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ANGEL HERNANDEZ, Plaintiff, v. JOHN NASH, Warden; MICHAEL SEPANEK, Captain; and KENNETH SHARLOW, Corrections Officer, FCI Ray Brook, Defendants.

Civil No. 9:00-CV-1564 (FJS/GLS)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

2003 U.S. Dist. LEXIS 16258

September 10, 2003, Decided

DISPOSITION: [*1] Recommended that defendants' motion to dismiss complaint be granted and that complaint be dismissed without prejudice.

COUNSEL: ANGEL HERNANDEZ, PLAINTIFF, Pro se, Ray Brook, New York.

FOR DEFENDANTS: JAMES C. WOODS, AUSA., HON. GLENN T. SUDDABY, United States Attorney, James T. Foley U.S. Courthouse, Albany, NY.

JUDGES: GARY L. SHARPE, U.S. MAGISTRATE JUDGE.

OPINION BY: GARY L. SHARPE

OPINION

REPORT AND RECOMMENDATION

Plaintiff, *pro se,* Angel Hernandez, a federal prison inmate currently at the Federal Correctional Institute ("FCI") in Ray Brook, New York, commenced this civil rights action to challenge an alleged failure on the part of prison officials to protect him from physical injury. Hernandez's claim stems from an altercation which occurred on August 21, 2000, and involved his cell mate, and as a result, he suffered physical injury which required medical attention. In his complaint, Hernandez asserts violations of his civil rights under [*2] the*Fifth*, *Sixth* and *Eighth Amendments*, and seeks damages in the amount of $ 1,000,000.

Currently pending before the court is a motion by the defendants seeking dismissal of Hernandez's complaint for failure to state a claim upon which relief may be granted or, in the alternative, summary judgment dismissing his complaint in all respects. In support of their motion, the defendants assert a variety of grounds including, *inter alia,* Hernandez's failure to exhaust available administrative remedies. He has not responded to the defendants' motion which was filed more than nine months ago.

Because it is clear from Hernandez's complaint that he has failed to avail himself of the internal administrative remedies required to be exhausted prior to commencement of suit, this court recommends dismissal of his complaint on this basis, without prejudice, and finds it unnecessary to recommend conversion of the defendants' motion to one for summary judgment and/or to address the various other grounds raised by the defendants in support of their motion.

I. BACKGROUND

The facts set forth in Hernandez's complaint, in support of his claims in this action, are concisely stated and [*3] exceedingly straightforward. [1] Hernandez alleges that on or about August 21, 2000, while assigned to the Special Housing Unit ("SHU"), he was confronted by his cell mate who requested that the two engage in sexual acts. Compl. P. 4 (*Dkt. No. 1).* Hernandez asserts that in response to that overture, he attempted to summons the assistance of a correctional officer which resulted in Sharlow coming to his cell door. *Id.* After Hernandez explained the situation and requested that he be moved, Sharlow allegedly responded that he did not have the keys necessary to open his cell door, and told

him to "do what [you] have to do". *Id.* Based upon a conversation between Hernandez and an unnamed lieutenant, he attributed the fact that Sharlow did not have a key to open his cell door to a directive issued by defendants Sepanek and Nash, that officers not carry keys within the SHU Tier late at night. *Id.* As a result of the incident, Hernandez alleges that he was assaulted by his cell mate which resulted in an eye injury and required medical attention, including stitches.

1 In their motion, the defendants have submitted considerable detail concerning Hernandez's criminal conviction and the basis for his confinement at FCI Ray Brook as well as regarding the incident at issue in this case. However, since this court finds that conversion of the motion to one for summary judgment is unnecessary, it is inappropriate to include the facts related in those documents. Instead, this court will limit it's focus to the facts set forth in Hernandez's complaint.

