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United States District Court
For the Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOHN WESLEY WILLIAMS,

Plaintiff,

v.

A. SOLIS, et al.,

Defendants.

No. C 12-3583 YGR (PR)

ORDER OF SERVICE;

**ORDER DIRECTING DEFENDANTS
TO FILE DISPOSITIVE MOTION OR
NOTICE REGARDING SUCH
MOTION;**

INSTRUCTIONS TO CLERK

INTRODUCTION

This is a federal civil rights action filed pursuant to 42 U.S.C. § 1983 by a *pro se* state prisoner. The Court now reviews the complaint pursuant to 28 U.S.C. § 1915A(a).

Defendants are directed to file a dispositive motion or notice regarding such motion on or before March 20, 2013, unless an extension is granted. **The Court further directs that defendants are to adhere to the new notice provisions detailed in Sections 2.a and 10 of the conclusion of this order.**

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ORDER OF SERVICE

1 As to the first set of claims, the complaint contains sufficient factual matter to state
2 claims against Correctional Officers Cermeno and Mejia for (1) the use of excessive force on
3 June 27, 2011, and (2) making threats and other acts of retaliation. The complaint also states
4 a due process claim against A. Solis, Soto, Trexler, V. Solis, and R. Machuca, for their
5 handling of plaintiff's grievances against Cermeno and Mejia. Liberally construed, these
6 claims are cognizable under § 1983.

7 **CONCLUSION**

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

9 1. The Clerk of the Court shall issue summons and the United States
10 Marshal shall serve, without prepayment of fees, a copy of the complaint in this matter, all
11 attachments thereto, and a copy of this order upon Correctional Officers Cermeno, Mejia,
12 A. Solis, Soto, Trexler, V. Solis, and R. Machuca, at Salinas Valley State Prison. The Clerk
13 shall also mail courtesy copies of the complaint and this order to the California Attorney
14 General's Office.

15 2. No later than ninety (90) days from the date of this order, defendants shall file
16 a motion for summary judgment or other dispositive motion with respect to the claims in the
17 complaint found to be cognizable above.

18 a. If defendants elect to file a motion to dismiss on the grounds plaintiff
19 failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),
20 defendants shall do so in an unenumerated Rule 12(b) motion pursuant to *Wyatt v. Terhune*,
21 315 F.3d 1108, 1119–20 (9th Cir. 2003), cert. denied *Alameida v. Terhune*, 540 U.S. 810
22 (2003). **Plaintiff is “entitled to notice — similar to the notice for motions for summary
23 judgment described in *Rand v. Rowland*, 154 F.3d 952 (9th Cir.1998) (en banc) —
24 explaining the requirements for a response to” a motion to dismiss for failure to
25 exhaust administrative remedies.** *Stratton v. Buck*, No. 10-35656, slip op. 11477, 11483
26 (9th Cir. Sept. 19, 2012).

1 b. Any motion for summary judgment shall be supported by adequate
2 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of
3 Civil Procedure. Defendants are advised that summary judgment cannot be granted, nor
4 qualified immunity found, if material facts are in dispute. If any defendant is of the opinion
5 that this case cannot be resolved by summary judgment, he shall so inform the Court prior to
6 the date the summary judgment motion is due.

7 3. Plaintiff's opposition to the dispositive motion shall be filed with the Court and
8 served on defendants no later than forty-five (45) days from the date defendants' motion is
9 filed.

10 a. In the event the defendants file an unenumerated motion to dismiss
11 under Rule 12(b) (such as a motion to dismiss for failure to exhaust administrative remedies),
12 plaintiff is hereby cautioned as follows:

13 The defendants have made a motion to dismiss pursuant to Rule 12(b) of the
14 Federal Rules of Civil Procedure, on the ground you have not exhausted your administrative
15 remedies. The motion will, if granted, result in the dismissal of your case. When a party you
16 are suing makes a motion to dismiss for failure to exhaust, and that motion is properly
17 supported by declarations (or other sworn testimony) and/or documents, you may not simply
18 rely on what your complaint says. Instead, you must set out specific facts in declarations,
19 depositions, answers to interrogatories, or documents, that contradict the facts shown in the
20 defendant's declarations and documents and show that you have in fact exhausted your
21 claims. If you do not submit your own evidence in opposition, the motion to dismiss, if
22 appropriate, may be granted and the case dismissed.

23 b. In the event defendants file a motion for summary judgment,
24 the Ninth Circuit has held that the following notice should be given to plaintiffs:

25 The defendants have made a motion for summary judgment by which they
26 seek to have your case dismissed. A motion for summary judgment under Rule
27 56 of the Federal Rules of Civil Procedure will, if granted, end your case.
28 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

1 genuine issue of material fact — that is, if there is no real dispute about any
2 fact that would affect the result of your case, the party who asked for summary
3 judgment is entitled to judgment as a matter of law, which will end your case.
4 When a party you are suing makes a motion for summary judgment that is
5 properly supported by declarations (or other sworn testimony), you cannot
6 simply rely on what your complaint says. Instead, you must set out specific
7 facts in declarations, depositions, answers to interrogatories, or authenticated
8 documents, as provided in Rule 56(e), that contradict the facts shown in the
9 defendants’ declarations and documents and show that there is a genuine issue
10 of material fact for trial. If you do not submit your own evidence in opposition,
11 summary judgment, if appropriate, may be entered against you. If summary
12 judgment is granted in favor of defendants, your case will be dismissed and
13 there will be no trial. *See Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998)
14 (en banc). Plaintiff is advised to read Rule 56 of the Federal Rules of Civil
15 Procedure and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (holding party
16 opposing summary judgment must come forward with evidence showing
17 triable issues of material fact on every essential element of his claim). Plaintiff
18 is cautioned that failure to file an opposition to defendants’ motion for
19 summary judgment may be deemed to be a consent by plaintiff to the granting
20 of the motion, and granting of judgment against plaintiff without a trial. *See*
21 *Ghazali v. Moran*, 46 F.3d 52, 53–54 (9th Cir. 1995) (per curiam); *Brydges v.*
22 *Lewis*, 18 F.3d 651, 653 (9th Cir. 1994).

23 4. Defendants shall file a reply brief no later than fifteen (15) days after
24 plaintiff’s opposition is filed.

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

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

7. 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) or Local
Rule 16-1 is required before the parties may conduct discovery.

8. It is plaintiff’s responsibility to prosecute this case. Plaintiff must keep the
court informed of any change of address and 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).

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

3 10. A recent decision from the Ninth Circuit requires that *pro se* prisoner-plaintiffs
4 be given “notice of what is required of them in order to oppose” summary judgment motions
5 at the time of filing of the motions, rather than when the court orders service of process or
6 otherwise before the motions are filed. *Woods v. Carey*, No. 09-15548, slip op. 7871, 7874
7 (9th Cir. July 6, 2012). **Defendants shall provide the following notice to plaintiff when**
8 **they file and serve any motion for summary judgment:**

9 The defendants have made a motion for summary judgment by which they seek
10 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.

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

18 *Rand v. Rowland*, 154 F.3d 952, 962–63 (9th Cir. 1998).

19 **IT IS SO ORDERED.**

20 DATED: January 10, 2013 _____


YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE

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