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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Jenghiz K. Stewart,
Plaintiff,
vs.
Central Arizona Correction Facility, et al.,
Defendants.

No. CV 09-0674-PHX-MHM (ECV)

ORDER

Plaintiff Jenghiz K. Stewart, who is confined in the Central Arizona Correction Facility in Florence, Arizona, filed this *pro se* civil rights action against various employees of the Arizona Department of Corrections (ADC). (Doc. #1.) Hamidi moves to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).¹ (Doc. #11.) Bezy and Hernandez join the motion. (Doc. #24.) The motion is fully briefed. (Doc. ##38, 48, 60.²)

The Court will deny the motion.

I. Background

In his Complaint, Plaintiff asserted that he has Tourette’s Syndrome and sensitivity

¹The Court issued a Notice pursuant to Wyatt v. Terhune, 315 F.3d 1108, 1120 n.14 (9th Cir. 2003). (Doc. #22.)

²Defendants also move to strike Plaintiff’s response to the motion to dismiss. (Doc. ##47, 48.)

1 to sound, heat, and bright lights. He alleged that Defendants' conduct subjected him to loud
2 noises, bright lights, and heat, all of which exacerbated his Tourette's tics. Plaintiff alleged
3 that Defendants' conduct violated the Eighth Amendment. (Doc. #1.)

4 Plaintiff alleged six counts in his Complaint. Each count is directed against a different
5 Defendant—Count 1 against Bezy, Count 2 against Boughter, Count 3 against Hernandez,
6 Count 4 against Hamidi, Count 5 against Phan, and Count 6 against Central Arizona
7 Detention Facility. (Id.) The Court dismissed Central Arizona Detention Facility and
8 directed the other Defendants to answer the Complaint. (Doc. #5.)

9 **II. Motion to Strike**

10 Defendants move to strike Plaintiff's response to the motion to dismiss, arguing that
11 it is untimely. (Doc. #47, 48.) Hamidi asserts that the Court ordered Plaintiff to file his
12 response by September 10, 2009, but it was not filed until September 16, 2009. (Doc. #47
13 at 1-2, ref. Doc. ##22, 38.) Bezy and Hernandez argue that Plaintiff's response to their
14 joinder was due August 28, 2009. (Doc. #48 at 1-2.) In addition, Bezy and Hernandez argue
15 that Plaintiff's response does not mention them or contest their joinder to the motion to
16 dismiss. (Doc. #48 at 2.) Plaintiff responds to the motions to strike. (Doc. ##51, 56.)

17 The Court has already ruled that Plaintiff's response to the motion to dismiss was
18 timely. (Doc. #49.) Hamidi's motion is, therefore, moot. The Court notes that no separate
19 Notice was sent pursuant to Wyatt, 315 F.3d at 1120 n. 14, regarding Plaintiff's obligation
20 to respond to Bezy and Hernandez, and it is unclear that a separate response was required.
21 In addition, in his response to the motion to strike, Plaintiff asserts that he did not receive
22 Bezy and Hernandez's joinder to the motion to dismiss, and he asks for a 30-day extension
23 of time. (Doc. #56.) The Court will deny this request as unnecessary and consider Plaintiff's
24 response as one to all Defendants. The Court will deny the motions to strike as moot in light
25 of the Court's analysis of the merits of the motion to dismiss.

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1 **III. Motion to Dismiss**

2 **A. Failure to State a Claim**

3 Hamidi, Hernandez, and Bezy move, pursuant to Federal Rule of Civil Procedure
4 12(b)(6), to dismiss the Complaint for failure to state a claim. (Doc. #11 at 1-2, Doc. #24 at
5 1.) They assert that the Complaint does not state a claim because it contains no dates of the
6 alleged constitutional violations. Plaintiff submits a response, a declaration, a statement of
7 facts, and over 200 pages of exhibits. (Doc. ##38, 39, 40.) Much of Plaintiff's
8 documentation in opposition provides dates and expands on the allegations made in the
9 Complaint. In his reply, Hamidi reasserts that Plaintiff did not mention a single date "[n]or
10 did Plaintiff elucidate any factual basis upon which Dr. Hamidi could be held liable for
11 violating Plaintiff's Eighth Amendment rights." (Doc. #60 at 2.) Hamidi notes that
12 Plaintiff's Response to the motion to dismiss identifies the period during which Hamidi
13 treated Plaintiff (August 6, 2007, to November 29, 2007). But he argues that Plaintiff still
14 fails to define or even allude to any specific conduct by Hamidi which would qualify as a
15 violation of Plaintiff's Eighth Amendment rights. Hamidi asserts that Plaintiff fails to allege
16 anything other than negligence.³ Hamidi points to no specific language in the Complaint.

