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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GUILLERMO CRUZ TRUJILLO,
Plaintiff,
v.
HITHE, et al.,
Defendants.

No. 2:14-cv-0584 JAM AC P

FINDINGS AND RECOMMENDATIONS

Plaintiff is a state prisoner proceeding pro se and in forma pauperis with a civil rights action under 42 U.S.C. § 1983 against Correctional Officer Hithe, the sole remaining defendant. Currently under consideration is defendant’s motion for summary judgment on grounds that: (1) plaintiff has failed to administratively exhaust his claims, and (2) the claims are barred by the applicable statute of limitations. See generally ECF No. 105 et seq. For the reasons stated below, the undersigned will recommend that the motion for summary judgment be granted due to plaintiff’s failure to exhaust administrative remedies. As a result, the undersigned declines to reach the statute of limitations argument.

I. RELEVANT PROCEDURAL HISTORY

A. Defendant’s Motion to Dismiss

On September 14, 2015, defendant filed a motion to dismiss on the ground that plaintiff had not exhausted his second amended complaint (“SAC”) and that this was evident on the face

1 of the complaint. ECF No. 53-1. On November 30, 2015, in what appears to have been an
2 attempt to assert that he had been deprived of complete administrative proceedings, plaintiff filed
3 an opposition to the motion, arguing that the motion to dismiss should be denied because the
4 appeals coordinator had acted in bad faith. Specifically, plaintiff asserted that the coordinator had
5 denied plaintiff the return of 602 appeal forms which had, in turn, effectively prevented plaintiff
6 from exhausting all administrative remedies. See ECF No. 55 at 1-2. He further contended that
7 were the court to deny the motion to dismiss, he would be able to show that he had attempted to
8 exhaust all administrative remedies. See id. at 2-3.

9 On September 7, 2016, the undersigned determined that it was not clear on the face of the
10 complaint that plaintiff had failed to exhaust. As a result, it was recommended that defendant
11 Hithe's motion to dismiss be denied without prejudice to the filing of a motion for summary
12 judgment on the same issue. ECF No. 73 at 7-10. On October 27, 2016, the district court judge
13 adopted these findings. ECF No. 74. Thereafter, discovery proceedings began. See generally
14 ECF No. 76 (issuance of discovery order).

15 B. Defendant's Motion for Summary Judgment

16 Defendant Hithe's motion for summary judgment was filed on April 25, 2018. ECF No.
17 105. Pursuant to Woods v. Carey, 684 F.3d 934, 936 (9th Cir. 2012), defendant sent a Rand
18 notice with the motion, which explained to plaintiff what was required to oppose the summary
19 judgment motion. See ECF No. 105-1. Nevertheless, plaintiff has not filed an opposition to the
20 motion. Consequently, on May 29, 2018, counsel for defendant filed a declaration in lieu of reply
21 stating that under Local Rule 230(1): (1) the court may deem plaintiff's failure to oppose the
22 motion for summary judgment as a waiver of any opposition to the granting of the motion, and
23 (2) because the time for the reply to any opposition has expired, defendant's motion for summary
24 judgment is deemed submitted. See ECF No. 106 at 1-2.

25 II. FAILURE TO OPPOSE SUMMARY JUDGMENT MOTION

26 Plaintiff has disputed neither the content nor the authenticity of the records submitted by
27 defendant in support of the summary judgment motion. The court may therefore assume that the
28 facts supported by that showing are uncontroverted. See Fed. R. Civ. P. 56(e)(2); see generally

1 Beard v. Banks, 548 U.S. 521, 527 (2006). The court may also, if appropriate, enter summary
2 judgment against plaintiff. See Fed. R. Civ. P. 56(e)(3). Furthermore, because plaintiff received
3 the Rand notice and has not timely opposed the motion for summary judgment, the court finds
4 that plaintiff has waived his opportunity to oppose it. See E.D. Cal., L.R. 230(1) (2009).
5 Accordingly, the instant motion is deemed submitted and ready for review.

