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2 UNITED STATES DISTRICT COURT
3 FOR THE NORTHERN DISTRICT OF CALIFORNIA
4 OAKLAND DIVISION
5

6 CARLOS ARMANDO ORTEGA,

7 Plaintiff,

8 vs.

9 DR. MARK RITCHIE, et al.,

10 Defendants.
11

Case No: C 09-5527 SBA (pr)

**ORDER DIRECTING
DEFENDANTS TO FILE A
RESPONSE TO PLAINTIFF'S
MOTION FOR
RECONSIDERATION**

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13 On September 26, 2013, the Court dismissed Plaintiff Carlos Armando Ortega's pro
14 se civil rights action for failure to exhaust administrative remedies as required by the Prison
15 Litigation Reform Act ("PLRA"). Plaintiff has since filed a motion for reconsideration
16 along with several other motions. Dkt. 96, 97, 98, 101. As will be set forth below, the
17 Court directs Defendants to file a response to the motion for reconsideration. The
18 remaining motions will be held in abeyance pending the submission of the additional briefs.

19 **I. BACKGROUND**

20 On November 20, 2009, Plaintiff, an inmate at the Santa Clara County Jail
21 ("SCCJ"), filed this pro se civil rights action under 42 U.S.C. § 1983 alleging that SCCJ
22 medical staff were deliberately indifferent to his serious medical needs by denying him
23 mental health care treatment from March 2007 through September 2009. He also alleged
24 that from May 13, 2009 through September 29, 2009, SCCJ correctional officers violated
25 his due process rights by failing to provide him with a process to object to his housing
26 assignment.

27 On September 26, 2013, the Court issued its Order Granting Defendants' Motion to
28 Dismiss and Dismissing All Claims as Unexhausted. Dkt. 94. The Court concluded that

1 Plaintiff had failed to exhaust administrative remedies as required by the PLRA, and
2 therefore, his claims were not properly before the Court. The Court dismissed the action
3 without prejudice.

4 On October 16, 2013, Plaintiff filed a motion pursuant to Federal Rule of Civil
5 Procedure 60(b) for the Court to reconsider its September 26 order dismissing the
6 complaint without prejudice. Dkt. 96. On the same date, Plaintiff filed a motion for a
7 decision on his motion for summary judgment. Dkt. 97.

8 On October 21, 2013, Plaintiff filed a Notice of Appeal from the Court's September
9 26 Order. Dkt. 100. He contemporaneously filed a motion for leave to proceed in forma
10 pauperis on appeal, as well as a motion to maintain his pro per privileges on appeal. Dkts.
11 98, 101.

12 On October 25, 2013, the Ninth Circuit Court of Appeals referred the matter to this
13 Court for a determination of whether Plaintiff's in forma pauperis status should continue
14 under 28 U.S.C. § 1915(a)(3) for appeal. Dkt. 103.

15 The motion to reconsider was filed before the Notice of Appeal, and thus is timely.
16 See Fed. R. Civ. P. 60(b). The appeal thus does not become effective until the motion to
17 reconsider is ruled upon. See Fed. R. App. P. 4(a)(4). Accordingly, this Court will first
18 consider Plaintiff's pending Rule 60(b) motion prior to making a determination as to
19 whether Plaintiff's in forma pauperis status should continue for his appeal. In addition, for
20 the reasons outlined below, the Court will defer ruling on the aforementioned motions until
21 after the parties submit their briefs relating to the motion for reconsideration.

22 **II. DISCUSSION**

23 Where a district court's ruling has resulted in a final judgment or order, a motion for
24 reconsideration may be filed under Rule 60(b) of the Federal Rules of Civil Procedure.
25 Rule 60(b) provides for reconsideration where one or more of the following is shown:
26 (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence
27 which by due diligence could not have been discovered before the court's decision;
28 (3) fraud by the adverse party; (4) the judgment is void; (5) the judgment has been satisfied;

1 (6) any other reason justifying relief. Fed. R. Civ. P. 60(b); School Dist. 1J v. ACandS Inc.,
2 5 F.3d 1255, 1263 (9th Cir.1993). Rule 60(b) provides a mechanism for the parties to seek
3 relief from a judgment when “it is no longer equitable that the judgment should have
4 prospective application,” or when there is any other reason justifying relief from judgment.
5 Jeff D. v. Kempthorne, 365 F.3d 844, 853-54 (9th Cir. 2004) (quoting Fed. R. Civ. P.
6 60(b)). “Although the application of Rule 60(b) is committed to the discretion of the
7 district courts . . . , as a general matter, Rule 60(b) is remedial in nature and must be
8 liberally applied.” TCI Group Life Ins. Plan v. Knoebber, 244 F.3d 691, 695-96 (9th Cir.
9 2001) (internal quotation marks and ellipsis omitted).

