UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ERIC ZACHARY ANDERSON,

Plaintiff,

v.

M. SOKOLOFF,

Defendant.

Case No. 15-cv-01854-YGR (PR)

ORDER OF PARTIAL DISMISSAL AND SERVICE

I. BACKGROUND

Plaintiff, an inmate at Pelican Bay State Prison ("PBSP"), filed this *pro se* civil rights complaint under 42 U.S.C. § 1983 concerning Defendants' responses to his medical needs on a "lay over" at San Quentin State Prison ("SQSP") during his transfer to PBSP in November of 2013.

In his original complaint, Plaintiff asserted that on November 11, 2013, he was "stabbed 15 times by two inmates with two knives" at California State Prison – Sacramento ("C.S.P. SAC"). Dkt. 1 at 3. Plaintiff claimed that "within 15 hours" he was transferred on November 12, 2013 out of C.S.P. SAC, and taken to SQSP for a "layover" on his way to PBSP. *Id.* Plaintiff alleged Registered Nurse M. Sokoloff refused to examine Plaintiff's injuries while he was at SQSP during the over-night lay over. *Id.* Plaintiff added that Defendant Sokoloff falsely indicated that he had "NO WOUNDS." *Id.* However, Plaintiff claimed that Defendant Sokoloff correctly indicated that Plaintiff was prescribed "T3" as pain medication on his "body chart," but that Defendant Sokoloff failed to provide him with his medication. *Id.* Plaintiff claimed that he "was forced to endure [his] pain all night on [his] lay over at SQSP with no medical treatment" and that the next day, he was still denied his medication and "forced in a prison bus and [driven] 9 hours to [PBSP] . . . ." *Id.* Plaintiff claimed that on November 14, 2013, he was finally given his medication at PBSP. *Id.*

Plaintiff had also named as Defendants Physicians E. Tootell and Lisa Pratt, as well as Medical Hiring Authority Andrew Deems, but added no facts in his original complaint linking them to his allegations of wrongdoing.

The Court reviewed Plaintiff's original complaint and dismissed it with leave to amend. The Court determined that such a claim of an isolated incident of Defendant Sokoloff failing to examine Plaintiff and denying him medication amounted at most to negligence, which does not violate a prisoner's Eighth Amendment rights. Dkt. 15 at 4 (citing *Toguchi v. Chung*, 391 F.3d 1051, 1060-61 (9th Cir. 2004); *see, e.g.*, *Frost v. Agnos*, 152 F.3d 1124, 1130 (9th Cir. 1998)). The Court pointed out that Plaintiff had conceded that Defendant Sokoloff's actions amounted to "medical negligence." *Id.* (quoting Dkt. 1 at 4). The Court also noted that Plaintiff had failed to mention any of the remaining named Defendants in the "Statement of Claim" section of his complaint. *Id.* (citing Dkt. 1 at 3). Therefore, the Court directed Plaintiff to file an amended complaint to correct the aforementioned deficiencies of his deliberate indifference claim against Defendants.

Plaintiff then filed an amended complaint, which is now before the Court for review under 28 U.S.C. § 1915A. Plaintiff again names Defendant Sokoloff as a Defendant, along with two new Defendants: John Doe #1 ("Medical Supervisor" of Defendant Sokoloff) and John Doe #2 ("Co-Worker" of Defendant Sokoloff).

II. 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). The court must identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint "is frivolous, malicious, or fails to state a claim upon which relief may be granted," or "seeks monetary relief from a defendant who is immune from such relief." *Id.* § 1915A(b). *Pro se* pleadings must be liberally construed, however. *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." "Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citations omitted). Although in

order to state a claim 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 cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). A complaint must proffer "enough facts to state a claim for relief that is plausible on its face." *Id.* at 570.

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

B. Legal Claims

1. Claims Against Defendants Tootell, Pratt and Deems

The Court notes that nowhere in his amended complaint does Plaintiff amend his claims against Defendants Tootell, Pratt and Deems. The time to file these amended claims has passed, and Plaintiff has failed to do so. Accordingly, the claims against Defendants Tootell, Pratt and Deems are DISMISSED without prejudice. Dismissal is without leave to amend because Plaintiff has been given an opportunity to amend this claim and it appears that further amendment would be futile.

