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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

RODNEY LAMONT DOWD,
Plaintiff,

v.

JAMES A. YATES, et al.,
Defendants.

CASE NO. 1:07-CV-01505-OWW-DLB PC

ORDER GRANTING NUNC PRO TUNC
MOTION FOR EXTENSION OF TIME TO
FILE MOTION TO DISMISS (DOC. 71)

ORDER DISREGARDING PLAINTIFF’S
MOTION REGARDING CASE STATUS AS
MOOT (DOC. 75)

FINDINGS AND RECOMMENDATION
RECOMMENDING DEFENDANT MEYST’S
MOTION TO DISMISS BE GRANTED
(DOC. 73)

OBJECTIONS DUE WITHIN TWENTY-ONE
DAYS

Findings And Recommendation

I. Background

A. Procedural History

Plaintiff Rodney Lamont Dowd (“Plaintiff”) is a prisoner in the custody of the California Department of Corrections and Rehabilitation (“CDCR”). Plaintiff is proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. This action is proceeding on Plaintiff’s second amended complaint against Defendants S. Meyst and Defendant Arguerralde¹ for violation of the Eighth Amendment. On May 4, 2010, Defendant Meyst filed a motion to dismiss pursuant to the unenumerated portion of Rule 12(b) of the Federal Rules of Civil Procedure on the grounds that Plaintiff has failed to exhaust his administrative remedies.

¹ Defendant Arguerralde has not been served in this action. Defendants Defosses, Jenan, McCollum, Teater, and Ward were dismissed from this action pursuant to this Court’s order filed on March 22, 2010. Doc. 70.

1 Doc. 73, Def. Meyst's Mot. Dismiss. Plaintiff filed his opposition on May 26, 2010. Doc. 76,
2 Pl.'s Opp'n.² Defendant filed his reply on June 1, 2010. Doc. 77, Reply. The matter is
3 submitted pursuant to Local Rule 230(l). The Court will first adjudicate Defendant's motion for
4 extension of time, filed April 6, 2010, and Plaintiff's motion regarding case status, filed May 24,
5 2010.

6 **B. Motion For Extension of Time**

7 On April 6, 2010, Defendant filed a motion for extension of time to file his motion to
8 dismiss nunc pro tunc. Doc. 71. The Court finds good cause to grant this motion. It is
9 HEREBY ORDERED that Defendant's motion for extension of time is granted.

10 **C. Motion Regarding Case Status**

11 On May 24, 2010, Plaintiff filed a motion entitled "Request Answer to Past Writ of
12 Motion To Dismiss on C/O Defosses Jenan, McCollum, Teater, and Ward Motion To Dismiss."
13 Plaintiff is requesting a status update regarding whether his case is still pending. As stated
14 previously, Defendants Defosses, Jenan, McCollum, Teater, and Ward were dismissed from this
15 action by order filed on March 22, 2010, for Plaintiff's failure to exhaust administrative
16 remedies. As of the date of this order, Defendants Meyst and Arguerralde remain in this action.
17 Accordingly, Plaintiff's motion is DISREGARDED.

18 **D. Summary of Second Amended Complaint**

19 Plaintiff alleges that on August 22, 2007, while housed at Pleasant Valley State Prison
20 ("PVSP"), Defendant Arguerralde informed Plaintiff that he would be moved to the gymnasium.
21 Plaintiff informed Defendant Arguerralde that he would rather be placed in administrative
22 segregation. Plaintiff alleges that Officer Teater later arrived at Plaintiff's cell and called for
23 more officers. Officer Defosses arrived, and Officer Teater ordered Officer Bonner, who was at
24 the control booth tower, to open the cell door. Officers Defosses, Jenan, and Arguerralde entered
25 Plaintiff's cell. Plaintiff alleges that Officers Defosses and Arguerralde then grabbed Plaintiff's
26 arm, that Officer Defosses slammed Plaintiff on the ground, and that he and Ward sat on

27
28 ² Plaintiff was provided with notice of the requirements for opposing an unenumerated Rule 12(b) motion
on February 10, 2009. *Wyatt v. Terhune*, 315 F.3d 1108, 1120 n.14 (9th Cir. 2003); Doc. 23.

