A-51

**NOT FOR PUBLICATION**

FILED

JUN 14 2019

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| SIR GIORGIO SANFORD CLARDY,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>GARTH GULICK, Dr.; et al.,<br><br>Defendants-Appellees. | No. 18-35826<br><br>D.C. No. 2:17-cv-00503-CL<br><br>MEMORANDUM* |

Appeal from the United States District Court
for the District of Oregon
Michael H. Simon, District Judge, Presiding

Submitted June 11, 2019**

Before: CANBY, GRABER, and MURGUIA, Circuit Judges.

Sir Giorgio Sanford Clardy, an Oregon state prisoner, appeals pro se from the district court's summary judgment for failure to exhaust administrative remedies in his 42 U.S.C. § 1983 action alleging deliberate indifference. We have jurisdiction under 28 U.S.C. § 1291. We review for an abuse of discretion a ruling

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* 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).

on a motion to strike. *Fed. Sav. & Loan Ins. Corp. v. Gemini Mgmt.*, 921 F.2d 241, 244 (9th Cir. 1990). We affirm.

The district court did not abuse its discretion by denying Clardy's motion to strike because the answer was timely served. *See* Fed. R. Civ. P. 6(b)(1)(A) (the district court may modify the time by which any act required by the Federal Rules of Civil Procedure is due); Fed. R. Civ. P. 12(a)(1) (discussing time limits for filing responsive pleadings); *Tindall v. First Solar Inc.*, 892 F.3d 1043, 1048 (9th Cir. 2018) (the district court may grant motions for an extension of time upon a finding of good cause).

We do not consider matters, including the basis for summary judgment, not specifically and distinctly raised and argued in the opening brief, or arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

**AFFIRMED.**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 26 2019

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

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| SIR GIORGIO SANFORD CLARDY,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>GARTH GULICK, Dr.; et al.,<br><br>Defendants-Appellees. | No. 18-35826<br><br>D.C. No. 2:17-cv-00503-CL<br>District of Oregon,<br>Pendleton<br><br>ORDER |

Before: CANBY, GRABER, and MURGUIA, Circuit Judges.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Clardy's petition for rehearing en banc (Docket Entry No. 19) is denied.

No further filings will be entertained in this closed case.

A-62

A - 6

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

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| **SIR GIORGIO SANFORD CLARDY,** | Case No. 3:17-cv-00503-CL |
| Plaintiff, | **ORDER** |
| v. | |
| **GARTH GULICK, *et al.*,** | |
| Defendants. | |

**Michael H. Simon, District Judge.**

United States Magistrate Judge Mark D. Clarke issued Findings and Recommendation in this case on July 26, 2018. ECF 44. Judge Clarke recommended that Defendants' Motion for Summary Judgment (ECF 34) should be granted and this action should be dismissed for failure to exhaust administrative remedies.

Under the Federal Magistrates Act ("Act"), the Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1). If a party files objections to a magistrate judge's findings and recommendations, "the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *Id.*; Fed. R. Civ. P. 72(b)(3).

A.07

For those portions of a magistrate judge's findings and recommendations to which neither party has objected, the Act does not prescribe any standard of review. *See Thomas v. Arn*, 474 U.S. 140, 152 (1985) ("There is no indication that Congress, in enacting [the Act], intended to require a district judge to review a magistrate's report to which no objections are filed."); *United States. v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) (holding that the court must review *de novo* magistrate judge's findings and recommendations if objection is made, "but not otherwise"). Although in the absence of objections no review is required, the Magistrates Act "does not preclude further review by the district judge[] *sua sponte* . . . under a *de novo* or any other standard." *Thomas*, 474 U.S. at 154. Indeed, the Advisory Committee Notes to Fed. R. Civ. P. 72(b) recommend that "[w]hen no timely objection is filed," the Court review the magistrate judge's recommendations for "clear error on the face of the record."

