

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

3 JOSEPH J. FLOWERS,
4 Plaintiff,

No. C 12-3181 YGR (PR)

ORDER OF SERVICE

5 vs.

6 ALAMEDA COUNTY SHERIFF'S DEPUTY R.
7 BIXBY, et al.,

8 Defendants.

9 Plaintiff Joseph J. Flowers, a state prisoner currently incarcerated at the California
10 Correctional Center, filed this *pro se* civil rights action alleging constitutional violations that took
11 place when he was a pretrial detainee at the Alameda County jail. Plaintiff has been granted *in*
12 *forma pauperis* status. The Court initially dismissed the complaint with leave to amend, and
13 Plaintiff has since filed his amended complaint.

14 In its initial review of Plaintiff's complaint, the Court found that Plaintiff stated a cognizable
15 claim against Alameda County Sheriff's Deputies R. Bixby and M. Menard, who allegedly used
16 excessive force against him on May 14, 2008. However, for reasons of judicial economy, the
17 service of this claim was held until Plaintiff filed an amended complaint to correct the deficiencies
18 of his other claims in order for all claims to proceed together. Also in its initial review, the Court
19 dismissed with leave to amend Plaintiff's claims in his complaint against Alameda County Sheriff
20 Gregory Ahern upon finding that it was "not sufficient to assert that [Defendant] Ahern is
21 responsible because he formulated unnamed policies." (Jan. 10, 2013 Order at 2-3.)

22 First, in his amended complaint, Plaintiff failed to corrected the pleading deficiencies as to
23 his claims against Defendant Ahern. In fact, Plaintiff no longer names Defendant Ahern as a
24 Defendant in this action. Therefore, Plaintiff's claim against Defendant Ahern is DISMISSED
25 without leave to amend.

26 Second, Plaintiff seeks to amend his excessive force claim to add Sergeant R. Lapoint as
27 another Defendant responsible for the use of excessive force on May 14, 2008. The Court grants
28 Plaintiff leave to amend to add an excessive force claim against Defendant Lapoint, which is found

1 to be a cognizable due process claim as well. *See Graham v. Connor*, 490 U.S. 386, 395 n.10
2 (1989) (citing *Bell v. Wolfish*, 441 U.S. 520, 535-39 (1979)) (Due Process Clause of the Fourteenth
3 Amendment protects post-arraignment pretrial detainee from use of excessive force that amounts to
4 punishment).

5 Finally, Plaintiff claims in his amended complaint that Defendants Bixby, Menard and
6 Lapoint refused to give him medical treatment for the injuries that resulted from the May 14, 2008
7 excessive force incident. The Court finds that Plaintiff's new allegations state a cognizable due
8 process claim for deliberate indifference to his serious medical needs against these Defendants. *See*
9 *Gibson v. County of Washoe*, 290 F.3d 1175, 1187 (9th Cir. 2002) (citing *Bell*, 441 U.S. at 535)
10 (pre-trial detainee's claim for deliberate indifference to medical needs derives from the Due Process
11 Clause rather than the Eighth Amendment).

12 Accordingly, Defendants Bixby, Menard and Lapoint will be served with the amended
13 complaint and directed to abide by the briefing schedule outlined below.

14 **CONCLUSION**

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

- 16 1. Plaintiff states cognizable due process claims for excessive force and deliberate
17 indifference to serious medical needs against Defendants Bixby, Menard and Lapoint.
- 18 2. Plaintiff's claim against Defendant Ahern is **DISMISSED** without leave to amend.
- 19 3. The Clerk of the Court shall mail a Notice of Lawsuit and Request for Waiver of
20 Service of Summons, two copies of the Waiver of Service of Summons, a copy of the amended
21 complaint and all attachments thereto (Docket No. 7) and a copy of this Order to the following jail
22 officials at the Alameda County Sheriff's Office: **Sergeant R. Lapoint; and Deputies R. Bixby and**
23 **M. Menard**. The Clerk of the Court shall also mail a copy of the complaint and a copy of this
24 Order to the Alameda County Counsel's Office. Additionally, the Clerk shall mail a copy of this
25 Order to Plaintiff.
- 26 4. Defendants are cautioned that Rule 4 of the Federal Rules of Civil Procedure requires
27 them to cooperate in saving unnecessary costs of service of the summons and complaint. Pursuant
28 to Rule 4, if Defendants, after being notified of this action and asked by the Court, on behalf of

