UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

RICHARD ARMENTA,

Plaintiff,

v.

SHAH, *et al.*,

Defendants.

Case No. 2:22-cv-00415-JDP (PC)

ORDER AND FINDINGS AND RECOMMENDATIONS

Plaintiff, a state prisoner, alleges that defendants violated his Eighth and Fourteenth Amendment rights by denying him adequate medical care. I found that two previous complaints failed, for screening purposes, to state a cognizable claim. I have twice given plaintiff leave to amend, and his third amended complaint is now before me. ECF No. 31. I have reviewed the complaint and the attached documents and now conclude that plaintiff's Eighth Amendment deliberate indifference claim against defendant Shah is suitable to proceed. All other claims and defendants should be dismissed.



AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

## Screening Order

### I. Screening and Pleading Requirements

A federal court must screen a prisoner's complaint that seeks relief against a governmental entity, officer, or employee. *See* 28 U.S.C. § 1915A(a). The court must identify any cognizable claims and dismiss any portion of the complaint that is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. *See* 28 U.S.C. §§ 1915A(b)(1), (2).

A complaint must contain a short and plain statement that plaintiff is entitled to relief, Fed. R. Civ. P. 8(a)(2), and provide "enough facts to state a claim to relief that is plausible on its face," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The plausibility standard does not require detailed allegations, but legal conclusions do not suffice. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). If the allegations "do not permit the court to infer more than the mere possibility of misconduct," the complaint states no claim. *Id.* at 679. The complaint need not identify "a precise legal theory." *Kobold v. Good Samaritan Reg'l Med. Ctr*., 832 F.3d 1024, 1038 (9th Cir. 2016). Instead, what plaintiff must state is a "claim"—a set of "allegations that give rise to an enforceable right to relief." *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1264 n.2 (9th Cir. 2006) (en banc) (citations omitted).

The court must construe a pro se litigant's complaint liberally. *See Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam). The court may dismiss a pro se litigant's complaint "if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hayes v. Idaho Corr. Ctr.*, 849 F.3d 1204, 1208 (9th Cir. 2017). However, "'a liberal interpretation of a civil rights complaint may not supply essential elements of the claim that were not initially pled.'" *Bruns v. Nat'l Credit Union Admin.*, 122 F.3d 1251, 1257 (9th Cir. 1997) (*quoting Ivey v. Bd. of Regents*, 673 F.2d 266, 268 (9th Cir. 1982)).

## II. Analysis

Plaintiff alleges that the four named defendants, all nurses or physicians at Banner Medical Hospital, violated his Eighth and Fourteenth Amendment rights when they failed to treat his abdominal pain that was initially diagnosed as appendicitis. ECF No. 31 at 3-4. In my previous screening order, I found that plaintiff's allegations sounded in negligence, rather than establishing potential Eighth Amendment deliberate indifference. ECF Nos. 21 & 25.

Plaintiff has now brought the same substantive allegations, but with added context. Broadly, he alleges that defendants knew that a substantial risk of serious harm existed after plaintiff underwent an appendectomy, because they had taken abdominal films and received lab results that should have indicated that his appendix had, in fact, not been removed. ECF No. 31 at 10. Despite this knowledge, he alleges that defendant Shah delayed informing him of the mistake, thereby endangering his health and causing him to suffer physically. *Id.* at 22-23. He also claims that, because defendant Shah removed "tissue" rather than the appendix he had consented to, this action amounts to an "unjustified intrusion into [his] body" that violates his Fourteenth Amendment rights. *Id.* at 11.

Only plaintiff's Eighth Amendment claim against Shah is suitable to proceed. As to that claim, I emphasize that the cognizable violation is not any error in the performance of the appendectomy. The complaint itself alleges that, at the procedure's completion, Shah believed he had removed the appendix. *Id.* at 23 (noting that Shah told plaintiff that he thought he had removed the appendix). Any error in performing the surgery sounds in negligence rather than deliberate indifference. Rather, the Eighth Amendment claim is based on the alleged delay in Shah's admission of his error. Lab results returned on January 18, 2022, two days after the surgery, show that the tissue removed during the surgery was not an appendix. *Id.* at 33. Plaintiff alleges that Shah did not inform him of the failure to remove the appendix until two or three weeks later. *Id.* at 22-23. These allegations, construed liberally, are sufficient to state an Eighth Amendment claim against Shah. I note that plaintiff alleges that he suffered physically during those two to three weeks, *id.* at 23, and that suffering might have been averted or

alleviated had Shah come forward sooner.

