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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

DAVID EARL PARMER,
CDCR #G-35622,

Plaintiff,

vs.

ISAAH ALVAREZ;
PEDRO CUEVAS,

Defendants.

Civil No. 09-0412 DMS (NLS)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED
COMPLAINT PURSUANT TO
FED.R.CIV.P. 12(b) & 12(b)(6)**

[Doc. No. 18]

**I.
PROCEDURAL HISTORY**

On September 29, 2009, Defendants filed a Motion to Dismiss Plaintiff's Amended Complaint pursuant to FED.R.CIV.P. 12(b) and 12(b)(6) [Doc. No. 18]. Because Plaintiff had failed to file an Opposition and Defendants move to dismiss Plaintiff's First Amended Complaint ("FAC") on grounds that Plaintiff failed to exhaust administrative remedies prior to suit pursuant to 42 U.S.C. § 1997e(a), the Court issued an Order providing Plaintiff with Notice of Defendants' Motion pursuant to *Wyatt v. Terhune* and set a revised briefing schedule. *See* Dec. 1, 2009 Order at 6. Plaintiff was given leave to file an Opposition by Thursday, December 24, 2009. *Id.* However, to date, Plaintiff has failed to file an Opposition.

1 **II.**

2 **FACTUAL ALLEGATIONS**

3 Plaintiff was formerly housed at Richard J. Donovan Correctional Facility. While
4 Plaintiff was housed in this facility, he went to the Prison’s medical facility for an examination.
5 (See FAC at 3.) Plaintiff alleges that when the examination was completed the nurse told him
6 to return to his cell but Plaintiff informed the nurse that he was unable to move. (*Id.*) Plaintiff
7 further alleges that Defendants Alvarez and Ceuvas-Pedro, without warning, threw him on the
8 floor. (*Id.*) He then claims that Defendant Alvarez “jump[ed] on [Plaintiff’s] back with his
9 knee” and used excessive force that caused him injuries. (*Id.*)

10 **III.**

11 **DEFENDANTS’ MOTION TO DISMISS PURSUANT TO FED.R.CIV.P. 12(b)**

12 Defendants move to dismiss Plaintiff’s claims for failing to exhaust available
13 administrative remedies pursuant to FED.R.CIV.P. 12(b) and 42 U.S.C. § 1997e(a).

14 **A. Standard of Review per FED.R.CIV.P. 12(b) and 42 U.S.C. § 1997e(a)**

15 Defendants claim “Plaintiff has failed to demonstrate that he exhausted his administrative
16 remedies before filing suit, and on this basis alone, his First Amended Complaint must be
17 dismissed.” (Defs.’ Mot. at 8.) Defendants, however, are applying the incorrect standard. The
18 Ninth Circuit has held that “failure to exhaust nonjudicial remedies is a matter of abatement” not
19 going to the merits of the case and is properly raised pursuant to a motion to dismiss, including
20 a non-enumerated motion under FED.R.CIV.P. 12(b). *See Ritza v. Int’l Longshoremen’s &*
21 *Warehousemen’s Union*, 837 F.2d 365, 368-69 (9th Cir. 1988); *Wyatt v. Terhune*, 315 F.3d
22 1108, 1119 (9th Cir. 2003) (finding a non-enumerated motion under Rule 12(b) to be “the proper
23 pretrial motion for establishing nonexhaustion” of administrative remedies under 42 U.S.C. §
24 1997e(a)).¹

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26
27 ¹ The Ninth Circuit also made clear that unlike a motion for summary judgment, “dismissal of
28 an action on the ground of failure to exhaust administrative remedies is not on the merits.” *Wyatt*, 315
F.3d at 1119 (citation omitted). Thus, if the court finds that the prisoner has failed to exhaust
nonjudicial remedies, “the proper remedy is dismissal of the claim without prejudice.” *Id.* (citing *Ritza*,
837 F.2d at 368 & n.3).

1 only give the defendant[s] fair notice of what ... the claim is and the grounds upon which it
2 rests.” *Erickson v. Pardus*, 551 U.S. 89, 127 S. Ct. 2197, 2200 (2007) (internal quotation marks
3 omitted).

4 A motion to dismiss should be granted if plaintiff fails to proffer “enough facts to state
5 a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570
6 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the
7 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”
8 *Ashcroft v. Iqbal*, 556 U.S. ----, 129 S.Ct. 1937, 1949 (2009) .

9 In addition, factual allegations asserted by pro se petitioners, “however inartfully
10 pleaded,” are held “to less stringent standards than formal pleadings drafted by lawyers.” *Haines*
11 *v. Kerner*, 404 U.S. 519-20 (1972). Thus, where a plaintiff appears in propria persona in a civil
12 rights case, the Court must construe the pleadings liberally and afford plaintiff any benefit of the
13 doubt. *See Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 623 (9th Cir. 1988).

14 Nevertheless, and in spite of the deference the court is bound to pay to any factual
15 allegations made, it is not proper for the court to assume that “the [plaintiff] can prove facts
16 which [he or she] has not alleged.” *Associated General Contractors of California, Inc. v.*
17 *California State Council of Carpenters*, 459 U.S. 519, 526 (1983). Nor must the court “accept
18 as true allegations that contradict matters properly subject to judicial notice or by exhibit” or
19 those which are “merely conclusory,” require “unwarranted deductions” or “unreasonable
20 inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.) (citation omitted),
21 *amended on other grounds*, 275 F.3d 1187 (9th Cir. 2001); *see also Iletto v. Glock Inc.*, 349 F.3d
22 1191, 1200 (9th Cir. 2003) (court need not accept as true unreasonable inferences or conclusions
23 of law cast in the form of factual allegations).