1 Plaintiff, to waive service of the summons, fail to do so, they will be required to bear the cost of
2 such service unless good cause be shown for their failure to sign and return the waiver form. If
3 service is waived, this action will proceed as if Defendants had been served on the date that the
4 waiver is filed, except that pursuant to Rule 12(a)(1)(B), Defendants will not be required to serve
5 and file an answer before **sixty (60) days** from the date on which the request for waiver was sent.
6 (This allows a longer time to respond than would be required if formal service of summons is
7 necessary.) Defendants are asked to read the statement set forth at the foot of the waiver form that
8 more completely describes the duties of the parties with regard to waiver of service of the summons.
9 If service is waived after the date provided in the Notice but before Defendants have been
10 personally served, the Answer shall be due **sixty (60) days** from the date on which the request for
11 waiver was sent or **twenty (20) days** from the date the waiver form is filed, whichever is later.

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

14 a. No later than **sixty (60) days** from the date their answer is due, Defendants
15 shall file a motion for summary judgment or other dispositive motion. The motion must be
16 supported by adequate factual documentation, must conform in all respects to Federal Rule of Civil
17 Procedure 56, and must include as exhibits all records and incident reports stemming from the
18 events at issue. A motion for summary judgment also must be accompanied by a *Rand*¹ notice so
19 that Plaintiff will have fair, timely and adequate notice of what is required of him in order to oppose
20 the motion. *Woods v. Carey*, 684 F.3d 934, 935 (9th Cir. 2012) (notice requirement set out in *Rand*
21 must be served concurrently with motion for summary judgment). A motion to dismiss for failure to
22 exhaust available administrative remedies must be accompanied by a similar notice. However, the
23 Court notes that under the *new* law of the circuit, in the rare event that a failure to exhaust is clear on
24 the face of the complaint, Defendants may move for dismissal under Rule 12(b)(6) as opposed the
25 previous practice of moving under an unenumerated Rule 12(b) motion. *Albino v. Baca*, No.
26 10-55702, slip op. at 4 (9th Cir. Apr. 3, 2014) (en banc) (overruling *Wyatt v. Terhune*, 315 F.3d
27 1108, 1119 (9th Cir. 2003), which held that failure to exhaust available administrative remedies

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¹ *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998).

1 under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) (PLRA), should be raised by a
2 defendant as an unenumerated Rule 12(b) motion). Otherwise if a failure to exhaust is *not* clear on
3 the face of the complaint, Defendants must produce evidence proving failure to exhaust in a motion
4 for summary judgment under Rule 56. Id. If undisputed evidence viewed in the light most
5 favorable to Plaintiff shows a failure to exhaust, Defendant are entitled to summary judgment under
6 Rule 56. Id. at 4-5. But if material facts are disputed, summary judgment should be denied and the
7 district judge rather than a jury should determine the facts in a preliminary proceeding. Id. at 5, 10.

8 If Defendants are of the opinion that this case cannot be resolved by summary judgment,
9 they shall so inform the Court prior to the date the summary judgment motion is due. All papers
10 filed with the Court shall be promptly served on Plaintiff.

11 b. Plaintiff's opposition to the dispositive motion shall be filed with the Court
12 and served on Defendants no later than **twenty-eight (28) days** after the date on which Defendants'
13 motion is filed.