17 The Court has already screened the Complaint pursuant to 28 U.S.C. § 1915A(a),
18 which uses the same standard as Rule 12(b)(6), Resnick v. Hayes, 213 F.3d 443, 447 (9th
19 Cir. 2000), and found that it states claims against Defendants. Defendants cite no authority
20 requiring specific dates in a Complaint or that the specific dates are essential elements of the
21 claims. Moreover, *pro se* pleadings are liberally construed. Haines v. Kerner, 404 U.S. 519
22 (1972). Finally, the information sought by Defendants can be obtained through discovery.

23 The motion to dismiss for failure to state a claim is denied.
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27 ³This is a new argument raised for the first time in the reply, and the Court declines
28 to consider it, see United States v. Wright, 215 F.3d 1020, 1030 n. 3 (9th Cir. 2000), but
again notes that the Complaint has already been screened under the Rule 12(b)(6) standard.

1 **B. Exhaustion**

2 **1. Legal Standard**

3 Under the Prison Litigation Reform Act (PLRA), a prisoner must exhaust available
4 administrative remedies before bringing a federal action concerning prison conditions. See
5 42 U.S.C. § 1997e(a); Griffin v. Arpaio, 557 F.3d 1117, 1119 (9th Cir. 2009). Exhaustion
6 is required for all suits about prison life, Porter v. Nussle, 534 U.S. 516, 523 (2002),
7 regardless of the type of relief offered through the administrative process, Booth v. Churner,
8 532 U.S. 731, 741 (2001). And a prisoner must complete the administrative review process
9 in accordance with the applicable rules. See Woodford v. Ngo, 548 U.S. 81, 92 (2006).

10 Exhaustion is an affirmative defense. Jones v. Bock, 549 U.S. 199, 212 (2007). Thus,
11 the defendant bears the burden of raising and proving the absence of exhaustion. Wyatt v.
12 Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). Because exhaustion is a matter of abatement
13 in an unenumerated Rule 12(b) motion, a court may look beyond the pleadings to decide
14 disputed issues of fact. Id. at 1119-20. Further, a court has broad discretion as to the
15 method to be used in resolving the factual dispute. Ritza v. Int’l Longshoremen’s &
16 Warehousemen’s Union, 837 F.2d 365, 369 (9th Cir. 1988) (quotation omitted).

17 **2. Parties Contentions**

18 **a. Defendants**

19 Defendants assert that Plaintiff admits that he failed to exhaust remedies as to every
20 Count and as to every Defendant. (Doc. #11 at 2.) They argue that in Speelman v. United
21 States, 461 F. Supp. 2d 71 (D.D.C. 2006), the court held that the plaintiffs’ claims as to
22 damages had to be dismissed pursuant to Rule 12(b)(6) because plaintiffs admitted that they
23 had failed to exhaust administrative remedies in the pleadings. (Id.) ““Since plaintiffs’
24 failure to exhaust is uncontested and is clearly required by the statute, their claim for
25 damages will be dismissed for failure to state a claim upon which relief may be granted.””
26 (Doc. #11 at 2, citing Speelman, 461 F. Supp. 2d at 74.) Bezy and Hernandez make no
27 additional arguments. (Doc. #24 at 2.)
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b. Plaintiff

Plaintiff asserts that he made every effort to attempt to exhaust his remedies. (Doc. #38 at 11.) He argues that it was not his fault that he did not exhaust his issues with Hamidi because it was prison officials who had the responsibility to answer grievances and appeals. He alleges that there is no instruction in ADC grievance procedure regarding what he should have done when grievable issues are not answered. (Id.)

