UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TONI DROUIN,

Plaintiff,

v.

CONTRA COSTA COUNTY, et al.,

Defendants.

Case No. 15-cv-03694-KAW

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

Re: Dkt. No. 62

On August 12, 2015, Plaintiff Toni Drouin filed the instant 42 U.S.C. § 1983 suit against Contra Costa County ("County") and Doe Defendants, alleging violations of Plaintiff's Eighth Amendment right to be free from cruel and unusual punishment. (Compl., Dkt. No. 1.) On November 17, 2016, Plaintiff filed a third amended complaint, which for the first time also named individual Defendants Deputy Geist, Deputy Christina Rodriguez, Nurse Maria Skallet, Nurse Brenda Baldwin, Nurse Joung Soon Park, and Nurse Librada Bacalzo. (Third Amended Compl., TAC, Dkt. No. 54.) Against these individual Defendants, Plaintiff also alleged violations of her Eighth Amendment right to be free from cruel and unusual punishment. (TAC ¶ 24.)

Defendants Rodriguez, Skallet, Park, and Bacalzo now move to dismiss Plaintiff's complaint against them.[1] (Defs.' Mot., Dkt. No. 62.) The Court deems the matter suitable for disposition without hearing pursuant to Civil Local Rule 7-1(b), and VACATES the hearing set for March 16, 2017. Having considered the papers filed by the parties and the relevant legal authority, the Court GRANTS IN PART and DENIES IN PART the motion to dismiss, for the

[1] Defendants assert that Defendants Geist and Baldwin were not properly served. (See Defs.' Mot. at 5 n.2; Dkt. No. 71.) Therefore, the motion is not brought on behalf of either of these Defendants, although the motion to dismiss does address the claims against Defendant Baldwin.

reasons set forth below.

I. BACKGROUND

A. Factual Background

Plaintiff is partially paralyzed due to a spinal cord injury. (TAC ¶ 5.) This is "readily apparent upon casual observation of [her] movements." (Id. ¶ 9.) On March 13, 2015, Plaintiff was in the County's custody, and was transferred from Martinez Jail to West County Detention Center. (Id. ¶ 8.) Although the Martinez Jail had appropriate handicapped facilities, the section of the West County Detention Center to which Plaintiff was transferred did not. (Id.)

During her processing, Plaintiff repeatedly informed Defendant Skallet about the nature of her disability, specifically regarding her medical need for a wheelchair. (Id. ¶ 10.) Defendant Skallet allegedly failed to properly note Plaintiff's need for a wheelchair, instead making a note that Plaintiff could "only walk with crutches." (Id.) Plaintiff was given crutches, which she could not use safely, instead of a wheelchair. (Id. ¶ 11.)

On March 15, 2015, Plaintiff fell and broke her femur bone, causing excruciating pain. (Id. ¶ 12.) Plaintiff alleges that she did not receive medical attention until four days later, despite her unbearable pain and repeated pleas for medical care. (Id. ¶ 13.) With respect to the individual Defendants, Plaintiff alleges that Defendants Geist and Rodriguez ignored her pleas for medical care on March 15, 16, and 17. (Id. ¶ 14.) On March 15, 2015, Defendant Park "made only a cursory examination of [her] . . . , and unreasonably determined that there were 'no signs of fracture to right leg,'" before clearing Plaintiff to remain in the facility without ordering further testing or treatment. (Id. ¶ 15.) On March 17, 2015, Defendant Baldwin "unreasonably considered Plaintiff's distal femoral fracture to be nothing more than a 'knee injury,' and denied Plaintiff the extra mattress that Plaintiff was requesting." (Id. ¶ 16.)

Several days after her injury, Plaintiff was prescribed more powerful pain medication but became violently ill and nauseous, and was vomiting frequently. (Id. ¶ 17.) Plaintiff alleges that Defendant Bacalzo "failed to take any action, and in response to Plaintiff's request for a modified diet responded indifferently that 'everyone gets the same food' and that Plaintiff would not receive 'special treatment.'" (Id.)

As a result of severe infections from her injury, Plaintiff has been hospitalized repeatedly, and the affected leg may need to be amputated. (Id. ¶ 18.)

B. Procedural Background

Plaintiff filed the instant action on August 12, 2015. On October 14, 2015, Defendants moved to dismiss the complaint. (Dkt. No. 9.) The Court granted in part and denied in part the motion, finding that Plaintiff had not alleged sufficient facts to state a viable Monell claim. (Mot. to Dismiss Ord., Dkt. No. 22.) Plaintiff filed an amended complaint on November 30, 2015, and Defendant County filed its answer on December 29, 2015. (Dkt. Nos. 23, 26.)

