No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ERIC C. BEAUCHAMP,
Petitioner

v.

F. De La TORRE Jr.,
D. J. DOGLIETTO,
C. ESPINOZA,
SGT. I. SOEKARDI
Respondents

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit
Case No. 15-15616
Summary Judgment Affirmed on October 06, 2017
Petition for Rehearing Denied on February 1, 2018
Before: Silverman, Tallman, N.R. Smith, Circuit Judges

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Eric C. Beauchamp E87593
Folsom State Prison
PO Box 950
Folsom, CA 95763
Pro Se Petitioner

INDEX TO APPENDICES

[1] The abbreviation "CD" refers to the numerical sequence assigned by the district court's electronic docket; USDC N. Dist. of CA., Case No. CV-13-2098 CRB (PR).

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NOT FOR PUBLICATION

FILED

OCT 6 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ERIC C. BEAUCHAMP, Plaintiff-Appellant, v. D. J. DOGLIETTO, Officer; et al., Defendants-Appellees.	No. 15-15616 D.C. No. 3:13-cv-02098-CRB MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Submitted September 26, 2017**

Before: SILVERMAN, TALLMAN, and N.R. SMITH, Circuit Judges.

California state prisoner Eric C. Beauchamp appeals pro se from the district court's summary judgment in his 42 U.S.C. § 1983 action alleging excessive force, deliberate indifference to medical needs, and state law claims. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Williams v. Paramo*,

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

775 F.3d 1182, 1191 (9th Cir. 2015) (summary judgment for failure to exhaust administrative remedies); *Hebbe v. Pliler*, 627 F.3d 338, 341 (9th Cir. 2010) (dismissal under Fed. R. Civ. P. 12(b)(6)). We affirm.

The district court properly granted summary judgment on Beauchamp's federal claims because Beauchamp failed to raise a genuine dispute of material fact as to whether he properly exhausted administrative remedies or whether administrative remedies were effectively unavailable to him. *See Ross v. Blake*, 136 S. Ct. 1850, 1858-60 (2016) (setting forth circumstances when administrative remedies are unavailable, including when "prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation"); *Woodford v. Ngo*, 548 U.S. 81, 90 (2006) ("[P]roper exhaustion of administrative remedies . . . means using all steps that the agency holds out, and doing so properly (so that the agency addresses the issues on the merits)." (citation, internal quotation marks, and emphasis omitted)); *Sapp v. Kimbrell*, 623 F.3d 813, 823-24, 826-27 (9th Cir. 2010) (describing limited circumstances where improper screening renders administrative remedies unavailable or where exhaustion might otherwise be excused).

The district court properly dismissed Beauchamp's state law assault and

battery claim as time-barred because, even with the benefit of all arguably applicable equitable tolling, Beauchamp failed to file this action within the applicable statute of limitations. *See* Cal. Gov't Code § 945.6(a)(1) (action must be commenced no more than six months after the notice of rejection of the government tort claim is mailed); *Fink v. Shedler*, 192 F.3d 911, 916 (9th Cir. 1999) (three-pronged test for equitable tolling in California).

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 1 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ERIC C. BEAUCHAMP, Plaintiff-Appellant, v. D. J. DOGLIETTO, Officer; et al., Defendants-Appellees.	No. 15-15616 D.C. No. 3:13-cv-02098-CRB Northern District of California, San Francisco ORDER

Before: SILVERMAN, TALLMAN, and N.R. SMITH, Circuit Judges.

The mandate is recalled for the limited purpose of considering the petition for panel rehearing. Beauchamp's petition for panel rehearing (Docket Entry No. 26) is denied. The mandate shall reissue forthwith.

Appellees' opposed bill of costs (Docket Entry No. 24) is granted. The determination of allowed costs is referred to the Clerk's Office. *See* 28 U.S.C. § 1920; Fed. R. App. P. 39; 9th Cir. R. 39-1.

No further filings will be entertained in this closed case.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 02 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ERIC C. BEAUCHAMP,

Plaintiff - Appellant,

v.