[*4] **II. PROCEDURAL HISTORY**

Hernandez commenced this action on October 12, 2000, and has paid the required $ 150.00 filing fee *(Dkt. No. 1)*. In his complaint, he asserts violations of his civil rights under the *Fifth*, *Sixth* and *Eighth Amendments*, asserting in his first cause of action that Sharlow violated those rights by exhibiting deliberate indifference to his safety and encouraging violence through his comments in response to Hernandez's request for assistance. [2] Compl. P. 5 *(Dkt. No. 1)*. In his second cause of action, Hernandez alleges participation by Sepanek and Nash in the constitutional infringement as a result of their implementation of "improper policies and adequate supervision of officers". *Id.* Hernandez seeks recovery of $ 1,000,000 as a result of the defendants' actions. Following commencement of suit and the ensuing inaction on the part of Hernandez in pursuing the matter, Chief District Judge Frederick J. Scullin, Jr., issued an order on March 18, 2002, directing that Hernandez show cause why the suit should not be dismissed based upon his failure to arrange for proper service of the summons and complaint upon the three named defendants ([*5] *Dkt. No. 7)*. In response, Hernandez filed an affidavit dated April 16, 2002, expressing his belief that he had done what was necessary to effectuate service and that service had, in fact, been effectuated in the case (*Dkt. No. 8*).

2 Although Hernandez's complaint purports to be filed under *42 U.S.C. § 1983*, this court will read the complaint as raising claims under *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971)*, which recognized the existence of a cognizable claim in certain instances for alleged constitutional violations committed by federal agents. In order to state a *Bivens* claim, a plaintiff must allege a constitutional deprivation by defendants acting under color of federal law. *Soichet v. Toracinta,* 1995 U.S. Dist. LEXIS 11693, 93 Civ. 8858, 1995 WL 489434, at *3 (S.D.N.Y. Aug. 16, 1995)(citing *Barbera v. Smith, 654 F. Supp. 386*,

390 (S.D.N.Y. 1987)). Generally, case law under *42 U.S.C. § 1983* applies to *Bivens* cases. *Chin v. Bowen, 833 F.2d 21, 24 (2d Cir. 1987)*(quoting *Ellis v. Blum, 643 F.2d 68, 84 (2d Cir. 1981))*.

[*6] On May 13, 2002, this court found the existence of good cause for Hernandez's failure to effectuate service of process in a timely manner, and directed the assistance of the United States Marshal to accomplish that objective *(Dkt. No. 9)*. Thereafter, service was accomplished with regard to each of the three named defendants who executed service waivers *(Dkt. No. 14)*.

In response to Hernandez's complaint, the defendants have moved seeking, in the alternative, either dismissal for failure to state a claim upon which relief may be granted, or summary judgment dismissing his complaint in its entirety *(Dkt. Nos. 19-21)*. In their motion, the defendants assert various grounds, including: 1) Hernandez's failure to exhaust available internal administrative remedies, as required under *42 U.S.C. § 1997e(a)*; 2) lack of personal involvement; and, 3) on the merits, based upon Hernandez's failure to allege and prove deliberate indifference by defendants to his safety. There has been no response by Hernandez to the defendants' motion which was filed on December 12, 2002.

The defendants' motion has been referred to this court for the issuance of a report and [*7] recommendation pursuant to *28 U.S.C. § 636(b)(1)(B)* and Local *Rule 72.3(c)*. *See also, Fed. R. Civ. P. 72(b)*.

III. DISCUSSION

A. Legal Effect Of Plaintiff's Failure To Oppose Defendants' Motion

The first issue to be addressed is the legal significance, if any, of Hernandez's failure to oppose the defendants' summary judgment motion, and specifically, whether such a failure automatically entitles the defendants to dismissal based upon their motion.

Local *Rule 7.1(b)(3)* provides that

> Where a properly filed motion is unopposed and the Court determines that

> the moving party has met its burden demonstrating entitlement to the relief requested therein, failure by the non-moving party to file or serve any papers as required by this Rule shall be deemed by the court as consent to the granting or denial of the motion, as the case may be, unless good cause is shown.

Even while recognizing that *pro se* plaintiffs are entitled to special latitude when defending against summary judgment motions (*see Jemzura v. Public Service Comm'n, 961 F. Supp. 406, 415 (N.D.N.Y. 1997)* (McAvoy, C.J.)), courts in this district have [*8] found it appropriate to grant a dispositive motion pursuant to Local *Rule 7.1(b)(3)* based upon a *pro se* plaintiff's failure to respond. *Robinson v. Delgado,* 1998 U.S. Dist. LEXIS 7903, 96-CV-169, 1998 WL 278264, at *2 (N.D.N.Y. May 22, 1998) (Pooler, J. and Hurd, M.J.); *Cotto v. Senkowski,* 1997 U.S. Dist. LEXIS 16462, 95-CV-1733, 1997 WL 665551, at *1 (N.D.N.Y. Oct. 23, 1997) (*Pooler, J. and Hurd, M.J.); Wilmer v. Torian, 980 F. Supp. 106, 106-07 (N.D.N.Y. 1997)* (Pooler, J. and Hurd, M.J.). As can be seen by the face of the rule, before an opposed motion can be granted, the court must review the motion to determine whether it is facially meritorious. *See Allen v. Comprehensive Analytical Group, Inc., 140 F. Supp.2d 229, 231-32 (N.D.N.Y. 2000)* (*Scullin, C.J.); Leach v. Dufrain, 103 F. Supp.2d 542, 545-46 (N.D.N.Y. 2000)* (Kahn, J.).

