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

RICHARD M. TORRES, J-52559,)	
)	
Plaintiff(s),)	No. C 09-5929 CRB (PR)
)	
v.)	ORDER GRANTING MOTION
)	TO DISMISS THIRD
M. CATE, et al.,)	AMENDED COMPLAINT
)	
Defendant(s).)	(Docket # 53)
_____)	

Plaintiff Richard Torres, a validated associate of the Mexican Mafia (EME) prison gang currently incarcerated at Pelican Bay State Prison's (PBSP) Secured Housing Unit (SHU), has filed a Third Amended Complaint (TAC) under 42 U.S.C. § 1983 alleging denial of due process in connection with four periodic review hearings of his SHU placement. For the reasons set forth below, defendants' motion to dismiss the TAC will be granted.

BACKGROUND

On December 17, 2009, plaintiff filed a prisoner complaint under § 1983 challenging his placement and retention in the SHU on the basis of his being a validated EME associate.

1 interest in periodic reviews, (2) plaintiff received all the procedural due process
2 protections that he was entitled to, and (3) the claim is barred by res judicata,
3 collateral estoppel and the Rooker-Feldman doctrine. Defendants also move to
4 dismiss on the ground that plaintiff failed to exhaust available administrative
5 remedies and on the ground that they are entitled to qualified immunity. Plaintiff
6 has filed an opposition and defendants have filed a reply.

7 DISCUSSION

8 A. Standard of Review

9 A motion to dismiss for failure to state a claim under Rule 12(b)(6) should
10 be granted if the complaint does not proffer "enough facts to state a claim for
11 relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S.
12 544, 570 (2007). The court "must accept as true all of the factual allegations
13 contained in the complaint," Erickson v. Pardus, 551 U.S. 89, 94 (2007), but need
14 not accept as true allegations that are legal conclusions, unwarranted deductions
15 of fact or unreasonable inferences. See Sprewell v. Golden State Warriors, 266
16 F.3d 979, 988, amended, 275 F.3d 1187 (9th Cir. 2001). Dismissal can be based
17 on the lack of a cognizable legal theory or the absence of sufficient facts alleged
18 under a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696,
19 699 (9th Cir. 1990).

20 Nonexhaustion under 42 U.S.C. § 1997e(a) is an affirmative defense.
21 Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003). It should be treated as a
22 matter of abatement and brought in an "unenumerated Rule 12(b) motion rather
23 than [in] a motion for summary judgment." Id. (citations omitted). In deciding a
24 motion to dismiss for failure to exhaust administrative remedies under §
25 1997e(a), the court may look beyond the pleadings and decide disputed issues of
26 fact. Id. at 1119-20. If the court concludes that the prisoner has not exhausted

1 California's prison administrative process, the proper remedy is dismissal without
2 prejudice. Id.

3 B. Analysis

4 Plaintiff alleges that defendants denied him due process in connection with
5 four periodic review hearings of his SHU placement. Specifically, plaintiff
6 alleges that Wong denied him due process in connection with a November 8,
7 2007 hearing at HDSP, Perez denied him due process in connection with a March
8 20, 2008 hearing at HDSP, and Getz denied him due process in connection with
9 August 19, 2008 and February 25, 2009 hearings at PBSP. Plaintiff does not
10 dispute that he was provided with notice and an opportunity to present his views
11 at these hearings; rather, he claims that the hearings were not meaningful.

12 Due process requires that prison officials engage in some sort of periodic
13 review of the inmate confinement following his placement in administrative
14 segregation. See Hewitt v. Helms, 459 U.S. 460, 477 n.9 (1983); Toussaint v.
15 McCarthy, 801 F.2d 1080, 1101 (9th Cir. 1986). The periodic reviews must be
16 more than "meaningless gestures" to satisfy due process. Toussaint v. Rowland,
17 711 F. Supp. 536, 540 n.11 (N.D. Cal. 1989) (citing Toussaint v. McCarthy, 801
18 F.2d at 1102). The "meaningless gesture" phrase was drawn from this statement
19 from the Ninth Circuit: "Since administrative segregation must not be a pretext
20 for punitive isolation, Hewitt, 459 U.S. at 477 n.9, the substantive criteria assure
21 that plaintiffs' due process rights are not meaningless gestures." Toussaint v.
22 McCarthy, 801 F.2d at 1102. Hewitt makes clear that the constitutionally
23 required periodic review is modest in scope:

24 This review will not necessarily require that prison officials permit
25 the submission of any additional evidence or statements. The
26 decision whether a prisoner remains a security risk will be based on
27 facts relating to a particular prisoner – which will have been
28 ascertained when determining to confine the inmate to
administrative segregation – and on the officials' general knowledge of prison

1 conditions and tensions, which are singularly unsuited for "proof" in any highly
2 structured manner.

