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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NOU THAO,
Plaintiff,
v.
CALIFORNIA PRISON INDUSTRY
AUTHORITY, et al.,
Defendants.

Case No. [16-cv-01098-PJH](#)

ORDER OF SERVICE

Plaintiff, a state prisoner, has filed a pro se civil rights complaint under 42 U.S.C. § 1983. He has been granted leave to proceed in forma pauperis.

DISCUSSION

I. 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). In its review the court must identify any cognizable claims, and dismiss any claims which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. *Id.* at 1915A(b)(1),(2). Pro se pleadings must be liberally construed. *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)

1 (citations omitted). Although in order to state a claim a complaint “does not need detailed
2 factual allegations, . . . a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment]
3 to relief' requires more than labels and conclusions, and a formulaic recitation of the
4 elements of a cause of action will not do. . . . Factual allegations must be enough to
5 raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550
6 U.S. 544, 555 (2007) (citations omitted). A complaint must proffer "enough facts to state
7 a claim to relief that is plausible on its face." *Id.* at 570. The United States Supreme
8 Court has recently explained the “plausible on its face” standard of *Twombly*: “While legal
9 conclusions can provide the framework of a complaint, they must be supported by factual
10 allegations. When there are well-pleaded factual allegations, a court should assume their
11 veracity and then determine whether they plausibly give rise to an entitlement to relief.”
12 *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

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

17 **II. LEGAL CLAIMS**

18 Plaintiff states that he was exposed to lead paint and asbestos while working in a
19 prison facility.

20 Deliberate indifference to an inmate's health or safety violates the Eighth
21 Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). A prison official violates the
22 Eighth Amendment only when two requirements are met: (1) the deprivation alleged is,
23 objectively, sufficiently serious, and (2) the official is, subjectively, deliberately indifferent
24 to the inmate's health or safety. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994).
25 Under the deliberate indifference standard, the prison official must not only "be aware of
26 facts from which the inference could be drawn that a substantial risk of serious harm
27 exists," but "must also draw the inference." *Id.* at 837.

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1 Plaintiff states that in May and early June 2012 he was required to clean and work
2 in an area containing lead paint and asbestos. He was not given proper protective
3 clothing and the wrong type of mask. While he was provided a shower he was not given
4 fresh clothing and had to wear the same clothing that was exposed to the lead paint and
5 asbestos. Plaintiff does not describe any health effects but states prison officials will not
6 have him tested and he continues to be exposed to asbestos. Plaintiff seeks money
7 damages and injunctive relief. Liberally construed, plaintiff's claims for exposure to lead
8 paint and asbestos and failure to have him tested are sufficient to proceed.

9 **CONCLUSION**

10 1. The clerk shall issue a summons and the United States Marshal shall serve,
11 without prepayment of fees, copies of the complaint with attachments and copies of this
12 order on the following defendants, who apparently work in the Prison Industries Section
13 of San Quentin State Prison (CAL-PIA): Joe Dobie, Gary Loreda, Brad Smith, Jeremy
14 Young, and Philip Early.

15 2. In order to expedite the resolution of this case, the court orders as follows:

16 a. No later than sixty days from the date of service, defendants shall file a
17 motion for summary judgment or other dispositive motion. The motion shall be supported
18 by adequate factual documentation and shall conform in all respects to Federal Rule of
19 Civil Procedure 56, and shall include as exhibits all records and incident reports
20 stemming from the events at issue. If defendant is of the opinion that this case cannot be
21 resolved by summary judgment, she shall so inform the court prior to the date her
22 summary judgment motion is due. All papers filed with the court shall be promptly served
23 on the plaintiff.

24 b. At the time the dispositive motion is served, defendants shall also serve,
25 on a separate paper, the appropriate notice or notices required by *Rand v. Rowland*, 154
26 F.3d 952, 953-954 (9th Cir. 1998) (en banc), and *Wyatt v. Terhune*, 315 F.3d 1108, 1120
27 n. 4 (9th Cir. 2003). See *Woods v. Carey*, 684 F.3d 934, 940-941 (9th Cir. 2012) (*Rand*
28 and *Wyatt* notices must be given at the time motion for summary judgment or motion to

1 dismiss for nonexhaustion is filed, not earlier); *Rand* at 960 (separate paper requirement).

2 c. Plaintiff's opposition to the dispositive motion, if any, shall be filed with
3 the court and served upon defendants no later than thirty days from the date the motion
4 was served upon him. Plaintiff must read the attached page headed "NOTICE --
5 WARNING," which is provided to him pursuant to *Rand v. Rowland*, 154 F.3d 952, 953-
6 954 (9th Cir. 1998) (en banc), and *Klinge v. Eikenberry*, 849 F.2d 409, 411-12 (9th Cir.
7 1988).

8 If defendants file a motion for summary judgment claiming that plaintiff failed to
9 exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),
10 plaintiff should take note of the attached page headed "NOTICE -- WARNING
11 (EXHAUSTION)," which is provided to him as required by *Wyatt v. Terhune*, 315 F.3d
12 1108, 1120 n. 4 (9th Cir. 2003).

13 d. If defendant wishes to file a reply brief, he shall do so no later than
14 fifteen days after the opposition is served upon her.

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

17 3. All communications by plaintiff with the court must be served on defendant, or
18 defendant's counsel once counsel has been designated, by mailing a true copy of the
19 document to defendants or defendants' counsel.

20 4. Discovery may be taken in accordance with the Federal Rules of Civil
21 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) is
22 required before the parties may conduct discovery.

23 5. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the court
24 informed of any change of address by filing a separate paper with the clerk headed
25 "Notice of Change of Address." He also must comply with the court's orders in a timely
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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).

IT IS SO ORDERED.

Dated: April 22, 2016



PHYLLIS J. HAMILTON
United States District Judge

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NOTICE -- WARNING (SUMMARY JUDGMENT)

If defendants move for summary judgment, they are seeking 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.

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 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 contradict 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.

NOTICE -- WARNING (EXHAUSTION)

If defendants file a motion for summary judgment for failure to exhaust, they are seeking to have your case dismissed. If the motion is granted it will end your case.

You have the right to present any evidence you may have which tends to show that you did exhaust your administrative remedies. Such evidence may be in the form of declarations (statements signed under penalty of perjury) or authenticated documents, that is, 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. If defendants file a motion for summary judgment for failure to exhaust and it is granted, your case will be dismissed and there will be no trial.

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CERTIFICATE OF SERVICE

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

That on April 22, 2016, I SERVED a true and correct copy(ies) of the attached, by
placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter
listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an
inter-office delivery receptacle located in the Clerk's office.

Nou Thao ID: Prisoner Id J-27560
San Quentin State Prison
San Quentin, CA 94974

Dated: April 22, 2016

Susan Y. Soong
Clerk, United States District Court



By: _____
Nichole Peric, Deputy Clerk to the
Honorable PHYLLIS J. HAMILTON