

to which Roberts filed a response. On February 28, 2017, the Magistrate Judge issued a Report recommending that Kinganga's motion for summary judgment be granted and that Kinganga be dismissed from the lawsuit. In this Report, the Magistrate Judge observed that according to the summary judgment evidence, Roberts had not filed any grievances relating to the alleged uses of force by either Kinganga or Lockett. Roberts did not file objections to the Report and Kinganga's motion for summary judgment was granted on March 28, 2017. Kinganga was dismissed from the lawsuit at that time.

The U.S. Marshal was unable to effect service of process upon Lockett. On March 30, 2017, the Magistrate Judge directed Roberts to furnish Lockett's correct name and address for service of process. *See Kersh v. Derozier*, 851 F.2d 1509 (5th Cir. 1988). When Roberts did not comply, the Magistrate Judge issued a Report recommending that the claims against Lockett be dismissed without prejudice for failure to effect service of process. No objections have been filed to this Report; accordingly, Roberts is barred from *de novo* review by the District Judge of those findings, conclusions, and recommendations and, except upon grounds of plain error, from appellate review of the unobjected-to factual findings and legal conclusions accepted and adopted by the District Court. *Douglass v. United Services Automobile Association*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

The Court has reviewed the pleadings in this cause and the Report of the Magistrate Judge. Upon such review, the Court has determined that the Report of the Magistrate Judge is correct. *See United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir.), *cert. denied*, 492 U.S. 918, 109 S.Ct. 3243 (1989) (where no objections to a Magistrate Judge's Report are filed, the standard of review is "clearly erroneous, abuse of discretion and contrary to law.")

In addition, the Court notes that the summary judgment evidence showed that Roberts did not exhaust his administrative remedies against Lockett. While Lockett did not join in Kinganga's motion for summary judgment, the Fifth Circuit has held that a successful motion for summary

judgment inures to the benefit of defaulting defendants who did not join in that motion. *Lewis v. Lynn*, 236 F.3d 766, 768 (5th Cir. 2001).

In *Blake v. McCormick*, civil action no. 5:06cv273, 2007 WL 1671732 (E.D.Tex., June 8, 2007), this Court stated as follows:

In the present case, the Defendants submitted competent summary judgment evidence showing that the Plaintiff did not pursue his Step Two grievance remedies with respect to any of his claims. The Plaintiff has not submitted any competent summary judgment evidence countering the defense. Consequently, the motions for summary judgment should be granted in favor of all of the Defendants, including Captain Finn [who was not served and did not answer or join the motion for summary judgment]. The defense inures to the benefit of any unserved or defaulting defendants such as Captain Finn. *Lewis v. Lynn*, 236 F.3d 766, 768 (5th Cir. 2001); *see also Bloch v. Samuels*, No. H-04-4861, 2006 WL 2239016 (S.D.Tex. Aug. 6, 2006). Furthermore, since the deadlines for the Plaintiff to pursue his Step Two grievances have expired, he cannot effectively exhaust his administrative remedies at this late date. As such, the argument that the Plaintiff's claims should be dismissed with prejudice is meritorious.

In the same way, Kinganga's motion for summary judgment inures to Lockett's benefit because the summary judgment evidence showed that Roberts did not exhaust his administrative remedies against Lockett. Roberts' lawsuit against Lockett may be dismissed on this basis as well as for failure to effect service of process. It is accordingly

ORDERED that the Report of the Magistrate Judge (docket no. 68) is **ADOPTED** as the opinion of the District Court. It is further

ORDERED that the above-styled civil action is **DISMISSED WITHOUT PREJUDICE** for failure to effect service of process and for failure to exhaust administrative remedies. It is further

ORDERED that the statute of limitations for filing federal civil rights lawsuits is **SUSPENDED** for a period of 60 days following the date of entry of final judgment in this case. Roberts may refile his lawsuit or seek the reopening of the present case upon ascertaining a current and valid address for Lockett. The suspension of the limitations period does not itself affect the TDCJ-CID exhaustion process; thus, should Roberts reopen or refile his lawsuit, he must demonstrate exhaustion of his administrative remedies or show valid cause for excusing the exhaustion requirement. It is further

ORDERED that any and all motions which may be pending in this action are hereby
DENIED.

So Ordered and Signed

Jan 10, 2018



Ron Clark, United States District Judge