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FILED

JUN 10 2013

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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

JASON MCCORD PATTEN,

Plaintiff,

v.

DR. F. KIANI, et al.,

Defendants.

No. C 11-2057 LHK (PR)

ORDER DENYING MOTION TO
DISMISS; DENYING MOTION
FOR RECONSIDERATION;
FURTHER SCHEDULING
ORDER

(Docket Nos. 134, 149)

Plaintiff, a state prisoner proceeding *pro se*, filed a second civil rights complaint pursuant to 42 U.S.C. § 1983 alleging that prison officials at San Quentin State Prison (“SQSP”) were deliberately indifferent to his serious medical needs. Defendants have filed a motion to dismiss for failure to state a claim. Plaintiff has filed an opposition and supplemental opposition, and Defendants have filed a reply. Plaintiff has also filed a motion for reconsideration regarding the dismissal of Defendant Dr. Stone. For the reasons stated below, Defendants’ motion is DENIED, and Plaintiff’s motion is DENIED.

I. Motion to Dismiss

Defendants have moved to dismiss Plaintiff’s second amended complaint for failure to state a claim. In his second amended complaint, Plaintiff states that, upon his arrival at SQSP on August 21, 2008, Plaintiff informed unserved Defendant Dr. Stone about his immediate need for dental treatment. Plaintiff claims that, despite requests for treatment, even after breaking several more teeth during his incarceration at SQSP, Plaintiff did not receive any dental treatment for the seven and a half months he was housed at SQSP.

1 treatment, or a claim of negligence. Neither a difference of opinion nor negligence are sufficient
2 to state a claim of deliberate indifference. Defendants also assert that they are entitled to
3 qualified immunity.

4 Defendants' motion seeks to have the Court revisit the Court's previous decision that the
5 second amended complaint did state a claim upon which relief may be granted. On October 5,
6 2012, the Court performed an initial screening of the complaint under 28 U.S.C. § 1915A, which
7 requires the Court to dismiss, among other things, any claims that "fail to state a claim upon
8 which relief may be granted." The Court determined that, liberally construed, the allegations of
9 the complaint adequately pleaded a cognizable Eighth Amendment claim.

10 To seek reconsideration of an interlocutory order, such as the previous order's
11 determination that the complaint stated a claim upon which relief may be granted, Defendants
12 had to comply with Local Rule 7-9(a). They did not. Moreover, they did not show: (1) that at
13 the time of the motion for leave, a material difference in fact or law existed from that which was
14 presented to the Court before entry of the order for which the reconsideration is sought, and that
15 in the exercise of reasonable diligence the party applying for reconsideration did not know such
16 fact or law at the time of the order; (2) the emergence of new material facts or a change of law
17 occurring after the time of such order; or (3) a manifest failure by the Court to consider material
18 facts which were presented to the Court before such interlocutory order. *See* N.D. Cal. Civil
19 L.R. 7-9(b). Even without the special requirements for motions to reconsider, Defendants have
20 the challenge that a motion to dismiss following a Section 1915A screening of a prisoner
21 complaint rarely will be successful, especially in light of the requirement that *pro se* complaints
22 be liberally construed. *See Hebbe*, 627 F.3d at 342 (even after Supreme Court cases heightened
23 the standards for pleading, the Court's obligation "remains, 'where the petitioner is *pro se*,
24 particularly in civil rights cases, to construe the pleadings liberally and to afford the petitioner
25 the benefit of any doubt.'").

26 Although Defendants' Rule 12(b)(6) motion to dismiss improperly requests
27 reconsideration of an earlier order, the Court also finds none of the arguments therein persuasive
28 on the merits.

1 Deliberate indifference to serious medical needs violates the Eighth Amendment's
2 proscription against cruel and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976);
3 *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on other grounds*, *WMX*
4 *Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc). A determination of
5 "deliberate indifference" involves an examination of two elements: the seriousness of the
6 prisoner's medical need and the nature of the defendant's response to that need. *McGuckin*, 974
7 F.2d at 1059. A "serious" medical need exists if the failure to treat a prisoner's condition could
8 result in further significant injury or the "unnecessary and wanton infliction of pain." *Id.* (citing
9 *Estelle*, 429 U.S. at 104). A prison official is deliberately indifferent if he knows that a prisoner
10 faces a substantial risk of serious harm and disregards that risk by failing to take reasonable steps
11 to abate it. *Farmer v. Brennan*, 511 U.S. 835, 837 (1994).

12 Defendants argue that Plaintiff's allegations against them stem from their responses to his
13 administrative appeals, and, as such, do not state a claim against them. Defendants cite to
14 *Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003), and *Mann v. Adams*, 855 F.2d 639, 640
15 (9th Cir. 1988), to support their argument. However, those cases only state that the
16 administrative appeals process does not create a protected liberty interest and have no
17 substantive right to a prison grievance system. *Ramirez* and *Mann* do not stand for the
18 proposition that allegations concerning individuals involved with the administrative appeals
19 process can never be held liable for their actions.