D. J. DOGLIETTO, Officer; et al.,

Defendants - Appellees.

No. 15-15616

D.C. No. 3:13-cv-02098-CRB
U.S. District Court for Northern California, San Francisco

MANDATE

The judgment of this Court, entered October 06, 2017, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

Costs are taxed against the appellant in the amount of $258.60.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Craig Westbrooke
Deputy Clerk
Ninth Circuit Rule 27-7

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ERIC C. BEAUCHAMP, E87593, Plaintiff(s), v. F. DE LATORRE, JR., et al., Defendant(s).	No. C 13-2098 CRB (PR) ORDER (Dkt. #71)

Plaintiff seeks reconsideration of the court's December 16, 2014 order granting defendants' motion for summary judgment and dismissal. For the reasons set forth in defendants' opposition papers, plaintiff's motion for reconsideration (dkt #71) is DENIED.

SO ORDERED.

DATED: Feb. 27, 2015

CHARLES R. BREYER
United States District Judge

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ERIC C. BEAUCHAMP, E87593, Plaintiff(s), vs. F. DELATORRE, JR., et al., Defendant(s).	No. C 13-2098 CRB (PR) ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DISMISSAL (Dkt. #54)

INTRODUCTION

Plaintiff, a California state prisoner currently incarcerated at the California Substance Abuse Training Facility and State Prison, Corcoran (SATF– CSP, Corcoran), filed the instant pro se civil rights action for damages under 42 U.S.C. § 1983 alleging that on February 8, 2011, while he was incarcerated at the Correctional Training Facility (CTF) in Soledad, California, Correctional Officer F. Delatorre, Jr. assaulted him while correctional officers C. Espinoza and D. J. Doglietto and Sergeant I. Soekardi "provided back-up coverage" for Delatorre and failed to intervene. Plaintiff further alleges that defendants prevented him from seeking prompt medical care for his injuries.

Per order filed on August 12, 2013, the court found that, liberally construed, plaintiff's allegations appear to state cognizable Eighth Amendment claims under § 1983 for use of excessive force (as well as a state law claim for assault and battery) and deliberate indifference to serious medical needs, and ordered the United States Marshal to serve the four named defendants.

Defendants now move for summary judgment on plaintiff's Eighth Amendment claims under Federal Rule of Civil Procedure 56 on the ground that plaintiff failed to properly exhaust his Eighth Amendment claims before filing suit, as required by the Prison Litigation Reform Act of 1995 (PLRA). Defendants also move for dismissal of plaintiff's state law assault and battery claim under Federal Rule of Civil Procedure 12(b)(6) on the ground that plaintiff failed to commence this suit within six months from the date the Victim Compensation & Government Claims Board rejected his state law assault and battery claim, as required by the California Tort Claims Act. Plaintiff has filed an opposition and defendants have filed a reply.

MOTION FOR SUMMARY JUDGMENT

Defendants move for summary judgment under Rule 56 on plaintiff's Eighth Amendment claims of excessive force and deliberate indifference to serious medical needs on the ground that plaintiff failed to properly exhaust available administrative remedies before filing suit, as required by the PLRA.

A. Standard of Review

"The PLRA mandates that inmates exhaust all available administrative remedies before filing 'any suit challenging prison conditions,' including, but not limited to, suits under § 1983." Albino v. Baca, 747 F.3d 1162, 1171 (9th Cir. 2014) (en banc) (citing Woodford v. Ngo, 548 U.S. 81, 85 (2006)). To the extent that the evidence in the record permits, the appropriate procedural device for pretrial determination of whether administrative remedies have been exhausted under the PLRA is a motion for summary judgment under Rule 56. Id. at 1168. The burden is on the defendant to prove that there was an available administrative remedy that the plaintiff failed to exhaust. See id. at 1172. If the defendant meets that burden, the burden shifts to the prisoner to present evidence

showing that there is something in his particular case that made the existing and generally available administrative remedies effectively unavailable to him. Id.

