NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARC ANTHONY LOWELL ENDSLEY, AKA Marc Endsley, Plaintiff-Appellant, v. EDMUND G. BROWN, Jr.; et al., Defendants-Appellees.	No. 18-15737 D.C. No. 3:17-cv-05038-WHA MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
William Alsup, District Judge, Presiding

Submitted March 12, 2019**

Before: LEAVY, BEA, and N.R. SMITH, Circuit Judges.

Civil detainee Marc Anthony Lowell Endsley, AKA Marc Endsley, appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging due process and equal protection claims. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal under 28 U.S.C.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Appendix A

§ 1915(e)(2)(B)(ii) for failure to state a claim. *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (order). We affirm.

The district court properly dismissed Endsley's due process claim because Endsley failed to allege facts sufficient to show that any defendant made a decision that was "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982).

The district court properly dismissed Endsley's equal protection claim because Endsley failed to allege facts sufficient to show that he was treated differently from similarly situated individuals. *See Serrano v. Francis*, 345 F.3d 1071, 1081-82 (9th Cir. 2003) (elements of equal protection claim).

The district court did not abuse its discretion in declining to grant Endsley leave to file an amended complaint. *See Chappel v. Lab. Corp.*, 232 F.3d 719, 725-26 (9th Cir. 2000) (providing standard of review and explaining that a "district court acts within its discretion to deny leave to amend when amendment would be futile . . .").

We do not consider arguments and allegations raised for the first time on

appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

Endsley's request for appointment of counsel, set forth in his opening brief, is denied.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARK ANTHONY LOWELL ENDSLEY, and all other Non-LPS patients who are or may be committed to Napa State Hospital,

Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF STATE HOSPITALS; EDMUND G. BROWN; DOLLY MATTEUCCI; PAM AHLIN,

Defendants.
/

No. C 17-5038 WHA

ORDER GRANTING MOTION TO DISMISS; DENYING MOTIONS TO DECLARE PLAINTIFF VEXATIOUS AND TO REQUIRE SECURITY

(ECF Nos. 14, 15)

INTRODUCTION

Plaintiff Mark Anthony Lowell Endsley, a civil detainee at Napa State Hospital ("NSH") pursuant to a verdict of not guilty by reason of insanity, filed this pro se civil rights complaint under 42 U.S.C. § 1983 against the State of California, the Governor of California, and two NSH officials. He has previously filed numerous civil rights actions in the United States District Court for the Central District of California that were dismissed, and on that basis he has been declared a vexatious litigant in that court. Here, plaintiff claims that defendants violated his federal constitutional rights by prohibiting him from engaging in consensual sex with another NSH patient.

Defendants have filed a motion to dismiss the complaint as frivolous under 28 U.S.C. § 1915(e)(2) and to require plaintiff to file a security under Local Rule 65.1-1. They have also

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filed a motion to declare plaintiff a vexatious litigant. Plaintiff has opposed both motions, and defendants have filed a reply brief. For the reasons discussed below, defendants motion to dismiss is **GRANTED**, and their motions to require a security and to declare plaintiff a vexatious litigant are **DENIED**.

STATEMENT

NSH policy allows patients to engage in sexual activity under limited circumstances unless it interferes with the treatment plan for any patient. Plaintiff alleges that NSH officials found him having consensual sex with another NSH patient in his bed. Officials told him that he was interfering with the other patient's treatment plan, and plaintiff was restricted to his unit for thirty days and moved to the bottom of a waiting list for job openings. He contends that these actions violated his constitutional right to due process which includes the right to engage in consensual sexual activity, violated his equal protection rights because detainees involuntarily committed under the Landerman Petris Short ("LPS") Act (Cal. Welf. & Inst. Code §§ 5000, et seq.) are not subject to the same restrictions on their sexual activity, and violated state law. Plaintiff seeks an injunction to change hospital policy to allow him to have sex in his bed, to designate a room allowing unfettered sexual activity between consenting adult patients at the hospital, and to vacate the decision to revoke his privileges. He also seeks money damages and declaratory relief.

ANALYSIS

Each party has submitted documents for judicial notice under Rule 201 of the Federal Rules of Evidence (ECF Nos. 16, 22). Defendants submit federal court records and an administrative order by the California Department of State Hospitals declaring policy regarding sexual conduct of patients. Plaintiff submits his own sworn statement of events. The documents submitted by defendants are judicially noticeable, but plaintiff's sworn statement is not.

Defendants argue that the complaint should be dismissed as frivolous under 28 U.S.C. § 1915(e)(2)(B). Section 1915(e)(2)(B) provides for dismissal of a complaint by a plaintiff

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proceeding in forma pauperis ("IFP") at "any time" if the action "(I) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such suit." It need not be determined here whether the complaint is frivolous because it is clear from the complaint and the judicially noticeable documents submitted that it must be dismissed for failure to state a claim upon which relief may be granted.

