

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TODD ASHKER and DANNY TROXELL,

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants.

No. 09-05796 CW

ORDER SCREENING
FIRST AMENDED
COMPLAINT UNDER
28 U.S.C. § 1915A
AND GRANTING
PLAINTIFFS LEAVE
TO SERVE
DEFENDANTS

On December 19, 2009, Plaintiffs Todd Ashker and Danny Troxell, state prisoners incarcerated in the Secured Housing Unit at Pelican Bay State Prison (PBSP), filed this civil rights action seeking injunctive relief and damages and requested leave to proceed in forma pauperis. On February 16, 2010, the Court issued an order denying Plaintiffs' request for leave to proceed in forma pauperis, screened the complaint in accordance with 28 U.S.C. § 1915A, dismissed several claims without leave to amend and dismissed the remaining claims with leave to amend. On March 15, 2010, Plaintiff Ashker paid the \$350 filing fee. On May 28, 2010, the Court granted Plaintiffs' motion for reconsideration allowing

1 them to proceed with several claims that had been dismissed without
2 leave to amend in the February 16, 2010 Order.

3 On May 21, 2010, Plaintiffs filed a First Amended Complaint
4 (FAC). In the FAC Plaintiffs remedy most of the deficiencies noted
5 in the February 16, 2010 Order: they have reduced the number of
6 causes of action from seventeen to eleven and they have indicated
7 which Defendants they are suing in regard to each cause of action.
8 The Court finds that the FAC states cognizable claims.

9 However, the FAC does not contain the causes of action that
10 the Court found to be cognizable in the May 28, 2010 Order granting
11 Plaintiffs' motion for reconsideration. Plaintiffs need not file a
12 new Second Amended Complaint containing these causes of action.
13 Rather, they may file a Supplemental FAC that includes only the
14 causes of action found to be cognizable in the May 28, 2010 Order.
15 In the Supplemental FAC, Plaintiffs need not include a separate
16 facts section, but should list each cause of action in a separate
17 section, indicate which Defendants are being sued under each cause
18 of action, and for each cause of action indicate the conduct of
19 each Defendant that violated Plaintiffs' constitutional rights.

20 Therefore, within thirty-five days from the date of this
21 Order, Plaintiffs may file a Supplemental FAC. If Plaintiffs
22 fail to do so within this time period, the claims addressed in the
23 Motion for Reconsideration will be dismissed. If Plaintiffs file a
24 Supplemental FAC, the Court will then review it under 28 U.S.C.
25 § 1915A. Plaintiffs now may serve Defendants against whom they
26 have stated claims in their FAC. After the Court reviews the
27 Supplemental FAC, Plaintiffs then may serve Defendants against whom
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1 they have stated cognizable supplemental claims.

2 Because Plaintiffs are not proceeding in forma pauperis in
3 this action, they may not rely on the United States Marshal for
4 service of the summons and complaint without paying for this
5 service. See Fed. R. Civ. P. 4(c)(3). Title 28 U.S.C.
6 § 1921(a)(A) provides that the United States Marshal shall
7 routinely collect, and the court may tax as costs, fees for serving
8 a summons and complaint. Title 28 C.F.R. § 0.114(a)(3) provides
9 that the United States Marshal shall collect a fee for personal
10 service of a summons and complaint at the rate of \$55.00 per hour,
11 or portion thereof, plus travel expenses. Consequently, Plaintiffs
12 may themselves arrange for service of all Defendants against whom
13 cognizable claims for relief have been found or they may request
14 the Court to order the Marshal to do so. If Plaintiffs wish the
15 Marshal to serve the summons and complaint, they must inform the
16 Court of this within twenty days of the date of this Order and they
17 must arrange to pay the required fee. Rule 4(m) of the Federal
18 Rules of Civil procedure provides:

19 If service and summons of a complaint is not made upon a
20 defendant within 120 days after the filing of the
21 complaint, the court, upon motion or on its own
22 initiative after notice to the plaintiff, shall dismiss
the action without prejudice as to that defendant or
direct that service be effected within a specified time
. . . .

23 Fed. R. Civ. P. 4(m).

24 In the alternative, pursuant to Rule 4(d) of the Federal Rules
25 of Civil Procedure, Plaintiffs may request that Defendants waive
26 service of summons. Pursuant to Rule 4, if Defendants, after being
27 notified of this action and requested by Plaintiffs to waive

1 service of the summons, fail to do so, they will be required to
2 bear the cost of such service unless good cause be shown for their
3 failure to sign and return the waiver form. If service is waived,
4 this action will proceed as if Defendants had been served on the
5 date that the waiver is filed, except that, pursuant to Rule
6 12(a)(1)(A)(ii), Defendants will not be required to serve and file
7 an answer before sixty (60) days from the date on which the request
8 for waiver was sent or twenty (20) days from the date the waiver
9 form is filed, whichever is later. (This allows a longer time to
10 respond than would be required if formal service of summons is
11 necessary.) Defendants are asked to read the statement set forth
12 at the foot of the waiver form that more completely describes the
13 duties of the parties with regard to waiver of service of the
14 summons. Defendants are cautioned that Rule 4(d) of the Federal
15 Rules of Civil Procedure requires them to cooperate in saving
16 unnecessary costs of service of the summons and complaint. With
17 this Order, the Clerk of the Court shall mail to Plaintiffs
18 sufficient copies of the forms: "Notice of a Lawsuit and Request to
19 Waive Service of a Summons" and "Waiver of the Service of Summons."