If undisputed evidence viewed in the light most favorable to the prisoner shows a failure to exhaust, a defendant is entitled to summary judgment under Rule 56. Id. at 1166. But if material facts are disputed, summary judgment should be denied and the district judge rather than a jury should determine the facts in a preliminary proceeding. Id.

B. Analysis

The PLRA amended 42 U.S.C. § 1997e to provide that "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, 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). Although once within the discretion of the district court, exhaustion in prisoner cases covered by § 1997e(a) is now mandatory. Porter v. Nussle, 534 U.S. 516, 524 (2002). All available remedies must now be exhausted; those remedies "need not meet federal standards, nor must they be 'plain, speedy, and effective.'" Id. (citation omitted). Even when the prisoner seeks relief not available in grievance proceedings, notably money damages, exhaustion is a prerequisite to suit. Id.; Booth v. Churner, 532 U.S. 731, 741 (2001). Similarly, exhaustion is a prerequisite to all prisoner suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong. Porter, 534 U.S. at 532. PLRA's exhaustion requirement requires "proper exhaustion" of available administrative remedies. Woodford v. Ngo, 548 U.S. 81, 93 (2006). Proper exhaustion requires using all steps of an administrative process and complying with "deadlines and other critical procedural rules." Id. at 90.

The California Department of Corrections and Rehabilitation (CDCR) CDCR provides any inmate or parolee under its jurisdiction the right to appeal "any policy, decision, action, condition, or omission by the department or its staff that the inmate or parolee can demonstrate as having a material adverse effect upon his or her health, safety, or welfare." Cal. Code Regs. tit. 15, § 3084.1(a). To initiate an appeal, the inmate or parolee must submit a CDCR Form 602 describing the issue to be appealed to the appeals coordinator's office at the institution or parole region for receipt and processing. Id. § 3084.2(a) - (c). The appeal must name "all staff member(s) involved" and "describe their involvement in the issue." Id. § 3084.2(a)(3). CDCR's appeal process consists of three formal levels of appeals: (1) first formal level appeal filed with one of the institution's appeal coordinators, (2) second formal level appeal filed with the institution head or designee, and (3) third formal level appeal filed with the CDCR director or designee. Id. §§ 3084.7, 3084.8. A prisoner exhausts the appeal process when he completes the third level of review. Id. § 3084.1(b); Harvey v. Jordan, 605 F.3d 681, 683 (9th Cir. 2010). A "cancellation or rejection" of an appeal "does not exhaust administrative remedies." Cal. Code Regs. tit. 15, § 3084.1(b).

Defendants properly raise nonexhaustion in a Rule 56 motion for summary judgment and argue that plaintiff failed to properly exhaust available administrative remedies as to his Eighth Amendment claims of excessive force and deliberate indifference to serious medical needs before filing suit, as required by 42 U.S.C. § 1997e(a).

1. Excessive force

In support of their claim that plaintiff failed to properly exhaust his excessive force claim before filing suit, defendants submit evidence showing that

plaintiff submitted six inmate appeals to the third level of review during the relevant time period, but none address his claim that he was subjected to excessive force by Correctional Officer Delatorre on February 8, 2011. See Maiorino Decl. (dkt. #54-3) Exs. A-F. Plaintiff did submit an inmate appeal, CTF 11-01266, to the second level of review alleging that Delatorre subjected him to excessive force on February 8, 2011. See id. Ex. I. But the appeal was cancelled at the second level of review and consquently not accepted at the third level of review. See Lozano Decl. (dkt. #21-1) Ex. A.

