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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

EARL WARNER,
Plaintiff,
v.
M. CATE, et al.,
Defendants.

Case No. 1:12-cv-01146-LJO-MJS (PC)
FINDINGS AND RECOMMENDATION TO
DENY DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT
(ECF No. 41.)
FOURTEEN (14) DAY OBJECTION
DEADLINE

I. PROCEDURAL HISTORY

Plaintiff is a state prisoner proceeding *pro se* and *in forma pauperis* in this civil rights action brought pursuant to 28 U.S.C. § 1983. (ECF No. 1 & 7.) The action proceeds on an Eighth Amendment failure to protect claim against Defendants Walker, Davis¹, Prokop, Spralding, and Fellows. (ECF No. 12.)

Before the Court is Defendants' August 18, 2014 motion for summary judgment on exhaustion grounds. (ECF No. 41.) Plaintiff opposes the motion. (ECF No. 57.) Defendants filed a reply (ECF No. 58.). The matter is deemed submitted. Local Rule 230(l).

II. LEGAL STANDARD – MOTION FOR SUMMARY JUDGMENT

Any party may move for summary judgment, and “[t]he [C]ourt shall grant

¹ Formerly Defendant D. McGaha.

1 summary judgment if the movant shows that there is no genuine dispute as to any
2 material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
3 56(a). Each party’s position, whether it be that a fact is disputed or undisputed, must be
4 supported by (1) citing to particular parts of materials in the record, including but not
5 limited to depositions, documents, declarations, or discovery; or (2) “showing that the
6 materials cited do not establish the absence or presence of a genuine dispute, or that
7 an adverse party cannot produce admissible evidence to support the fact.” Fed R. Civ.
8 P. 56(c)(1).

9 “Where the moving party will have the burden of proof on an issue at trial, the
10 movant must affirmatively demonstrate that no reasonable trier of fact could find other
11 than for the moving party.” *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th
12 Cir. 2007). If the burden of proof at trial rests with the nonmoving party, then the
13 moving party need only point to “an absence of evidence to support the nonmoving
14 party’s case.” *Id.* Once the moving party has met its burden, the nonmoving party must
15 point to “specific facts showing that there is a genuine issue for trial.” *Id.* (*quoting*
16 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)).

17 In evaluating the evidence, “the [C]ourt does not make credibility determinations
18 or weigh conflicting evidence,” and “it draws all inferences in the light most favorable to
19 the nonmoving party.” *Id.*

20 **III. PLAINTIFF’S CLAIMS**

21 Plaintiff complains in his First Amended Complaint (“FAC”) that on January 19,
22 2011 at his initial classification hearing, he informed Defendants of his concerns about
23 threats from the Northern Riders gang and their leader at Pleasant Valley State Prison
24 (“PVSP”), inmate Sordia. (ECF No. 10.) Defendants acted with hostility and deliberate
25 indifference towards Plaintiff and informed Plaintiff “he was out of places to go.” (ECF
26 No. 10.) Defendant Walker placed Plaintiff in an adjacent holding cell to Sordia. Sordia
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1 denied any animosity, and Defendants approved Plaintiff for general population housing
2 in the same unit as inmate Sordia.

3 Prisoners affiliated with Sordia loitered outside Plaintiff's cell during meal breaks.
4 Eventually, Plaintiff suffered a nervous breakdown and was transferred because of self-
5 inflicted lacerations to his wrists.

6 **IV. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

7 **A. Legal Standard -- Exhaustion**

8 The Prison Litigation Reform Act ("PLRA") stipulates, "No action shall be brought
9 with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by
10 a prisoner confined in any jail, prison, or other correctional facility until such
11 administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).
12 Therefore, prisoners are required to exhaust all available administrative remedies prior
13 to filing suit. *Jones v. Bock*, 549 U.S. 199, 211 (2007).

14 "The primary purpose of a [prisoner's administrative] grievance is to alert the
15 prison to a problem and facilitate its resolution, not to lay groundwork for litigation."
16 *Griffin v. Arpaio*, 557 F.3d 1117, 1120 (9th Cir. 2009). "A grievance need not include
17 legal terminology or legal theories unless they are in some way needed to provide
18 notice of the harm being grieved. A grievance also need not contain every fact
19 necessary to prove each element of an eventual legal claim." *Id.* Instead, the grievance
20 must alert "the prison to the nature of the wrong for which redress is sought," *id.* at
21 1120 (*quoting Strong v. David*, 297 F.3d 646, 650 (7th Cir. 2002)), and must give the
22 prison an opportunity "to reach the merits of the issue." *Id.* at 1119.