Plaintiff timely filed an objection. ECF 47. Plaintiff argues that Defendants should be barred from raising the affirmative defense of failure to exhaust administrative remedies because, in Plaintiff's view, Defendants' answer was untimely. Plaintiff bases this contention on Rule 4(d) of the Rules of Civil Procedure, which states that a "plaintiff may notify . . . a defendant that an action has been commenced and request that the defendant waive service of a summons" and that "[a] defendant who, before being served with process, timely returns a waiver need not serve an answer to the complaint until 60 days after the request was sent." Plaintiff further argues that in this case, Defendants served an answer more than 60 days after the request for a waiver was sent by the Court, and that Defendants should therefore be barred from raising affirmative defenses in their answer.

The Court has reviewed *de novo* those portions of the Findings and Recommendation to which Plaintiff has objected. The Court finds that Rule 4(d) by its own terms governs the

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

A-1

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

SIR GIORGIO SANFORD CLARDY,

Plaintiff,

v.

DR. GARTH GULICK; ANNA HUGHES; ROBERT WHITE; "JOHN OR JANE" BRISTOL; "JOHN" MASSOTH; ROB DOE; "JOHN" SHELTON,

Defendants.

Case No. 2:17-cv-00503-CL

FINDINGS AND RECOMMENDATION

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CLARKE, Magistrate Judge:

Plaintiff, an inmate at the Oregon State Penitentiary, filed suit pursuant to 42 U.S.C. § 1983 and alleged that defendants were deliberately indifferent to his serious medical needs by failing to provide effective pain relief for his broken jaw. Defendants now move for summary judgment under Federal Rule of Civil Procedure 56 on grounds that plaintiff failed to exhaust his available administrative remedies. For the reasons set forth below, defendants' motion should be granted.

A-2

## DISCUSSION

To prevail on their motion for summary judgment, defendants must show there is no genuine dispute as to any material fact and they are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Albino v. Baca*, 747 F.3d 1162, 1166 (9th Cir. 2014) ("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."). The court must construe the evidence and draw all reasonable inferences in the light most favorable to plaintiff. *Torres v. City of Madera*, 648 F.3d 1119, 1123 (9th Cir. 2011).

Under the Prison Litigation Reform Act (PLRA), inmates must exhaust all available administrative remedies before filing a federal action to redress prison conditions or incidents. *See* 42 U.S.C § 1997e(a) ("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 such administrative remedies as are available are exhausted."). The exhaustion requirement is mandatory and requires compliance with both procedural and substantive elements of the prison administrative process. *Woodford v. Ngo,* 548 U.S. 81, 89-91, 93 (2006) (holding that "the PLRA exhaustion requirement requires proper exhaustion"). If the defendant shows that the inmate did not exhaust available administrative remedies, "the burden shifts to the prisoner to come forward with evidence showing that there is something in his particular case that made the existing and generally available administrative remedies effectively unavailable to him." *Albino*, 747 F.3d at 1172; *see also Sapp v. Kimbrell*, 623 F.3d 813, 822 (9th Cir. 2010) (the PLRA does not require exhaustion when administrative remedies are "effectively unavailable"); *Brown v. Valoff*, 422 F.3d 926, 937 (9th Cir. 2005) (an administrative remedy must be available "as a practical matter").

A-3

The Oregon Department of Corrections (ODOC) employs a three-step grievance and appeal process to address inmate complaints. Or. Admin. R. 291-109-0140. Inmates may file grievances for numerous issues, including "unprofessional behavior or action which may be directed toward an inmate by an employee or volunteer" or an "oversight or error affecting an inmate." *Id.* 291-109-0140(2)(c),(d). Generally, the inmate must file a grievance within 30 days of the alleged condition or incident. *Id.* 291-109-0150(2). If a grievance is returned on procedural grounds, the inmate may not appeal and must resubmit the grievance within 14 days if the procedural errors can be corrected. *Id.* 291-109-0160(5). If a grievance is accepted, the inmate may appeal a response to the grievance within 14 calendar days. *Id.* 291-109-0170(1)(b). If the first appeal is denied, the inmate may file a second appeal within 14 days of the date the denial was sent to the inmate. *Id.* 291-109-0170(2)(c). A decision following a second appeal is final and not subject to further review. *Id.* 291-109-0170(2)(f). If a prisoner files a tort claim or lawsuit regarding the subject matter of the grievance before the appeal process is completed, the grievance process ceases and the grievance is returned to the inmate. *Id.* 291-109-0160(4).

