UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

WINSTON KEMPER, Plaintiff, v. DR. CROSSON, et al., Defendants.	No. 2:14-cv-0305 TLN KJN P FINDINGS & RECOMMENDATIONS

Plaintiff is a state prisoner, proceeding without counsel. Plaintiff filed this civil rights complaint, pursuant to 42 U.S.C. § 1983. Plaintiff alleges that defendants Dr. Crosson and Dr. Pai, erroneously named as Dr. Pie, were deliberately indifferent to his serious medical needs, in violation of the Eighth Amendment. On February 12, 2013, pursuant to a referral by Dr. Pai, a physician and surgeon employed at the California Medical Facility, plaintiff was seen by Dr. Crosson, an ophthalmologist in Fairfield, California, in order to be evaluated and undergo a laser procedure in both eyes to relieve pressure. (ECF No. 24.) Both defendants move to dismiss alleging that plaintiff fails to state a cognizable civil rights claim, including a claim that it appears from the face of the pleading that plaintiff failed to exhaust his administrative remedies prior to filing the instant action. As set forth below, the undersigned recommends that defendants' motions to dismiss be granted.

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I. Rule 12(b)(6) Standards

Rule 12(b)(6) of the Federal Rules of Civil Procedures provides for motions to dismiss for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In considering a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the court must accept as true the allegations of the complaint in question, Erickson v. Pardus, 551 U.S. 89 (2007), and construe the pleading in the light most favorable to the plaintiff. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969); Meek v. County of Riverside, 183 F.3d 962, 965 (9th Cir. 1999). Still, to survive dismissal for failure to state a claim, a pro se complaint must contain more than "naked assertions," "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-57 (2007). In other words, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Furthermore, a claim upon which the court can grant relief must have facial plausibility. Twombly, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678. Attachments to a complaint are considered to be part of the complaint for purposes of a motion to dismiss for failure to state a claim. Hal Roach Studios v. Richard Reiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990).

A motion to dismiss for failure to state a claim should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief. Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984). In general, pro se pleadings are held to a less stringent standard than those drafted by lawyers. Haines v. Kerner, 404 U.S. 519, 520 (1972). The court has an obligation to construe such pleadings liberally. Bretz v. Kelman, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (en banc). However, the court's liberal interpretation of a pro se complaint may not supply essential elements of the claim that were not pled. Ivey v. Board of Regents of Univ. of Alaska, 673 F.2d 266, 268 (9th Cir. 1982).

In ruling on a motion to dismiss pursuant to Rule 12(b)(6), the court "may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly

subject to judicial notice." Outdoor Media Group, Inc. v. City of Beaumont, 506 F.3d 895, 899 (9th Cir. 2007) (citation and quotation marks omitted).

II. Alleged Failure to Exhaust

A. Legal Standard

The Prison Litigation Reform Act of 1995 ("PLRA") amended 42 U.S.C. § 1997e to provide that "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Exhaustion in prisoner cases covered by § 1997e(a) is mandatory. Porter v. Nussle, 534 U.S. 516, 524 (2002). Exhaustion is a prerequisite for all prisoner suits regarding conditions of confinement, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong. Porter, 534 U.S. at 532.

Proper exhaustion of available remedies is mandatory. Booth v. Churner, 532 U.S. 731, 741 (2001). "Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules." Woodford v. Ngo, 548 U.S. 81, 95-96 (2006). For a remedy to be available, there must be the "possibility of some relief. . . ." Booth, 532 U.S. at 738. Relying on Booth, the Ninth Circuit has held:

> [A] prisoner need not press on to exhaust further levels of review once he has received all "available" remedies at an intermediate level of review or has been reliably informed by an administrator that no remedies are available.

Brown v. Valoff, 422 F.3d 926, 935 (9th Cir. 2005).

Failure to exhaust under the PLRA is "an affirmative defense the defendant must plead and prove." Jones v. Bock, 549 U.S. 199, 204, 216 (2007). To carry this burden,

> a defendant must demonstrate that pertinent relief remained available, whether at unexhausted levels of the grievance process or through awaiting the results of the relief already granted as a result of that process. Relevant evidence in so demonstrating would include statutes, regulations, and other official directives that explain the scope of the administrative review process; documentary or testimonial evidence from prison officials who administer the review process; and information provided to the prisoner concerning the operation of the grievance procedure in this

> case. . . . With regard to the latter category of evidence, information provided [to] the prisoner is pertinent because it informs our determination of whether relief was, as a practical matter, "available."

Brown, 422 F.3d at 936-37 (citations omitted).