3 Hewitt, 459 U.S. at 477 n.9.

4 In view of the foregoing, this court (Patel, J.) recently held that a prisoner
5 housed in PBSP's SHU is only entitled to "a periodic review at which the reason
6 for placement is considered and at which he was allowed to present his views."
7 Manriquez v. Tilton, No. C 08-2427 MHP (PR), 2011 WL 1230022, at *3 (N.D.
8 Cal. Mar. 30, 2011). The requirement of periodic reviews "does not require that
9 the reviewer start from scratch and re-validate the inmate at each periodic
10 review." Id. at *4.

11 Like in Manriquez, plaintiff's initial gang validation is not at issue in this
12 case. Nor is whether plaintiff received periodic reviews at which the reason for
13 placement was considered and at which he was allowed to present his views. In
14 the TAC, plaintiff concedes that defendants' decisions to retain him in
15 administrative segregation at HDSP and PBSP's SHU were based on his prior
16 validation as an EME associate and defendants' knowledge that prison gangs are
17 dangerous. TAC ¶¶ 28, 32, 35 & 39. And plaintiff further concedes that at each
18 of the hearings at issue he was allowed an opportunity to present his views. Id.
19 Plaintiff received the limited due process protections he was entitled to at the
20 periodic review hearings. See Manriquez, 2011 WL 1230022, at **3-4; see also
21 Wilkinson v. Austin, 545 U.S. 209, 217, 224 (2005) (upholding administrative
22 segregation policy that called for 30-day review of file and annual reviews at
23 which inmate was allowed to appear and present his views).

24 That the hearings did not result in plaintiff's desired outcome did not make
25 them meaningless gestures, as he suggests. Nor did defendants' alleged statement
26 that plaintiff would only be released from the SHU upon debriefing. Given
27 plaintiff's indefinite placement and CDCR's recognized avenues for release from
28

1 the SHU – through the debriefing process or through being determined to be an
2 inactive prison gang member or associate – the statement appears to have been
3 nothing more than a "realistic assessment" of plaintiff's situation. Manriquez,
4 2011 WL 1230022, at *4. In order that not every failed applicant could allege a
5 due process violation by contending that a hearing was a meaningless gesture,
6 there must be something more than an undesired assessment or outcome for the
7 proceeding to be a meaningless gesture. Id. at *3. Plaintiff has not alleged any
8 such something more. Nor is there any indication that he can do so.

9 The periodic reviews afforded plaintiff on November 8, 2007, March 20,
10 2008, August 19, 2008 and February 25, 2009 accomplished the basic reasons for
11 periodic reviews – plaintiff could have brought to the attention of the committee
12 that he wanted to debrief, that he was being held in error due to a paperwork
13 snafu (such as having someone else's documentation being used against him), or
14 that he thought he met the criteria for an inactivity review – and comported with
15 due process. See id. at * 4 (citing Wilkinson, 545 U.S. at 225-26). Plaintiff was
16 not entitled to a re-examination of the evidence and re-validation process, as he
17 suggests. See id.

18 In sum, plaintiff has not alleged facts (nor is there any indication that he
19 can allege facts) showing that any of the four periodic review hearings at issue
20 were meaningless procedures so as to state a due process claim "that is plausible
21 on its face." Twombly, 550 U.S. at 570.¹

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26 ¹Because plaintiff has failed to state a claim for relief that is plausible on
27 its face, the court need not address defendants' other arguments in favor of
28 dismissal.


1 **CONCLUSION**

2 For the foregoing reasons, defendants' motion to dismiss the TAC (docket
3 # 53) is GRANTED without further leave to amend.

4 The clerk is instructed to enter judgment in favor of defendants and close
5 the file.

6 SO ORDERED.

7 DATED: Dec. 2, 2011

8 
9 CHARLES R. BREYER
10 United States District Judge