UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CHUNG KAO,

Plaintiff,

v.

R. SORIA, et al.,

Defendants.

Case No. 17-cv-00873-HSG (PR)

ORDER OF SERVICE

INTRODUCTION

Plaintiff, a state prisoner incarcerated at San Quentin State Prison ("SQSP"), filed this *pro se* civil rights complaint under 42 U.S.C. § 1983 claiming that he was retaliated against for pursuing an administrative grievance. Plaintiff is granted leave to proceed in forma pauperis in a separate order. The complaint is now before the Court for review pursuant to 28 U.S.C. § 1915A.

BACKGROUND

The complaint alleges the following:

In December 2013, defendant SQSP correctional officer R. Soria confiscated plaintiff's privileged legal correspondence at the SQSP library and prepared a false entry for plaintiff's prison file. Plaintiff requested that Soria amend or remove the entry from plaintiff's prison file , but Soria refused to respond. Plaintiff proceeded to file an inmate grievance challenging Soria's actions, and he pursued the grievance through to the final level of review. The inmate appeal was assigned for review as a "staff complaint" against Soria, which meant that Soria would be notified of the allegations.

At the time of these events, Soria's father worked at SQSP as a correctional captain. Soria used his father's position to obtain a post in plaintiff's housing unit and began working as one of

plaintiff's housing unit officers on February 4, 2014. On the morning of February 5, 2014, Soria, along with defendant housing unit officers B. Coffer, S. Arana, and B. Broyles woke plaintiff up, removed him from his cell, locked him in a stand-up holding cage, and proceeded to search plaintiff's cell for nearly three hours. The search was conducted while defendants housing unit sergeant J. Van Blarcom and lieutenant Hal Williams were present in the housing unit, sanctioning the search and giving directions. The search was later joined by defendant Investigative Services Unit sergeant A. Lujan.

During the search, defendant correctional lieutenants D. McGraw and T.A. Lee escorted plaintiff to the unit sergeant's office ostensibly to conduct an interview concerning the staff complaint against defendant Soria. During the interview, McGraw and Lee pressured plaintiff to withdraw the staff complaint. Plaintiff did not.

As a result of the cell search, defendants confiscated a typewriter and a bottle of glue, both of which were authorized by prison regulations as allowable inmate personal property. The glue was discarded at once, and defendant Lujan took the typewriter to the SQSP Investigative Services Unit. Defendants also confiscated a cell phone and cell phone charger, which they claimed were hidden in the typewriter.

Plaintiff was issued a Rules Violation Report ("RVR") for possession of the cell phone and charger. He pled guilty to the charge in exchange for defendant Williams's promise to return the typewriter to plaintiff. Williams never returned the typewriter. Plaintiff further contends that the prison refused to permit him to send the typewriter home, as allowed by prison policy

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*, 127 S. Ct. 2197, 2200 (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*, 127 S. Ct. 1955, 1964-65 (2007) (citations omitted). A complaint must proffer "enough facts to state a claim for relief that is plausible on its face." *Id.* at 1974.

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

"Within the prison context, a viable claim of First Amendment retaliation entails five basic elements: (1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal." *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005) (footnote omitted). Prisoners may not be retaliated against for exercising their right of access to the courts. *See Schroeder v. McDonald*, 55 F.3d 454, 461 (9th Cir. 1995). The right of access to the courts extends to established prison grievance procedures. *See Bradley v. Hall*, 64 F.3d 1276, 1279 (9th Cir. 1995) *overruled on other grounds by Shaw v. Murphy*, 532 U.S. 223, 230, n.2 (2001). Thus, a prisoner may not be retaliated against for using such procedures. *See Rhodes*, 408 F.3d at 567.

Liberally construed, the allegations of the complaint state a Section 1983 retaliation claim against R. Soria, B. Coffer. S. Arana, R. Broyles, J. Van Blarcom, Hal Williams, D. McGraw,

T.A. Lee, and A. Lujan.

Ordinarily, due process of law requires notice and an opportunity for some kind of hearing prior to the deprivation of a significant property interest. *See Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19 (1978). However, neither the negligent nor intentional deprivation of property states a due process claim under § 1983 if the deprivation was random and unauthorized. *See Parratt v. Taylor*, 451 U.S. 527, 535-44 (1981) (state employee negligently lost prisoner's hobby kit), *overruled in part on other grounds by Daniels v. Williams*, 474 U.S. 327, 330-31 (1986); *Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (intentional destruction of inmate's property). This is because "[t]he state can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct." *Hudson*, 468 U.S. at 533.

