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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

LEON DURELL HOBLEY,
Plaintiff,
v.
E. BAKER, et al.,
Defendants.

No. 2:15-cv-1260 MCE CKD P

ORDER

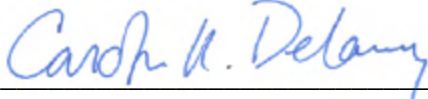
Plaintiff is proceeding pro se with an action for violation of civil rights under 42 U.S.C. § 1983. On August 12, 2016, defendant Baker filed a motion to dismiss arguing that plaintiff failed to exhaust administrative remedies prior to filing suit. Defendant Baker brought the motion “under unenumerated Federal Rule of Civil Procedure 12(b)” as authorized by the Ninth Circuit in Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). However, the portion of Wyatt which permitted a defendant to argue failure to exhaust in an “unenumerated Rule 12(b) motion” was overruled by the Ninth Circuit in Albino v. Baca, 747 F.3d 1162, 1166 (9th Cir. 2014). After Albino, the failure to exhaust affirmative defense must be asserted in a motion for summary judgment or “in the rare event that a failure to exhaust is clear on the face of the complaint,” the defense can be asserted in a Rule 12(b)(6) motion to dismiss for failure to state a claim. Good cause appearing, defendant Baker’s motion to dismiss will be denied without prejudice to defendant Baker asserting failure to exhaust in a proper motion.

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In accordance with the above, IT IS HEREBY ORDERED that:

1. Defendant Baker’s motion to dismiss (ECF No. 29) is denied without prejudice; and
2. Defendant Baker shall file his response to plaintiff’s complaint within 21 days.

Dated: November 22, 2016



CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

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