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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GUSTAVO TORRES,
Plaintiff,
v.
BURKETT, et al.,
Defendants.

No. 1:14-cv-01217-DAD-BAM (PC)

ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS AND GRANTING
DEFENDANTS' MOTION TO DISMISS FOR
FAILURE TO EXHAUST REMEDIES

(Doc. Nos. 28, 39, 42)

Plaintiff Gustavo Torres is a state prisoner proceeding *pro se* in this civil rights action pursuant to 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On September 14, 2015, defendants filed a motion to dismiss. (Doc. No. 28.) On September 2, 2016, the assigned magistrate judge filed findings and recommendations recommending that defendants' motion to dismiss be granted due to plaintiff's failure to exhaust his administrative remedies prior to filing suit as required. (Doc. No. 42.) In their motion, defendants argued that on the face of plaintiff's complaint it was clear that he had failed to comply with the thirty-day time limit to submit a valid inmate appeal concerning the incidents complained of in this civil rights action. The assigned magistrate judge agreed and recommended dismissal. The findings and recommendations were served on the parties and contained notice

1 that objections thereto were to be filed within fourteen days. (*Id.*)

2 On September 16, 2016, plaintiff timely filed objections to the findings and
3 recommendations. (Doc. No. 43). In his objections plaintiff concedes that his inmate appeals
4 concerning the incidents in question were untimely filed. (*Id.* at 1-2.) Nevertheless, he contends
5 that administrative remedies were not available to him because prison officials did not respond to
6 his untimely inmate appeals. The failure by prison officials to respond to an appeal or grievance
7 may excuse a prisoner from fully exhausting his administrative remedies, when the inmate appeal
8 or grievance was properly filed. *See, e.g., Boyd v. Corr. Corp. of Am.*, 380 F.3d 989, 996 (6th
9 Cir. 2004); *see also Marella v. Terhune*, 568 F.3d 1024, 1028 (9th Cir. 2010) (“If a prisoner had
10 full opportunity and ability to file a grievance timely, but failed to do so, he has not properly
11 exhausted his administrative remedies.”); *Powe v. Ennis*, 177 F.3d 393, 394 (5th Cir. 1999) (“A
12 prisoner’s administrative remedies are deemed exhausted *when a valid grievance has been filed*
13 *and the state’s time for responding thereto has expired.*”) (emphasis added); *Dominguez v. Rojas*,
14 No. CV 03-0195 DSF (AJW), 2011 WL 8614834, at *7 (C.D. Cal. Nov. 3, 2011) (“Because no
15 exception to the timely filing requirement applies, it is immaterial that plaintiff never received a
16 response to his inmate appeal.”) Here, however, plaintiff concedes that whatever inmate appeals
17 he filed were untimely. Moreover, plaintiff has not alleged or made any showing that this
18 untimely filing of his inmate appeal was not his fault or that his inmate appeals were otherwise
19 properly made. (*See* Doc. No. 43 at 4.)

20 Plaintiff also asserts that because he is not an attorney, he was “bound to make mistakes
21 along the process” and that these were “honest mistakes.” (Doc. No. 43 at 4.) That plaintiff may
22 have made an “honest mistake” in belatedly filing his inmate appeals does not establish that
23 administrative remedies were unavailable to him. Moreover, that circumstance does not show
24 that prison staff affirmatively interfered with plaintiff’s ability to exhaust his administrative
25 remedies, or that those remedies were unknowable despite his good faith effort to become
26 informed. “Plaintiff’s subjective unawareness is not enough to excuse exhaustion.” *Passineau v.*
27 *Oxborrow*, No. 1:12-cv-01894-LJO, 2014 WL 7409103, at *9 (E.D. Cal. Dec. 30, 2014) (citing
28 *Albino v. Baca*, 697 F.3d 1023, 1035 (9th Cir. 2012)).

1 Defendants have carried their burden of establishing that plaintiff failed to exhaust his
2 administrative remedies prior to filing suit as required. Plaintiff has not shown that such
3 administrative remedies were unavailable to him. Therefore, this action must be dismissed,
4 without prejudice, due to plaintiff's failure to exhaust his administrative remedies before filing
5 this action.

6 Accordingly:

- 7 1. The September 2, 2016 findings and recommendations (Doc. No. 42) are adopted in
8 full;
- 9 2. Defendants' motion to dismiss due to plaintiff's failure to exhaust his administrative
10 remedies prior to filing suit as required (Doc. No. 28) is granted;
- 11 3. This action is dismissed, without prejudice, due to plaintiff's failure to exhaust his
12 administrative remedies before filing suit;
- 13 4. All other pending motions (Doc. No. 39) are denied as having been rendered moot by
14 this order; and
- 15 5. The Clerk of the Court is directed to close this case.

16 IT IS SO ORDERED.

17 Dated: November 7, 2016

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19 _____
20 UNITED STATES DISTRICT JUDGE