IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

RONNIE SMITH, # K56919,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 16-cv-0377-MJR-SCW**
	)	
DENNIS LARSON,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

REAGAN, Chief Judge:

I. INTRODUCTION

In April 2016, while incarcerated at Robinson Correctional Center, Ronnie Smith filed a pro se lawsuit in this Court pursuant to 42 U.S.C. 1983, alleging violations of his federally-secured civil rights while he was confined at Big Muddy Correctional Center. He named Dr. Andrew Johnson (an employee of Crossroads Community Hospital) and Dr. Dennis Larson (an employee of Wexford Health Sources, Inc.) as defendants and alleged that he had received inadequate medical treatment from them while at Big Muddy. The Court dismissed the original complaint and ordered Smith to amend. Smith did so in June 2016.

The Court conducted threshold review of the amended complaint under 28 U.S.C. 1915A via an Order dated July 27, 2016 (Doc. 12). The undersigned dismissed Dr. Johnson without prejudice (as the amended complaint failed to state a claim against him) but found that Plaintiff had stated a cognizable claim against Dr. Larson for

deliberate indifference to medical needs. Defendant Larson answered and asserted the affirmative defense of lack of exhaustion of exhaustion of administrative remedies (Doc. 18, p. 4).

The case comes now before the Court on Defendant Larson's December 8, 2016 motion for summary judgment and supporting memorandum asserting that Plaintiff failed to exhaust administrative remedies before filing this lawsuit (Docs. 25-26). Although plainly notified of the need to respond to the motion (*see* notice at Doc. 27), Plaintiff did not file any response or opposition to the motion.

The Local Rules of this District allow the Court to treat that failure to respond as an admission of the *merits* of Defendant's motion. **SDIL Local Rule 7.1(c)**. The undersigned treats the lack of response as an admission that there are no disputed material facts. ***See, e.g., Flynn v. Sandahl*, 58 F.3d 283, 288 (7th Cir. 1995) (a failure to respond constitutes an admission that there are no disputed material facts).**

The motion presents a purely legal issue on which no evidentiary hearing is necessary. For the reason explained below, the Court finds that Plaintiff failed to exhaust his administrative remedies as required by the Prison Litigation Reform Act (PLRA) and grants Defendant's motion.

II. SUMMARY OF KEY ALLEGATIONS AND EVIDENCE

Plaintiff claims that he received deliberately inadequate medical care for his scrotal hernia from Defendant Larson while an inmate at Big Muddy. Plaintiff alleges that the inadequate care related to his hernia started in May 2013 and continued for two years. The record before the Court reveals the following.

Plaintiff was approved for hernia surgery, which was performed on March 11, 2015. Plaintiff was transferred to Robinson Correctional Center on June 3, 2015. On November 11, 2015, Plaintiff had a second surgery in which drainage tubes were inserted to relieve swelling and fluid build-up.

On December 8, 2015, Plaintiff filed a grievance with his counselor at Robinson related to his medical care from Defendant Larson at Big Muddy (Doc. 26-1). Plaintiff's counselor returned the grievance on December 17, 2015, because the issues within the grievance were not related to incidents that occurred at Robinson and were outside of the jurisdiction of Robinson (*id.*, p. 1). Plaintiff's counselor instructed Plaintiff to send his grievance to the Administrative Review Board (ARB) (*id.*). The ARB received Plaintiff's grievance on December 29, 2015 and returned it on January 4, 2016, explaining that none of the issues except the second surgery (the November 11, 2015 surgery) fell within the applicable 60-day review period (Doc. 26-2). The ARB has no record of any other grievance filed by Plaintiff (Doc. 26-3).

III. ANALYSIS

Analysis starts with an overview of the applicable legal standards.

A. Summary Judgment Motions

Summary judgment is proper only if the admissible evidence considered as a whole shows there is no genuine dispute as to any material fact, and the movant is entitled to judgment as a matter of law. ***Dynegy Mktg. & Trade v. Multi Corp.*, 648 F.3d 506, 517 (7th Cir. 2011),** *citing* **FED. R. CIV. P. 56(a).** The party seeking summary judgment bears the initial burden of showing -- based on the pleadings, affidavits,

and/or information obtained via discovery -- the lack of any genuine issue of material fact. ***Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).** After a properly supported motion for summary judgment is made, the adverse party "must set forth specific facts showing that there is a genuine issue for trial." ***Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986), *quoting* FED R. CIV. P. 56(e)(2).**

