

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

DEC 21 2018

FOR THE NINTH CIRCUIT

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

ELMER MORENO MENDOZA,

No. 18-15564

Plaintiff-Appellant,

D.C. No. 3:16-cv-05529-EDL

v.

MEMORANDUM\*

CAPTAIN AGUILAR, individual capacity  
as Facility Central Captain,

Defendant-Appellee.

Appeal from the United States District Court  
for the Northern District of California  
Elizabeth D. Laporte, Magistrate Judge, Presiding\*\*

Submitted December 17, 2018\*\*\*

Before: WALLACE, SILVERMAN, and McKEOWN, Circuit Judges.

California state prisoner Elmer Moreno Mendoza appeals pro se from the

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

\*\* The parties consented to proceed before a magistrate judge. *See* 28 U.S.C. § 636(c).

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

district court’s summary judgment for failure to exhaust administrative remedies in his 42 U.S.C. § 1983 action alleging failure-to-protect and due process claims. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Albino v. Baca*, 747 F.3d 1162, 1168 (9th Cir. 2014) (en banc). We affirm.

The district court properly granted summary judgment because Mendoza failed to exhaust his administrative remedies, and failed to raise a genuine dispute of material fact as to whether administrative remedies were effectively unavailable. *See Woodford v. Ngo*, 548 U.S. 81, 90 (2006) (proper exhaustion requires “using all steps that the agency holds out, and doing so properly (so that the agency addresses the issues on the merits)” (emphasis, citation, and internal quotation marks omitted)); *Sapp v. Kimbrell*, 623 F.3d 813, 823-24, 826-27 (9th Cir. 2010) (describing limited circumstances under which exhaustion may be effectively unavailable). Because we affirm the district court’s summary judgment on the basis of Mendoza’s failure to exhaust administrative remedies, we treat the judgment as being entered without prejudice. *See Lira v. Herrera*, 427 F.3d 1164, 1170 (9th Cir. 2005) (“[A] district court must dismiss a case without prejudice when there is no presuit exhaustion[.]” (emphasis, citation, and internal quotation marks omitted)).

We reject as unsupported by the record Mendoza’s contention that the district court failed to dispose of his pending motions.

We do not consider matters raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

**AFFIRMED.**