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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ROBERTO HERRERA,
Plaintiff,
v.
ROUCH,
Defendant.

CASE No. 1:13-cv-00289-LJO-MJS
ORDER DENYING DEFENDANT'S
REQUEST TO CONVERT THE
UNENUMERATED 12(B) PORTION OF
THE MOTION TO DISMISS INTO A
MOTION FOR SUMMARY JUDGMENT
AND GRANTING DEFENDANT'S
REQUEST FOR LEAVE TO FILE A
MOTION FOR SUMMARY JUDGMENT
(ECF No. 65)

Plaintiff Roberto Herrera, a state prisoner proceeding pro se and in forma pauperis, filed this civil rights action pursuant to 42 U.S.C. § 1983 on February 27, 2013. (ECF No. 1.) This case proceeds on Plaintiff's Second Amended Complaint which alleges Defendant Rouch denied Plaintiff medical care in violation of the Eighth Amendment. (ECF No. 18.)

On December 26, 2013 Defendant Rouch moved to dismiss the case, in part¹, under the unenumerated provisions of Federal Rule of Civil Procedure 12(b) for failure

¹ Defendant also asserted that the action should be dismissed for failure to state a claim and because of qualified immunity. (ECF No. 32.)

1 exhaust administrative remedies. (ECF No. 32.) Plaintiff filed an opposition and
2 Defendant replied. (ECF Nos. 36 and 37.)

3 On April 3, 2014, the United States Court of Appeals for the Ninth Circuit issued a
4 decision overruling Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003) with respect
5 to the proper procedural device for raising the issue of administrative exhaustion. Albino
6 v. Baca, 747 F.3d 1162, 1166 (9th Cir. 2014). Following the decision in Albino,
7 Defendants may raise the issue of exhaustion in either (1) a motion to dismiss pursuant
8 to Rule 12(b)(6), in the rare event the failure to exhaust is clear on the face of the
9 complaint, or (2) a motion for summary judgment. Albino, 747 F.3d at 1166. An
10 unenumerated Rule 12(b) motion is no longer the proper procedural device for raising
11 the issue of exhaustion. Id. at 1168.

12 On June 18, 2014, Defendant filed a notice acknowledging Albino and requesting
13 that the Court convert the unenumerated Rule 12(b) portion of the Motion to Dismiss,
14 regarding exhaustion of administrative remedies, into a motion for summary judgment.
15 Alternatively, Defendant asked that he be permitted to withdraw the 12(b) portion and be
16 granted leave to file a motion for summary judgment based on exhaustion of
17 administrative remedies. In either case Defendant asks that the sections of the Motion
18 to Dismiss not addressing exhaustion remain. (ECF No. 65.)

19 The unenumerated Rule 12(b) portion of the Motion to Dismiss is procedurally
20 deficient in light of the decision in Albino. Because the Rule 12(b) motion does not
21 contain all that a motion for summary judgment would require and to ensure proper
22 notice to Plaintiff of such a motion, the motion to convert shall be denied.

23 Accordingly, it is HEREBY ORDERED that:

24 1. The request to convert the unenumerated Rule 12(b) portion of the Motion
25 to Dismiss (ECF No. 32) is DENIED and that section of the motion shall be
26 DISREGARDED; and

27 2. Defendant's request for leave to file a motion for summary judgment (ECF
28 No. 65) is GRANTED. Defendant shall, within thirty (30) days from the date of service of

1 this Order, file a summary a summary judgment motion addressing administrative
2 exhaustion.

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4 IT IS SO ORDERED.

5 Dated: August 1, 2014

1st Michael J. Seng
UNITED STATES MAGISTRATE JUDGE

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