According to defendants, plaintiff filed no grievance that named defendants Robert White, Thomas Bristol, Robin Nutt, or Steven Shelton concerning medical care for his jaw. Taylor Decl. ¶ 13. Plaintiff submitted three grievances with attachments that identified defendants Gulick, Hughes, and Massoth and arguably raised the lack of medical care for his jaw. *Id.* However, plaintiff failed to exhaust the administrative process for each of these three grievances.

In Grievance No. SRCI-2015-05-143, plaintiff alleged that Dr. Gulick denied adequate medical care for the "severe injury" to his jaw. *Id.* ¶ 16 & Att. 5 at 2. This grievance was returned for non-compliance with the grievance process, in that plaintiff had exceeded the

A-4

maximum number of grievances he could file for that week. *Id.* ¶ 17 & Att. 5 at 1; Or. Admin. R. 291-1019-0180. Under the PLRA, a plaintiff must comply with all procedural requirements of the relevant grievance process. *Woodford*, 548 U.S. at 89-91. Plaintiff failed to do so, even though he previously was notified of the maximum grievance rule and counseled on how to avoid violation of this rule in the future. Taylor Decl. ¶ 18 & Att. 6.

In Grievance Nos. SRCI-2015-06-108 and SRCI-2015-08-016, plaintiff alleged the denial of medical care and ineffective pain relief for his jaw. *Id.* ¶¶ 22-23, 27 & Att. 8 at 2, Att. 10 at 2. Both grievances were returned because plaintiff had attached notices of tort claim to each grievance. *Id.* ¶¶ 24, 28-29 & Att. 8 at 1, 3-9, Att. 11 at 1-2. Under Or. Admin. R. 291-109-0140(3)(g), inmates may not grieve "[c]laims or issues for which the inmate has filed a Notice of Tort." Consequently, plaintiff did not complete the administrative grievance procedure for either of these grievances. *See Vega v. Bell*, No. 2:13-cv-00931-HU, 2015 WL 413796, at *5 (D. Or. Jan. 29, 2015) (finding that the plaintiff did not exhaust his administrative remedies when he "did not comply with a critical procedural rule – completing the grievance procedure *before* filing a tort claim notice").

In his response to defendants' motion, plaintiff does not dispute defendants' argument regarding exhaustion or maintain that his administrative remedies were effectively unavailable. Rather, plaintiff moves to strike defendants' Answer as untimely and argues that defendants should be barred from raising the affirmative defense of failure to exhaust. (ECF Nos. 41, 42) Plaintiff's position is without merit.

Defendants obtained an extension of time to file their Waiver of Service, and it was due on October 18, 2018. (ECF No. 18) On that date, defendants filed a Waiver of Service, and

A-5

twenty-one days later, on November 8, 2017, defendants timely filed their Answer. (ECF Nos. 20, 21)

At this stage of the proceedings, plaintiff must present evidence showing the existence of a genuine issue of material fact regarding exhaustion. *Albino*, 747 F.3d at 1169. Plaintiff fails to do so. Accordingly, plaintiff's claims are barred under the PLRA for failure to exhaust his administrative remedies.

## CONCLUSION

For the reasons explained above, plaintiff's Motion to Strike Answer (ECF No. 41) is DENIED. Defendants' Motion for Summary Judgment (ECF No. 34) should be GRANTED and this action should be DISMISSED for failure to exhaust administrative remedies.

This Findings and Recommendation will be referred to a district judge. Objections, if any, are due within (14) days from service of the Findings and Recommendation. If objections are filed, any response is due fourteen (14) days after being served with a copy of the objections. The parties are advised that the failure to file objections within the specified time may waive the right to appeal the District Court's final order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

Any appeal from an Order adopting this Findings and Recommendation or Judgment dismissing this case would be frivolous and not taken in good faith. Therefore, plaintiff's IFP status should be revoked.

DATED this 26 day of July, 2018.

MARK D. CLARKE
United States Magistrate Judge