A fact is material if it is outcome determinative under applicable law. ***Anderson*, 477 U.S. at 248; *Ballance v. City of Springfield, Ill. Police Dep't*, 424 F.3d 614, 616 (7th Cir. 2005).** A genuine issue of material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." ***Anderson*, 477 U.S. at 248.** "A mere scintilla of evidence in support of the nonmoving party's position is not sufficient; there must be evidence on which the jury could reasonably find for the non-moving party." ***Harris N.A. v. Hershey*, 711 F.3d 794, 798 (7th Cir. 2013).** On summary judgment, the district court construes the facts and draws the reasonable inferences in favor of the non-moving party. ***Cole v. Board of Trustees of Northern Illinois University*, 838 F.3d 888, 895 (7th Cir. 2016).**

Generally, a district court's role on summary judgment is not to evaluate the weight of the evidence, judge witness credibility, or determine the truth of the matter, but only to determine whether a general issue of triable fact exists. However, a different standard governs summary judgment motions on the issue of exhaustion. ***Nat'l Athletic Sportswear, Inc. v. Westfield Ins. Co.*, 528 F.3d 508, 512 (7th Cir. 2008)**.

A motion for summary judgment based upon failure to exhaust administrative remedies typically requires a hearing to determine any contested issues about

exhaustion, and the judge may make limited findings of fact at that time. ***Pavey v. Conley*, 544 F.3d 739, 742 (7th Cir. 2008).** But "debatable factual issues relating to the defense of failure to exhaust administrative remedies" are not required to be decided by a jury and can be determined by the judge. ***Pavey*, 544 F.3d at 740-41.** In the case at bar, the exhaustion issue presents a purely legal question, so no hearing is required.

B. <u>Exhaustion under the Prison Litigation Reform Act</u>

Lawsuits brought by prisoners are governed by the PLRA, 42 U.S.C 1997e, which requires that "no action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until … administrative remedies as are available are exhausted." **42 U.S.C. 1997e(a).**

Exhaustion is a condition precedent to suit in federal court, so the inmate must exhaust *before* he commences his federal litigation. He cannot exhaust while his lawsuit is pending. ***See Perez v. Wisconsin Department of Corr.*, 182 F.3d 532, 535 (7th Cir. 1999); *Dixon v. Page*, 291 F.3d 485, 488 (7th Cir. 2002).** If the inmate fails to exhaust before filing suit in federal court, the district court must *dismiss* the suit. ***See Jones v. Bock*, 549 U.S. 199, 223 (2007); *Burrell v. Powers*, 431 F.3d 282, 284-85 (7th Cir. 2005).**[1]

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[1] Although *dismissal* is the procedural step the district court takes if a plaintiff failed to exhaust prior to filing suit, the issue of exhaustion most often is raised via summary judgment motion, so that the Court can consider evidence "outside the pleadings," such as affidavits, grievances, responses, appeals, and related documentation. ***See* FED. R. CIV. P. 12(d).**

The law of this Circuit requires strict adherence to the PLRA's exhaustion requirement. "Unless a prisoner completes the administrative process by following rules the state has established for that process, exhaustion has not occurred." ***Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir. 2002).** This includes the filing of "complaints and appeals in the place, and at the time, the prison's rules require." ***Id*. at 1025.** ***See also Dole v. Chandler*, 438 F.3d 804, 809 (7th Cir. 2006) ('This circuit has taken a strict compliance approach to exhaustion").** If the prisoner fails to comply with the established procedures, including time restraints, the court may not consider the claims. ***Pavey v. Conley*, 663 F.3d 899, 903 (7th Cir. 2011); *Jones*, 549 U.S. at 211, *citing Porter v. Nussell*, 534 U.S. 516, 524 (2002).** But the PLRA's plain language makes clear that an inmate is required to exhaust only those administrative remedies that are available to him. **42 U.S.C. 1997e(a).**

The purpose of the exhaustion requirement is two-fold. First, it gives the prison officials the chance to address the prisoner's claims internally, before any litigation becomes necessary. ***Kaba v. Stepp*, 458 F.3d 678, 684 (7th Cir. 2006); *Woodford v. Ngo*, 548 U.S. 81, 89-90 (2006).** Second, it "seeks to reduce the quantity and improve the quality of prisoner suits." ***Porter*, 534 U.S. at 524.** ***See also Booth v. Churner*, 532 U.S. 731, 737 (2001) (exhaustion requirement will help "filter out some frivolous claims.").**

Because exhaustion is a prerequisite to filing a suit, a prisoner must wait to commence litigation until he has completed the established process and may not file in anticipation of administrative remedies soon being exhausted. ***Perez*, 182 F.3d at 535, *citing* 42 U.S.C 1997e(a); *Ford v. Johnson*, 362 F.3d 395, 398 (7th Cir. 2004).** A suit filed

prior to exhaustion of available remedies will be dismissed even if the remedies become exhausted *while* the suit is pending. ***Perez*, 182 F.3d at 535.**