6 III. PLAINTIFF’S ALLEGATIONS

7 In the SAC, plaintiff alleges that Correctional Officer Hithe used excessive force in
8 violation of plaintiff’s Eighth Amendment rights after plaintiff “refused to relinquish [his] boxer
9 shorts in front of female correctional officer[.]s.” ECF No. 36 at 2-4 (brackets added). On the
10 same day, plaintiff was also wrongfully written up for disobeying orders. Id. Plaintiff contends
11 that he “used the prisoner grievance procedure available . . . to try and cease and solve the
12 problem.” Id. at 5. His appeals have been “rejected . . . cancelled . . . and . . . not authorized to
13 bypass any level.” Id.

14 IV. MOTION FOR SUMMARY JUDGMENT

15 A. Defendant’s Argument

16 Defendant maintains that there is no genuine dispute as to any material fact with respect to
17 non-exhaustion and application of the statute of limitations. Accordingly, he contends that he is
18 entitled to judgment as a matter of law. See ECF No. 105-2 at 5-13. In support of this argument,
19 he has provided declarations, documents, deposition transcripts and other materials in compliance
20 with Federal Rule of Civil Procedure 56(c)(1)(A)-(B). See generally ECF No. 105 et seq.

21 B. Plaintiff’s Response

22 As previously noted, plaintiff has not opposed the motion for summary judgment.

23 V. APPLICABLE LAW

24 A. Summary Judgment Generally

25 Summary judgment is appropriate when the moving party “shows that there is no genuine
26 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
27 Civ. P. 56(a). Under summary judgment practice, the moving party “initially bears the burden of
28 proving the absence of a genuine issue of material fact.” Nursing Home Pension Fund, Local 144

1 v. Oracle Corp. (In re Oracle Corp. Securities Litigation), 627 F.3d 376, 387 (9th Cir. 2010)
2 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). The moving party may accomplish
3 this by “citing to particular parts of materials in the record, including depositions, documents,
4 electronically stored information, affidavits or declarations, stipulations (including those made for
5 purposes of the motion only), admission, interrogatory answers, or other materials” or by showing
6 that such materials “do not establish the absence or presence of a genuine dispute, or that the
7 adverse party cannot produce admissible evidence to support the fact.” Fed. R. Civ. P.
8 56(c)(1)(A)-(B).

9 B. Exhaustion Standards

10 1. Prison Litigation Reform Act

11 Because plaintiff is a prisoner challenging the conditions of his confinement, his claims
12 are subject to the Prison Litigation Reform Act (“PLRA”), 42 U.S.C. § 1997e(a). The Act
13 requires prisoners to exhaust available administrative remedies before bringing an action
14 challenging prison conditions under section 1983. Id. “The PLRA mandates that inmates exhaust
15 all available administrative remedies before filing ‘any suit challenging prison conditions,’
16 including, but not limited to, suits under § 1983.” Albino v. Baca, 747 F.3d 1162, 1171 (9th Cir.
17 2014) (quoting Woodford v. Ngo, 548 U.S. 81, 85 (2006)). “[F]ailure to exhaust is an affirmative
18 defense under the PLRA.” Jones v. Bock, 549 U.S. 199, 216 (2007). It is the defendant’s burden
19 “to prove that there was an available administrative remedy, and that the prisoner did not exhaust
20 that available remedy.” Albino, 747 F.3d at 1172 (citing Hilao v. Estate of Marcos, 103 F.3d 767,
21 778 n.5 (9th Cir. 1996)). The burden then “shifts to the prisoner to come forward with evidence
22 showing that there is something in his particular case that made the existing and generally
23 available administrative remedies unavailable to him.” Id.

24 Regardless of the relief sought, a prisoner must pursue an appeal through all levels of a
25 prison’s grievance process as long as some remedy remains available. “The obligation to exhaust
26 ‘available’ remedies persists as long as *some* remedy remains ‘available.’ Once that is no longer
27 the case, then there are no ‘remedies . . . available,’ and the prisoner need not further pursue the
28 grievance.” Brown v. Valoff, 422 F.3d 926, 935 (9th Cir. 2005) (emphasis and alteration in

1 original) (referencing Booth v. Churner, 532 U.S. 731 (2001)).

