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E-FILED - 4/7/11

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

EUGENE HAMILTON,)	No. C 11-0227 RMW(PR)
)	
Plaintiff,)	ORDER OF SERVICE;
)	DIRECTING DEFENDANTS TO
v.)	FILE DISPOSITIVE MOTION
)	OR NOTICE REGARDING
J. RHOADS, et al.,)	SUCH MOTION
)	
Defendants.)	

Plaintiff, a state prisoner proceeding pro se, filed a civil rights complaint pursuant to 42 U.S.C. § 1983. Plaintiff is granted leave to proceed in forma pauperis in a separate order. For the reasons stated below, the court orders service upon named defendants.

DISCUSSION

A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that 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. See 28 U.S.C. § 1915A(b)(1), (2). Pro se pleadings must, however, be liberally construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988).

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

5 B. Plaintiff's Claims

6 Liberally construed, plaintiff's assertions in his complaint that Defendants were
7 deliberately indifferent to his serious medical needs are sufficient to state a cognizable federal
8 civil rights claim.

9 C. Motion for Preliminary Injunction

10 Plaintiff has concurrently filed a motion for preliminary injunction. Specifically, he asks
11 this court to mandate his immediate transfer to the California Medical Facility in Vacaville,
12 California. Federal Rule of Civil Procedure 65 sets forth the procedure for issuance of a
13 preliminary injunction. Prior to granting a preliminary injunction, notice to the adverse party is
14 required. See Fed. R. Civ. P. 65(a)(1). Therefore, a motion for preliminary injunction generally
15 cannot be decided until the parties to the action are served. See Zepeda v. INS, 753 F.2d 719,
16 727 (9th Cir. 1983). Further, a motion for preliminary injunction may be granted without written
17 or oral notice to the adverse party or that party's attorney only if: (1) it clearly appears from
18 specific facts shown by affidavit or by the verified complaint that immediate and irreparable
19 injury, loss or damage will result to the applicant before the adverse party or the party's attorney
20 can be heard in opposition, and (2) the applicant's attorney certifies in writing the efforts, if any,
21 which have been made to give notice and the reasons supporting the claim that notice should not
22 be required. See Fed. R. Civ. P. 65(b). Here, plaintiff has not been able to meet his burden.
23 Thus, plaintiff's motion is DENIED without prejudice as premature.

24 D. Motion for Appointment of Counsel

25 Plaintiff requests the appointment of counsel. However, there is no constitutional right to
26 counsel in a civil case unless an indigent litigant may lose his physical liberty if he loses the
27 litigation. See Lassiter v. Dep't of Social Services, 452 U.S. 18, 25 (1981). The decision to
28 request counsel to represent an indigent litigant under § 1915 is within "the sound discretion of

1 the trial court and is granted only in exceptional circumstances.” Franklin v. Murphy, 745 F.2d
2 1221, 1236 (9th Cir. 1984). A finding of the “exceptional circumstances” of the plaintiff seeking
3 assistance requires an evaluation of the likelihood of the plaintiff’s success on the merits and an
4 evaluation of the plaintiff’s ability to articulate his claims pro se in light of the complexity of the
5 legal issues involved. See Agyeman v. Corrections Corp. of America, 390 F.3d 1101, 1103 (9th
6 Cir. 2004). Thus far, plaintiff has not demonstrated any exceptional circumstances regarding his
7 ability to articulate his remaining cognizable claim pro se. However, should the issue become
8 more complex, the court will sua sponte consider appointing counsel on plaintiff’s behalf.

9 CONCLUSION

10 For the foregoing reasons, the court hereby orders as follows:

11 1. Plaintiff’s motion for a preliminary injunction is DENIED. Plaintiff’s motion for
12 appointment of counsel is DENIED.

13 3. The clerk shall issue a summons and the United States Marshal shall serve,
14 without prepayment of fees, copies of the complaint in this matter (docket nos. 1 and 2), all
15 attachments thereto, and copies of this order on **Nurse Practitioner J. Rhoads, Registered**
16 **Nurse C. Shyates, Health Care Appeals Coordinator E. Talanoa, Correctional Nurse J.**
17 **Chu, Health Care Appeals Coordinator D. Boyett, Warden A. Hedgpeth, and Registered**
18 **Nurse I. Larcon at Salinas Valley State Prison.** The clerk shall also serve a copy of this order
19 on plaintiff and mail a courtesy copy of the amended complaint to the California Attorney
20 General’s Office.

