FILED: May 13, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6034
(0:18-cv-00876-HMH)

FRANK STEPHON JOHNSON

Plaintiff - Appellant

v.

CORRECT CARE SOLUTIONS; MRS. M. GASKINS, Administer Nurse; DIRECTOR DR. RANDOLPH; RN SHANNON; MRS. NURSE MCLEAN; NURSE MELISSA

Defendants - Appellees

and

MRS. PARKER, Nurse

Defendant

ORDER

The court denies the petition for rehearing and the supplemental petition for rehearing.

Entered at the direction of the panel: Judge Niemeyer, Judge Harris and Senior Judge Shedd.

For the Court

/s/ Patricia S. Connor, Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6034

FRANK STEPHON JOHNSON,

Plaintiff - Appellant,

v.

CORRECT CARE SOLUTIONS; MRS. M. GASKINS, Administer Nurse; DIRECTOR DR. RANDOLPH; RN SHANNON; MRS. NURSE MCLEAN; NURSE MELISSA,

Defendants - Appellees,

and

MRS. PARKER, Nurse,

Defendant.

Appeal from the United States District Court for the District of South Carolina, at Rock Hill. Henry M. Herlong, Jr., Senior District Judge. (0:18-cv-00876-HMH)

Submitted: April 4, 2019 Decided: April 10, 2019

Before NIEMEYER and HARRIS, Circuit Judges, and SHEDD, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Frank Stephon Johnson, Appellant Pro Se. Mark Victor Gende, Ryan Joseph Patane, SWEENY, WINGATE & BARROW, PA, Columbia, South Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Frank Stephon Johnson appeals the district court's order adopting the recommendation of the magistrate judge and dismissing his 42 U.S.C. § 1983 (2012) civil action for failure to exhaust administrative remedies. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Johnson v. Correct Care Sols.*, No. 0:18-cv-00876-HMH (D.S.C. Dec. 19, 2018). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Frank Stephon Johnson, Plaintiff, v. Correct Care Solutions Corp.; Mrs. M. Gaskins, *Administer Nurse*; Director Dr. Randolph; RN Shannon; Mrs. Nurse McLean; Nurse Melissa; Defendants.	)	C/A No. 0:18-876-HMH-PJG **REPORT AND RECOMMENDATION**

Plaintiff Frank Stephon Johnson, a self-represented pretrial detainee, filed this civil rights action against the named defendants pursuant to 42 U.S.C. § 1983. This matter is before the court pursuant to 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2) (D.S.C.) for a Report and Recommendation on the parties' cross motions for summary judgment. (ECF Nos. 39, 73, & 94.) Pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975), the court advised Johnson of the summary judgment and dismissal procedures and the possible consequences if he failed to respond adequately to the defendants' motion. (ECF No. 95.) The parties responded in opposition to the motions. (ECF Nos. 45, 78, 98, & 104.) Having reviewed the parties' submissions and the applicable law, the court concludes that Johnson's claims should be dismissed for failure to exhaust his administrative remedies.

BACKGROUND

The following facts are either undisputed or are taken in the light most favorable to Johnson, to the extent they find support in the record. Johnson alleges that, while housed at the Alvin S.

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Glenn Detention Center, he suffered from a rash for which he sought medical treatment. He was given shots of Benadryl, but alleges that he suffered an allergic reaction, resulting in chemical burns. (See generally Compl., ECF No. 1 at 5-10.)

The court construed Johnson's Complaint as bringing claims against the defendants pursuant to 42 U.S.C. § 1983 alleging deliberate indifference to his medical needs in violation of the Fourteenth Amendment. (ECF No. 21 at 1; ECF No. 74 at 1.) Johnson seeks monetary damages.

DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate only if the moving party "shows that there is no genuine dispute as to any material fact and the [moving party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party may support or refute that a material fact is not disputed by "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). Rule 56 mandates entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

In deciding whether there is a genuine issue of material fact, the evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in favor of the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). However, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

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The moving party has the burden of proving that summary judgment is appropriate. Once the moving party makes this showing, however, the opposing party may not rest upon mere allegations or denials, but rather must, by affidavits or other means permitted by the Rule, set forth specific facts showing that there is a genuine issue for trial. See Fed. R. Civ. P. 56(c), (e); Celotex Corp., 477 U.S. at 322. Further, while the federal court is charged with liberally construing a complaint filed by a *pro se* litigant to allow the development of a potentially meritorious case, see, e.g., Erickson v. Pardus, 551 U.S. 89 (2007), the requirement of liberal construction does not mean that the court can ignore a clear failure in the pleadings to allege facts which set forth a federal claim, nor can the court assume the existence of a genuine issue of material fact where none exists. Weller v. Dep't of Soc. Servs., 901 F.2d 387 (4th Cir. 1990).

B. Exhaustion of Administrative Remedies

The defendants argue that Johnson failed to exhaust his administrative remedies with regard to his claims. A prisoner must exhaust his administrative remedies as required by the Prison Litigation Reform Act ("PLRA"), specifically 42 U.S.C. § 1997e(a).[1] Section 1997e(a) provides that "[n]o 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 such administrative remedies as are available are exhausted." This requirement "applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." Porter v. Nussle, 534 U.S. 516, 532 (2002). Moreover, exhaustion is required even when a prisoner seeks remedies, such as money

[1] Pretrial detainees are specifically included in this requirement pursuant to § 1997e(h), which defines a "prisoner" as "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law."

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damages, that are not available in the administrative proceedings. See Booth v. Churner, 532 U.S. 731, 740-41 (2001). To satisfy this requirement, a plaintiff must avail himself of every level of available administrative review. See generally id. Those remedies neither need to meet federal standards, nor are they required to be plain, speedy, and effective. Porter, 534 U.S. at 524 (quoting Booth, 532 U.S. at 739). Satisfaction of the exhaustion requirement requires "using all steps that the agency holds out, and doing so *properly*." Woodford v. Ngo, 548 U.S. 81, 90 (2006) (quoting Pozo v. McCaughtry, 286 F.3d 1022, 1024 (7th Cir. 2002)). Thus, "it is the prison's requirements, and not the [Prison Litigation Reform Act], that define the boundaries of proper exhaustion." Jones v. Bock, 549 U.S. 199, 218 (2007). The defendants have the burden of establishing that a plaintiff failed to exhaust his administrative remedies. See Custis v. Davis, 851 F.3d 358, 361 (4th Cir. 2017).

Here, the defendants have presented evidence that the detention center has a grievance procedure. Specifically, Lieutenant Kenneth Sligh, who works in the Operations Division, attests in relevant part that the detention center

> has an established detainee grievance system and is accessible to all inmates. This system is designed to provide inmates with a mechanism for which to seek formal review of complaints, provide a vehicle for internal solutions at the level having most direct contact with the grievant, and provide a means for management review of staff decisions that may be the source of the complaint. Inmates are provided an explanation of grievance procedures during new admission orientation and prior to being placed in the general population. Grievance Procedure information is contained in the Inmate Guide that is available to each inmate. . . . Upon receipt of grievance, the responding personnel will make an investigation into the complaint, which may include interviewing affected employees and inmates, and attempt to resolve the matter by appropriate and practical means. The person in receipt of grievances will respond, in writing . . . . If the grievant is not satisfied with the outcome of the grievance, he/she may appeal the decision one time within five (5) working days of the response . . . . The Request for Grievance Appeal Form is

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> obtained from the Grievance Officer, completed by the inmate, and returned to the Grievance Officer.

(Sligh Aff. ¶¶ 4-5, 8-10, ECF No. 94-2.) The defendants have further presented evidence that although Johnson filed and received responses to twenty-six grievances related to his medical care while housed at the detention center, he failed to ever initiate an appeal for any of those grievances as required by the detention center grievance procedure. (Id. ¶¶ 15-16, ECF No. 94-2 at 3.)