10 In adjudicating Defendants’ motion to dismiss for failure to exhaust administrative
11 remedies, the Court considered twenty-three grievances identified by Plaintiff. These
12 grievances raised a plethora of complaints regarding medical and non-medical issues,
13 including officer misconduct, housing in segregation, inmate mail, clothing exchange,
14 personal property, water quality and visitation. In their motion, Defendants argued that
15 Plaintiff’s claims were not fully exhausted and were thus not properly before the Court.
16 The PLRA provides that “[n]o action shall be brought with respect to prison conditions
17 under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail,
18 prison, or other correctional facility until such administrative remedies as are available are
19 exhausted.” 42 U.S.C. § 1997e(a). The PLRA requires the inmate to exhaust every level in
20 the administrative process. See McKinney v. Carey, 311 F.3d 1198, 1200 (9th Cir. 2002).
21 Exhaustion is a prerequisite to the inmate’s filing of a lawsuit. See Porter v. Nussle, 534
22 U.S. 516, 524 (2002).

23 Section 1073 of Title 15 of the California Code of Regulations affords county jail
24 inmates a right to appeal and have resolved grievances relating to their confinement.
25 Pursuant to section 1073, Santa Clara County has established grievance procedures for
26 inmates at SCCJ. See SCCJ Inmate Orientation and Rule Book at 8-9. An inmate may
27 grieve “any condition of confinement over which the Department of Correction has
28 control” by first raising the complaint informally with the Officer in charge of the inmate’s

1 housing unit. Id. at 8. If the grievance is not resolved, the inmate may then complete an
2 “Inmate Grievance Form” which may be submitted to any Officer. Id. If the Officer is
3 unable to resolve the grievance, it is forwarded to the Sergeant; if the Sergeant cannot
4 resolve it, the grievance is referred to the Watch Commander, who will “determine the
5 appropriate actions to take and ensure [the inmate] receive[s] a written response.” Id.
6 Finally, an inmate may then appeal the Watch Commander’s decision by writing a letter to
7 the Division Commander of the facility where the inmate is housed. Id. The Division
8 Commander may “either affirm or reverse the decision and will give [the inmate] a written
9 response.” Id. at 9. If the inmate prefers to “correspond confidentially” with the Chief of
10 Correction instead of the Division Commander, the inmate may do so, and he will receive a
11 “written response.” Id. The addresses of the Division Commander and Chief of Correction
12 are listed under the “Grievance Procedure” section of the jail’s Inmate Orientation and Rule
13 Book. Id.

14 In this case, the Court noted that while Plaintiff filed multiple grievances pertaining
15 to a vast range of issues—including six relevant grievances relating to alleged inadequate
16 mental health care treatment and housing assignment concerns—he nonetheless was
17 required to have appealed the Watch Commander’s decision by writing a letter to the
18 Division Commander or the Chief of Correction in order to properly exhaust his claims.
19 The Court found that nothing in the record demonstrated that Plaintiff had done so. To the
20 contrary, Division Commander David Sepulveda declared that Plaintiff’s Department of
21 Correction file does not contain any letters of appeal addressed to him or any subsequent
22 Division Commander relating to the alleged inadequate mental health care treatment or
23 improper housing assignment during the relevant time frame.

24 The Court also noted that Plaintiff had claimed, in a conclusory manner, that he had
25 exhausted his administrative remedies regarding his claims by filing other forms and letters,
26 including the following: Complaints to the Department of Correction’s Internal Affairs
27 Unit and to the California Department of Corrections and Rehabilitation;
28 Medical/Psychiatric Referral Forms; Health Services Request Forms; Inmate Request

1 Forms relating to mental health treatment and admission to the mental health ward; state
2 hospital records; and letters requesting assistance from the Mental Health Advocacy
3 Project. The Court, however, found unavailing Plaintiff’s claim that he satisfied the
4 requirements of the grievance procedure by submitting the aforementioned forms and
5 letters, given that none of them was addressed to either the Division Commander or the
6 Chief of Correction.

7 As discussed, it is Plaintiff’s responsibility to complete “Inmate Grievance Forms”
8 and to pursue his grievances to the Division Commander’s level by writing a letter to either
9 the Division Commander or the Chief of Correction. See SCCJ Inmate Orientation and
10 Rule Book at 9. The PLRA “requires *proper* exhaustion of administrative remedies.” Sept.
11 26, 2013 Order at 4 (citing Woodford v. Ngo, 548 U.S. 81, 83, (2006)) (emphasis in
12 original). In granting Defendants’ motion to dismiss, the Court concluded that “the record
13 in this case demonstrates that Plaintiff had the opportunity and ability to properly exhaust,
14 but failed to do so.” Id. at 8. Therefore, Plaintiff’s claims were dismissed as
15 unexhausted—meaning that Plaintiff is free to refile his lawsuit after fully and properly
16 exhausting his administrative remedies.