2 “Under § 1997e(a), the exhaustion requirement hinges on the ‘availab[ility]’ of
3 administrative remedies: An inmate . . . must exhaust available remedies, but need not exhaust
4 unavailable ones.” Ross v. Blake, 136 S. Ct. 1850, 1858 (2016) (brackets in original). In
5 discussing availability in Ross the Supreme Court identified three circumstances in which
6 administrative remedies were unavailable: (1) where an administrative remedy “operates as a
7 simple dead end – with officers unable or consistently unwilling to provide any relief to aggrieved
8 inmates;” (2) where an administrative scheme is “incapable of use” because “no ordinary prisoner
9 can discern or navigate it,” and (3) where “prison administrators thwart inmates from taking
10 advantage of a grievance process through machination, misrepresentation, or intimidation.” Ross,
11 136 S. Ct. at 1859–60. “[A]side from [the unavailability] exception, the PLRA’s text suggests no
12 limits on an inmate’s obligation to exhaust – irrespective of any ‘special circumstances.’” Id. at
13 1856 (brackets added). “[M]andatory exhaustion statutes like the PLRA establish mandatory
14 exhaustion regimes, foreclosing judicial discretion.” Id. at 1857.

15 2. California Regulations Governing Exhaustion

16 “The California prison system’s requirements ‘define the boundaries of proper
17 exhaustion.’” Marella v. Terhune, 568 F.3d 1024, 1027 (9th Cir. 2009) (quoting Jones, 549 U.S.
18 at 218). In order to exhaust, the prisoner is required to complete the administrative review
19 process in accordance with all applicable procedural rules. Woodford, 548 U.S. at 90. California
20 regulations allow a prisoner to “appeal” any action or inaction by prison staff that has “a material
21 adverse effect upon his or her health, safety, or welfare.” Cal. Code Regs. tit. 15, § 3084.1(a)
22 (2017).¹ The appeal process is initiated by the inmate’s filing a “Form 602” the “Inmate/Parolee
23 Appeal Form,” “to describe the specific issue under appeal and the relief requested.” Id., §
24 3084.2(a). “The California prison grievance system has three levels of review: an inmate
25 exhausts administrative remedies by obtaining a decision at each level.” Reyes v. Smith, 810

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28 ¹ All citations to Title 15 of the California Code of Regulations are, unless otherwise noted, for
the current version, which has been unchanged, in pertinent part, since January 2011.

1 F.3d 654, 657 (9th Cir. 2016) (citing Cal. Code Regs. tit. 15, § 3084.1(b) (2011); see Harvey v.
2 Jordan, 605 F.3d 681, 683 (9th Cir. 2010)).

3 Each prison is required to have an “appeals coordinator” whose job is to “screen all
4 appeals prior to acceptance and assignment for review.” Cal. Code Regs. tit. 15, § 3084.5(b).
5 The appeals coordinator may refuse to accept an appeal and does so either by “rejecting” or
6 “canceling” it. Id., § 3084.6(a) (“Appeals may be rejected pursuant to subsection 3084.6(b), or
7 cancelled pursuant to subsection 3084.6(c), as determined by the appeals coordinator.”).

8 “Cancellation” is reserved for those appeals which the inmate cannot simply correct. For
9 example, an appeal can be cancelled if the action complained of “is not within the jurisdiction” of
10 the CDCR, or if time limits for submitting the appeal have been exceeded. Id., § 3084.6(c)(1),
11 (4). Upon “cancellation” of the appeal, the inmate’s only recourse, if he still wishes to pursue it,
12 is to show that the reason given for the cancellation was inaccurate or erroneous, or that “new
13 information” now makes it eligible for review. Id., § 3084.6(a)(3) (cancelled appeal may later be
14 accepted “if a determination is made that cancellation was made in error or new information is
15 received which makes the appeal eligible for further review”).

16 According to the regulations, “a cancellation or rejection decision does not exhaust
17 administrative remedies.” Id., § 3084.1(b). Outside of any exceptions outlined in the regulations,
18 “all appeals are subject to a third level of review, as described in section 3084.7, before
19 administrative remedies are deemed exhausted.” Id.

