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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

RODRIGO LOPEZ,  
  
Plaintiff,  
  
v.  
  
NORTH KERN STATE PRISON, *et al.*,  
  
Defendants.

No. 1:16-cv-00881-ADA-BAM (PC)

ORDER ADOPTING FINDINGS AND  
RECOMMENDATIONS REGARDING  
DEFENDANT’S MOTION FOR SUMMARY  
JUDGMENT RE: EXHAUSTION

(Doc. Nos. 23, 37)

Plaintiff Rodrigo Lopez (“Plaintiff”) is a state prisoner proceeding *pro se* and *in forma pauperis* in this civil rights action pursuant to 42 U.S.C. § 1983. This action proceeds on Plaintiff’s first amended complaint against Defendant J. McDermott (“Defendant”) for failure to intervene while inmate Cancel was attacking Plaintiff, in violation of the Eighth Amendment. (Doc. No. 9.)

On April 12, 2022, the magistrate judge issued findings and recommendations that Defendant’s motion for summary judgment for failure to exhaust be granted. (Doc. No. 37.) The findings and recommendations were served on the parties and contained notice that any objections were to be filed within fourteen (14) days after service. (*Id.*) Plaintiff timely filed objections on May 2, 2022. (Doc. No. 38.) Following an extension of time, Defendant filed a response to Plaintiff’s objections on May 31, 2022. (Doc. No. 42.)

As Plaintiff’s objections largely reiterate the arguments raised in his opposition to the

1 motion for summary judgment, the court finds no basis to overturn the findings and  
2 recommendations. In Plaintiff's objections, Plaintiff cited to *Andres v. Marshall*, 867 F.3d 1076  
3 (9th Cir. 2017), to support that he had exhausted the administrative remedies within the meaning  
4 of the Prison Litigation Reform Act. (*See* 42 U.S.C. § 1997e(a).) In *Andres*, the Ninth Circuit  
5 held that when prison officials fail to respond to a prisoner's grievance, the prisoner is deemed to  
6 have exhausted his administrative remedies. (*Andres*, 867 F.3d at 1079.) Because prison officials  
7 timely responded to each of Plaintiff's submitted California Department of Corrections and  
8 Rehabilitation Forms 602, Plaintiff's case is distinguishable from *Andres*. (Doc. No. 37.)  
9 Therefore, the court finds Plaintiff's objections unpersuasive to overturn the findings and  
10 recommendations.

11 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), the court has conducted a  
12 *de novo* review of this case, including plaintiff's objections and defendant's response. Having  
13 carefully reviewed the entire file, the court finds the findings and recommendations to be  
14 supported by the record and by proper analysis.

15 Accordingly,

- 16 1. The findings and recommendations issued on April 12, 2022, (Doc. No. 37), are adopted  
17 in full;
- 18 2. Defendant's motion for summary judgment for failure to exhaust administrative remedies,  
19 (Doc. No. 23), is granted;
- 20 3. This action is dismissed, without prejudice, for the failure to exhaust available  
21 administrative remedies; and
- 22 4. The Clerk of the Court is directed to close this case.

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25 IT IS SO ORDERED.

26 Dated: September 2, 2022

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UNITED STATES DISTRICT JUDGE