14 c. Plaintiff is advised that a motion for summary judgment under Rule 56 of the
15 Federal Rules of Civil Procedure will, if granted, end your case. Rule 56 tells you what you must do
16 in order to oppose a motion for summary judgment. Generally, summary judgment must be granted
17 when there is no genuine issue of material fact -- that is, if there is no real dispute about any fact that
18 would affect the result of your case, the party who asked for summary judgment is entitled to
19 judgment as a matter of law, which will end your case. When a party you are suing makes a motion
20 for summary judgment that is properly supported by declarations (or other sworn testimony), you
21 cannot simply rely on what your complaint says. Instead, you must set out specific facts in
22 declarations, depositions, answers to interrogatories, or authenticated documents, as provided in
23 Rule 56(e), that contradicts the facts shown in the defendant's declarations and documents and show
24 that there is a genuine issue of material fact for trial. If you do not submit your own evidence in
25 opposition, summary judgment, if appropriate, may be entered against you. If summary judgment is
26 granted, your case will be dismissed and there will be no trial. *Rand*, 154 F.3d at 962-63.

27 Plaintiff also is advised that -- in the rare event that Defendants argue that the failure to
28 exhaust is clear on the face of the complaint -- a motion to dismiss for failure to exhaust available

1 administrative remedies under 42 U.S.C. § 1997e(a) will, if granted, end your case, albeit without
2 prejudice. To avoid dismissal, you have the right to present any evidence to show that you did
3 exhaust your available administrative remedies before coming to federal court. Such evidence may
4 include: (1) declarations, which are statements signed under penalty of perjury by you or others who
5 have personal knowledge of relevant matters; (2) authenticated documents -- documents
6 accompanied by a declaration showing where they came from and why they are authentic, or other
7 sworn papers such as answers to interrogatories or depositions; (3) statements in your complaint
8 insofar as they were made under penalty of perjury and they show that you have personal
9 knowledge of the matters state therein. As mentioned above, in considering a motion to dismiss for
10 failure to exhaust under Rule 12(b)(6) or failure to exhaust in a summary judgment motion under
11 Rule 56, the district judge may hold a preliminary proceeding and decide disputed issues of fact
12 with regard to this portion of the case. *Albino*, slip op. at 5, 10.

13 (The notices above do not excuse Defendants' obligation to serve similar notices again
14 concurrently with motions to dismiss for failure to exhaust available administrative remedies and
15 motions for summary judgment. *Woods*, 684 F.3d at 935.)

16 d. Defendants shall file a reply brief no later than **fourteen (14) days** after the
17 date Plaintiff's opposition is filed.

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

20 6. Discovery may be taken in this action in accordance with the Federal Rules of Civil
21 Procedure. Leave of the Court pursuant to Rule 30(a)(2) is hereby granted to Defendants to depose
22 Plaintiff and any other necessary witnesses confined in prison.

23 7. All communications by Plaintiff with the Court must be served on Defendants or
24 their counsel, once counsel has been designated, by mailing a true copy of the document to them.

25 8. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the Court
26 informed of any change of address and must comply with the Court's orders in a timely fashion.
27 Pursuant to Northern District Local Rule 3-11 a party proceeding *pro se* whose address changes
28 while an action is pending must promptly file a notice of change of address specifying the new

1 address. *See* L.R. 3-11(a). The Court may dismiss without prejudice a complaint when: (1) mail
2 directed to the *pro se* party by the Court has been returned to the Court as not deliverable, and
3 (2) the Court fails to receive within sixty days of this return a written communication from the *pro*
4 *se* party indicating a current address. *See* L.R. 3-11(b).

5 9. Extensions of time are not favored, though reasonable extensions will be granted.
6 Any motion for an extension of time must be filed no later than **fourteen (14) days** prior to the
7 deadline sought to be extended.

8 IT IS SO ORDERED.

9 DATED: April 18, 2014


10 **YVONNE GONZALEZ ROGERS**
11 **UNITED STATES DISTRICT COURT JUDGE**

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