23 A motion for summary judgment is the proper means to raise a prisoner's failure
24 to exhaust administrative remedies. *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir.
25 2014). Defendants have the burden of proving Plaintiff failed to exhaust available
26 administrative remedies. *Id.* A defendant's burden of establishing an inmate's failure to
27 exhaust administrative remedies has been characterized by the Ninth Circuit as "very
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1 low.” *Albino v. Baca*, 697 F.3d 1023, 1031 (9th Cir. 2012). The “defendant need only
2 show the existence of . . . [a grievance procedure] that the plaintiff did not use.” *Id.*
3 (citing *Hilao v. Estate of Marcos*, 103 F.3d 767, 778, n.5 (9th Cir. 1996)).

4 “If undisputed evidence viewed in the light most favorable to the prisoner shows
5 a failure to exhaust, a defendant is entitled to summary judgment under Rule 56.”
6 *Albino*, 747 F.3d at 1166. If material facts are disputed, summary judgment should be
7 denied, and the district court should decide “disputed factual questions relevant to
8 exhaustion . . . in the same manner a judge rather than a jury decides disputed factual
9 questions relevant to jurisdiction and venue.” *Id.* at 1170-71.

10 **B. Factual Background**

11 The event which gave rise to the Eighth Amendment claim in Plaintiff’s FAC
12 occurred on January 19, 2011. Plaintiff filed his original complaint on July 12, 2012, and
13 his FAC on May 10, 2013. (ECF Nos. 1 & 10.) Plaintiff filed three prison appeals
14 relevant to exhaustion of the claims raised in his FAC: PVSP-O-12-00872, RJD-B-12-
15 00796, and RJD-B-12-01098.

16 While housed at PVSP, Plaintiff submitted appeal PVSP-O-12-00872 on
17 December 12, 2011. On January 30, 2012, the appeal was rejected at the first level on
18 the basis that Plaintiff failed to demonstrate a material adverse effect on his welfare
19 pursuant to 15 C.C.R. § 3084.6(b)(2). Plaintiff resubmitted the appeal. A letter dated
20 April 13, 2012 was sent to Plaintiff informing him to resubmit his appeal to the
21 appropriate California Department of Corrections and Rehabilitation (“CDCR”) unit
22 because PVSP no longer had jurisdiction over Plaintiff when he was transferred to
23 Richard J. Donovan Correctional Facility (“RJD”).

24 The parties dispute when Plaintiff received the April 13, 2012 letter and how
25 appeal RJD-B-12-00796 was initiated. Defendants contend that the appeal was
26 received in the appeals office at RJD on April 20, 2012, it was screened and cancelled
27 as untimely pursuant to 15 C.C.R. § 3084.6(c)(4), and a letter was sent to the Plaintiff
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1 May 11, 2012, informing him of the cancellation and the process for appealing the
2 cancellation decision. Plaintiff contends that he had not received the April 13, 2012
3 letter by May 3, 2012, when he sent a letter to the PVSP Appeals Office inquiring on the
4 status of his appeal. He subsequently received the April 13, 2012 letter and notification
5 that his PVSP-O-12-00872 had been assigned appeal number RJD-B-12-00796 and
6 rejected as untimely.

7 Plaintiff appealed the cancellation of RJD-B-12-00796 by submitting appeal RJD-
8 B-12-01098. In a letter dated May 24, 2012, the appeal was cancelled pursuant to 15
9 C.C.R. § 3084.6(c)(4) as untimely.

10 **C. Parties' Arguments**

11 Defendants argue that Plaintiff did not exhaust his administrative remedies
12 because he did not obtain a third level decision on any of the three appeals. Appeal
13 PVSP-O-12-00872 concluded when Plaintiff was no longer housed at PVSP. Although
14 he then resubmitted the appeal as RJD-B-12-00796 on April 20, 2012, it was properly
15 cancelled as untimely. Plaintiff properly appealed that cancellation in RJD-B-12-01098.
16 While RJD-B-12-01098 may have been improperly cancelled, Plaintiff failed to appeal
17 the cancellation decision, and therefore, he failed to exhaust his administrative
18 remedies.