20 VI. UNDISPUTED MATERIAL FACTS

21 For purposes of summary judgment, the following facts are undisputed by the parties or
22 are found to be undisputed pursuant to this court’s review of the evidence.²

- 23 • At all relevant times, there was an administrative appeal process available at Folsom State
24 Prison. ECF No. 105-3 at ¶¶ 8-14; ECF No. 105-8 at ¶¶ 1-4 (prison official describing
25 grievance system; declaring it instituted in 1993).

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27 ² These facts are taken from defendant Hithe’s Statement of Undisputed Facts (ECF No. 105-3)
28 and supporting declarations and exhibits (ECF Nos. 105-4 to 105-9). Plaintiff has neither
disputed these facts nor submitted an opposition to these materials.

- 1 • At times during the relevant period in question, plaintiff availed himself of the
2 administrative appeal process. See ECF No. 36 at ¶¶ 12-13.
- 3 • The SAC was signed on October 22, 2014 and was filed on October 27, 2014. ECF No.
4 36 at 1, 7.
- 5 • In the SAC, plaintiff alleges that defendant Hithe and an unknown co-worker used
6 excessive force against him at Folsom State Prison and that on that day, he also received
7 two rules violation reports for disobeying orders. ECF No. 36 at 2-4.
- 8 • Plaintiff contends that defendant Hithe used force against him on three separate dates:
9 May 19, 2011, October 26, 2011 and November 5, 2011. See ECF No. 105-9 at 54-55
10 (plaintiff's Interrogatory Response No. 4 attached to Ehlenbach declaration).
- 11 • When asked for log numbers for the administrative appeals and/or grievances plaintiff
12 alleges have exhausted his SAC claims, plaintiff listed the following seven appeals: FSP-
13 O-16-01129, FSP-O-16-1274, FSP-O-16-00671, FSP-O-16-00691, FSP-O-16-00356,
14 FSP-O-16-00449 and FSP-O-16-00760. See ECF No. 105-9 at 40-41, 47-48 (plaintiff's
15 Interrogatory Response No. 1 [two sets] attached to Ehlenbach declaration).
- 16 • None of the seven appeals plaintiff claims are relevant to this complaint include
17 allegations that defendant Hithe used excessive force against plaintiff on May 19, 2011,
18 October 26, 2011 or November 5, 2011. See ECF No. 105-4 at ¶¶ 7-14 (declaration of
19 appeals coordinator Peterson describing content of plaintiff's appeals); see also ECF Nos.
20 105-5 to 105-7 (copies of appeals and administrative responses at issue).
- 21 • None of the seven appeals plaintiff asserts are relevant to this complaint reached the third
22 level of review. See ECF No. 105-4 at ¶¶ 7-14 (Peterson declaration listing final levels of
23 each of plaintiff's appeals); see also ECF Nos. 105-5 to 105-7 (copies of appeals and
24 administrative responses at issue).
- 25 • None of the seven appeals plaintiff claims are relevant to this complaint were exhausted
26 prior to plaintiff filing his SAC in this court. See ECF No. 105-4 at ¶¶ 7-14 (Peterson
27 declaration identifying final level review dates of plaintiff's appeals); see also ECF Nos.
28 105-5 to 105-7 (copies of appeals and administrative responses with dates of final

1 administrative review all of which are in 2016); see also ECF No. 1 at 1 (filing date of
2 original complaint stamped 10/29/13); see also ECF No. 36 at 1 (filing date of SAC
3 stamped 10/27/14).

4 VII. ANALYSIS

5 Defendant has clearly established that plaintiff failed to exhaust his claim that Hithe used
6 excessive force against him. First, defendant has shown that: (1) at the time plaintiff lodged his
7 grievances against him, Title 15 of the California Code of Regulations required that a three-tiered,
8 formal appeals process be completed prior to filing suit in federal court, and (2) this process was
9 available to plaintiff. See ECF No. 105-2 at 2-4, 10-11 (citing to Cal. Code Regs. tit. 15, §§
10 3084.7(a)-(c), (d)(3)); see also ECF Nos. 105-3 at ¶ 8, 105-4 at ¶¶ 4-14.