2. Deliberate Indifference Claim Against Defendants Sokoloff and John Doe #2

Deliberate indifference to serious medical needs violates the Eighth Amendment's proscription against cruel and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). A "serious medical need" exists if the failure to treat a prisoner's condition could result in further significant injury or the "unnecessary and wanton infliction of pain." *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992) (citing *Estelle*, 429 U.S. at 104), *overruled in part on other grounds by WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc). A prison official is "deliberately indifferent" if he knows that a prisoner faces a substantial risk of serious harm and disregards that risk by failing to take reasonable steps to abate it. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

Neither negligence nor gross negligence warrant liability under the Eighth Amendment. *Id.* at 835-36 & n4. An "official's failure to alleviate a significant risk that he should have perceived but did not, . . . cannot under our cases be condemned as the infliction of punishment." *Id.* at 838. Instead, "the official's conduct must have been 'wanton,' which turns not upon its effect on the prisoner, but rather, upon the constraints facing the official." *Frost*, 152 F.3d at 1128 (citing *Wilson v. Seiter*, 501 U.S. 294, 302-03 (1991). Prison officials violate their constitutional obligation only by "intentionally denying or delaying access to medical care." *Estelle*, 429 U.S. at 104-05.

In his amended complaint, Plaintiff re-alleges the aforementioned background relating to the fact that he had been stabbed prior to arriving at SQSP for the layover on November 12, 2013. In response to the Court's Order of Dismissal With Leave to Amend, Plaintiff now claims that Defendants Sokoloff's and John Doe #2's failure to provide him with pain management treatment for his injuries from the stabbing incident amounted to deliberate indifference to his serious medical needs. Plaintiff also now claims that he was suffering from additional injuries due to "one gun shot from a 40 mill[imeter] block gun." Dkt. 16 at 6.[1] As to Defendant Sokoloff, Plaintiff states the following:

> . . . upon my arrival to SQSP R&R I informed R.N. Sokoloff I was a victim of a stabbing assault and gunshot less than 24 hours ago and the bus ride here has made my wounds bleed and puss and are throbbing horribly. I asked for my medication that the [doctor] in C.S.P. SAC prescribed me after getting my stitches Tylenol Three with Cod[e]ine. I was to get six a day and hadn[']t received anything. [Defendant Sokoloff] seemed irritated with my pleas for medical help. After approx. 2 and a half hours of pleading for medical attention, [Defendant Sokoloff] came to my holding cell and said "O Rite [sic] already I get it your [sic] in pain and need your T3's." And [Defendant Sokoloff] wrote T3 on my body chart in order to make me think she was going to get my meds. However, what [Defendant Sokoloff] really did was falsify my CDCR 7219 body chart to say I had no wounds at all in order for her to not have to tend to my medical needs.

Id. at 8-9. Plaintiff adds as follows:

> [b]y not examining [his] wounds and falsifying [his] body chart

[1] Page number citations refer to those assigned by the Court's electronic case management filing system and not those assigned by Plaintiff.

> [Defendant Sokoloff] knowingly cleared [him] for a nine hour bus ride in shackles[,] waist chains and cuffs locked in a two man [metal] cage with throbbing, bloody and puss[y] wounds that ultimately were worsened by continual battering of the hard plastic and [metal] cage around him . . . .

Id. at 9. Regarding Defendant John Doe #2, Plaintiff alleges the following: "Although [Defendant John Doe #2] did not falsif[y] my examination, [Defendant John Doe #2] did disregard my pleas for medical treatment, pain medication and willingly allowed me to suffer in pain . . . ." *Id.* at 11. These new allegations, liberally construed, state a claim of deliberate indifference against Defendants Sokoloff and John Doe #2.

