

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

SEP 22 2021

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

KWESI KHARY MUHAMMAD,

No. 20-17346

Plaintiff-Appellant,

D.C. No. 2:19-cv-02592-TLN-EFB

v.

MEMORANDUM*

CHRISTINE BARBER,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of California
Troy L. Nunley, District Judge, Presiding

Submitted September 14, 2021**

Before: PAEZ, NGUYEN, and OWENS, Circuit Judges.

California state prisoner Kwesi Khary Muhammad appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging deliberate indifference to his serious medical needs. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Colony Cove Props, LLC v. City of Carson*, 640

* 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).

F.3d 948, 955 (9th Cir. 2011). We affirm.

The district court properly dismissed Muhammad's deliberate indifference claim because Muhammad failed to allege facts sufficient to show that defendant disregarded an excessive risk to Muhammad's foot condition. *See Toguchi v. Chung*, 391 F.3d 1051, 1056-60 (9th Cir. 2004) (a prison official is deliberately indifferent only if he or she knows of and disregards an excessive risk to inmate health; medical malpractice, negligence, or a difference of opinion concerning the course of treatment does not amount to deliberate indifference).

The district court properly dismissed Muhammad's claim for intentional infliction of emotional distress ("IIED") because Muhammad failed to allege facts sufficient to show that defendant intended to inflict severe emotional distress. *See Wong v. Tai Jing*, 117 Cal. Rptr. 3d 747, 766 (Ct. App. 2010) (setting forth the three-part test for IIED under California law).

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).

Muhammad's request for judicial notice, set forth in the opening brief, is denied.

AFFIRMED.