11 Next, referencing each of plaintiff's appeals filed during the relevant period, defendant
12 Hithe asserts and the record provided shows that none of plaintiff's grievances put the prison on
13 notice regarding plaintiff's excessive force claims against him, let alone made it to the third level
14 of appeal without cancellation. See generally ECF No. 105-2 at 11-12; see also ECF No. 105-3 at
15 ¶¶ 15-29 (defendant Hithe's undisputed facts). In other words, none of the appeal forms that
16 plaintiff had claimed in his interrogatory responses would establish that he had met his exhaustion
17 requirement actually did so. Compare ECF No. 105-9 at 40-41, 47-48 (plaintiff's interrogatory
18 responses identifying alleged exhausted appeals), with ECF No. 105-4 at ¶¶ 5-15 (prison
19 authorities' list of claims raised in appeals), and ECF No. 36 at ¶¶ 6-8 (plaintiff's excessive force
20 claim). Actual copies of these appeals accompany the summary judgment motion. See generally
21 ECF Nos. 105-5 to 105-7. Plaintiff does not dispute these facts, nor does he challenge the
22 authenticity or the completeness of these documents. Moreover, a review of the documents
23 provided by defendant Hithe does not indicate that any grievances filed by plaintiff were
24 improperly delayed, destroyed or dismissed by prison officials.

25 Finally, defendant Hithe argues that in the alternative, a grant of summary judgment is
26 also proper because plaintiff failed to complete the administrative grievance process prior to filing
27 his SAC. See ECF No. 105-2 at 12-13. Specifically, he points out that at the earliest, plaintiff
28 raised his excessive force claim against him on October 22, 2014 in the SAC. See ECF No. 105-

1 2; see also ECF No. 105-3 at ¶¶ 6-7. However, all seven of the “related” appeals were submitted
2 by plaintiff to prison officials in 2016, years after plaintiff had filed the SAC, and the prison did
3 not respond to those appeals until a significant period thereafter. See ECF No. 105-2 at 12; see
4 also ECF No. 105-3 at ¶¶ 14-29. Thus, defendant Hithe contends, because 42 U.S.C. § 1997e(a)
5 requires exhaustion to occur prior to the filing of a complaint, plaintiff’s premature filing of the
6 SAC also warrants a grant of the summary judgment motion. See ECF No. 105-2 at 12-13 (citing
7 Rhodes v. Robinson, 621 F.3d 1002, 1005 (9th Cir. 2010) and McKinney v. Carey, 311 F.3d
8 1198, 1199 (9th Cir. 2002) for exhaustion before federal filing requirement). Again, plaintiff
9 neither disputes these facts, nor does he challenge this argument.

10 In light of the above, the court finds that Hithe has adequately shown that plaintiff failed
11 to exhaust his excessive force claims. Therefore, the court will recommend that Hithe’s motion to
12 dismiss be granted and that the action be dismissed without prejudice for failure to exhaust. See
13 Vaden v. Summerhill, 449 F.3d 1047, 1051 (9th Cir. 2006) (citing Wyatt v. Terhune, 315 F.3d
14 1108, 1120 (9th Cir. 2003)). In light of these facts, the court need not consider defendant’s
15 statute of limitations argument.

16 Accordingly, IT IS HEREBY RECOMMENDED that:

- 17 1. Defendant Hithe’s motion for summary judgment (ECF No. 105) be GRANTED on
18 the grounds that plaintiff has failed to exhaust his administrative remedies, and
- 19 2. This action be DISMISSED without prejudice.

20 These findings and recommendations are submitted to the United States District Judge
21 assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
22 after being served with these findings and recommendations, the parties may file written
23 objections with the court. Such a document should be captioned “Objections to Magistrate
24 Judge’s Findings and Recommendations.” The parties are advised that failure to file objections

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

3 DATED: July 9, 2018

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5 ALLISON CLAIRE
6 UNITED STATES MAGISTRATE JUDGE
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