The Eighth Amendment claims against other defendants fail. Plaintiff vaguely alleges that these other members of the hospital staff knew that his appendix had not been removed and that he was in severe pain, but failed to inform him of the error or otherwise help him. These allegations are belied by the documents attached to his complaint. *See Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th Cir. 1998) ("We are not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint."). Plaintiff alleges that he underwent the appendectomy on January 16, 2022, at approximately 1:30 a.m., ECF No. 31 at 8, and by 8:00 a.m. he was in "unbearable" pain and vomiting. *Id.* at 9. A medical form, time-stamped to 10:40 a.m., however, indicates that plaintiff was "alert, oriented, [and] in no acute distress." *Id.* at 26. It notes that plaintiff "offer[ed] no complaints." *Id.*

There are two sets of progress reports from January 17, 2022. The first, authored by defendant Kuliyev at approximately 10:00 a.m., does indicate that plaintiff was having frequent episodes of nausea and vomiting, as well as increasing pain around the surgical area. *Id.* at 37. Kuliyev notes, however, that plaintiff's vital signs and lab results were good, the only abnormal number being a low level of potassium. *Id.* Abdominal films showed only "mild post-surgical ileus with underlying constipation." *Id.* Another set of progress notes authored by defendant Shah, entered at approximately 10:20 a.m. acknowledge plaintiff's vomiting, but note that it was now "under good control" with the medication Zofran being administered intravenously. *Id.* at 27. Plaintiff appeared "alert and oriented." *Id.* He was discharged the next day as planned. *Id.* at 28, 32.

No defendant other than Shah is alleged to have had any contact with plaintiff after discharge. Plaintiff alleges that, during his stay at the hospital, the other defendants knew or should have known that the appendix was not removed—either because of the aforementioned lab report or because of abdominal films taken on January 17, 2022. These allegations are insufficient to state a claim. There is no allegation that any of the other defendants—Taylor, Theobald, and Kuliyev—had access to the lab report; only defendant Shah's name is listed on it. *Id.* at 33. Moreover, there is no allegation that these defendants had interactions with plaintiff

after January 17, 2022. Additionally, defendant Kuliyev's notes about the abdominal films on January 17 show that they were unremarkable, showing only mild post-surgical ileus with underlying constipation. *Id.* at 37. Plaintiff does allege that these defendants conspired to falsify his medical records to show that his surgery went well, but he offers no specifics to support this view.[1] Given that I recommend dismissal of plaintiff's federal claims against these defendants, I also recommend dismissal of his state law claims against them.

Plaintiff's Fourteenth Amendment claims against all defendants, premised on an unjustified intrusion into his body, fail. There is no legal authority to support the proposition that a minor, accidental taking of tissue during consensual surgery amounts to a taking of property or a violation of bodily autonomy without due process that violates the Fourteenth Amendment.

Accordingly, it is ORDERED that:

1. The third amended complaint, ECF No. 31, brings a viable Eighth Amendment claim against Defendant Shah for delay in informing plaintiff that his appendix had not been removed.

2. With this order the Clerk of the Court shall provide to plaintiff a blank summons, a copy of the April 20, 2023 complaint, and 1 USM-285 form and instructions for service of process on defendant Shah. Within 30 days of service of this order, plaintiff must return the attached Notice of Submission of Documents with the completed summons, the completed USM-285 form, and two copies of the endorsed complaint. The court will transmit them to the United States Marshal for service of process pursuant to Rule 4 of the Federal Rules of Civil Procedure. Defendant will be required to respond to plaintiff's allegations within the deadlines stated in Rule 12(a)(1) of the Federal Rules of Civil Procedure.

3. The Clerk of Court is directed to assign a district judge to this action.

Further, it is RECOMMENDED that all other claims and defendants be DISMISSED

[1] Most of the pertinent medical documents attached to plaintiff's complaint were generated before the return of the lab results showing that the appendix had not been removed. As noted above, the January 16 and 17 medical notes were mostly positive and certainly not indicative of a failed surgery. It appears that defendants would only have had a motive to falsify documents once the lab reports were returned on January 18.

without leave to amend for failure to state a viable claim.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any response to the objections shall be served and filed within fourteen days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: June 12, 2023

JEREMY D. PETERSON
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| RICHARD ARMENTA,<br>Plaintiff,<br>v.<br>SHAH, *et al*.,<br>Defendants. | No. 2:22-cv-0415 JDP (PC)<br><br>NOTICE OF SUBMISSION OF DOCUMENTS |

In accordance with the court's Screening Order, plaintiff must submit:

___1___ completed summons form

___1___ completed USM-285 forms

___2___ copies of the April 20, 2023, complaint

DATED:

_____
Plaintiff