CTF 11-01266 was cancelled because plaintiff refused to cooperate with the investigation of his appeal. On August 1, 2011, Lieutenant Villasenor attempted to interview plaintiff concerning his claim that he was subjected to excessive force by defendants on February 8, 2011. See Villasenor Decl. (dkt. #34-3) ¶ 3, Ex. B. Plaintiff was escorted from his cell to a holding cell for the interview, but once Villasenor arrived and informed plaintiff that he was there to interview him about his excessive force claim, plaintiff protested that he had been kidnapped and placed in the holding cell against his will, and indicated that he could not breathe and wanted to return to his cell. See id. ¶¶ 3, 4. Villasenor offered plaintiff water and plaintiff drank two glasses of water. See ¶ 5. Plaintiff again asked to be returned to his cell. See id. Villasenor advised plaintiff that, if he refused to cooperate and participate in the interview concerning his excessive force claim, his inmate appeal CTF 11-01266 would be cancelled for failure to cooperate with the investigation. See id. ¶ 6. In response, plaintiff demanded to be returned to his cell. See id. Villasenor instructed staff to return plaintiff to his assigned cell and requested that plaintiff be evaluated by medical personnel. See id. ¶ 7. Medical staff examined plaintiff and advised Villasenor that there was nothing medically wrong with plaintiff. See id. Based on the medical staff's

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assessment and his own observations, Villasenor requested that plaintiff be escorted back to the holding cell to proceed with the interview, but plaintiff refused to leave his cell and participate in the interview. See id. ¶ 8. Villasenor then cancelled plaintiff's inmate appeal CTF 11-01226 for refusal to cooperate with the investigation of his inmate appeal. See id. ¶ 8, Ex. B.

The cancellation of plaintiff's inmate appeal CTF 11-01226 for refusal to cooperate is supported by California prison regulations. Section 3084.6(c)(8) provides that an inmate appeal may be cancelled if the inmate "refuses to be interviewed or to cooperate with the interviewer." Cal. Code Regs. tit. 15 § 3084.6(c)(8). Once cancelled, an appeal shall not be accepted except pursuant to section 3084.6(a)(3), which provides that "at the discretion of the appeals coordinator or third level Appeals Chief, a cancelled appeal may later be accepted if a determination is made that the cancellation was made in error or new information is received that which makes the appeal eligible for further review." But plaintiff's inmate appeal CTF 11-01226 was not later accepted for review; instead, in a letter dated January 17, 2012, the Office of Appeals confirmed that plaintiff's appeal was properly cancelled pursuant to California prison regulations on the ground that plaintiff refused to be interviewed by Lieutenant Villasenor. See Maiorino Decl. Ex. J.

The evidence submitted by defendants meets their burden of proving that there was an available administrative remedy that plaintiff failed to exhaust in connection with his excessive force claim. See Albino, 747 F.3d at 1172. The burden now shifts to plaintiff to present evidence showing that there is something in his particular case that made the existing and generally available administrative remedies effectively unavailable to him. See id.

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Under the law of the circuit, improper screening of a prisoner's administrative grievances may render administrative remedies "effectively unavailable" such that exhaustion is not required under § 1997e(a). Sapp v. Kimbrell, 623 F.3d 813, 823 (9th Cir. 2010). But to fall within this exception, the prisoner must show "that he attempted to exhaust his administrative remedies but was thwarted by improper screening." Id. He must show "(1) that he actually filed a grievance or grievances that, if pursued through all levels of administrative appeals, would have sufficed to exhaust the claim that he seeks to pursue in federal court, and (2) that prison officials screened his grievance or grievances for reasons inconsistent with or unsupported by applicable regulations." Id.

Plaintiff claims that prison officials improperly cancelled his inmate appeal CTF 11-01266 because he suffered from a serious medical condition that prevented him from participating in the August 1, 2011 interview with Lieutenant Villasenor. But plaintiff offers no medical evidence to support his claim. The medical evidence in the record instead supports the medical staff's report to Villasenor that there was nothing medically wrong with plaintiff to prevent him from participating in the interview – Dr. Adams reviewed plaintiff's medical file and has opined that, in her professional medical judgment, there was no medical impediment to plaintiff's ability to participate in the August 1, 2011 interview. See Adams Decl. (dkt. #34-5) ¶¶ 5, 6. Plaintiff's additional claim that he was entitled to more notice of, and more opportunity to contest, the cancellation of CTF 11-01266 does not compel a different conclusion. The record makes clear that Villasenor articulated the reason for the cancellation when he completed the second level response on the backside of inmate appeal CTF 11-01266 and hand-wrote that the appeal was "cancelled per CCR 3084.4(4)(d)." Villasenor Decl.

