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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MAILLIARD KING

Plaintiff,

No. 2:07-cv-0846-FCD-JFM (PC)

vs.

D. K. SISTO, et al.,

ORDER AND

Defendants.

FINDINGS & RECOMMENDATIONS

_____ /

Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. This action is proceeding on claims raised against defendants S. Cervantes, M.D. Corioso, and W. Stufflebeam in plaintiff’s fourth amended complaint, filed December 16, 2008. This matter is before the court on defendants’ motion to dismiss for failure to exhaust administrative remedies prior to suit pursuant to the unenumerated provisions of Fed. R. Civ. P. 12(b) and for failure to state a claim upon which relief may be granted pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiff opposes the motion.¹

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¹ With his opposition, plaintiff filed a document styled as a motion for judicial notice. The motion contains legal argument and case citations, which are not properly the subject of judicial notice. Plaintiff’s motion will be denied.

1 ALLEGATIONS OF THE FOURTH AMENDED COMPLAINT

2 Plaintiff's fourth amended complaint contains the following allegations against
3 defendants Cervantes, Corioso and Stufflebeam. On March 9, 2005, a personal alarm was
4 activated at California State Prison-Solano (CSP-Solano). Generally, all inmates except those
5 with medical chronos are required to get down on the ground when personal alarms are activated.
6 On March 9, 2005, plaintiff had medical chronos which stated that plaintiff did not have to get
7 down during an alarm. Plaintiff was approached by Correctional Officer Harris, who ordered
8 him to get down on the ground. Plaintiff showed the Officer Harris his chronos, which were
9 based on plaintiff's back injuries and other medical problems. Officer Harris disregarded the
10 chronos and forced plaintiff to the ground. Officer Harris then confiscated the chronos and
11 escorted plaintiff to the medical department to obtain verification of the chronos. When told he
12 would have to wait, Officer Harris left the medical department without returning plaintiff's
13 chronos.

14 On March 11, 2005, plaintiff filed an inmate grievance against the correctional
15 officer. On August 1, 2005, after plaintiff had experienced "undue delays" in the return of his
16 grievance, plaintiff filed another grievance concerning the efforts of the administration at CSP-
17 Solano to "deliberately impede" plaintiff's right to file an inmate appeal. Fourth Amended
18 Complaint, filed December 16, 2008, at 8.

19 On November 1, 2005, plaintiff was sixth in line to enter the law library.
20 Defendant Stufflebeam told plaintiff that he used the law library too much and therefore that the
21 library was "going to strictly adhere to an already existing but not constantly used ducating
22 system." Id. After that, plaintiff was told by another inmate that he had overheard Officer Harris
23 and defendant Stufflebeam "mentioning plaintiff's name several times during a conversation."
24 Id. For that reason, plaintiff filed an inmate grievance alleging that defendant Stufflebeam had
25 retaliated against plaintiff for filing an inmate grievance against Officer Harris by "capriciously
26 and arbitrarily denying Plaintiff access to the Law Library." Id. at 9.

1 2007, the court advised plaintiff of the requirements for opposing a motion to dismiss for failure
2 to exhaust administrative remedies pursuant to the unenumerated provisions of Fed. R. Civ. P.
3 12(b). See Wyatt v. Terhune, 315 F.3d 1108, 1120 n.14 (9th Cir. 2003).

4 “Section 1997e(a) of Title 42 of the United States Code provides:
5 No action shall be brought with respect to prison conditions under
6 [42 U.S.C. § 1983], or any other Federal law, by a prisoner
7 confined in any jail, prison, or other correctional facility until such
8 administrative remedies as are available are exhausted.

9 This exhaustion requirement is mandatory. Booth v. Churner, 532 U.S. 731, 741 (2001).”
10 McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. Dec. 5, 2002). Exhaustion must precede the
11 filing of the complaint; compliance with the statute is not achieved by satisfying the exhaustion
12 requirement during the course of an action. Id. at 1200. Defendants have the burden of proving
13 that plaintiff failed to exhaust available administrative remedies. See Wyatt, 315 F.3d at 1120.

14 California’s Department of Corrections provides a four-step
15 grievance process for prisoners who seek review of an
16 administrative decision or perceived mistreatment. Within fifteen
17 working days of “the event or decision being appealed,” the inmate
18 must ordinarily file an “informal” appeal, through which “the
19 appellant and staff involved in the action or decision attempt to
20 resolve the grievance informally.” Cal.Code Regs., tit. 15, §§
21 3084.5(a), 3084.6(c). [Footnote omitted.] If the issue is not
22 resolved during the informal appeal, the grievant next proceeds to
23 the first formal appeal level, usually conducted by the prison’s
24 Appeals Coordinator. Id. §§ 3084.5(b), 3084.6(c). Next are the
25 second level, providing review by the institution's head or a
26 regional parole administrator, and the third level, in which review
is conducted by a designee of the Director of the Department of
Corrections. [Footnote omitted.] Id. § 3084.5(e)(1)-(2).

Brown v. Valoff, 422 F.3d 926, 929-30 (9th Cir. 2005.)

21 Defendants contend that plaintiff failed to exhaust administrative remedies with
22 respect to any of the claims raised in this action before the action was filed on October 18, 2006.
23 In support of this contention, defendants have presented evidence that between the time the
24 events that gave rise to the allegations in the fourth amended complaint occurred and the time
25 this action was commenced, plaintiff submitted a total of twelve inmate grievances. Declaration
26 of T. Moore, filed April 14, 2009, (Moore Declaration) at ¶ 3. One concerned the November 1,

1 2005 incident and was withdrawn by plaintiff. Id. and Ex. 1 to Moore Declaration. Of the five
2 other grievances filed by plaintiff that arguably relate to the incidents at bar, none were resolved
3 at the third and final level of administrative review prior to the time this action was filed. Id. and
4 Exs. 1-12 of Moore Declaration.

5 Plaintiff does not dispute that he failed to exhaust administrative remedies prior to
6 commencing this action. Instead, he argues that the alleged ongoing retaliation and reprisals
7 forced him to proceed to court before exhausting his administrative remedies. This argument is
8 without merit.

9 For the foregoing reasons, this court finds that plaintiff failed to exhaust
10 administrative remedies for any of his claims against defendants Stufflebeam, Cervantes or
11 Corioso prior to filing this action. For that reason, this action must be dismissed without
12 prejudice.²

13 In accordance with the above, IT IS HEREBY ORDERED that plaintiff's
14 September 23, 2009 motion for judicial notice is denied; and

15 IT IS HEREBY RECOMMENDED that:

- 16 1. Defendants' April 14, 2009 motion to dismiss be granted; and
17 2. This action be dismissed without prejudice for failure to exhaust administrative
18 remedies prior to suit.

19 These findings and recommendations are submitted to the United States District
20 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen
21 days after being served with these findings and recommendations, any party may file written
22 objections with the court and serve a copy on all parties. Such a document should be captioned
23 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
24 objections shall be filed and served within fourteen days after service of the objections. The

25 ² In light of this finding, the court will not reach the remaining arguments in defendants'
26 motion to dismiss.

1 parties are advised that failure to file objections within the specified time may waive the right to
2 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: February 1, 2010.

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6 UNITED STATES MAGISTRATE JUDGE

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