A motion asserting an affirmative defense such as failure to exhaust may be brought under Rule 12(b)(6) or Rule 56 depending on whether the factual predicate for the motion is based on the text of the pleading or instead depends upon evidence submitted with the motion. See Albino v. Baca, 747 F.3d 1162, 1169 (9th Cir.) ("in those rare cases where a failure to exhaust is clear from the face of the complaint, a defendant may successfully move to dismiss under Rule 12(b)(6) for failure to state a claim."), cert. denied sub nom. Scott v. Albino, 135 S. Ct. 403 (2014); Bock, 549 U.S. at 215 ("A complaint is subject to dismissal for failure to state a claim if the allegations, taken as true, show the plaintiff is not entitled to relief."). The administrative process is exhausted only after the inmate complies with all relevant prison grievance procedures and receives a decision from the third level. Ngo, 548 U.S. at 95-96.

B. Administrative Appeal Process

The California Department of Corrections and Rehabilitation ("CDCR") provides inmates the right to appeal administratively "any policy, decision, action, condition, or omission by the department or its staff that the inmate or parolee can demonstrate as having a material adverse effect upon his or her health, safety, or welfare." Cal. Code Regs. tit. 15, § 3084.1(a). Following amendments that took effect January 28, 2011, California prisoners are required to proceed through three levels of appeal to exhaust the administrative appeal process: (1) formal written appeal on a CDC 602 inmate appeal form; (2) second level appeal to the institution head or designee; and (3) third level appeal to the Director of the CDCR. See 15 Cal. Code Regs. § 3084.1-3084.9.[1] A final decision from the Director's level of review satisfies the exhaustion requirement under 42 U.S.C. § 1997e(a). See Lira v. Herrera, 427 F.3d 1164, 1166-67 (9th Cir. 2005); see also Cal. Code Regs. tit. 15, § 3084.7(d)(3) (as amended Dec. 13, 2010).

[1] The informal resolution level was eliminated. See Cal. Code Regs. tit. 15, § 3084.7 (as amended Dec. 13, 2010).

To initiate an appeal, the inmate must submit a CDCR Form 602 describing the issue to be appealed and the relief requested to the appeals coordinator's office at the institution. Id. § 3084.2(a)-(c). An inmate must submit the appeal within 30 calendar days of: (1) the occurrence of the event or decision being appealed; or (2) first having knowledge of the action or decision being appealed; or (3) receiving an unsatisfactory departmental response to an appeal. Id. § 3084.8(b). Specific time limits apply to the processing of each administrative appeal. See Cal. Code Regs. tit. 15, § 3084.8. Absent any specific exceptions, the first and second level administrative responses are required to be completed "within 30 working days from [the] date of receipt by the appeals coordinator," and a third level response is due within 60 working days from the date the appeal is received by the appeals chief. Id.

C. Discussion

In his verified pleading, plaintiff concedes that he did not exhaust the administrative grievance process because "he was not aware [he] had to do so." (ECF No. 24 at 2.) In his opposition to the motion, plaintiff now claims that he thought he had exhausted his administrative remedies, citing Gomez v. Winslow, 177 F.Supp. 2d 977 (N.D. Cal. 2001), and provided a copy of a 2014 administrative appeal seeking referral to an outside specialist. (ECF No. 53 at 3.)

i. Administrative Appeal CHCF SC14000189

In this appeal, signed on July 28, 2014, plaintiff seeks referral to "any eye specialist capable of assessing the condition of [his] eyes other than Dr. Crosson." (ECF No. 53 at 3.) Plaintiff explained his issue as "I have a very serious medical complaint against the ophthalmologist (Dr. Crosson). I'm willing to see anyone else capable of assessing my eye condition except Dr. Crosson." (ECF No. 53 at 3.)

This appeal could not serve to exhaust the instant claims for several reasons. First, appeal CHCF SC14000189 was submitted long after this action was filed on November 27, 2013. In order to properly exhaust his administrative remedies, plaintiff was required to complete his administrative remedies before he filed this action. Porter, 534 U.S. at 532. Thus, appeals filed after November 27, 2013, cannot serve to exhaust his administrative remedies in connection with plaintiff's instant claims. Second, this appeal fails to identify what Dr. Crosson did or did not do,

and also fails to mention Dr. Pai, or include any allegations identifying actions or omissions that could be attributable to Dr. Pai. Therefore, this appeal fails to put prison officials on notice of defendants' alleged wrongdoing. Appeal CHCF SC14000189 did not exhaust plaintiff's claims.