c. Reply

Hamidi asserts that Plaintiff “freely and repeatedly admits” that he failed to exhaust administrative remedies as to his allegations against Hamidi. (Doc. #60 at 3, ref. Doc. #38 at 12(B)(1).) Hamidi argues that although “failure to exhaust” is an affirmative defense, Plaintiff’s own admissions that he failed to exhaust administrative remedies satisfy the Defendant’s burden of proof. He asks, in the alternative, that he be permitted to conduct discovery and to re-urge the motion as one for summary judgment.

C. Analysis

The Court will deny the motion because Defendants have failed to meet their burden to demonstrate the availability of an administrative procedure, what the steps of such a procedure are, and that Plaintiff failed to exhaust available remedies.

First, the Court notes that a motion to dismiss for failure to exhaust is properly raised under the Federal Rules of Civil Procedure as an unenumerated 12(b) motion, not a motion under Rule 12(b)(6) or Rule 56. Wyatt, 315 F.3d at 1119. But most important, exhaustion is an affirmative defense; it is not a pleading or jurisdictional requirement. Id. Therefore, Defendants “have the burden of raising and proving the absence of exhaustion.” See id.

Plaintiff admitted in numerous paragraphs of his Complaint that he failed to exhaust remedies. But he also claimed as to Hamidi, for example, that he did not exhaust because he did not receive responses from prison officials, some grievances were returned as unprocessed, and he was moved to another unit where he attempted to exhaust but he was ignored. (Id. at Count 4-A ¶ 5, see also Count 1 ¶ 5 and Count 3 ¶ 5.) Essentially, Plaintiff asserted that no remedy was, in fact, available. See Brown v. Valoff, 422 F.3d 926, 935

1 (2005). If Plaintiff was unable to file grievance forms or if he was reliably informed that
2 administrative remedies were not available, exhaustion is not required. See Marella v.
3 Terhune, 568 F.3d 1024, 1027 (9th Cir. 2009); Brown, 422 F.3d at 935.

4 Here, Defendants provide no evidence of the particulars of an administrative
5 procedure; they provide no evidence of the steps of such a procedure, or whether Plaintiff
6 filed grievances that were unprocessed, and if so why, or whether there is a procedure for
7 proceeding to the next level of review if the inmate receives no response. Defendants merely
8 assert in their Motion that Plaintiff admitted his failure to exhaust, but certainly on this
9 record, that is insufficient to meet their burden.

10 Defendants' motion to dismiss on the ground of non-exhaustion is denied without
11 prejudice.

12 **IT IS ORDERED:**

13 (1) The reference to the Magistrate Judge is withdrawn as to Hamidi's Motion to
14 Dismiss (Doc. #11), in which Bezy and Hernandez join (Doc. #24), and Defendants' Motions
15 to Strike (Doc. ##47, 48).

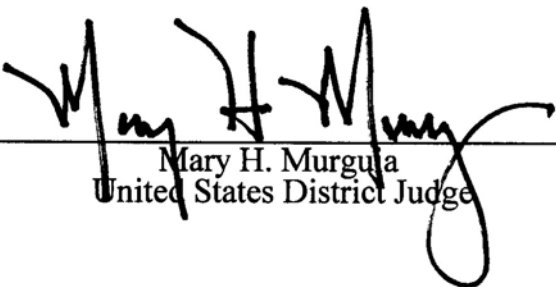
16 (2) Defendants' Motions to Strike (Doc. ##47, 48) are **denied as moot**.

17 (3) Plaintiff's request for an extension of time to respond to Bezy and Hernandez's
18 joinder (contained in Doc. #56) is **denied as unnecessary**.

19 (4) The Motion to Dismiss is **denied without prejudice**. Defendants have 30 days
20 to file another motion to dismiss on the ground of failure to exhaust administrative remedies.

21 DATED this 5th day of November, 2009.

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Mary H. Murgula
United States District Judge