1 Plaintiff's back. Plaintiff alleges that Officer Jenan handled Plaintiff roughly and that both
2 Officers Teater and Jenan were also complicit in the attack. Plaintiff alleges that Officers Ward
3 and McCollum snatched at Plaintiff, causing Plaintiff to dislocate his shoulder. Plaintiff alleges
4 that Defendant Meyst assisted the other correctional officers during the attack and was complicit
5 in the assault.

6 **II. Failure To Exhaust Administrative Remedies**

7 **A. Legal Standard**

8 Pursuant to the Prison Litigation Reform Act of 1995, “[n]o action shall be brought with
9 respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner
10 confined in any jail, prison, or other correctional facility until such administrative remedies as are
11 available are exhausted.” 42 U.S.C. § 1997e(a). Prisoners are required to exhaust the available
12 administrative remedies prior to filing suit. *Jones v. Bock*, 549 U.S. 199, 211 (2007); *McKinney*
13 *v. Carey*, 311 F.3d 1198, 1199-1201 (9th Cir. 2002). Exhaustion is required regardless of the
14 relief sought by the prisoner and regardless of the relief offered by the process, *Booth v. Churner*,
15 532 U.S. 731, 741 (2001), and the exhaustion requirement applies to all prisoner suits relating to
16 prison life, *Porter v. Nussle*, 435 U.S. 516, 532 (2002).

17 Section 1997e(a) does not impose a pleading requirement, but rather, is an affirmative
18 defense under which defendants have the burden of raising and proving the absence of
19 exhaustion. *Jones*, 549 U.S. at 216; *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003). The
20 failure to exhaust non-judicial administrative remedies that are not jurisdictional is subject to an
21 unenumerated Rule 12(b) motion, rather than a summary judgment motion. *Wyatt*, 315 F.3d at
22 1119 (citing *Ritza v. Int’l Longshoremen’s & Warehousemen’s Union*, 837 F.2d 365, 368 (9th
23 Cir. 1998) (per curiam)). In deciding a motion to dismiss for failure to exhaust administrative
24 remedies, the Court may look beyond the pleadings and decide disputed issues of fact. *Id.* at
25 1119-20. If the Court concludes that the prisoner has failed to exhaust administrative remedies,
26 the proper remedy is dismissal without prejudice. *Id.*

1 **B. Analysis**

2 The CDCR has an administrative grievance system for prisoner complaints. Cal. Code
3 Regs. tit. 15, § 3084.1. The process is initiated by submitting a CDC Form 602. *Id.* § 3084.2(a).
4 Four levels of appeal are involved, including the informal level, first formal level, second formal
5 level, and third formal level, also known as the “Director’s Level.” *Id.* § 3084.5. Appeals must
6 be submitted within fifteen working days of the event being appealed, and the process is initiated
7 by submission of the appeal to the informal level, or in some circumstances, the first formal
8 level. *Id.* §§ 3084.5, 3084.6(c). In order to satisfy § 1997e(a), California state prisoners are
9 required to use this process to exhaust their claims prior to filing suit. *Woodford v. Ngo*, 548
10 U.S. 81, 85-86 (2006); *McKinney*, 311 F.3d at 1199-1201. Exhaustion does not *always* require
11 pursuit of an appeal through the Director’s Level of review. What is required to satisfy
12 exhaustion is a fact specific inquiry, and may be dependent upon prison officials’ response to the
13 appeal. *See Nunez v. Duncan*, 591 F.3d 1217, 1224 (9th Cir. 2010) (listing examples of
14 exceptions to exhaustion requirement from other circuits); *Brown v. Valoff*, 422 F.3d 926, 935-36
15 (9th Cir. 2005) (“[E]ntirely pointless exhaustion” not required).

16 Defendant contends that this action should be dismissed because Plaintiff failed to
17 exhaust his administrative remedies. Doc. 73, Mem. P. & A. Support Mot. Dismiss 5:24-25.
18 Defendant contends that Plaintiff did not exhaust his inmate grievance at the Director’s level of
19 review. *Id.* 5:25-6:3. Defendant further contends that Plaintiff did not attempt to exhaust
20 administrative remedies prior to filing this action. *Id.* 6:4-9. Defendant submits as evidence in
21 support declarations from N. Grannis, chief of the Inmate Appeals Branch, and G. Duran, appeals
22 coordinator at PVSP. Doc. 73-2, N. Grannis Decl.; Doc. 73-3, G. Duran Decl.