20 Defendants also argue that Plaintiff fails to demonstrate that any Defendant acted with
21 deliberate indifference. Taking Plaintiff's allegations as true, as the Court is required to do,
22 Plaintiff claims that, in general, the Defendants knew that Plaintiff was experiencing pain, knew
23 that Plaintiff needed dental care and treatment, and failed to take reasonable steps to abate his
24 suffering. Certainly, liberally construing Plaintiff's second amended complaint, an inference can
25 be made that Defendants were aware of Plaintiff's serious medical need yet purposely failed to
26 act.

27 The Court also rejects Defendants' argument that they are entitled to qualified immunity.
28 The qualified immunity inquiry is separate from the constitutional inquiry for a claim of

1 deliberate indifference under the Eighth Amendment. *Estate of Ford v. Caden*, 301 F.3d 1043,
2 1053 (9th Cir. 2002). A determination that there is a triable issue of fact as to whether
3 defendants were deliberately indifferent does not necessarily preclude a finding of qualified
4 immunity. *Id.* For a qualified immunity analysis, the Court need not determine whether the
5 facts alleged show that Defendants acted with deliberate indifference. *See Osolinski v. Kane*, 92
6 F.3d 934, 936 (9th Cir. 1996). Rather, the Court need only review the relevant law to determine
7 whether, in light of clearly established principles at the time of the incident, the officials could
8 have reasonably believed their conduct was lawful. *See id.* at 939 (granting qualified immunity
9 on Eighth Amendment safety claim because reasonable prison official could have reasonably
10 believed that defendants' conduct, as alleged, did not violate Eighth Amendment). Liberally
11 construing Plaintiff's second amended complaint, it is possible that Defendants intentionally
12 denied or delayed treatment to Plaintiff despite Plaintiff's requests. Defendants do not show
13 why, if this was the case, it would not have been clear to them that they were violating Plaintiff's
14 rights.

15 Defendant's motion to dismiss is DENIED.

16 II. Motion for Reconsideration

17 Plaintiff requests that the Court reconsider its March 21, 2013 order dismissing
18 Defendant Dr. Stone under Federal Rule of Civil Procedure 4(m). Plaintiff argues that he has
19 discovered Defendant Dr. Stone's full name to be "Dr. Charles Frank Stone," and requests that
20 the Marshal's office locate Defendant Dr. Stone for service.

21 However, if the Marshal is unable to effectuate service through no fault of his own, e.g.,
22 because a plaintiff failed to provide sufficient information or because the defendant is not where
23 plaintiff claims, and the plaintiff is informed, a plaintiff must seek to remedy the situation or face
24 dismissal. *See Walker v. Sumner*, 14 F.3d 1415, 1421-22 (9th Cir. 1994) (prisoner failed to show
25 cause why prison official should not be dismissed under Rule 4(m) because prisoner did not
26 prove that he provided marshal with sufficient information to serve official or that he requested
27 that official be served). That is what happened in this case. The Marshal is under no affirmative
28 duty to locate unserved Defendants without sufficient location information. Plaintiff's motion

1 for reconsideration is DENIED.

2 Nonetheless, in the interest of justice, the Litigation Coordinator at SQSP is requested to
3 provide within **thirty days** of the filing date of this order, a forwarding address of Dr. Charles
4 Frank Stone, DDS, or notice that such information is not available. The Clerk of the Court shall
5 forward a copy of this order to the Litigation Coordinator at SQSP. If the Litigation Coordinator
6 has a forwarding address, the Court will direct the Marshal to serve Dr. Stone at that address.

7 **CONCLUSION**

8 Accordingly, Defendants' motion to dismiss is DENIED. Plaintiff's motion for
9 reconsideration is DENIED.

10 The Clerk of the Court shall forward a copy of this order to the Litigation Coordinator at
11 SQSP.

12 No later than **sixty (60) days** from the date of this order, Defendants shall file a motion
13 for summary judgment or other dispositive motion with respect to the cognizable claims in the
14 complaint. If Defendants elect to file a motion to dismiss on the grounds that Plaintiff failed to
15 exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a), Defendants
16 shall do so in an unenumerated Rule 12(b) motion pursuant to *Wyatt v. Terhune*, 315 F.3d 1108,
17 1119-20 (9th Cir. 2003). Plaintiff's opposition to the dispositive motion shall be filed with the
18 Court and served on Defendants no later than **twenty-eight (28) days** from the date Defendants'
19 motion is filed. Defendants shall file a reply brief no later than **fourteen (14) days** after
20 Plaintiff's opposition is filed.

21 IT IS SO ORDERED.

22 DATED: 6/10/13

23 Lucy H. Koh
LUCY H. KOH
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

JASON M. PATTEN,
Plaintiff,

Case Number: CV11-02057 LHK

CERTIFICATE OF SERVICE

v.

JERRY BROWN et al,
Defendant.

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 June 10, 2013, 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.

Jason McCord Patten G-29284
Avenal State Prison
PO Box 900
Building 230-2-23-2 Low
Avenal, CA 93204

Prison Coordinator at SQSP
Avenal State Prison
PO Box 900
Building 230-2-23-2 Low
Avenal, CA 93204

Dated: June 10, 2013

Richard W. Wieking, Clerk

Elizabeth C Garcia

By: Elizabeth Garcia, Deputy Clerk