The affirmative defense of failure to exhaust depends on whether a plaintiff has fulfilled the PLRA's exhaustion requirement, which in turn depends on the prison grievance procedures set forth by the state. ***See Jones*, 549 U.S. at 218.** As a prisoner in Illinois institutions--first Big Muddy and later Robinson--Plaintiff Smith was required to follow the grievance procedures of the Illinois Department of Corrections (IDOC). ***See Jones v. Bock*, 549 U.S. 199, 218 (2007).**

C. Exhaustion under Illinois Law

In Illinois, the process for exhausting administrative remedies is laid out in the IDOC's Grievance Procedures for Offenders. **20 Ill. Adm. Code 504.810.** The procedures first require inmates to speak with their counselor about the issue or concern. **20 Ill. Admin. Code 504.810(a).** If unable to resolve a dispute with the counselor, the prisoner may file a written grievance with the Grievance Officer within sixty days of discovery of the dispute. ***Id.*** The grievance should include "factual details regarding each aspect of the offender's complaint, including what happened, when, where, and the name of each person who is the subject of or who is otherwise involved in the complaint…[or] as much descriptive information about the individual as possible." **20 Ill. Admin. Code 504.810(b).**

The grievance officer shall review the grievance and report findings and recommendations to the Chief Administrative Officer (CAO). **20 Ill. Adm. Code 504.830(d)**. The prisoner then has the opportunity to review the CAO's response. ***Id.*** If

the prisoner is unsatisfied with the institution's resolution of the grievance, he may file an appeal to the Director through the Administrative Review Board within 30 days of the CAO's decision. **20 Ill. Adm. Code 504.850**. Completion of this process exhausts a prisoner's administrative remedies.

In emergencies, the Illinois Administrative Code also provides that a prisoner may request his grievance handled on an emergency basis by forwarding the grievance directly to the CAO. **20 Ill. Adm. Code 504.840**. The grievance may be handled on an emergency basis if the CAO determines that there exists a substantial risk of imminent personal injury or other serious or irreparable harm to the offender. ***Id.*** The request to have a grievance handled on an emergency basis may also be appealed to the ARB. **20 Ill. Adm. Code 504.850**.

When a grievance is related to "disciplinary proceedings that were made at a facility other than the facility where the offender is currently assigned," the prison may submit that grievance directly to the ARB. **20 Ill. Adm. Code 504.870(a).** The ARB must "review and process the grievance in accordance with Section 504.850," as discussed above. **20 Ill. Adm. Code 504.870(b).**

D. **Application**

Defendant argues that Plaintiff failed to exhaust his administrative remedies because he did not file his grievance within the 60-day time period in § 504.810(a) of the Illinois Administrative Code and, therefore, he has not complied with the PLRA's exhaustion requirement and cannot assert this claim in federal court. The Court agrees.

Section 504.810 provides that a grievance "shall be filed within 60 days after the discovery of the incident, occurrence, or problem that gives rise to the grievance." Plaintiff's grievance was filed on December 12, 2015 and alleged inadequate medical care related to his time at Big Muddy under the medical care of Defendant Larson. Plaintiff contends that for two years beginning in May 2013, Defendant was deliberately indifferent to Plaintiff's serious medical needs arising from the hernia. Plaintiff had his first surgery in March 2015, was transferred to Robinson in June 2015. At that time, Plaintiff was aware of his dissatisfaction with the care he received from Dr. Larson. Plaintiff even claims to have notified medical staff during the previous two years at Big Muddy (Doc. 26-1, p. 1).

Clearly, Plaintiff should have filed his grievance when he became aware of the problem with his medical care. Plaintiff has made no attempt to explain why he waited. Nor has he shown that his grievance "was not timely filed for good cause," thereby allowing it to be considered by the ARB. Plaintiff has simply not responded to Defendant's motion. He has furnished no explanation of how he exhausted his administrative remedies or why he should be excused from having not done so.

After Plaintiff's counselor at Robinson reviewed the 12/8/2015 grievance, he instructed Plaintiff to send it to the ARB for review, since the incidents alleged in the grievance took place at Big Muddy and were therefore outside Robinson's jurisdiction. The ARB responded within one week of receiving Plaintiff's grievance and explained that only the November 6, 2015 surgery was within the applicable 60-day time period. Thus, Plaintiff was made aware of the precise problem with his grievance and yet made

no effort to explain why he failed to timely file in the first place. The Court concludes that Plaintiff failed to fully exhaust his available administrative remedies. That failure requires the dismissal of this lawsuit.

IV. CONCLUSION

For the reasons stated above, the Court **GRANTS** Defendant's motion (Doc. 26) and **DISMISSES without prejudice** all claims against Defendant Larson. No other claims remain herein, so the Clerk of Court shall close the case.

IT IS SO ORDERED.

DATED April 10, 2017.

s/ Michael J. Reagan
Michael J. Reagan
United States District Judge