

United States District Court
For the Northern District of California

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

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

SEMYON NEYS,

Plaintiff,

v.

MAYO, et al.,

Defendants.

No. C 12-04241 EJD (PR)

ORDER OF SERVICE; DIRECTING
DEFENDANTS TO FILE
DISPOSITIVE MOTION OR NOTICE
REGARDING SUCH MOTION;
INSTRUCTIONS TO CLERK

Plaintiff, currently incarcerated at the San Francisco County Jail filed the instant civil rights action in pro se pursuant to 42 U.S.C. § 1983 against officers at the San Francisco County Jail for unconstitutional acts. Plaintiff's motion for leave to proceed in forma pauperis, (Docket Nos. 3 & 4), will be granted in a separate order.

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

1 a claim upon which relief may be granted or seek monetary relief from a defendant who
2 is immune from such relief. See id. § 1915A(b)(1),(2). Pro se pleadings must,
3 however, be liberally construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696,
4 699 (9th Cir. 1988).

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

9 **B. Plaintiff's Claims**

10 Plaintiff claims that he was handcuffed with his hands behind his back, taken
11 into an interview room and forced onto the floor. (Compl. at 3) While on the floor
12 Deputies Mayo, Forde, Ng and others assaulted him by kicking and punching him.
13 Plaintiff states they also verbally harassed him. (Id.) Plaintiff states he suffered injuries
14 to his shoulder, back and arms. (Id.) Plaintiff's allegations of verbal harassment are
15 dismissed as "[v]erbal harassment or abuse ... is not sufficient to state a constitutional
16 deprivation[.]" Oltarzewski v. Ruggiero, 830 F.2d 136, 139 (9th Cir. 1987) Liberally
17 construed, Plaintiff's claims of excessive force are cognizable under § 1983 as
18 violations of the Fourteenth Amendment, as plaintiff appears to be a pre-trial detainee.

19 Plaintiff names "other San Francisco Sheriff's Deputies" as defendants in his
20 amended complaint. Although the use of "John Doe" to identify a defendant is not
21 favored in the Ninth Circuit, see Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir.
22 1980); Wiltsie v. Cal. Dep't of Corrections, 406 F.2d 515, 518 (9th Cir. 1968),
23 situations may arise where the identity of alleged defendants cannot be known prior to
24 the filing of a complaint. In such circumstances, the plaintiff should be given an
25 opportunity through discovery to identify the unknown defendants, unless it is clear that
26 discovery would not uncover their identities or that the complaint should be dismissed
27 on other grounds. See Gillespie, 629 F.2d at 642; Velasquez v. Senko, 643 F. Supp.
28 1172, 1180 (N.D. Cal. 1986). Accordingly, the other deputies are DISMISSED from

1 this action. If through discovery Plaintiff is able to identify the unknown defendants, he
2 may then motion the Court for leave to amend to name the intended defendants and to
3 issue summons upon him. See Gillespie, 629 F.2d at 642; Barsten v. Dep't of the
4 Interior, 896 F.2d 422, 423-24 (9th Cir. 1990).

5 6 CONCLUSION

7 For the reasons stated above, the Court orders as follows:

8 1. The Clerk of the Court shall mail a Notice of Lawsuit and Request for
9 Waiver of Service of Summons, two copies of the Waiver of Service of Summons, a
10 copy of the complaint, (Docket No. 1), all attachments thereto, and a copy of this order
11 upon **Defendants Mayo, Forde and Ng** of the San Francisco County Sheriffs
12 Department at the **Sheriff's Department, City Hall, Room 456** (1 Dr. Carlton B.
13 Goodlett Place, San Francisco, CA 94102). The Clerk shall also mail a copy of this
14 Order to Plaintiff.