24 C. Eighth Amendment Excessive Force Claims

25 Defendants seek dismissal of Plaintiff’s Eighth Amendment excessive force claims on the
26 grounds that he has failed to adequately plead all the elements required to state an Eighth
27 Amendment excessive force claim. (Defs.’ Mot. at 5-6.) When an inmate claims that prison
28 officials violated his Eighth Amendment rights by using excessive force, the relevant inquiry is

1 “whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously
2 and sadistically to cause harm.” *Hudson v. McMillian*, 503 U.S. 1, 7 (1992). An Eighth
3 Amendment violation occurs only when an inmate is subjected to the “unnecessary and wanton
4 infliction of pain.” *Whitley v. Albers*, 475 U.S. 312, 319 (1986). To determine whether Plaintiff
5 has satisfied the malicious and sadistic standard, the Court examines the following five factors:
6 (1) the extent of the injury suffered; (2) the need for the application of force; (3) the relationship
7 between that need and the amount of force used; (4) the threat reasonably perceived by
8 Defendants; and (5) any efforts made to temper the severity of a forceful response. *Hudson*, 503
9 U.S. at 7; *Whitley*, 475 U.S. at 321.

10 Here, Defendants argue, and the Court agrees, that Plaintiff has failed to allege any facts
11 sufficient to show that he suffered any injury as a result of the alleged incident. “[N]ot every
12 push or shove, even if it may later seem unnecessary in the peace of a judge’s chambers, violates
13 a prisoner’s constitutional rights.” *Meredith v. Arizona*, 523 F.2d 481, 483 (9th Cir. 1975).
14 Thus, the Court **GRANTS** Defendants’ Motion to Dismiss Plaintiff’s First Amended Complaint
15 on the grounds that he failed to state a claim upon which relief could be granted pursuant to
16 FED.R.CIV.P. 12(b)(6). However, Plaintiff will be permitted leave to file a Second Amended
17 Complaint in order to correct the deficiencies of pleading identified in this Court’s Order.

18 **D. Qualified Immunity**

19 Defendants also move for dismissal of the entire action on qualified immunity grounds.
20 “Government officials enjoy qualified immunity from civil damages unless their conduct violates
21 ‘clearly established statutory or constitutional rights of which a reasonable person would have
22 known.’” *Jeffers v. Gomez*, 267 F.3d 895, 910 (9th Cir. 2001) (quoting *Harlow v. Fitzgerald*,
23 457 U.S. 800, 818 (1982)). When presented with a qualified immunity defense, the central
24 questions for the court are: (1) whether the facts alleged, taken in the light most favorable to
25 Plaintiff, demonstrate that the Defendant’s conduct violated a statutory or constitutional right;
26 and (2) whether the right at issue was “clearly established” at the time it is alleged to have been
27 violated. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

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1 Although *Saucier* originally required the Court to answer these questions in order, the
2 U.S. Supreme Court has recently held that “while the sequence set forth there is often
3 appropriate, it should no longer be regarded as mandatory.” *Pearson v. Callahan*, __U.S. __, 129
4 S.Ct. 808, 818 (2009).

5 If the Court finds that Plaintiff’s allegations do not make out a statutory or constitutional
6 violation, “there is no necessity for further inquiries concerning qualified immunity.” *Saucier*,
7 533 U.S. at 201. Similarly, if the Court determines that the right at issue was not clearly
8 established at the time of the defendant’s alleged misconduct, the court may end further inquiries
9 concerning qualified immunity without determining whether the allegations in fact make out a
10 statutory or constitutional violation. *Pearson*, 129 S.Ct. at 818.

11 In this case, the Court has found that Plaintiff has not sufficiently alleged a constitutional
12 claim against Defendants and thus, need not decide whether Defendants are entitled to qualified
13 immunity. *Saucier*, 522 U.S. at 201.

14 **V.**

15 **CONCLUSION AND ORDER**

16 For all the foregoing reasons, IT IS HEREBY ORDERED that:

17 (1) Defendants’ Motion to Dismiss Plaintiff’s First Amended Complaint for failing to
18 exhaust administrative remedies pursuant to FED.R.CIV.P. 12(b) [Doc. No. 18] is **DENIED**;

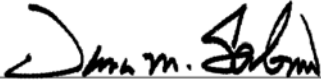
19 (2) Defendants’ Motion to Dismiss Plaintiff’s First Amended Complaint for failing to
20 state a claim upon which relief can be granted pursuant to FED.R.CIV.P. 12(b)(6) [Doc. No. 18]
21 is **GRANTED**; and

22 (3) **GRANTS** Plaintiff forty-five (45) days leave to file and serve upon Defendants a
23 Second Amended Complaint which addresses each deficiency of pleading identified in this
24 Order. Plaintiff’s Amended Complaint must be complete in itself without reference to his
25 original Complaint. *See* S. D. CAL. CIVLR 15.1. Any Defendant not named and any claim not
26 re-alleged in the Amended Complaint will be considered waived. *See King v. Atiyeh*, 814 F.2d
27 565, 567 (9th Cir. 1987). If Plaintiff does not file and serve an Amended Complaint upon
28 Defendants within that time, this civil action shall remain closed without prejudice pursuant to

1 FED.R.CIV.P. 41(a) and without further Order of the Court. *See McHenry v. Renne*, 84 F.3d
2 1172, 1177-79 (9th Cir. 1996).

3 **IT IS SO ORDERED.**

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5 DATED: January 7, 2010



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7 HON. DANA M. SABRAW
8 United States District Judge

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