However, regarding Defendant John Doe #2, Plaintiff describes this Defendant as "M. Sokoloff['s] co-worker on 11-12-13 in R&R," but states that he does know this Defendant's name. *Id.* at 3. Although the use of "John Doe" to identify a defendant is not favored in the Ninth Circuit, *see Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980); *Wiltsie v. Cal. Dep't of Corrections*, 406 F.2d 515, 518 (9th Cir. 1968), situations may arise where the identity of alleged defendants cannot be known prior to the filing of a complaint. In such circumstances, the plaintiff should be given an opportunity through discovery to identify the unknown defendants, unless it is clear that discovery would not uncover their identities or that the complaint should be dismissed on other grounds. *See Gillespie*, 629 F.2d at 642; *Velasquez v. Senko*, 643 F. Supp. 1172, 1180 (N.D. Cal. 1986). Plaintiff must provide to the Court the name Defendant John Doe #2 by the date scheduled in this Order for any served Defendant to file a dispositive motion. Failure to do so will result in dismissal of Defendant John Doe #2 without prejudice to Plaintiff filing a new action against him or her.

3. Supervisory Liability Claim

Plaintiff sues Defendant John Doe #1 (described as "Medical Supervisor of M. Sokoloff"), in his or her supervisory capacity. First, as mentioned above, the use of "John Doe" to identify a defendant is not favored in the Ninth Circuit. *See Gillespie*, 629 F.2d at 642. Moreover, Plaintiff does not allege facts demonstrating that Defendant John Doe #1 violated his federal rights, but seems to claim Defendant John Doe #1 is liable based on the conduct of his or her subordinate, Defendant Sokoloff. There is, however, no respondeat superior liability under section 1983 solely

because a defendant is responsible for the actions or omissions of another. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). A supervisor generally "is only liable for constitutional violations of his subordinates if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them." *Id.* A supervisor may also be held liable if he or she implemented "a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation." *Redman v. County of San Diego*, 942 F.2d 1435, 1446 (9th Cir. 1991) (en banc). Because there is no vicarious liability under section 1983 and Plaintiff does not include allegations showing that Defendant John Doe #1 was personally involved in the constitutional deprivation, Plaintiff's claim against this Defendant is therefore DISMISSED without prejudice.

III. CONCLUSION

For the foregoing reasons, the Court orders as follows:

1. The claims against Defendants Tootell, Pratt and Deems are DISMISSED without prejudice and without any further leave to amend.

2. Plaintiff's new allegations in his amended complaint state a claim of deliberate indifference against Defendants Sokoloff and John Doe #2. Plaintiff must provide to the Court the name Defendant John Doe #2 by the dispositive motion due date indicated below. Failure to do so will result in dismissal of Defendant John Doe #2 without prejudice to Plaintiff filing a new action against him or her.

3. Plaintiff's supervisory liability claim against Defendant John Doe #1 is DISMISSED without prejudice.

4. The Clerk of the Court shall mail a Notice of Lawsuit and Request for Waiver of Service of Summons, two copies of the Waiver of Service of Summons, a copy of the amended complaint and all attachments thereto (dkt. 16), and a copy of this Order to **Registered Nurse M. Sokoloff** at SQSP.

The Clerk shall also mail a copy of the amended complaint and a copy of this Order to the State Attorney General's Office in San Francisco. Additionally, the Clerk shall mail a copy of this Order to Plaintiff.

5. Defendant is cautioned that Rule 4 of the Federal Rules of Civil Procedure requires Defendant to cooperate in saving unnecessary costs of service of the summons and amended complaint. Pursuant to Rule 4, if Defendant, after being notified of this action and asked by the court, on behalf of Plaintiff, to waive service of the summons, fail to do so, Defendant will be required to bear the cost of such service unless good cause be shown for Defendant's failure to sign and return the waiver form. If service is waived, this action will proceed as if Defendant had been served on the date that the waiver is filed, except that pursuant to Rule 12(a)(1)(B), Defendant will not be required to serve and file an answer before **sixty (60) days** from the date on which the request for waiver was sent. (This allows a longer time to respond than would be required if formal service of summons is necessary.) Defendant is asked to read the statement set forth at the foot of the waiver form that more completely describes the duties of the parties with regard to waiver of service of the summons. If service is waived after the date provided in the Notice but before Defendant has been personally served, the Answer shall be due **sixty (60) days** from the date on which the request for waiver was sent or **twenty (20) days** from the date the waiver form is filed, whichever is later.