Ex. A at 3. (Never mind that it is undisputed that Villasenor verbally told plaintiff that the appeal was going to be cancelled for his refusal to cooperate and that several days later Villasenor issued plaintiff a CDCR-128b chrono documenting plaintiff's refusal to cooperate and be interviewed. See id. ¶ 6, Ex. B.) And the record also makes clear that plaintiff was afforded ample opportunity to contest the cancellation and was provided a detailed explanation as to why the cancellation was supported by the record and in accordance with state prison regulations. See Maiorino Decl. Ex. J. That plaintiff's unsupported justification for refusing to cooperate with Villasenor was rejected by prison officials cannot be said to have amounted to improper screening rendering administrative remedies effectively unavailable. See Sapp, 623 F.3d at 823.

Plaintiff tries to get around the cancellation of inmate appeal CTF 11-01266 at the second level of review by arguing that his subsequent attempts to get the appeal accepted at the third level of review were successful. But the record does not support plaintiff's contention; rather, it shows that the Office of Appeals again and again advised plaintiff that inmate appeal CTF 11-01266 may not be processed at the third level of review because of the August 1, 2011 cancellation for refusal to cooperate. See Reply (dkt. #62) at 6-8 (summarizing Office of Appeals' responses to plaintiff's repeated attempts to submit appeal for third level review). Nor did plaintiff properly exhaust his excessive force claim via inmate appeal CTF 11-01551 or inmate appeal CTF 11-12183, as he suggests. Inmate appeal CTF 11-01551alleges that plaintiff was improperly placed in administrative segregation housing, see Maiorino Decl. Ex. A, and inmate appeal CTF 11-12183 alleges that plaintiff had not been seen by a medical specialist or been given his pain medication, see id. Ex. H. Neither appeal alerted prison officials to the nature of plaintiff's excessive force claim against the four named

defendants. See Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th Cir. 2009) (inmate grievance suffices only if it alerts prison officials to the nature of the wrong for which the inmate seeks redress).

Plaintiff has not met his burden of showing that there is something in his particular case that made the existing and generally available administrative remedies effectively unavailable to him. See Albino, 747 F.3d at 1172. He has not shown that he properly exhausted available administrative remedies in connection with excessive force claim by using all steps of CDCR's administrative process and complying with its "deadlines and other critical procedural rules." Woodford, 548 U.S. at 90. Nor has he shown that "he attempted to exhaust his administrative remedies but was thwarted by improper screening." Sapp, 623 F.3d at 823. Defendants are entitled to summary judgment on plaintiff's Eight Amendment excessive force claim on the basis of nonexhaustion. See Albino, 747 F.3d at 1166, 1172.

2. Deliberate indifference to serious medical needs

In support of their claim that plaintiff failed to properly exhaust his deliberate indifference to serious medical needs claim before filing suit, defendants point to the six inmate appeals plaintiff submitted to the third level of review during the relevant time period, see Maiorino Decl. Exs. A-F, and argue that none address plaintiff's claim that defendants prevented him from seeking prompt medical care after the February 8, 2011 incident.

In the operative complaint, plaintiff alleges that right after Correctional Officer Delatorre assaulted him on February 8, 2011, Delatorre told him that if plaintiff sought medical treatment he would be placed "in the hole," and thereby Delatorre and other cooperating defendants prevented plaintiff from seeking prompt medical care for his injuries. Am. Compl. (dkt. #14) ¶¶ 20, 21. But the