Plaintiff filed the operative complaint on November 17, 2016, and Defendants Rodriguez, Skallet, Park, and Bacalzo timely moved to dismiss Plaintiff's complaint against them. Defendants also filed a request for judicial notice. (Request for Judicial Notice, RJN, Dkt. No. 63.) Plaintiff filed her opposition to Defendants' motion and the request for judicial notice on February 22, 2017. (Plf.'s Opp'n, Dkt. No. 67; Plf.'s Opp'n to RJN, Dkt. No. 68.) Defendants filed their replies as to the motion and request for judicial notice on March 1, 2017. (Defs.' Reply, Dkt. No. 69; Defs.' Reply re RJN, Dkt. No. 70.)

II. LEGAL STANDARD

A. Request for Judicial Notice

A district court may take judicial notice of facts not subject to reasonable dispute that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b); United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th Cir. 1993). A court may, therefore, take judicial notice of matters of public record. United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980).

B. Motion to Dismiss

Under Federal Rule of Civil Procedure 12(b)(6), a party may file a motion to dismiss based on the failure to state a claim upon which relief may be granted. A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001).

In considering such a motion, a court must "accept as true all of the factual allegations

contained in the complaint," Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam) (citation omitted), and may dismiss the case or a claim "only where there is no cognizable legal theory" or there is an absence of "sufficient factual matter to state a facially plausible claim to relief." Shroyer v. New Cingular Wireless Servs., Inc., 622 F.3d 1035, 1041 (9th Cir. 2010) (citing Ashcroft v. Iqbal, 556 U.S. 662, 677-78 (2009); Navarro, 250 F.3d at 732) (internal quotation marks omitted).

A claim is plausible on its face when a plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678 (citation omitted). In other words, the facts alleged must demonstrate "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

"Threadbare recitals of the elements of a cause of action" and "conclusory statements" are inadequate. Iqbal, 556 U.S. at 678; see also Epstein v. Wash. Energy Co., 83 F.3d 1136, 1140 (9th Cir. 1996) ("[C]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim."). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully . . . When a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 557) (internal citations omitted).

Generally, if the court grants a motion to dismiss, it should grant leave to amend even if no request to amend is made "unless it determines that the pleading could not possibly be cured by the allegation of other facts." Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000) (citations omitted).

III. DISCUSSION

A. Request for Judicial Notice

Defendants request that the Court take judicial notice of excerpts of Plaintiff's West County Detention Facility medical records, which were prepared by Defendants Park, Bacalzo, and Baldwin. (RJN, Exh. A.) Defendants assert that the Court may take judicial notice of these

records because the operative complaint incorporates the medical records, as it "quotes and relies on the contents of these medical records." (RJN at 2; see TAC ¶¶ 15-17.) Plaintiff objects to the request for judicial notice, arguing that while the parties may agree that the records exist, they disagree on "the propriety and veracity of the entries in question." (Plf.'s Opp'n to RJN at 2.)[2]

The "incorporation by reference" doctrine "permits [a court] to take into account documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the plaintiff's pleading." Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005). Thus, "[e]ven if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim." United States v. Richie, 342 F.3d 903, 908 (9th Cir. 2003). The court, however, "is not required to incorporate documents by reference." Davis v. HSBC Bank Nev., N.A., 691 F.3d 1152, 1159 (9th Cir. 2012).

Here, the Court declines to take judicial notice of the excerpts of Plaintiff's medical records. While Plaintiff does quote from the medical records, these quotes are not extensive, and used only to show what actions Defendants Park, Baldwin, and Bacalzo stated they took with respect to Plaintiff. These limited quotations are insufficient to allow the Court to take judicial notice of the entirety of the medical record, particularly when Defendants seek to introduce the records for the truth of the matter contained therein to "establish that both [Defendants] Park and Baldwin took reasonable action in response to [Plaintiff]'s complaints." (Defs.' Reply at 6.) The Court therefore DENIES Defendants' request for judicial notice.

B. Motion to Dismiss

"The Eighth Amendment's prohibition of cruel and unusual punishment requires that prison and jail officials take reasonable measures for the safety of inmates." Mirabel v. Smith, No.