19 Plaintiff contends the prison prevented him from exhausting his administrative
20 remedies and that appeal of RJD-B-12-01098 would have been futile. PVSP-O-12-
21 00872 was erroneously cancelled; Plaintiff alleged a material adverse effect on his
22 welfare when he claimed that the incident caused him to have a nervous breakdown
23 and slit his wrists. Plaintiff resubmitted PVSP-O-12-00872, and it was re-assigned
24 appeal number RJD-B-12-00796 when Plaintiff transferred to RJD. RJD-B-12-00796
25 was erroneously cancelled as untimely. The appeal was erroneously treated as though
26 it was submitted for the first time, and the Appeals Office never characterized it as
27 untimely when it was first submitted at PVSP. When Plaintiff attempted to appeal the
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1 cancellation and complained about the above issues with the appeals process via
2 appeal RJD-B-12-01098, this appeal was again erroneously cancelled as untimely even
3 though he had submitted it well within thirty days of receiving notice of the cancellation
4 as required under the California Code of Regulations.

5 **D. Analysis**

6 There is a genuine issue of material fact as to whether the administrative
7 remedies were effectively unavailable to Plaintiff. Defendants contend that the
8 cancellation of RJD-B-12-01098 may have been a mistake, but that Plaintiff should have
9 still appealed that cancellation because all of Plaintiff's prior appeals were properly
10 screened out. However, Plaintiff presents evidence that his initial appeal PVSP-O-12-
11 00872 was improperly screened out because he had alleged a material adverse effect
12 on his welfare, that he properly resubmitted that appeal and it was instead cancelled as
13 untimely, and when he attempted to appeal the cancellation again, he was given the
14 same response -- that his appeal was untimely.

15 A Plaintiff can demonstrate that administrative remedies were effectively
16 unavailable to him when he attempts to comply with the process, but is "thwarted by
17 improper screening." *Sapp v. Kimbrell*, 623 F.3d 813, 823 (9th Cir. 2010). In order to
18 demonstrate this exception applies, the plaintiff "must establish (1) that he actually filed
19 a grievance or grievances that, if pursued through all levels of administrative appeals,
20 would have sufficed to exhaust the claim that he seeks to pursue in federal court, and
21 (2) that prison officials screened his grievance or grievances for reasons inconsistent
22 with or unsupported by applicable regulations." *Id.* at 823-24. Alternatively, exhaustion
23 may "be excused where repeated rejections of an inmate's grievances at the screening
24 stage give rise to a reasonable good faith belief that administrative remedies are
25 effectively unavailable." *Id.* at 826.

26 Defendants effectively concede that Plaintiff's appeal RJD-B-12-01098 was
27 cancelled "for reasons inconsistent with or unsupported by applicable regulations." *Id.*
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1 at 823-24. And, without examining all the facts and claims and weighing the evidence,
2 the Court cannot resolve whether or not Plaintiff had a reasonable good faith belief that
3 the administrative remedies were effectively unavailable to him. Because such
4 determinations cannot be made on a motion for summary judgment, the Court must
5 recommend that Defendants' motion for summary be DENIED. *See Soremekun*, 509
6 F.3d at 984.

7 **VI. CONCLUSION AND RECOMMENDATION**

8 The Court finds there are disputed issues of material fact regarding exhaustion,
9 precluding summary judgment. Accordingly, the Court HEREBY RECOMMENDS that
10 Defendants' motion for summary judgment (ECF No. 41.) be DENIED. In light of
11 Defendants' request for an evidentiary hearing in the event that their motion is denied, it
12 is FURTHER RECOMMENDED that an evidentiary hearing be conducted to resolve the
13 issue of exhaustion.

14 These Findings and Recommendations are submitted to the United States
15 District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1).
16 Within **fourteen** (14) days after being served with these Findings and
17 Recommendations, any party may file written objections with the Court and serve a
18 copy on all parties. Such a document should be captioned "Objections to Magistrate
19 Judge's Findings and Recommendations." Any reply to the objections shall be served
20 and filed within **fourteen** (14) days after service of the objections. The parties are
21 advised that failure to file objections within the specified time may result in the waiver of
22 rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014) (*citing Baxter*
23 *v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

24
25 IT IS SO ORDERED.

26 Dated: May 18, 2015

27 1s/ Michael J. Seng
28 UNITED STATES MAGISTRATE JUDGE