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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

RODNEY BLACH,

Plaintiff,

No. C 05-4447 PJH (PR)

v.

**ORDER GRANTING MOTION  
TO DISMISS**

SCOTT KERNAN, Director, Division of  
Adult Institutions, California Department  
of Corrections and Rehabilitation; and  
DOES 1-100,

Defendants.

\_\_\_\_\_ /  
This is a civil rights case filed pro se by a state prisoner. Plaintiff contended in his first amended complaint that a regulation of the California Department of Corrections and Rehabilitation limiting inmates' papers in their cells to six or seven square feet violated his right of access to the courts, because he has far more paper than that and needs it to pursue his court cases. He demands injunctive relief only.

The court concluded that plaintiff's first amended complaint stated a claim against the Director of the CDCR and ordered service.

Defendant Kernan has moved to dismiss on grounds (1) plaintiff has not exhausted his administrative remedies and (2) the complaint is barred by the statute of limitations. He has abandoned a third ground. Reply at 2 n.1. Plaintiff has opposed the motion and moved for summary judgment, and defendant has replied. The court granted defendant's motion to extend the time for him to oppose the motion for summary judgment until after the motion to dismiss is ruled upon, if it is not mooted by the motion being granted.

For the reasons set out below, the motion to dismiss will be granted and the motion for summary judgment will be denied as moot.

**United States District Court**  
For the Northern District of California



1 in an “unenumerated Rule 12(b) motion rather than [in] a motion for summary judgment.”  
2 *Id.* (citations omitted). In deciding a motion to dismiss for failure to exhaust administrative  
3 remedies under § 1997e(a), the court may look beyond the pleadings and decide disputed  
4 issues of fact. *Id.* at 1119-20. If the court concludes that the prisoner has not exhausted  
5 California’s prison administrative process, the proper remedy is dismissal without prejudice.  
6 *Id.* at 1120.

7 Defendant has provided a declaration from N. Grannis, Chief of the Inmate Appeals  
8 Branch of the CDCR, sufficient to establish that plaintiff has not exhausted his claim by  
9 appealing it through the third and final formal level. Decl. Grannis at ¶ ¶ 6-7. Plaintiff does  
10 not contest this, but contends that administrative remedies were not available to him, and  
11 thus that he did not fail to exhaust “available” remedies.

12 Plaintiff has failed to provide an evidentiary basis for his contentions, in that his  
13 opposition is not verified, so the facts alleged in it are not evidence. Leaving that aside, his  
14 arguments in opposition to the exhaustion claim, to extent they can be extracted from the  
15 thicket of verbiage, are that he was not permitted to file more than one grievance a week  
16 and that his use of the grievance system was deterred by mistreatment by prison guards.

17 Plaintiff has completely failed to establish that the one-grievance-a-week limit  
18 prevented him from exhausting – after all, he had two years to get his complaint on file, and  
19 at one a week, he easily could have filed a grievance regarding the limit on papers in cells.  
20 As to the contention that he was deterred from filing by misconduct of guards, it is  
21 completely unsupported by specifics applicable to grievances. If anything, the references  
22 on pages eighteen and nineteen of his opposition to his filing many grievances suggest that  
23 he was well able to do so. Quite why someone so vociferous as plaintiff failed to file a  
24 grievance attacking the limitations on papers in cells, or why, if he did file one at a lower  
25 level, he did not pursue it to the end, is unclear. But he did not. The motion to dismiss on  
26 this ground will be granted.

27 ///

28 **II. Statute of Limitations**

1 The statute of limitations for Section 1983 claims brought in California is the two-  
2 year period set forth at California Civil Procedure Code § 335.1. See *Maldonado v. Harris*,  
3 370 F.3d 945, 954 (9th Cir. 2004). In his first amended complaint plaintiff alleges that the  
4 property regulation had an impact on his litigation activities starting on July 15, 2003.  
5 Corrected First Amended Compl. (document 35) at 7. As he does not contend that his  
6 rights were violated earlier than that, it is clear that the claim accrued on that date.

7 Because plaintiff asks only for injunctive relief, he is not entitled to tolling under  
8 sections 352.1(a) and (c) of the California Code of Civil Procedure, which otherwise  
9 provides tolling for prisoners serving terms of less than life. This case was not filed until  
10 November 1, 2005, more than two years after it accrued, so unless plaintiff is correct that  
11 he is entitled to equitable tolling, it is barred.

12 The court may grant a motion to dismiss based on the running of the statute of  
13 limitations "only if the assertions in the complaint, read with the required liberality, would not  
14 permit the plaintiff to prove that the statute was tolled." *Pisciotta v. Teledyne Industries,*  
15 *Inc.*, 91 F.3d 1326, 1331 (9th Cir. 1996). The allegations of the complaint, read with the  
16 required liberality, might permit plaintiff to establish equitable tolling. For that reason this  
17 claim would have to be resolved on a motion for summary judgment, not a motion to  
18 dismiss. Because the motion to dismiss will not be granted on this ground, the dismissal,  
19 being based only on failure to exhaust administrative remedies, will be without prejudice.

20 **CONCLUSION**

21 *The motion to dismiss (document number 37) is **GRANTED**. Plaintiff's motion for*  
22 *summary judgment (document 40) is **DENIED** as moot. This case is **DISMISSED** without*  
23 *prejudice. The clerk shall close the file.*

24 **IT IS SO ORDERED.**

25 Dated: September 29, 2008.



26 \_\_\_\_\_  
PHYLLIS J. HAMILTON  
United States District Judge

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