[2] At this point, the Court finds it necessary to observe that portions of Plaintiff's briefs are highly unprofessional. For example, Plaintiff's sarcastic reference to individual Defendants as "so-called 'individual defendants'" and to Defendants Park and Baldwin as "so-called medical professionals" is not proper language to use in court filings. (See Plf.'s Opp'n to RJN at 1; Plf.'s Opp'n at 1, 8.) Plaintiff's repeated use of all-caps in the text is also not appropriate. (See Plf.'s Opp'n to RJN at 2; Plf.'s Opp'n at 3, 6.) Finally, Plaintiff's use of a rhetorical question ("An icepack, a painkiller, and an extra pillow?") before declaring it "[p]athetic," is unbecoming. (Plf.'s Opp'n at 8.) Plaintiff must refrain from using such rhetoric in all future filings before this Court.

C 12-3075-SI, 2012 WL 5425407, at *1 (N.D. Cal. Nov. 6, 2012) (citing Farmer v. Brennan, 511 U.S. 825, 834 (1994).) "A prison or jail official violates the Eighth Amendment only when two requirements are met: (1) the deprivation alleged is, objectively, sufficiently serious, and (2) the official is, subjectively, deliberately indifferent to the inmate's safety." Id. (citing Farmer, 511 U.S. at 834.)

With respect to the first requirement, "[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), overruled on other grounds by WMX Techs., Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997). "The existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain are examples of indications that a prisoner has a 'serious' need for medical treatment." Id. at 1059-60 (citations omitted).

As to the second requirement, to establish deliberate indifference, "a person is liable for denying a prisoner needed medical care only if the person knows of and disregards an excessive risk to inmate health and safety." Gibson v. Cty. of Washoe, Nev., 290 F.3d 1175, 1187 (9th Cir. 2002), overruled on other grounds by Castro v. Cty. of L.A., 833 F.3d 1060, 1077 (9th Cir. 2016). Furthermore, "[i]n order to know of the excessive risk, it is not enough that the person merely be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, he must also draw that inference." Id. at 1188 (internal modifications omitted). Thus, even "[i]f a person should have been aware of the risk, but was not, then the person has not violated the Eighth Amendment, no matter how severe the risk." Id. (citing Jeffers v. Gomez, 267 F.3d 895, 914 (9th Cir. 2001)); see also Toguchi v. Chung, 391 F.3d 1051, 1059 (9th Cir. 2004) ("there must be a conscious disregard of a serious risk of harm for deliberate indifference to exist").

In the instant case, the parties primarily dispute whether Plaintiff has alleged sufficient facts that the individual Defendants were deliberately indifferent to a serious medical need.

i. Defendant Skallet

Plaintiff alleges that Defendant Skallet was informed by Plaintiff about the nature of

Plaintiff's disability, "specifically regarding her medical need for a wheel chair to allow her to move as required within designated locations inside the jail." (TAC ¶ 10.) Defendant Skallet, however, failed to properly note Plaintiff's need for a wheelchair and instead made a note that Plaintiff could "only walk with crutches." (Id.)

Defendant contends that this allegation is not sufficient because Plaintiff does not allege facts necessary to "enable [Defendant] Skallet to assess [Plaintiff's] claim of a 'medical need' for a wheelchair," or that her "authorization of crutches, as opposed to a wheelchair, 'was medically unacceptable under the circumstances' and was chosen 'in conscious disregard to an excessive risk to plaintiff's health.'" (Defs.' Mot. at 8.) The Court disagrees that this is not adequate. Plaintiff clearly alleges not only that her partial paralysis is "readily apparent upon casual observation of Plaintiff's movements," but that she informed Defendant Skallet of "the nature of her disability" and "her medical need for a wheel chair." In short, Plaintiff has alleged that Defendant Skallet actually knew of Plaintiff's medical needs. (TAC ¶ 10.) Despite this need for a wheelchair, Defendant Skallet allegedly authorized only the use of crutches.

Defendants also rely on slip and fall cases to argue that "federal courts have consistently held that slippery prison floors do not violate the Eighth Amendment," relying on Butler v. CDCR, No. CV-08-0857-RHW, 2010 WL 2672180 (E.D. Cal. July 2, 2010). (Defs.' Reply at 7.) Butler, however, challenged the slippery floor itself, based on water on the dining room floors. Butler, 2010 WL 2672180, at *3. Here, however, the issue is not the slippery floor itself, but the failure to authorize the use of a wheelchair, rather than crutches. In short, Plaintiff alleges her injury resulted not simply from slipping on the prison floor, but because she was given crutches instead of a wheelchair that she required to navigate the prison floors. Thus, it was the act of giving crutches rather than a wheelchair that created the heightened risk that allegedly resulted in Plaintiff's injury.