6. Defendant shall answer the amended complaint in accordance with the Federal Rules of Civil Procedure. The following briefing schedule shall govern dispositive motions in this action:

a. No later than **sixty (60) days** from the date the answer is due, Defendant shall file a motion for summary judgment or other dispositive motion. The motion must be supported by adequate factual documentation, must conform in all respects to Federal Rule of Civil Procedure 56, and must include as exhibits all records and incident reports stemming from the events at issue. A motion for summary judgment also must be accompanied by a *Rand*[2] notice so that Plaintiff will have fair, timely and adequate notice of what is required of him in order to oppose the motion. *Woods v. Carey*, 684 F.3d 934, 935 (9th Cir. 2012) (notice requirement set out in Rand must be served concurrently with motion for summary judgment). A motion to dismiss

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

for failure to exhaust available administrative remedies must be accompanied by a similar notice. However, the court notes that under the new law of the circuit, in the rare event that a failure to exhaust is clear on the face of the amended complaint, Defendant may move for dismissal under Rule 12(b)(6) as opposed to the previous practice of moving under an unenumerated Rule 12(b) motion. *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014) (en banc) (overruling *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003), which held that failure to exhaust available administrative remedies under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), should be raised by a defendant as an unenumerated Rule 12(b) motion). Otherwise if a failure to exhaust is not clear on the face of the amended complaint, Defendant must produce evidence proving failure to exhaust in a motion for summary judgment under Rule 56. *Id.* If undisputed evidence viewed in the light most favorable to Plaintiff shows a failure to exhaust, Defendant is entitled to summary judgment under Rule 56. *Id.* But if material facts are disputed, summary judgment should be denied and the district judge rather than a jury should determine the facts in a preliminary proceeding. *Id.* at 1168.

If Defendant is of the opinion that this case cannot be resolved by summary judgment, Defendant shall so inform the court prior to the date the summary judgment motion is due. All papers filed with the court shall be promptly served on Plaintiff.

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

c. Plaintiff is advised that 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 amended 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 contradicts 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. *Rand*, 154 F.3d at 962-63.

Plaintiff also is advised that—in the rare event that Defendant argues that the failure to exhaust is clear on the face of the amended complaint—a motion to dismiss for failure to exhaust available administrative remedies under 42 U.S.C. § 1997e(a) will, if granted, end your case, albeit without prejudice. To avoid dismissal, you have the right to present any evidence to show that you did exhaust your available administrative remedies before coming to federal court. Such evidence may include: (1) declarations, which are statements signed under penalty of perjury by you or others who have personal knowledge of relevant matters; (2) authenticated documents—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; (3) statements in your amended complaint insofar as they were made under penalty of perjury and they show that you have personal knowledge of the matters state therein. As mentioned above, in considering a motion to dismiss for failure to exhaust under Rule 12(b)(6) or failure to exhaust in a summary judgment motion under Rule 56, the district judge may hold a preliminary proceeding and decide disputed issues of fact with regard to this portion of the case. *Albino*, 747 F.3d at 1168.

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

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

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

7. Discovery may be taken in this action in accordance with the Federal Rules of Civil

Procedure. Leave of the court pursuant to Rule 30(a)(2) is hereby granted to Defendant to depose Plaintiff and any other necessary witnesses confined in prison.

8. 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 them.

9. 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. Pursuant to Northern District Local Rule 3-11 a party proceeding *pro se* whose address changes while an action is pending must promptly file a notice of change of address specifying the new address. *See* L.R. 3-11(a). The court may dismiss without prejudice a complaint when: (1) mail directed to the *pro se* party by the court has been returned to the court as not deliverable, and (2) the court fails to receive within sixty days of this return a written communication from the *pro se* party indicating a current address. *See* L.R. 3-11(b).

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

IT IS SO ORDERED.

Dated: April 20, 2016

YVONNE GONZALEZ ROGERS
United States District Judge

United States District Court
Northern District of California