If the deprivation is not random and unauthorized, but the result of "established state procedure," the availability of a post-termination tort action does not necessarily provide due process. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435-37 (1982) (failure on part of state commission to hold hearing within statutory time limits not permitted to terminate timely filed claim). *Parratt* does not apply where the state has procedures designed to control the actions of state officials and the officials act pursuant to those procedures. *See Zimmerman v. City of Oakland*, 255 F.3d 734, 738 (9th Cir. 2001). In those instances, the Fourteenth Amendment requires "an opportunity . . . granted at a meaningful time and in a meaningful manner, . . . for a hearing appropriate to the nature of the case." *Logan*, 455 U.S. at 437.

Liberally construed, plaintiff also states a cognizable claim that he was deprived of his personal property in violation of his due process rights as against defendant Williams.

Plaintiff also alleges state law claims for: (1) intentional infliction of emotional distress as against R. Soria, B. Coffer. S. Arana, R. Broyles, J. Van Blarcom, Hal Williams, D. McGraw, T.A. Lee, and A. Lujan; (2) violation of the Information Practices Act, Cal. Civil Code § 1798.45-1798.53, as against R. Soria; (3) conversion of property as against R. Soria, B. Coffer. S. Arana, R. Broyles, J. Van Blarcom, Hal Williams, D. McGraw, T.A. Lee, and A. Lujan; and (4) negligence as against R. Soria, B. Coffer. S. Arana, R. Broyles, J. Van Blarcom, Hal Williams,

D. McGraw, T.A. Lee, and A. Lujan. The Court will exercise supplemental jurisdiction over these state law claims pursuant to 28 U.S.C. § 1367.

Plaintiff also names CDCR Director Scott Kernan and Does 1-10 as defendants, but provides no facts linking them to his allegations of wrongdoing. Therefore these defendants will be dismissed from this action. If plaintiff can allege facts to establish liability against these defendants, he may move to amend his pleadings.

Plaintiff is advised that a supervisor is not liable merely because the supervisor is responsible, in general terms, for the actions of another. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989); *Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 680-81 (9th Cir. 1984). A supervisor may be liable only on a showing of (1) personal involvement in the constitutional deprivation or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation. *Henry A. v. Willden*, 678 F.3d 991, 1003-04 (9th Cir. 2012).

Further, plaintiff is advised that the use of "Jane Doe" or "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). Although the use of a Doe defendant designation is acceptable to withstand dismissal of a complaint at the initial review stage, using a Doe defendant designation creates its own problem: the person identified as a Doe cannot be served with process until he or she is identified by his or her real name. If plaintiff moves for leave to file an amended complaint that alleges claims against any Doe defendant, plaintiff must take steps promptly to discover the full name (i.e., first and last name) of each such Doe defendant and provide that information to the Court in his proposed amended complaint. The burden remains on the plaintiff; the Court cannot undertake to investigate the names and identities of unnamed defendants.

Finally, the Court notes that according to the complaint, plaintiff filed an action in the Marin County Superior Court in May 2015 "naming the same defendants and including the same causes of action." Compl. at 6. Plaintiff states that the instant action "is filed while the aforementioned proceeding is still pending in the state court" and that "[t]he filing of this action is in effect to remove the state court action to this Court." *Id.* Plaintiff's apparent request that the

Court take pendent jurisdiction over a pending state court action is improper. If plaintiff is a defendant in a state court action, he may seek to remove it to federal court, provided that it could have been brought in federal court in the first instance. *See* 28 U.S.C. § 1441(a). Plaintiff cannot remove a state court action in which he is the plaintiff.

