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

| | | |
|------------------------|---|-------------------------|
| JEROLD DESMOND FORNEY, |) | No. C 11-2841 LHK (PR) |
| |) | |
| Plaintiff, |) | ORDER OF SERVICE; |
| |) | DIRECTING DEFENDANTS TO |
| v. |) | FILE DISPOSITIVE MOTION |
| |) | OR NOTICE REGARDING |
| CTF DR. TRENT, et al., |) | SUCH MOTION |
| |) | |
| Defendants. |) | |
| _____ |) | |

Plaintiff, a California state prisoner proceeding *pro se*, filed an amended civil rights complaint pursuant to 42 U.S.C. § 1983. For the reasons stated below, the Court orders the amended complaint served 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).

To state a claim under 42 U.S.C. § 1983, 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

1 the alleged violation was committed by a person acting under the color of state law. *See West v.*
2 *Atkins*, 487 U.S. 42, 48 (1988).

3 B. Legal Claim

4 Plaintiff alleges that on December 22, 2010, he sustained a serious shoulder separation
5 injury. He claims that Defendants Doctors Trent, Ahmed, and Biggs failed to adequately treat
6 his serious medical need because the injury required surgery but Defendants wanted to treat it
7 only with medication. Plaintiff also alleges that Doctors Chudy and Sepulveda knew of this
8 failure, yet failed to correct it.

9 Deliberate indifference to serious medical needs violates the Eighth Amendment's
10 proscription against cruel and unusual punishment. *See Estelle v. Gamble*, 429 U.S. 97, 104
11 (1976); *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on other grounds*,
12 *WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc). A
13 determination of "deliberate indifference" involves an examination of two elements: the
14 seriousness of the prisoner's medical need and the nature of the defendant's response to that
15 need. *See McGuckin*, 974 F.2d at 1059.

16 Plaintiff's allegations, when liberally construed, state a cognizable claim of deliberate
17 indifference to serious medical needs.

18 **CONCLUSION**

19 For the foregoing reasons, the Court hereby orders as follows:

20 1. The Clerk shall issue a summons, and the United States Marshal shall serve,
21 without prepayment of fees, copies of the amended complaint in this matter (docket no. 10), all
22 attachments thereto, and copies of this order on **Dr. Trent, Dr. Ahmed, Dr. Robert Biggs, Dr.**
23 **J. Chudy, and Dr. M. Depulveda at Correctional Training Facility - North.** The Clerk shall
24 also serve a copy of this Order on Plaintiff and mail a courtesy copy of the amended complaint to
25 the California Attorney General's Office.

26 2. No later than **ninety (90) days** from the date of this order, Defendants shall file a
27 motion for summary judgment or other dispositive motion with respect to the cognizable claims
28 in the amended complaint.

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

5 b. Any motion for summary judgment shall be supported by adequate factual
6 documentation and shall conform in all respects to Rule 56 of the Federal Rules of Civil
7 Procedure. **Defendants are advised that summary judgment cannot be granted, nor**
8 **qualified immunity found, if material facts are in dispute. If Defendants are of the opinion**
9 **that this case cannot be resolved by summary judgment, they shall so inform the Court**
10 **prior to the date the summary judgment motion is due.**

11 3. Plaintiff's opposition to the dispositive motion shall be filed with the Court and
12 served on Defendants no later than **thirty (30) days** from the date Defendants' motion is filed.

13 a. In the event Defendants file an unenumerated motion to dismiss under
14 Rule 12(b), Plaintiff is hereby cautioned as follows:¹

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

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

28 The defendants have made a motion for summary judgment by which
they seek 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

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 no genuine issue of material fact--that is, if there is no real dispute about any fact
2 that would affect the result of your case, the party who asked for summary
3 judgment is entitled to judgment as a matter of law, which will end your case.
4 When a party you are suing makes a motion for summary judgment that is
5 properly supported by declarations (or other sworn testimony), you cannot simply
6 rely on what your complaint says. Instead, you must set out specific facts in
7 declarations, depositions, answers to interrogatories, or authenticated documents,
8 as provided in Rule 56(e), that contradict the facts shown in the defendants'
9 declarations and documents and show that there is a genuine issue of material fact
10 for trial. If you do not submit your own evidence in opposition, summary
11 judgment, if appropriate, may be entered against you. If summary judgment is
12 granted in favor of defendants, your case will be dismissed and there will be no
13 trial.

14 *See Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to read
15 Rule 56 of the Federal Rules of Civil Procedure and *Celotex Corp. v. Catrett*, 477 U.S. 317
16 (1986) (holding party opposing summary judgment must come forward with evidence showing
17 triable issues of material fact on every essential element of his claim). Plaintiff is cautioned that
18 failure to file an opposition to Defendants' motion for summary judgment may be deemed to be a
19 consent by Plaintiff to the granting of the motion, and granting of judgment against Plaintiff
20 without a trial. *See Ghazali v. Moran*, 46 F.3d 52, 53-54 (9th Cir. 1995) (per curiam); *Brydges v.*
21 *Lewis*, 18 F.3d 651, 653 (9th Cir. 1994).

22 4. Defendants shall file a reply brief no later than **fifteen (15) days** after Plaintiff's
23 opposition is filed.

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

26 6. All communications by the Plaintiff with the Court must be served on Defendants,
27 or Defendants' counsel once counsel has been designated, by mailing a true copy of the
28 document to Defendants or Defendants' counsel.

7. Discovery may be taken in accordance with the Federal Rules of Civil Procedure.
No further Court order is required before the parties may conduct discovery.

For Plaintiff's information, the proper manner of promulgating discovery is to send
demands for documents or interrogatories (for example, questions asking for specific, factual
responses) directly to Defendants' counsel. *See Fed. R. Civ. P. 33-34*. The scope of discovery is
limited to matters "relevant to the claim or defense of any party . . ." *See Fed. R. Civ. P.*

1 26(b)(1). Discovery may be further limited by court order if “(i) the discovery sought is
2 unreasonably cumulative or duplicative, or is obtainable from some other source that is more
3 convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample
4 opportunity by discovery in the action to obtain the information sought; or (iii) the burden or
5 expense of the proposed discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(2). In
6 order to comply with the requirements of Rule 26, before deciding to promulgate discovery
7 Plaintiff may find it to his benefit to wait until Defendants have filed a dispositive motion which
8 could include some or all of the discovery Plaintiff might seek. In addition, no motion to compel
9 will be considered by the Court unless the meet-and-confer requirement of Rule 37(a)(2)(B) and
10 N.D. Cal. Local Rule 37-1 has been satisfied. Because Plaintiff is detained, he is not required to
11 meet and confer with Defendants in person. Rather, if his discovery requests are denied, and he
12 intends to seek a motion to compel, he must send a letter to Defendants to that effect, offering
13 them one last opportunity to provide him with the sought-after information.

14 8. It is Plaintiff’s responsibility to prosecute this case. Plaintiff must keep the Court
15 and all parties informed of any change of address and must comply with the Court’s orders in a
16 timely fashion. Failure to do so may result in the dismissal of this action for failure to prosecute
17 pursuant to Federal Rule of Civil Procedure 41(b).

18 IT IS SO ORDERED.

19 DATED: 10/21/11


LUCY H. KOH
United States District Judge