21 4. No later than **ninety (90) days** from the date of this order, defendants shall file a
22 motion for summary judgment or other dispositive motion with respect to the cognizable claim
23 in the complaint.

24 a. If defendants elect to file a motion to dismiss on the grounds that plaintiff
25 failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a),
26 defendants shall do so in an unenumerated Rule 12(b) motion pursuant to Wyatt v. Terhune, 315
27 F.3d 1108, 1119-20 (9th Cir. 2003).

28 b. Any motion for summary judgment shall be supported by adequate factual

1 documentation and shall conform in all respects to Rule 56 of the Federal Rules of Civil
2 Procedure. **Defendants are advised that summary judgment cannot be granted, nor**
3 **qualified immunity found, if material facts are in dispute. If defendants are of the opinion**
4 **that this case cannot be resolved by summary judgment, they shall so inform the court**
5 **prior to the date the summary judgment motion is due.**

6 5. Plaintiff's opposition to the dispositive motion shall be filed with the court and
7 served on defendants no later than **thirty (30) days** from the date defendant's motion is filed.

8 a. In the event defendants file an unenumerated motion to dismiss under
9 Rule 12(b), plaintiff is hereby cautioned as follows:¹

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

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

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

26 Rule 56 tells you what you must do in order to oppose a motion for
27 summary judgment. Generally, summary judgment must be granted when there is
28 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 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

¹ The following notice is adapted from the summary judgment notice to be given to pro se
prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See
Wyatt v. Terhune, 315 F.3d at 1120 n.14.

1 judgment, if appropriate, may be entered against you. If summary judgment is
2 granted in favor of defendants, your case will be dismissed and there will be no
trial.

3 See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to read
4 Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v. Catrett, 477 U.S. 317
5 (1986) (holding party opposing summary judgment must come forward with evidence showing
6 triable issues of material fact on every essential element of his claim). Plaintiff is cautioned that
7 failure to file an opposition to defendant's motion for summary judgment may be deemed to be a
8 consent by plaintiff to the granting of the motion, and granting of judgment against plaintiff
9 without a trial. See Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir. 1995) (per curiam); Brydges
10 v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

11 6. Defendants shall file a reply brief no later than **fifteen (15) days** after plaintiff's
12 opposition is filed.

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

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

18 9. Discovery may be taken in accordance with the Federal Rules of Civil Procedure.
19 No further court order is required before the parties may conduct discovery.

20 For plaintiff's information, the proper manner of promulgating discovery is to send
21 demands for documents or interrogatories (questions asking for specific, factual responses)
22 directly to defendants' counsel. See Fed. R. Civ. P. 33-34. The scope of discovery is limited to
23 matters "relevant to the claim or defense of any party . . ." See Fed. R. Civ. P. 26(b)(1).

24 Discovery may be further limited by court order if "(i) the discovery sought is unreasonably
25 cumulative or duplicative, or is obtainable from some other source that is more convenient, less
26 burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by
27 discovery in the action to obtain the information sought; or (iii) the burden or expense of the
28 proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(2). In order to comply

1 with the requirements of Rule 26, before deciding to promulgate discovery plaintiff may find it
2 to his benefit to wait until defendants have filed a dispositive motion which could include some
3 or all of the discovery plaintiff might seek. In addition, no motion to compel will be considered
4 by the Court unless the meet-and-confer requirement of Rule 37(a)(2)(B) and N.D. Cal. Local
5 Rule 37-1 has been satisfied. Because plaintiff is detained, he is not required to meet and confer
6 with defendants in person. Rather, if his discovery requests are denied and he intends to seek a
7 motion to compel he must send a letter to defendants to that effect, offering them one last
8 opportunity to provide him with the sought-after information.

9 10. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the court
10 and all parties informed of any change of address and must comply with the court's orders in a
11 timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute
12 pursuant to Federal Rule of Civil Procedure 41(b).

13 This order terminates docket numbers 5 and 6.

14 IT IS SO ORDERED.

15 DATED: 4/6/11


RONALD M. WHYTE
United States District Judge