15 2. Defendants are cautioned that Rule 4 of the Federal Rules of Civil
16 Procedure requires them to cooperate in saving unnecessary costs of service of the
17 summons and amended complaint. Pursuant to Rule 4, if Defendants, after being
18 notified of this action and asked by the Court, on behalf of Plaintiff, to waive service of
19 the summons, fail to do so, they will be required to bear the cost of such service unless
20 good cause shown for their failure to sign and return the waiver form. If service is
21 waived, this action will proceed as if Defendants had been served on the date that the
22 waiver is filed, except that pursuant to Rule 12(a)(1)(B), Defendants will not be
23 required to serve and file an answer before **fifty-six (56) days** from the day on which
24 the request for waiver was sent. (This allows a longer time to respond than would be
25 required if formal service of summons is necessary.) Defendants are asked to read the
26 statement set forth at the foot of the waiver form that more completely describes the
27 duties of the parties with regard to waiver of service of the summons. If service is
28 waived after the date provided in the Notice but before Defendants have been personally

1 served, the Answer shall be due **fifty-six (56) days** from the date on which the request
2 for waiver was sent or **twenty-one (21) days** from the date the waiver form is filed,
3 whichever is later.

4 3. No later than **fifty-six (56) days** from the date of this order, Defendants
5 shall file a motion for summary judgment or other dispositive motion with respect to the
6 claims in the amended complaint found to be cognizable above.

7 a. If Defendants elect to file a motion to dismiss on the grounds
8 Plaintiff failed to exhaust his available administrative remedies as required by 42 U.S.C.
9 § 1997e(a), Defendants shall do so in an unenumerated Rule 12(b) motion pursuant to
10 Wyatt v. Terhune, 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied Alameida v.
11 Terhune, 540 U.S. 810 (2003). **The Ninth Circuit has held that Plaintiff must be**
12 **provided with the appropriate warning and notice under Wyatt concurrently with**
13 **Defendants' motion to dismiss. See Woods v. Carey, Nos. 09-15548 & 09-16113,**
14 **slip op. 7871, 7874 (9th Cir. July 6, 2012).**

15 b. Any motion for summary judgment shall be supported by adequate
16 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules
17 of Civil Procedure. Defendants are advised that summary judgment cannot be granted,
18 nor qualified immunity found, if material facts are in dispute. If any Defendant is of the
19 opinion that this case cannot be resolved by summary judgment, he shall so inform the
20 Court prior to the date the summary judgment motion is due.

21 4. Plaintiff's opposition to the dispositive motion shall be filed with the
22 Court and served on Defendants no later than **twenty-eight (28) days** from the date
23 Defendants' motion is filed.

24 a. **In the event Defendants file a motion for summary judgment,**
25 **the Ninth Circuit has held that Plaintiff must be concurrently provided the**
26 **appropriate warnings under Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998)**
27 **(en banc). See Woods, Nos. 09-15548 & 09-16113, slip op. at 7874.**

28 Plaintiff is also advised to read Rule 56 of the Federal Rules of Civil Procedure

1 and Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (holding party opposing summary
2 judgment must come forward with evidence showing triable issues of material fact on
3 every essential element of his claim). Plaintiff is cautioned that failure to file an
4 opposition to Defendants' motion for summary judgment may be deemed to be a
5 consent by Plaintiff to the granting of the motion, and granting of judgment against
6 Plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir. 1995) (per
7 curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

8 5. Defendants shall file a reply brief no later than **fourteen (14) days** after
9 Plaintiff's opposition is filed.

10 6. The motion shall be deemed submitted as of the date the reply brief is due.
11 No hearing will be held on the motion unless the Court so orders at a later date.

12 7. All communications by the Plaintiff with the Court must be served on
13 Defendants, or Defendants' counsel once counsel has been designated, by mailing a true
14 copy of the document to Defendants or Defendants' counsel.

15 8. Discovery may be taken in accordance with the Federal Rules of Civil
16 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or
17 Local Rule 16-1 is required before the parties may conduct discovery.

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

22 10. Extensions of time must be filed no later than the deadline sought to be
23 extended and must be accompanied by a showing of good cause.

24
25 DATED: 11/21/12


EDWARD J. DAVILA
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

SEMYON NEYS,
Plaintiff,

Case Number CV 12-04241 EJD (PR)

CERTIFICATE OF SERVICE

v.

MAYO, et al.,
Defendants.

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 11/21/12, 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) inter-office delivery receptacle located in the Clerk's office.

Semyon Neys
607720
San Francisco County Jail
850 Bryant St.,
San Francisco, CA 94103

DATED: 11/21/12


Richard W. Wieking, Clerk
By: Elizabeth Garcia, Deputy Clerk