20 Defendants shall answer the complaint in accordance with the
21 Federal Rules of Civil Procedure. The following briefing schedule
22 shall govern dispositive motions in this action:

23 1. No later than ninety (90) days from the date their answer
24 is due, Defendants shall file a motion for summary judgment or
25 other dispositive motion. The motion shall be supported by
26 adequate factual documentation and shall conform in all respects to
27 Federal Rule of Civil Procedure 56. If Defendants are of the

1 opinion that this case cannot be resolved by summary judgment, they
2 shall so inform the Court prior to the date the summary judgment
3 motion is due. All papers filed with the Court shall be promptly
4 served on Plaintiffs.

5 2. Plaintiffs' opposition to the dispositive motion shall be
6 filed with the Court and served on Defendants no later than sixty
7 (60) days after the date on which Defendants' motion is filed. The
8 Ninth Circuit has held that the following notice should be given to
9 pro se plaintiffs facing a summary judgment motion:

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

15 Rule 56 tells you what you must do in order to
16 oppose a motion for summary judgment. Generally, summary
17 judgment must be granted when there is no genuine issue
18 of material fact--that is, if there is no real dispute
19 about any fact that would affect the result of your case,
20 the party who asked for summary judgment is entitled to
21 judgment as a matter of law, which will end your case.
22 When a party you are suing makes a motion for summary
23 judgment that is properly supported by declarations (or
24 other sworn testimony), you cannot simply rely on what
25 your complaint says. Instead, you must set out specific
26 facts in declarations, depositions, answers to
27 interrogatories, or authenticated documents, as provided
28 in Rule 56(e), that contradict the facts shown in the
29 defendant's declarations and documents and show that
30 there is a genuine issue of material fact for trial. If
31 you do not submit your own evidence in opposition,
32 summary judgment, if appropriate, may be entered against
33 you. If summary judgment is granted in favor of
34 defendants, your case will be dismissed and there will be
35 no trial.

36 Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc).

37 Plaintiffs are advised to read Rule 56 of the Federal Rules of
38 Civil Procedure and Celotex Corp. v. Catrett, 477 U.S. 317 (1986)
39 (party opposing summary judgment must come forward with evidence

1 showing triable issues of material fact on every essential element
2 of his claim). Plaintiffs are cautioned that because they bear the
3 burden of proving their allegations in this case, they must be
4 prepared to produce evidence in support of those allegations when
5 they file their opposition to Defendants' dispositive motion. Such
6 evidence may include sworn declarations from themselves and other
7 witnesses to the incident, and copies of documents authenticated by
8 sworn declaration. Plaintiffs will not be able to avoid summary
9 judgment simply by repeating the allegations of their complaint.

10 3. If Defendants wish to file a reply brief, they shall do so
11 no later than thirty (30) days after the date Plaintiffs'
12 opposition is filed.

13 4. The motion shall be deemed submitted as of the date the
14 reply brief is due. No hearing will be held on the motion unless
15 the Court so orders at a later date.

16 5. Discovery may be taken in this action in accordance with
17 the Federal Rules of Civil Procedure. Leave of the Court pursuant
18 to Rule 30(a)(2) is hereby granted to Defendants to depose
19 Plaintiffs and any other necessary witnesses confined in prison.

20 6. All communications by Plaintiffs with the Court must be
21 served on Defendants, or Defendants' counsel once counsel has been
22 designated, by mailing a true copy of the document to Defendants or
23 Defendants' counsel.

24 7. It is Plaintiffs' responsibility to prosecute this case.
25 Plaintiffs must keep the Court informed of any change of address
26 and must comply with the Court's orders in a timely fashion.

27 8. Extensions of time are not favored, though reasonable
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1 extensions will be granted. Any motion for an extension of time
2 must be filed no later than seven days prior to the deadline sought
3 to be extended.

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5 IT IS SO ORDERED.

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7 Dated: 12/20/2010

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CLAUDIA WILKEN
United States District Judge

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1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA

4 TODD ASHKER et al,

Case Number: CV09-05796 CW

5 Plaintiff,

CERTIFICATE OF SERVICE

6 v.

7 ARNOLD SCHWARZENEGGER et al,

8 Defendant.

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

11 That on December 20, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said
12 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
13 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located
14 in the Clerk's office.

15 Danny Troxell
16 Pelican Bay State Prison
17 B76578
18 P.O. Box 7500
19 D1-120
20 Crescent City, CA 95532

21 Todd Ashker C58191
22 Pelican Bay State Prison
23 P.O. Box 7500
24 D1-SHU
25 Crescent City, CA 95532

26 Dated: December 20, 2010

27 Richard W. Wiekling, Clerk
28 By: Nikki Riley, Deputy Clerk