only inmate appeal of the six plaintiff submitted to the third level of review that even addresses a medical needs issue – CTF 11-12183 – does not alert prison officials of the nature of plaintiff's deliberate indifference to serious medical needs claim against Delatorre and other defendants here. See Griffin, 557 F.3d at 1120 (inmate grievance suffices only if it alerts prison officials to the nature of the wrong for which the inmate seeks redress). Inmate appeal CTF 11-12183, dated June 16, 2011, more than four months after the defendants' alleged actions, only contends that plaintiff had not been seen by a medical specialist or been given his pain medication. See Maiorino Ex. H. It makes no mention of defendants having prevented plaintiff from seeking prompt medical care. Inmate appeal CTF 11-12183 did not properly exhaust plaintiff's deliberate indifference to serious medical needs claim against Delatorre and other defendants because the appeal did not include sufficient information "to allow prison officials to take appropriate responsive measures" against Delatorre and other defendants. Griffin, 557 F.3d at 1120 (citation and internal quotation omitted) (finding no exhaustion where grievance complaining of upper bunk assignment failed to allege, as the complaint had, that nurse had ordered lower bunk but officials disregarded that order).

Inmate appeal CTF 11-12183 did not properly exhaust plaintiff's deliberate indifference to serious medical needs claim against Correctional Officer Delatorre and other defendants for an additional reason. It is well established that a prisoner must exhaust available administrative remedies before he files suit. See McKinney v. Carey, 311 F.3d 1198, 1199 (9th Cir. 2002); see also Vaden v. Summerhill, 449 F.3d 1047, 1051 (9th Cir. 2006) (where administrative remedies are not exhausted before prisoner sends complaint to court complaint should be dismissed, even if exhaustion is completed by the time

the complaint is actually filed). Plaintiff did not. It is undisputed that plaintiff filed this action on May 8, 2013, more than a year before his inmate appeal CTF 11-12183 was even submitted to the third level of review on May 23, 2014.[1]

Defendants have met their burden of showing that there was an available administrative remedy that plaintiff failed to exhaust in connection with his deliberate indifference to serious medical needs claim, and plaintiff has not met his burden of showing that there is something in his particular case that made the existing and generally available administrative remedies effectively unavailable to him. See Albino, 747 F.3d at 1172. Defendants are entitled to summary judgment on plaintiff's Eight Amendment deliberate indifference to serious medical needs claim on the basis of nonexhaustion. See id. at 1166, 1172.

MOTION TO DISMISS

Defendants move for dismissal of plaintiff's state law assault and battery claim under Rule 12(b)(6) on the ground that plaintiff failed to commence this suit within six months from the date the Victim Compensation & Government Claims Board (VCGCB) rejected his state law assault and battery claim, as required by the California Tort Claims Act.

A. Standard of Review

Dismissal is proper where the complaint fails to "state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "While a complaint attacked by

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[1]A prisoner may satisfy the exhaustion requirement and add new claims in an amended complaint if he exhausts his administrative remedies as to the new claims before he files the amended complaint. See Rhodes v. Robinson, 621 F.3d 1002, 1006 (9th Cir. 2010) (amended complaint raised new claims which arose after the original complaint was filed); Cano v. Taylor, 739 F.3d 1214, 1220 (9th Cir. 2014) (amended complaint raised new claims which arose prior to the filing of the initial complaint). But plaintiff here did not add a new exhausted claim in an amended complaint.

a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, . . . a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above the speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (citations omitted). A motion to dismiss should be granted if the complaint does not proffer "enough facts to state a claim for relief that is plausible on its face." Id. at 570.

The court must accept as true all material allegations in the complaint, but it need not accept as true "legal conclusions cast in the form of factual allegations if those conclusions cannot be reasonably drawn from the facts alleged." Clegg v. Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994). Review is limited to the contents of the complaint, including documents physically attached to the complaint or documents the complaint necessarily relies on and whose authenticity is not contested. Lee v. County of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001). The court may also take judicial notice of facts that are not subject to reasonable dispute. Id.