17 In the instant motion for reconsideration, Plaintiff contends that the Court erred in
18 dismissing his claims as unexhausted on the grounds that he was successful in his efforts to
19 exhaust these claims. Again, Plaintiff makes a conclusory allegation that the SCCJ Inmate
20 Orientation and Rule Book provided more appeal options beyond the aforementioned
21 grievance procedure. Plaintiff claims that on “pages 4 and 5” thereof there are eight other
22 options that an inmate may use to exhaust his administrative grievance procedures.
23 However, Plaintiff has failed to attach these particular pages, and instead claims that proof
24 of the same is already in the Court’s and Defendants’ “possession by Affidavits and
25 Exhibits.” Mot. for Recons. at 3.

26 The Court notes that the evidence presented in support of and in opposition to
27 Defendants’ motion to dismiss was quite voluminous. In addition, Plaintiff’s present
28 motion for reconsideration, including attachments, totals eighty-eight pages. It is not the

1 Court's role to sift through the record to attempt to locate the specific pages of the SCCJ
2 Inmate Orientation and Rule Book that Plaintiff claims warrant reconsideration. See Bias
3 v. Moynihan, 508 F.3d 1212, 1219 (9th Cir. 2007) ("A district court lacks the power to act
4 as a party's lawyer, even for pro se litigants."); Indep. Towers of Wash. v. Wash., 350 F.3d
5 925, 929 (9th Cir. 2003) (noting that the court is not obligated to consider matters not
6 specifically brought to its attention). In addition, the Court notes that Defendants
7 previously attached pages eight and nine of the SCCJ Inmate Orientation and Rule Book as
8 Exhibit A to the declaration of Sabina DeLara, and that these pages specifically referred to
9 the "Grievance Procedure" at SCCJ. As such, it is highly questionable whether there is
10 another section in the SCCJ Inmate Orientation and Rule Book relating to grievances which
11 recites eight *additional* options to exhaust administrative grievances. Nonetheless, based
12 on the record presented, the Court is unable to render an informed decision on this issue
13 without first having the opportunity to review pages four and five of the aforementioned
14 publication.

15 In addition, Plaintiff now claims that he actually filed "a letter to Chief of
16 Correction[] and Captain of Internal Affairs." Mot. for Recons. at 3. In particular, Plaintiff
17 states he chose the "last option" by submitting a letter to the Chief of Correction and
18 Captain of Internal Affairs; however, he has "no copies of [these] letters." Id. The Court
19 notes that nowhere in his prior pleadings, including his opposition to Defendants' motion to
20 dismiss, did Plaintiff claim that he wrote such a letter to the Chief of Correction. Rather, he
21 asserted that he never received a response from either the Chief of Correction or Captain.
22 Again, however, because there is nothing in the record to refute Plaintiff's new claim, the
23 Court cannot, at this juncture, ascertain whether it has merit.

24 Accordingly, in light of Plaintiff's allegations above, the Court directs Defendants to
25 file a response addressing Plaintiff's claim that he did, in fact, exhaust his administrative
26 remedies as to all of his claims in this action. The parties shall abide by the briefing
27 schedule outlined below.

28

1 **III. CONCLUSION**

2 For the reasons stated above,

3 IT IS HEREBY ORDERED THAT:

4 1. By no later than **fourteen (14) days** from the date this Order is filed,
5 Defendants shall file and serve their response to Plaintiff's motion for reconsideration.

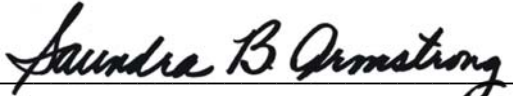
6 2. If Plaintiff wishes to file a reply brief, he shall do so no later than **fourteen**
7 **(14) days** after the date Defendants' response is filed.

8 3. The motion for reconsideration shall be deemed submitted as of the date the
9 reply brief is due. The Court will hold Plaintiff's other pending motions, including his
10 request to proceed in forma pauperis on appeal, until after the motion for reconsideration is
11 resolved.

12 4. Pursuant to Federal Rule of Appellate Procedure 24(a)(4), the Clerk is
13 directed to provide notice of this Order to the Ninth Circuit Court of Appeals and to the
14 parties.

15 IT IS SO ORDERED.

16 Dated: October 30, 2013


SAUNDRA BROWN ARMSTRONG
United States District Judge

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