23 A review of the submitted exhibits indicates that Plaintiff submitted grievance No. PVSP-
24 07-02904 regarding this alleged force incident on August 8, 2007. Doc. 73-3, G. Duran Decl.,
25 Ex. B. It was re-categorized as a staff complaint and went to first level review on September 11,
26 2007. *Id.* On October 11, 2007, the response was completed. G. Duran Decl., Ex. C. Plaintiff
27 received his response on October 29, 2007. *Id.*, Ex. B. On November 1, 2007, Plaintiff
28 submitted his grievance to the second level of review. *Id.*, Ex. B. The second level response was

1 completed on November 27, 2007, *id.*, Ex. D, and Plaintiff received the response on November
2 29, 2007, *id.*, Ex. B. Plaintiff did not submit his grievance to the Director's level of review until
3 July 24, 2008. Doc. 73-2, N. Grannis Decl. ¶ 4; Ex. A. The Director's Level screened out
4 Plaintiff's grievance on August 13, 2008 as untimely. *Id.*

5 The Court finds that Defendant Meyst has met his burden of demonstrating Plaintiff did
6 not exhaust his administrative remedies. The burden thus shifts to Plaintiff to demonstrate that
7 he exhausted all administrative remedies as were available.

8 Plaintiff in opposition contends that he was denied the opportunity to properly exhaust his
9 administrative remedies. Pl.'s Opp'n 1-2. Plaintiff contends that he inquired as to what the
10 response was to his grievance at the second level of review, but received no response, which
11 explained his delay in seeking third level review. *Id.* Plaintiff cites to *Brown*, 422 F.3d 926, in
12 support. *Id.*

13 Defendant in reply contends that Plaintiff's arguments are without merit. Def.'s Reply 2-
14 3. Defendant contends that Plaintiff's grievance requested three things (1) an investigation; (2)
15 reimbursement for property damage; and (3) an apology. *Id.* at 3:17-28. Defendant contends that
16 Plaintiff did not receive the latter two and was informed that if he was dissatisfied, he should
17 submit his grievance to the next level of review. *Id.* Defendant contends that *Brown* does not
18 support Plaintiff's argument because he had available remedies at the Director's Level of review.

19 The Court finds Plaintiff's arguments unavailing. Plaintiff is not contending that he did
20 not receive the first or second level review responses. Plaintiff had requested further information
21 at the second level of review as to what portion of his grievance had been granted at the first
22 level of review. Having examined the second level response, it is clear what portion of the
23 grievance was granted (i.e., the investigation), and what was not (i.e., the property reimbursement
24 and apology). Plaintiff thus did receive the requested information he asked for in his appeal to
25 the second level of review. Plaintiff does not cite to any case law, statute, or regulation in
26 support of his argument that he is not responsible for exhausting administrative remedies in this
27 instance, and the Court is not aware of any such authority. Because Plaintiff failed to properly
28 exhaust his administrative grievances, the Court recommends dismissal of Defendant Meyst from

1 this action without prejudice. *Wyatt*, 315 F.3d at 1119-20.

2 **III. Conclusion**

3 Based on the foregoing, it is HEREBY ORDERED that:

- 4 1. Defendant’s nunc pro tunc motion for extension of time to file a motion to
5 dismiss, filed April 6, 2010, is GRANTED; and
- 6 2. Plaintiff’s motion regarding case status, filed May 24, 2010, is DISREGARDED
7 as moot.

8 Furthermore, it is HEREBY RECOMMENDED that Defendant Meyst’s motion to
9 dismiss pursuant to the unenumerated portion of Rule 12(b) of the Federal Rules of Civil
10 Procedure, on the grounds that Plaintiff has failed to exhaust his administrative remedies, should
11 be GRANTED, and Defendant Meyst be DISMISSED from this action without prejudice.

12 These Findings and Recommendations are submitted to the United States District Judge
13 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **twenty-one**
14 **(21) days** after being served with these Findings and Recommendations, the parties may file
15 written objections with the court. Such a document should be captioned “Objections to
16 Magistrate Judge's Findings and Recommendations.” The parties are advised that failure to file
17 objections within the specified time may waive the right to appeal the District Court's order.
18 *Martinez v. Ylst*, 951 F.2d 1153, 1156-57 (9th Cir. 1991).

19 IT IS SO ORDERED.

20 **Dated: December 8, 2010**

20 /s/ Dennis L. Beck
21 UNITED STATES MAGISTRATE JUDGE