Under the Due Process Clause of the Fourteenth Amendment, civilly-committed persons retain substantive liberty interests, which include at least the right to basic necessities such as adequate food, shelter, clothing and medical care; safe conditions of confinement; and freedom from unnecessary bodily restraint. *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982). To determine whether the nature and extent of an infringement of one of these liberty interests rises to the level of a due process violation, a court must balance the individual's liberty interest against the relevant state interests, as measured by the state's asserted reasons for restraining the individual. *Id.* at 320-21. With respect to infringements on the rights to safety and freedom from bodily restraint, rights that are often in conflict, the court must only make certain that professional judgment in fact was exercised in making the pertinent decision. *Id.* at 319-22. "[T]he decision, if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such judgment." *Id.* at 323. The Ninth Circuit has held that the professional judgment test requires a "finding of conscious indifference amounting to gross negligence" by the professional in order to impose liability. *Estate of Conners by Meredith v. O'Connor*, 846 F.2d 1205, 1208 (9th Cir. 1988).

The facts set forth in the complaint and attachments indicate that defendants' actions were based upon professional judgment, and that they were reasonably related to the legitimate state interest in keeping patients safe and providing them professional psychological treatment. The facts alleged demonstrate that professionals made the decision that consensual sexual

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activity would be detrimental to treating the person plaintiff had sex with. Plaintiff alleges no facts that call into question that judgment, let alone rebut the presumption that the professional judgment was sound. *See e.g.*, *Mitchell v. State of Washington*, 818 F.3d 436, 443-44 (9th Cir. 2016) (plaintiff failed to rebut *Youngberg* presumption that doctor's decision not to administer certain treatment was reasonable). Indeed, the facts alleged in the complaint indicate that the professional team that evaluated the incident agreed that sexual activity interfered with the patient's medical care, which the state had legitimate interest in protecting. The suspension of privileges described by plaintiff was very limited and reasonably related to deterring or preventing him from engaging in sexual activity again with the other patient. Because NSH policy prohibited sexual activity when professionals judged that such activity would jeopardize the safety or treatment of a patient, enforcing and adhering to that policy did not violate plaintiff's due process rights. Accordingly, plaintiff's due process claim must be dismissed for failure to state grounds upon which relief may be granted.

The complaint also fails to state a claim upon which relief may be granted under the Equal Protection Clause. "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). Although the initial review of the complaint appeared to indicate that this claim was cognizable, when liberally construed, it is clear that there is no valid claim for a violation of plaintiff's equal protection rights. Plaintiff claims that he is being treated differently than people civilly committed under the LPS, but he does not allege how so. Plaintiff does not describe any instances in which an LPS detainee received different restrictions upon their sexual activity than plaintiff. It is likely, and certainly not alleged otherwise, that like plaintiff, an LPS detainee would be prohibited in engaging in sexual activity with another patent at NSH when professionals determine it interfered with the other patient's proper medical treatment. Moreover, he is not similarly situated to LPS detainees because they are committed

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under an entirely distinct statutory scheme. *See* Cal. Health & Inst. Code §§ 5000, et seq; *see also Thornton v. City of St. Helens*, 425 F.3d 1158, 1168 (9th Cir. 2005) (evidence of different treatment of unlike groups does not support an equal protection claim). Plaintiff is committed because he is not guilty of murder by reason of insanity, unlike LPS detainees who have not been charged with a crime or found insane by a fact-finder. Because the complaint does not allege facts showing that he is being treated differently than LPS detainees, and it is clear from the complaint that he is not similarly situated to those detainees, he does not state a cognizable equal protection claim.

Plaintiff argues that defendants' motion is untimely because it untimely for a motion under Rule 12(b) of the Federal Rules of Civil Procedure. The motion is not brought under Rule 12(b), however, it is brought under 28 U.S.C. § 1915(e)(2), which authorizes dismissal for failure to state a claim upon which relief may be granted at "any time." Plaintiff also argues that the motion relies upon the Prison Litigation Reform Act, which does not apply to him because he is a civil detainee and not a prisoner. Section 1915(e) applies to all cases in which the plaintiff is proceeding in forma pauperis, including plaintiffs who are not prisoners. Plaintiff also argues that the motion improperly relies upon evidence outside of the complaint. It does not. It only relies on the complaint and judicially noticeable documents reviewed by the court.

Defendants' arguments that plaintiff be declared a vexatious litigant and to require plaintiff to furnish a security are not persuasive because plaintiff is an indigent pro se detainee and this is only his second case filed in this district.

As all of plaintiff's federal claims are dismissed for failure to state a claim for relief, his state law claims are also dismissed without prejudice to him filing them in state court. *See* 28 U.S.C. § 1367(c) (3) (federal court may decline to exercise supplemental jurisdiction over state law claims when all federal claims are dismissed).

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss is **GRANTED**. The case is **DISMISSED** because plaintiff's complaint is clear that he cannot state a claim upon which relief

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may be granted under federal law. Defendants' motions to require a security and to declare plaintiff a vexatious litigant are **DENIED**.

The clerk shall enter judgment and close the file.

IT IS SO ORDERED.

Dated: February 12, 2018.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

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Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF STATE HOSPITALS; EDMUND G. BROWN; DOLLY MATTEUCCI; PAM AHLIN,

Defendants.
/

No. C 17-5038 WHA

JUDGMENT

Judgment is entered in favor of defendants.

IT IS SO ORDERED.

Dated: February 12, 2018.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

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