Furthermore, the Court cannot ignore the potential that res judicata or collateral estoppel may bar this action after judgment is rendered in the state court proceedings. Under the Federal Full Faith and Credit Statute, 28 U.S.C. § 1738, "a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984); *see Adam Bros. Farming, Inc. v. County of Santa Barbara*, 604 F.3d 1142, 1148 (9th Cir. 2010) (same). A civil rights action under section 1983 may be dismissed as barred by res judicata, for example, if a prior California state court judgment rendered a valid judgment on the merits in favor of a defendant. *See Takahashi v. Bd. of Trustees*, 783 F.2d 848, 850-51 (9th Cir. 1986). Accordingly, defendants are advised that the Court will entertain a motion to stay the instant action pending resolution of plaintiff's state court action. *See Nakash v. Marciano*, 882 F.2d 1411, 1415 (1989) ("[A] federal court may stay its proceedings in deference to pending state proceedings.").

CONCLUSION

For the foregoing reasons, the Court orders as follows:

1. The claims against defendants Scott Kernan and Does 1-10 are DISMISSED without prejudice. The Clerk shall terminate these entities as defendants on the court docket.

2. The Clerk shall issue summons and the United States Marshal shall serve, without prepayment of fees, a copy of the complaint with all attachments thereto, and a copy of this order upon defendants **R. Soria, B. Coffer. S. Arana, R. Broyles, J. Van Blarcom, Hal Williams, D. McGraw, T.A. Lee,** and **A. Lujan** at **San Quentin State Prison**.

A courtesy copy of the complaint with attachments and this order shall also be mailed to the California Attorney General's Office.

3. In order to expedite the resolution of this case, the Court orders as follows:

a. No later than **91 days** from the date this Order is filed, defendants must file and serve a motion for summary judgment or other dispositive motion, or a motion to stay as indicated above. If defendants are of the opinion that this case cannot be resolved by summary judgment, defendants must so inform the Court prior to the date the motion is due. A motion for summary judgment also must be accompanied by a *Rand* 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, 939 (9th Cir. 2012) (notice requirement set out in *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998), must be served concurrently with motion for summary judgment). A motion to dismiss for failure to exhaust available administrative remedies similarly must be accompanied by a *Wyatt* notice. *Stratton v. Buck*, 697 F.3d 1004, 1008 (9th Cir. 2012).

b. Plaintiff's opposition to the summary judgment or other dispositive motion must be filed with the Court and served upon defendants no later than **28 days** from the date the motion is filed. Plaintiff must bear in mind the notice and warning regarding summary judgment provided later in this order as he prepares his opposition to any motion for summary judgment. Plaintiff also must bear in mind the notice and warning regarding motions to dismiss for non-exhaustion provided later in this order as he prepares his opposition to any motion to dismiss.

c. Defendants **shall** file a reply brief no later than **14 days** after the date the opposition is filed. The motion shall be deemed submitted as of the date the reply brief is due. No hearing will be held on the motion.

4. 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 complaint says. Instead, you must set out specific facts in declarations, depositions, answers to interrogatories, or authenticated documents,

as provided in Rule 56(c), that contradict the facts shown in the defendants' 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 v. Rowland,* 154 F.3d 952, 962-63 (9th Cir. 1998) (en banc) (App. A).

Plaintiff also is advised that 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. You must "develop a record" and present it in your opposition in order to dispute any "factual record" presented by defendants in their motion to dismiss. *Wyatt v. Terhune*, 315 F.3d 1108, 1120 n.14 (9th Cir. 2003).

(The *Rand* and *Wyatt* notices above do not excuse defendants' obligation to serve said notices again concurrently with motions to dismiss for failure to exhaust available administrative remedies and motions for summary judgment. *Woods*, 684 F.3d at 939).

5. All communications by plaintiff with the Court must be served on defendants' counsel by mailing a true copy of the document to defendants' counsel. The Court may disregard any document which a party files but fails to send a copy of to his opponent. Until a defendants' counsel has been designated, plaintiff may mail a true copy of the document directly to defendants, but once a defendant is represented by counsel, all documents must be mailed to counsel rather than directly to that defendant.

6. 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 is required before the parties may conduct discovery.

7. Plaintiff is responsible for prosecuting this case. Plaintiff must promptly 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). Plaintiff must file a notice of change of address in every pending case every time he is moved to a new facility.

8. Any motion for an extension of time must be filed no later than the deadline sought to

be extended and must be accompanied by a showing of good cause.

9. Plaintiff is cautioned that he must include the case name and case number for this case on any document he submits to the Court for consideration in this case.

IT IS SO ORDERED.

Dated: 4/6/2017

HAYWOOD S. GILLIAM, JR.
United States District Judge

United States District Court
Northern District of California