

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 12-cv-03231-PAB-KLM

DEAN CARBAJAL,

Plaintiff,

v.

ANDREW KEEFER, in his individual capacity,

Defendant.

ORDER

Entered by Judge Philip A. Brimmer

This matter is before the Court on plaintiff's Motion for a Progression Order [Docket No. 303], wherein plaintiff seeks a ruling on defendant's motion for summary judgment [Docket No. 293]. Docket No. 303 at 1. After the filing of plaintiff's motion, the Court issued an order granting in part and denying in part defendant's motion for summary judgment. Docket No. 305. The Court found that, although the exhaustion requirement under the Prison Litigation Reform Act applies to this case, there is a genuine issue of material fact as to whether plaintiff has exhausted administrative remedies. Docket No. 305 at 11, 13-14. As stated in the Order, questions related to exhaustion are not triable to a jury. See *Lee v. Willey*, 789 F.3d 673, 678 (6th Cir. 2015); *Albino v. Baca*, 747 F.3d 1162, 1170-71 (9th Cir. 2014). Accordingly, the Court has set a half-day evidentiary hearing on the issue of exhaustion for February 23, 2018. See Docket No. 314. The case will only be set for trial when and if the exhaustion issue is resolved in plaintiff's favor. See *Albino*, 747 F.3d at 1171 (if court holds that plaintiff has exhausted administrative remedies, "the case may proceed to the merits"). It is therefore

ORDERED that the Motion for a Progression Order [Docket No. 303] is **DENIED** without prejudice.

DATED November 27, 2017.