Notably, the Court previously found such allegations adequate to allege a constitutional violation in the County's first motion to dismiss. (Mot. to Dismiss Ord. at 6.) There, Plaintiff had alleged that she had partial paralysis that was readily apparent, that she had informed someone regarding the nature of her disability and her need for a wheelchair to move inside the jail, and that

she broke her femur bone. (Id.) The Court found that "[w]hen taken as true, the Court may infer that, at a minimum, the jail officials with whom Plaintiff spoke had both objective and subjective knowledge that providing Plaintiff with crutches . . . posed a serious risk of harm." (Id. (emphasis added.)) Thus, the Court held that Plaintiff had sufficiently alleged a constitutional violation. Here, Plaintiff alleges the same facts, adding only the name of the individual Plaintiff specifically informed about her disability and medical need for a wheelchair. The Court concludes these allegations are sufficient to allege a constitutional violation against Defendant Skallet.

ii. Defendant Rodriguez

Plaintiff alleges that Defendant Rodriguez "ignored and displayed deliberate indifference towards Plaintiff's multiple pleas for medical care for her injury on March 15, 16, and 17, 2015." (TAC ¶ 14.)

Defendants argue that this is a conclusory allegation, and that Plaintiff fails to allege facts that "[Defendant] Rodriguez had actual knowledge of the injury at the time [Plaintiff] allegedly requested medical assistance." (Defs.' Mot. at 8.) Defendants also contend that Plaintiff fails to allege any facts indicating that Defendant Rodriguez had reason to believe the medical treatment Plaintiff did receive from Defendants Park and Baldwin were insufficient, or that Defendant Rodriguez's failure to respond resulted in any harm to Plaintiff in light of the treatment received. (Id.; Defs.' Reply at 8.) Plaintiff responds that the knowledge element is satisfied because "there will be testimony that a loud 'pop' or 'cracking sound' could be heard throughout the pod at the moment that Plaintiff's femoral bone was broken . . . ." (Plf.'s Opp'n at 9.)

The Court agrees that Plaintiff has not alleged facts that Defendant Rodriguez had actual knowledge of Plaintiff's injury when Plaintiff requested medical assistance. For starters, Plaintiff's argument that the knowledge element is satisfied by the sound of the "pop" or "cracking sound" when Plaintiff's femoral bone was broken is not in the complaint; therefore, it cannot be considered for purposes of this motion. Furthermore, this allegation alone is insufficient because it does not show that Defendant Rodriguez heard the "pop" or "cracking sound," such as by alleging that Defendant Rodriguez was in the pod at the time Plaintiff's femoral bone was broken. At best, Plaintiff alleges that Defendant Rodriguez ignored Plaintiff's cries for help, but does not

allege that Defendant Rodriguez had any knowledge of the injury that prompted the cries for help, whether by hearing the bone being broken or because Plaintiff informed Defendant Rodriguez that her femur was broken. Because Plaintiff fails to allege that Defendant Rodriguez was actually aware of the injury, and therefore the risk to Plaintiff, the Court dismisses Plaintiff's claim against Defendant Rodriguez without prejudice.

iii. Defendants Park and Baldwin

Plaintiff alleges that Defendant Park conducted only a "cursory examination" or Plaintiff on March 15, before determining that there were "no signs of fracture" to Plaintiff's leg. (TAC ¶ 15.) Similarly, Plaintiff alleges that Defendant Baldwin "unreasonably considered" Plaintiff's broken femur "to be nothing more than a knee injury," before denying Plaintiff the extra mattress that Plaintiff had requested. (TAC ¶ 16.)

Defendants argue that Plaintiff does not allege that Defendants Park and Baldwin had actual knowledge that Plaintiff's leg was broken, such as by "plead[ing] any facts regarding detectible, objective indicia of the 'severely broken' femur." (Defs.' Mot. at 6; Defs.' Reply at 5.)[3] Plaintiff does not respond to this inability to allege actual knowledge, instead challenging the need for knowledge. (Plf.'s Opp'n at 7-8.) Plaintiff's argument, however, is contrary to established Supreme Court and Ninth Circuit law, which require that an "official know[] of and disregard[] an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer, 511 U.S. at 837 (emphasis added). Plaintiff may disagree with the law, but her pleadings must still comply with the law's requirements. Of course, whether a prison official has this requisite knowledge can be demonstrated by circumstantial evidence, such that "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." Id. at 843. This still requires, at the very least, that Plaintiff allege facts from which the inference could be drawn that a substantial risk of serious harm exists. Because

[3] Defendants also argue that Defendants Park's and Baldwin's medical notes showed that they took reasonable action in response to her complaints. (Defs.' Mot. at 7; Defs.' Reply at 6.) This argument, however, depends on facts outside of the complaint. Because the Court has denied Defendants' request for judicial notice, it does not consider this argument.