B. *Rule 12(b)(6)* Standard of Review

As previously noted, the defendants' motion is styled as seeking alternative relief, either in the form of dismissal of Hernandez's complaint for failure to state a cognizable claim or, in the alternative, summary judgment in their favor. Because Hernandez has not received notice [*9] of the court's intention to treat the motion as one for summary judgment, and hence an opportunity to respond in that context, and in light of the fact that the portion of the defendants' motion seeking dismissal for failure to exhaust available administrative remedies is susceptible of resolution through resort to Hernandez's complaint, which acknowledges this failure, this court recommends the motion be treated in the first instance as seeking dismissal for failure to state a claim upon which relief may be granted.

A court may not dismiss an action pursuant to *Rule 12(b)(6)* unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Cohen v. Koenig, 25 F.3d 1168, 1171-72 (2d Cir. 1994)* (citing, *inter alia, Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99(1957))*. In deciding a *12(b)(6)* motion, the court must accept the material facts alleged in the complaint as true. *Id.* (citing *Cooper v. Pate, 378 U.S. 546, 546, 12 L. Ed. 2d 1030, 84 S. Ct. 1733 (1964)* (per curiam)).

When determining whether a complaint states a cause of action, a [*10] court should afford great liberality to *pro se* litigants. *Platsky v. Central Intelligence Agency, 953 F.2d 26, 28 (2d Cir. 1991)* (citation omitted). In fact, the Second Circuit has held that a court should not dismiss without granting leave to amend at least once if there is any indication that a valid claim might be stated. *Branum v. Clark, 927 F.2d 698, 704-05 (2d Cir.1991)*; *see also, Fed. R. Civ. P. 15(a)* (leave to amend "shall be freely given when justice so requires"). "These liberal pleading rules apply with particular stringency to complaints of civil rights violations." *Phillip v. University of Rochester, 316 F.3d 291, 2003 WL 139522 (2d Cir. Jan. 21, 2003)*.

C. Failure To Exhaust

The primary thrust of the defendants' motion, at least to the extent that it challenges the facial sufficiency of Hernandez's complaint, surrounds his conceded failure to exhaust available administrative remedies.

The Prison Litigation Reform Act of 1996 ("PLRA"), Pub. L. No. 104-134, 110 Stat. 1321 (1996), requires that "no action shall be brought with respect to prison conditions under *section 1983* of this title, or any other Federal law, [*11] by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." *42 U.S.C. § 1997e(a)*. Moreover, under the PLRA, a prisoner pursuing a federal lawsuit, including a *Bivens* action like this one, is required to exhaust the available administrative remedies before a court may hear his or her case. *See Porter v. Nussle, 534 U.S. 516, 524-25, 152 L. Ed. 2d 12, 122 S. Ct. 983 (2002)*. The Court has further held that the PLRA requires administrative exhaustion even where the grievance process does not permit award of money damages and the prisoner seeks only money damages, so long as the grievance tribunal has authority to take some responsive action. *See Booth v. Churner, 532 U.S. 731, 741, 149 L. Ed. 2d 958, 121 S. Ct. 1819 (2001)*. However, "a dismissal of an action for failing to comply with the PLRA is without prejudice." *Morales v. Mackalm, 278 F.3d 126, 131 (2d Cir. 2002)*.