B. Analysis

Under California's Tort Claims Act, a tort claim against a state employee or entity must be presented to the VCGCB within six months of the accrual of the cause of action, Cal. Gov. Code § 911.2, and a civil suit must be filed within six months of the rejection of the tort claim by the VCGCB, id. § 945.6(a)(1). "The six-month statute of limitations for bringing suit is mandatory and must be strictly complied with. Failure to commence an action within the prescribed period constitutes a valid ground for dismissal, absent waiver, estoppel or a tolling period." Julian v. City of San Diego, 183 Cal. App. 3d 169, 176 (1986)

(citations omitted). The sixth-month deadline for filing a civil suit against a state employee or entity "is a true statute of limitations defining the time in which, after a claim presented to the government has been rejected or deemed rejected, the plaintiff must file a complaint alleging a cause of action based on the facts set out in the denied claim." Shirk v. Vista Unified School Dist., 42 Cal. 4th 201, 209 (2007).

The court takes judicial notice that the VCGCB rejected plaintiff's state law assault and battery claim on August 18, 2011. Req. for Judicial Notice (dkt. #55) Ex. B. See Marsh v. San Diego County, 432 F. Supp. 2d 1035, 1043-44 (S.D. Cal. 2006) (courts may take judicial notice of records and reports of administrative bodies, including the VCGCB). Consequently, plaintiff was required to commence a civil suit raising his state law assault and battery claim by February 18, 2012. The instant action was not filed until May 8, 2013, however.

Plaintiff argues that he complied with the six-month deadline to file a civil suit raising his state law assault and battery claim by February 18, 2012 because he filed a civil suit raising his state law assault and battery claim on February 16, 2012 in Monterey County Superior Court. See Pl.'s Decl. (dk. #26, 26-1) Ex. T at 1. But unfortunately for plaintiff, he voluntarily dismissed that suit on August 20, 2012 – long after the six-month deadline expired on February 18, 2012. See id. Ex. T. at 9-11. Under California law, a party who chooses to dismiss his claim runs the risk that a limitations period will run before he is ready to renew the dismissed claim. See Hill v. City of Clovis, 63 Cal. App. 4th 434, 445 (1998) ("[A] party's voluntary dismissal without prejudice does not come equipped by law with an automatic tolling or waiver of all relevant limitations periods; instead, such a dismissal includes the very real risk that an applicable statute of

limitations will run before the party is in a position to renew the dismissed cause of action."). Here, the relevant six-month limitations period on plaintiff's state law assault and battery claim had expired by the time plaintiff voluntarily dismissed his state civil suit on August 20, 2012 and, even if it had started to run again on August 20, 2012, it expired again before plaintiff filed the instant federal civil suit on May 8, 2013. See Martell v. Antelope Valley Hosp. Med. Ctr., 67 Cal. App. 4th 978, 985 (1998) (no equitable tolling where plaintiff waited more than six months after voluntary dismissal to file new lawsuit).

Plaintiff correctly notes that time during which a litigant reasonably pursues his administrative remedies is excluded from the six-month time limit for filing a court action after VCGCB rejects a tort claim. See Wright v. California, 122 Cal. App. 4th 659, 671 (2004). But this has no effect on plaintiff's state law assault and battery claim being time-barred under California's Tort Claims Act because plaintiff's reasonable pursual of administrative remedies in connection with his assault and battery claim ended when his inmate appeal was cancelled on August 1, 2011 – more than two weeks before the six-month time limit started running against plaintiff on August 18, 2011 (the date on which VCGCB rejected plaintiff's assault and battery claim).

Plaintiff's claim that his state court suit was dismissed because his attorney became disabled does not render plaintiff's time-barred state law assault and battery claim timely. Despite being advised by counsel to act within six months, see Pl.'s Decl. Ex. T at 12-13, plaintiff took more than six months after his state court suit was voluntary dismissed on August 20, 2012 to file the instant federal suit. Cf. Martell, 67 Cal. App. 4th at 985 (no equitable tolling where plaintiff waited more than six months after voluntary dismissal to file new lawsuit).

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CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment and dismissal (dkt. #54) is GRANTED.

The clerk shall enter judgment in accordance with this order and close the file.

SO ORDERED.

DATED: Dec. 16, 2014

CHARLES R. BREYER
United States District Judge

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Additional material from this filing is available in the Clerk's Office.