In response, Johnson argues that the grievance system is not applicable because his grievances concerned his medical care, and the employees of Correct Care Solutions[2] do not work for the detention center. (Pl.'s Resp. Opp'n Summ. J., ECF No. 98 at 8.) Johnson argues that, instead, Correct Care Solutions should have its own grievance procedure.[3] (Id.) Relevant here, the defendants—private physicians under contract to provide medical care to detainees—are generally considered to be state actors because they were hired to fulfill the state's constitutional obligation to attend to necessary medical care of inmates. West v. Atkins, 487 U.S. 42, 51, 53-54, 57 (1988); (see also Randolph Aff. ¶¶ 2-3, ECF No. 94-1 at 1). Further, health care providers who treat a prisoner act under color of state law even when there is no contractual relationship between the state-run facility and the health care provider. Conner v. Donnelly, 42 F.3d 220 (4th Cir. 1994). Accordingly, any constitutional claims regarding Johnson's medical care—an aspect of his prison life—are subject to the exhaustion requirements of the PLRA. See Porter, 534 U.S. at 532; see, e.g.,

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[2] Correct Care Solutions appears to be a private corporation that employs medical care providers (doctors, physician assistants and nurses) who provide medical services for the detention center. (See Randolph Aff. ¶¶ 2-3, ECF No. 94-1 at 1.)

[3] To the extent Johnson intends to raise a claim pursuant to § 1983 against Defendant Correct Care Solutions, such a claim must fail, as Johnson has failed to allege any policy or custom of this entity that caused the alleged deprivation of his constitutional rights. See Austin v. Paramount Parks, Inc., 195 F.3d 715, 728 (4th Cir. 1999).

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Monge v. Miles, Civil Action No. 4:14-1250-RBH, 2015 WL 1643458 (D.S.C. Apr. 14, 2015) (finding a detainee failed to exhaust his administrative remedies with regard to a physician working for Correct Care Solutions); Williams v. Jones, No. 9:14-0787, 2015 WL 1573213 (D.S.C. Apr. 8, 2015) (same).

Importantly, Johnson does not dispute the defendants' evidence that he never appealed any of his grievances regarding his medical care. Moreover, Johnson makes no allegation that he was prevented from doing so. Cf. Ross v. Blake, 136 S. Ct. 1850 (2016) (outlining circumstances in which an administrative remedy may be unavailable). The law is clear that exhaustion is a prerequisite to suit and must be completed prior to filing an action. Anderson v. XYZ Corr. Health Servs., Inc., 407 F.3d 674, 676-77 (4th Cir. 2005). Based on the foregoing, the court finds that the defendants have carried their burden to show that Johnson failed to properly exhaust his administrative remedies in accordance with § 1997e(a).

RECOMMENDATION

For the foregoing reasons, the court recommends that Johnson's claims be dismissed without prejudice for failure to exhaust his administrative remedies.

Paige J. Gossett
UNITED STATES MAGISTRATE JUDGE

November 29, 2018
Columbia, South Carolina

The parties' attention is directed to the important notice on the next page.

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.' " Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); see Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
901 Richland Street
Columbia, South Carolina 29201

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

Frank Stephon Johnson,	)	
	)	
Plaintiff,	)	C.A. No. 0:18-0876-HMH-PJG
	)	
vs.	)	**OPINION & ORDER**
	)	
Correct Care Solutions Corp.,	)	
Mrs. M. Gaskins, Director	)	
Dr. Randolph, RN Shannon,	)	
Mrs. Nurse McLean, and Nurse Melissa,	)	
	)	
Defendants.	)	