The available administrative remedies for a *Bivens* claim, consist of a four-step set of procedures set forth in the Bureau Of Prisons' Administrative Remedy [*12] Program, 28 C.F.R. § 542, which include: (1) attempting informal resolution with prison staff; (2) submitting a formal written "Administrative Remedy Request" to the warden within twenty days of the triggering event; (3) appealing the warden's decision to the appropriate regional director within twenty days of the formal request being denied; and, (4) appealing the Regional Director's decision to the BOP General Counsel's Office within

thirty days. *See 28 C.F.R. §§ 542.13(a), 542.14(a), 542.15(a)*

In his complaint, Hernandez acknowledges that FCI Ray Brook had an internal grievance procedure. However, he admits that he failed to file a grievance. (*Dkt. No. 1, P. 4*). Hernandez explains this failure by simply stating: "I am seeking monetary damages that cannot be addressed via the grievance program." Unfortunately for him, however, it is now well established that the mere non-existence of monetary relief as a remedy which is available to an inmate through the grievance process does not excuse a plaintiff from first pursuing that avenue before resorting to the institution of suit in a federal court. Because Hernandez's complaint on its face readily reveals [*13] a critical failure on his part to exhaust available administrative remedies, this court finds that the defendants are entitled to dismissal of Hernandez's complaint, without prejudice, based upon his failure to exhaust available administrative remedies. [3]

3 In their motion papers, the defendants suggest that Hernandez's failure to exhaust divests this court of subject matter jurisdiction. "District courts within this circuit have reached contrary conclusions about the nature of the PLRA's exhaustion requirement." *Delio v. Morgan,* 2003 U.S. Dist. LEXIS 9974, 00 Civ.7167, 2003 WL 21373168, at *2 (S.D.N.Y. June 13, 2003) (citing and comparing *Arnold v. Goetz, 245 F. Supp.2d 527, 531-533 (S.D.N.Y.2003)* (collecting cases and joining "chorus of voices" concluding that the PLRA's exhaustion requirement is an affirmative defense and not a jurisdictional prerequisite), with *Harris v. Totten, 244 F. Supp.2d 229, 231 (S.D.N.Y. 2003)* ("when a defendant moves for dismissal on the ground that the plaintiff has failed to exhaust administrative remedies, the defendant is raising a challenge to the court's jurisdiction"), and *Long v. Lafko,* 2001 U.S. Dist. LEXIS 10808, 00 Civ.723, 2001 WL 863422, at *2 (S.D.N.Y. July 31, 2001) (plaintiff's failure to exhaust all administrative remedies "deprives this court of subject matter jurisdiction")). However, this court finds that under either a jurisdictional or affirmative defense interpretation of the PLRA exhaustion requirement, this case must be dismissed because the defendants have asserted the defense and Hernandez's failure to exhaust appears on the face of the pleadings.

[*14] **IV. SUMMARY AND RECOMMENDATION**

It is by now well-established that prisoner claims of the nature now asserted by Hernandez in this action are subject to the PLRA's exhaustion of remedies requirement, notwithstanding unavailability of monetary relief through that avenue. Since Hernandez, by his own admission, failed to exhaust available administrative remedies by filing a grievance and pursuing it through the appropriate channels at FCI Ray Brook before commencement of this action, his complaint is subject to dismissal, without prejudice. In light of this determination, this court finds that conversion is inappropriate and will not address the various other arguments raised by the defendants, many of which may ultimately be determined to be meritorious should Hernandez choose to reinstitute this action following his pursuit of the matter through the available grievance process.

Based upon the foregoing, it is hereby

RECOMMENDED that the defendants' motion to dismiss Hernandez's complaint for failure to state a claim upon which relief may be granted *(Dkt. No. 19)* be **GRANTED** and that Hernandez's complaint be **DISMISSED,** without prejudice, and that [*15] the defendants' motion, in the alternative, for summary judgment *(Dkt. No. 19)* be **DENIED** as moot, in light of this determination.

NOTICE: Pursuant to *28 U.S.C. § 636(b)(1)*, the parties have **TEN (10) DAYS** ten days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN TEN DAYS WILL PRECLUDE APPELLATE REVIEW.** *28 U.S.C. § 636(b)(1)*; *Fed. R. Civ. P. 6(a), 6(e), 72*; *Roldan v. Racette, 984 F.2d 85 (2d Cir. 1993)*.

It is further **ORDERED** that the Clerk of the Court serve a copy of this Report and Recommendation upon the parties by regular mail.

Dated: September 10, 2003

Gary L. Sharpe

U.S. Magistrate Judge