ii. Administrative Appeal HC 13038036

With his original complaint, plaintiff provided a copy of his Appeal HC 13038036, in which he noted "damage to [his] eyes by optometrist," and "what was done and what [he] thought would be done to [his] eyes were 2 different things." (ECF No. 1 at 6.) In this appeal, plaintiff sought a referral to an optometrist "due to the damage to [his] eyes (strain & pain) request visit to optometrist not Dr. Crosson." (ECF No. 1 at 6.) Plaintiff provided a copy of the consent form he signed on February 12, 2013, for the eye procedure: "laser openings to prevent high eye pressure attack both eyes." (ECF No. 1 at 7.) Appeal HC 13038036 was rejected on April 13, 2013, stating plaintiff failed to provide sufficient information. (ECF No. 1 at 5.) Plaintiff was instructed to return the form and the appeal with the necessary information. (ECF No. 1 at 5.) Also, at the bottom of the form, inmates are alerted that they "should take the corrective action necessary and resubmit the appeal within the timeframes," and providing reference to additional Title 15 regulations. (ECF No. 1 at 5.)

The administrative process is exhausted only after the inmate complies with all relevant prison grievance procedures and receives a decision from the third level. Ngo, 548 U.S. at 95-96; see also Sapp v. Kimbrell, 623 F.3d 813, 826 (9th Cir. 2010) (dismissal is appropriate where administrative grievances were properly screened out). "[A] cancellation or rejection decision does not exhaust administrative remedies." Cal. Code Regs. tit. 15, § 3084.1(b).

It appears that plaintiff failed to further pursue appeal HC 13038036, despite being provided specific instructions on the initial rejection. Plaintiff was directed to the appropriate sections of Title 15 to assist him in taking corrective action. Accordingly, appeal HC 13038036 did not exhaust plaintiff's administrative remedies.

Finally, plaintiff's reliance on Gomez is unavailing. In Gomez, the court found that a general grievance about inadequate medical care may satisfy the exhaustion requirement as to specific aspects of a medical care claim if it puts prison officials on notice of the complaints.

Gomez pursued an administrative appeal that put prison officials on notice of his claim that he had received, and was continuing to receive, inadequate medical care for his hepatitis, through the second level of review where he was granted partial relief. Here, in two separate verified pleadings, plaintiff conceded that he did not complete the grievance process because he was not aware he had to file a grievance concerning the facts relating to his complaint. (ECF Nos. 22, 24 at 2.)

In 2014, the Ninth Circuit explained that a litigant's alleged unawareness of administrative remedies is no excuse:

> litigants in this circuit were presumed to have knowledge of duly enacted laws, regulations, and procedures. See Luna v. Holder, 659 F.3d 753, 759 (9th Cir. 2011) (presuming aliens had notice of duly enacted federal regulations and guidelines issued thereunder). Grievance procedures in California jails are promulgated under the direction of state laws and regulations. See Cal. Penal Code § 6030(a); Cal. Code Regs. tit. 15, § 1073(a).

Albino, 747 F.3d at 1182. Thus, plaintiff may not be excused from exhausting administrative remedies by simply claiming he was unaware of the exhaustion requirement.

For all of the above reasons, it is apparent from the face of plaintiff's pleading that he failed to exhaust his administrative remedies prior to filing the instant action. Therefore, this action should be dismissed without prejudice based on plaintiff's failure to exhaust administrative remedies.

III. Alleged Failure to State a Claim

Further, defendants argue that plaintiff fails to allege facts demonstrating that either were deliberately indifferent to plaintiff's serious medical needs, and contend that a difference of opinion over a course of medical treatment or medical malpractice is insufficient to demonstrate an Eighth Amendment violation.

To maintain an Eighth Amendment claim based on prison medical treatment, plaintiff must show (1) a serious medical need by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain, and (2) a deliberately indifferent response by defendant. Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006).

To act with deliberate indifference, a prison official must both know of and disregard an excessive risk to inmate health; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists and he must also draw the inference. Farmer v. Brennan, 511 U.S. 825, 837 (1994). Deliberate indifference in the medical context may be shown by a purposeful act or failure to respond to a prisoner's pain or possible medical need, and harm caused by the indifference. Jett, 439 F.3d at 1096. Deliberate indifference may also be shown when a prison official intentionally denies, delays, or interferes with medical treatment or by the way prison doctors respond to the prisoner's medical needs. Estelle v. Gamble, 429 U.S. 97, 104-05 (1976); Jett, 439 F.3d at 1096.