Plaintiff fails to allege any facts that would establish actual knowledge, such as visible indicia of her broken femur, the Court dismisses Plaintiff's claim against Defendants Park and Baldwin without prejudice.

iv. Defendant Bacalzo

Finally, Plaintiff alleges that after she was prescribed more powerful pain medication, Defendant Bacalzo failed to take any actions, including not acceding to Plaintiff's request for a modified diet by responding that "everyone gets the same food" and that Plaintiff would not receive "special treatment." (TAC ¶ 17.)

Defendants argue that Plaintiff does not allege "factual allegations establishing that [Plaintiff] faced a serious medical risk as a result of the 'more powerful' pain medication." (Defs.' Mot. at 8; Defs.' Reply at 8.) Defendants also contend that Plaintiff does not allege factual allegations that Defendant Bacalzo was deliberately indifferent. (Defs.' Mot. at 8; Defs.' Reply at 8.) Plaintiff responds that Defendant Bacalzo's "indifference was found in the callous manner in which she declined to approve a modified diet being requested by Plaintiff due to the extreme nausea and vomiting Plaintiff was experiencing due either to an adverse reaction to the drugs that had been prescribed or to the shock and infection her body was experiencing due to the injury itself." (Plf.'s Opp'n at 9.)

As with Plaintiff's argument with respect to Defendant Rodriguez, Plaintiff's allegation that she had requested a modified diet due to the nausea and vomiting she was experiencing is not in the complaint. Instead, she alleges that she was suffering from nausea and vomiting, but does not allege that she ever informed Defendant Bacalzo of these symptoms, or that she requested the modified diet to combat these symptoms. (See TAC ¶ 17.) Absent such facts, Plaintiff has not sufficiently alleged that Defendant Bacalzo had knowledge of the symptoms Plaintiff was suffering from, or that Plaintiff was in risk of further significant injury or the unnecessary and wanton infliction of pain because of Defendant Bacalzo's refusal to approve a modified diet. Accordingly, Plaintiff's claim against Defendant Bacalzo is dismissed without prejudice.

v. Leave to Amend

Defendants argue that leave to amend should be denied because Plaintiff had already

conducted fact discovery, and therefore "had an adequate opportunity to develop a factual basis for any claims against Individual Defendants and to plead those claims." (Defs.' Mot. at 9; see also Defs.' Reply at 8-9.) Leave to amend, however, should be granted "unless [the court] determines that the pleading could not possibly be cured by the allegation of other facts." Lopez, 203 F.3d at 1127. Given that this is the first complaint in which Plaintiff has alleged claims against the individual Defendants, and that there is no showing that the pleading "could not possibly be cured by the allegation of other facts," the Court will give Plaintiff one more opportunity to amend the complaint.

C. Service of the Complaint

At the hearing, the parties discussed whether Defendants Baldwin and Geist should be dismissed under Federal Rule of Civil Procedure 4(m) for failure to serve. (Dkt. No. 80; see also Dkt. No. 75.) Based on Plaintiff's assertion that he would be able to resolve the service issues in one week, the Court allowed Plaintiff one week from the hearing date to re-serve Defendants Baldwin and Geist. (Dkt. No. 80.) Plaintiff has since filed a proof of service regarding service on Defendant Baldwin, but did not seek issuance of summons as to Defendant Geist. (Dkt. No. 83.)

Because Plaintiff did not timely serve Defendant Geist, as required by the Court, the causes of action against Defendant Geist are DISMISSED without prejudice pursuant to Federal Rule of Civil Procedure 4(m).

IV. CONCLUSION

For the reasons stated above, Defendants' motion to dismiss is GRANTED IN PART AND DENIED IN PART WITH LEAVE TO AMEND. Additionally, the claims against Defendant Geist are dismissed without prejudice for failure to timely serve. Plaintiff shall file her fourth amended complaint within 14 days of this order.

IT IS SO ORDERED.

Dated: April 3, 2017

Kandis Westmore

KANDIS A. WESTMORE
United States Magistrate Judge