This matter is before the court with the Report and Recommendation of United States Magistrate Judge Paige J. Gossett, made in accordance with 28 U.S.C. § 636(b)(1) and Local Civil Rule 73.02 of the District of South Carolina.[1] Frank Stephon Johnson ("Johnson"), a state pretrial detainee, proceeding pro se, alleges violations of 42 U.S.C. § 1983. Johnson filed two motions for summary judgment. (Pl.'s First Mot. Summ. J., ECF No. 39; Pl.'s Sec. Mot. Summ. J., ECF No. 73.) Defendants Correct Care Solutions Corp., Mrs. M. Gaskins, Nurse McLean, Nurse Melissa, Dr. Randolph, and RN Shannon (collectively "Defendants") also filed a motion for summary judgment. (Defs.' Mot. Summ. J., ECF No. 94.) In her Report and Recommendation, Magistrate Judge Gossett recommends dismissing Johnson's claims without prejudice for failure to exhaust his administrative remedies. (R&R 6, ECF No. 107.)

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[1] The recommendation has no presumptive weight, and the responsibility for making a final determination remains with the United States District Court. See Mathews v. Weber, 423 U.S. 261, 270-71 (1976). The court is charged with making a de novo determination of those portions of the Report and Recommendation to which specific objection is made. The court may accept, reject, or modify, in whole or in part, the recommendation made by the magistrate judge or recommit the matter with instructions. 28 U.S.C. § 636(b)(1).

Johnson filed objections to the Report and Recommendation. (Objs., generally, ECF No. 111.) Objections to the Report and Recommendation must be specific. Failure to file specific objections constitutes a waiver of a party's right to further judicial review, including appellate review, if the recommendation is accepted by the district judge. See United States v. Schronce, 727 F.2d 91, 94 & n.4 (4th Cir. 1984). In the absence of specific objections to the Report and Recommendation of the magistrate judge, this court is not required to give any explanation for adopting the recommendation. See Camby v. Davis, 718 F.2d 198, 199 (4th Cir. 1983).

Upon review, the court finds that many of Johnson's objections are non-specific, unrelated to the dispositive portions of the Report and Recommendation, or merely restate his claims. However, the court was able to glean one specific objection. Johnson objects to the magistrate judge's finding that Johnson was not prevented from appealing any of his grievances. (Objs., 3-4, ECF No. 111.) This objection is without merit.

Pursuant to the Prison Litigation Reform Act ("PLRA"), a prisoner must exhaust available administrative remedies prior to commencing a federal action challenging the conditions of his confinement. 42 U.S.C. § 1997e(a). It appears that Johnson filed and received responses to twenty-six grievances related to his medical care at Alvin S. Glenn Detention Center ("ASGDC"). (R&R 5, ECF No. 107.) Johnson did not appeal any of these grievances, as required by ASGDC's grievance procedure. Johnson submits that the instructions for filing an appeal were unavailable to him because his grievances involved medical concerns, rather than concerns regarding prison conditions. (Objs. 4, ECF No. 111.) However, the following is printed at the bottom of every Inmate Grievance Form: "If not satisfied with the Grievance Officer's response, you may appeal to the Director or designee once by completing the reverse

side of this form within 3 business days. The Director or designee decision is FINAL." (Pl.'s First Mot. Summ. J. Attach. 1, (Supp. Docs. 1, 5, 9, 12, 15, 18, 21-23, 25, 27-28, 31, 35-39, 41, 44-46), ECF No. 39-1.) Johnson attached these forms to his first motion for summary judgment. Thus, Johnson plainly had access to these instructions, and his assertion that these instructions were unavailable to him is without merit.

Therefore, after a thorough review of the magistrate judge's Report and the record in this case, the court adopts Magistrate Judge Gossett's Report and Recommendation and incorporates it herein.

Therefore, it is

ORDERED that Johnson's motions for summary judgment, docket numbers 39 and 73, are denied. It is further

ORDERED that Defendants' motion for summary judgment, docket number 94, is granted. It is further

ORDERED that Johnson's claims are dismissed without prejudice.

IT IS SO ORDERED.

s/Henry M. Herlong, Jr.
Senior United States District Judge

Greenville, South Carolina
December 19, 2018

NOTICE OF RIGHT TO APPEAL

Plaintiff is hereby notified that he has the right to appeal this order within thirty (30) days from the date hereof, pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure.

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