In applying this standard, the Ninth Circuit has held that before it can be said that a prisoner's civil rights have been abridged, "the indifference to his medical needs must be substantial. Mere 'indifference,' 'negligence,' or 'medical malpractice' will not support this cause of action." Broughton v. Cutter Labs., 622 F.2d 458, 460 (9th Cir. 1980), citing Estelle, 429 U.S. at 105-06. "[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." Estelle, 429 U.S. at 106; McGuckin v. Smith, 974 F.2d 1050, 1050 (9th Cir. 1992), overruled on other grounds, WMX Techs., Inc. v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc). Even gross negligence is insufficient to establish deliberate indifference to serious medical needs. See Wood v. Housewright, 900 F.2d 1332, 1334 (9th Cir. 1990).

Differences in medical opinion do not rise to the level of an Eighth Amendment violation. A difference of opinion between medical professionals concerning the appropriate course of treatment generally does not amount to deliberate indifference to serious medical needs. Toguchi v. Chung, 391 F.3d 1051, 1058 (9th Cir. 2004); Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989). Also, "a difference of opinion between a prisoner-patient and prison medical authorities regarding treatment does not give rise to a[§]1983 claim." Franklin v. Oregon, 662 F.2d 1337, 1344 (9th Cir. 1981). To establish that such a difference of opinion amounted to deliberate indifference, the prisoner "must show that the course of treatment the doctors chose was

medically unacceptable under the circumstances" and "that they chose this course in conscious disregard of an excessive risk to [the prisoner's] health." See Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996); see also Wilhelm v. Rotman, 680 F.3d 1113, 1123 (9th Cir. 2012) (doctor's awareness of need for treatment followed by his unnecessary delay in implementing the prescribed treatment sufficient to plead deliberate indifference); see also Snow v. McDaniel, 681 F.3d 978, 988 (9th Cir. 2012) (decision of non-treating, non-specialist physicians to repeatedly deny recommended surgical treatment may be medically unacceptable under all the circumstances.)

Here, the record reflects that plaintiff signed a consent form on February 12, 2013, to undergo a laser procedure to relieve eye pressure. Plaintiff alleges that Dr. Pai acted with deliberate indifference when she referred plaintiff to an ophthalmologist and he was "subjected" to a laser procedure to relieve eye pressure. Dr. Pai argues that a referral to an ophthalmologist does not rise to the level of a civil rights violation. Dr. Crosson argues that, even assuming the laser procedure somehow caused injury to plaintiff's eyes, medical malpractice is insufficient to state a federal civil rights claim, and plaintiff failed to allege any facts demonstrating a culpable state of mind on the part of Dr. Crosson.

In opposition, plaintiff provides no additional factual allegations to demonstrate deliberate indifference on the part of either defendant. Rather, plaintiff argues he is in poor health and suffers from a mental illness. (ECF No. 46 at 1, 3.) Plaintiff repeats his earlier claims that defendants caused him glaucoma and insisted on a procedure he did not request. (Id.) In addition, plaintiff provided a copy of an April 23, 2013 request for health care services form in which plaintiff's physician requested a second opinion from an outside provider for "S/P [Status Post] YAG Iridotomy," noting "pressures still elevated." (ECF No. 53 at 4.) Plaintiff's principle diagnosis was listed as glaucoma. (Id.) Plaintiff was evaluated by a consultant on July 23, 2013, who recommended holding off on surgical intervention, "if eye pressure increases or inconsistent with medications, consider phaco/ECP." (ECF No. 53 at 4.)

Thus, the record reflects that Dr. Pai referred plaintiff to an outside ophthalmologist, Dr. Crosson, who recommended that plaintiff undergo the laser procedure to prevent high eye

pressure in both eyes, and plaintiff signed the consent form for the procedure on February 12, 2013. Following the laser procedure, plaintiff was referred for a second opinion to an outside consultant, and he was evaluated on July 23, 2013. While it appears that plaintiff believes he should not have been referred to Dr. Crosson, and should not have received the laser procedure, his disagreement with such medical professionals is insufficient to demonstrate either defendant's deliberate indifference. Taking plaintiff's claims as true, as this court must on a motion to dismiss, plaintiff's claims reflect negligence or, at most, medical malpractice. Plaintiff fails to allege facts demonstrating that either defendant acted with a culpable state of mind. Therefore, defendants' motions to dismiss should be granted.

IV. Recommendation

Accordingly, IT IS HEREBY IT IS RECOMMENDED that defendants' motions to dismiss (ECF Nos. 40, 49) be granted, and this action be dismissed without prejudice.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any response to the objections shall be served and filed within fourteen days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: August 10, 2016

KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

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