumerated motion to dismiss claiming that plaintiff failed to  
18 exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a), plaintiff  
19 should take note of the attached page headed "NOTICE -- WARNING (EXHAUSTION),"  
20 which is provided to him as required by *Wyatt v. Terhune*, 315 F.3d 1108, 1120 n. 4 (9th  
21 Cir. 2003).

22           d. If defendants wish to file a reply brief, they shall do so no later than fifteen  
23 days after the opposition is served upon them.

24           e. The motion shall be deemed submitted as of the date the reply brief is  
25 due. No hearing will be held on the motion unless the court so orders at a later date.

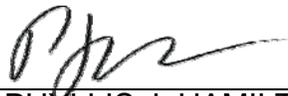
26           4. All communications by plaintiff with the court must be served on defendants, or  
27 defendants' counsel once counsel has been designated, by mailing a true copy of the  
28 document to defendants or defendants' counsel.

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

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

9           **IT IS SO ORDERED.**

10          Dated: November 30, 2012.

  
\_\_\_\_\_  
PHYLLIS J. HAMILTON  
United States District Judge

11  
12  
13          G:\PRO-SE\PJH\CR.09\Perry5461srv.wpd  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**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 an unenumerated motion to dismiss 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 to dismiss and it is granted, your case will be dismissed and there will be no trial.