

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RUDY AROCHA,
Plaintiff,
v.
E. SAUCEDA, et al.,
Defendants.

No. 2: 11-cv-2959 LKK KJN P

ORDER

Pending before the court are motions to dismiss filed on behalf of defendants Hart and Munoz (ECF No. 98) and defendant Rogel (ECF No. 103). In both motions, defendants move to dismiss for failure to exhaust administrative remedies pursuant to Federal Rule of Civil Procedure 12(b) and for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

The Ninth Circuit Court of Appeals, in Albino v. Baca, __ F.3d __, 2014 WL 1344468 (9th Cir. Apr. 7, 2014) (en banc), recently held that a motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, not an “unenumerated 12(b) motion” to dismiss, is the appropriate vehicle for challenging a prisoner’s claims based on an alleged failure to exhaust administrative remedies (unless the failure to exhaust is evident from the face of the complaint).

Accordingly, IT IS HEREBY ORDERED that:

- 1. Defendants’ motions to dismiss (ECF Nos. 98 and 103) are denied without prejudice;

////

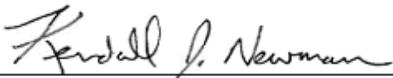
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

2. Defendants may file and serve, within thirty (30) days after the filing date of this order, motions for summary judgment addressing administrative exhaustion that include notice to plaintiff of the evidentiary requirements for opposing the motion. See Woods v. Carey, 684 F.3d 934 (9th Cir. 2012); Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998). Such motions shall be briefed in accordance with Local Rule 230(l); and

3. Defendants may file and serve, within thirty (30) days after the filing date of this order, motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

Dated: April 18, 2014

Ar2959.ord


KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE