Case: 18-15032, 05/01/2020, ID: 11677644, DktEntry: 65-1, Page 1 of 4

FILED

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U.S. COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT TREVINO, Plaintiff-Appellant, v. E. DOTSON; D. AMBRIZ; D. VEGA; D. ANGUIANO; G. COLLIER; E. ELIAS; S. MILENEWICZ; M. PEREZ; P. LORD; W. WATERMAN; W. KEKU; C. SEVIER; B. HOPKINS; E. MEDINA; DOES, Defendants-Appellees.	No. 18-15032 D.C. No. 4:15-cv-05373-PJH MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Phyllis J. Hamilton, Chief District Judge, Presiding

Argued and Submitted April 15, 2020
San Francisco, California

Before: PAEZ and CLIFTON, Circuit Judges, and HARPOOL,** District Judge.

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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 Honorable M. Douglas Harpool, United States District Judge for the Western District of Missouri, sitting by designation.

Robert Trevino, a California prisoner, appeals the district court's grant of summary judgment in favor of defendants on his claims brought under 42 U.S.C. § 1983. In March 2012, Trevino was found guilty in a prison disciplinary hearing of assaulting another inmate with a weapon capable of causing serious bodily injury. He alleged that he filed an administrative appeal the next month, in April 2012, and received no response. Several months later, in August 2012, Trevino submitted an inquiry about the status of the appeal that he allegedly submitted in April. Trevino claimed in the August inquiry that he had filed an earlier inquiry in June requesting a "status update" of the appeal, but there is no other record evidence of this separate inquiry. In response to the August inquiry, a prison official informed Trevino that the appeal database showed no record of receiving Trevino's appeal.

Trevino took no further action to pursue his administrative remedies, and instead filed a habeas petition in California state court more than two years later. The state court dismissed Trevino's petition for failure to exhaust his administrative remedies. He then filed this action. The district court held that under the Prison Litigation Reform Act ("PLRA"), Trevino failed to exhaust administrative remedies and granted summary judgment in favor of defendants.

This Court reviews the district court's ruling on whether a prisoner failed to exhaust administrative remedies *de novo*. *Albino v. Baca*, 747 F.3d 1162, 1171 (9th Cir. 2014) (en banc). The PLRA 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 . . . correctional facility until *such administrative remedies as are available are exhausted.*" 42 U.S.C. § 1997e(a) (emphasis added).

Trevino has failed to meet his burden of producing "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. The evidence raised by Trevino is insufficient to create a "genuine dispute as to any material fact" in this case. Fed. R. Civ. P. 56(a); *see Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002). A fact issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 248 (1986). The record evidence reflects only a single inquiry that Trevino submitted in August, to which prison officials responded. And upon receiving this response, Trevino took no further action to pursue his administrative remedies. No reasonable jury could find that "prison administrators thwart[ed] [Trevino] from

taking advantage of a grievance process through machination, misrepresentation, or intimidation" on the basis of the evidence he has presented. *Ross v. Blake*, 136 S. Ct. 1850, 1860 (2016); *see also Andres v. Marshall*, 867 F.3d 1076, 1079 (9th Cir. 2017).

Finally, Trevino filed a motion for reconsideration under Fed. R. Civ. P. 60(b) arguing, *inter alia*, that the district court's analysis was incorrect because it overlooked evidence that he actually filed a new appeal on August 14, 2012. Accompanying that motion, he proffered for the first time an alleged "hand duplicated" copy of the August 14 appeal. The district court properly declined to consider this new evidence, which could have been provided in response to defendants' summary judgment motion.

AFFIRMED.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ROBERT TREVINO,

Plaintiff,

v.

E. DOTSON, et al.,

Defendants.

Case No. 15-cv-05373-PJH

ORDER DENYING MOTION FOR RELIEF FROM A FINAL JUDGMENT IN PART AND DENYING MOTION TO PROCEED IFP

Re: Dkt. Nos. 114, 115

Plaintiff, a California prisoner, filed a civil rights case under 42 U.S.C. § 1983. The court granted defendants' motion for summary judgment and dismissed the case as unexhausted. Plaintiff has now filed a motion for relief from a final judgment pursuant to Fed. R. Civ. P. 60(b).

Rule 60(b) lists six grounds for relief from a judgment. Such a motion must be made within a "reasonable time," and as to grounds for relief (1) - (3), no later than one year after the judgment was entered. *See* Fed. R. Civ. P. 60(b). A Rule 60(b) motion does not affect the finality of a judgment or suspend its operation, *see id.*; therefore, a party is not relieved of its obligation to comply with the court's orders simply by filing a Rule 60(b) motion. *See Hook v. Arizona Dep't of Corrections*, 107 F.3d 1397, 1404 (9th Cir. 1997).

Rule 60(b) provides for reconsideration where one or more of the following is shown: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial; (3) fraud by the adverse party; (4) the judgment is void; (5) the judgment has been satisfied; (6) any other reason justifying relief. Fed. R. Civ. P. 60(b); *School Dist. 1J*

v. ACandS Inc., 5 F.3d 1255, 1263 (9th Cir. 1993). Rule 60(b) provides a mechanism for parties to seek relief from a judgment when "it is no longer equitable that the judgment should have prospective application," or when there is any other reason justifying relief from judgment. *Jeff D. v. Kempthorne*, 365 F.3d 844, 853-54 (9th Cir. 2004) (quoting Fed. R. Civ. P. 60(b)).

As discussed in detail in the motion for summary judgment, the court viewed plaintiff's factual statements as true and assumed that plaintiff submitted an inmate appeal on April 22, 2012, that was not received by prison officials, perhaps because against regulations, plaintiff submitted it confidentially. The court also found that on June 3, 2012 and August 1, 2012, plaintiff submitted additional requests regarding the status of his appeal. On August 2, 2012, the appeals coordinator responded that there was no record of plaintiff's appeal. The court noted that plaintiff took no more action regarding the appeal until he filed a state habeas petition two years later. The court found that plaintiff failed to exhaust his administrative remedies and emphasized his lack of action after the August 2, 2012, response from the appeals coordinator.

In this motion, plaintiff argues that he actually submitted a new appeal on August 14, 2012; therefore, the court's analysis is incorrect. Docket No. 114 at 16. Plaintiff has attached a copy of the appeal he states he submitted with this motion for relief from a judgment. However, this is not the actual appeal submitted by plaintiff; rather it is a hand duplicate of that appeal, apparently recently created for this motion. *Id.* This appears to be new evidence that was not part of plaintiff's extensive opposition to the motion for summary judgment and it specifically addresses one of the court's key arguments in dismissing the case.

Plaintiff argues that he presented this argument in his opposition, specifically in fact number 99 in his opposition. Docket No. 103 at 24-25. Yet, his statement in the opposition does not reflect this refiled appeal that he now provides to the court. Plaintiff stated in the opposition:

> It should also be noted for the Record, and in Opposition to Def.'s Motion for Summary Judgment dated Apr. 5, 2017, that a few weeks after the Plaintiff submitted his 602/Appeal dated 4-22-2012, he also submitted another 602 on the 602/Appeal dated 4-22-2012; And the Appeals Office did not return a response. The Plaintiff has used this readily technique in the past. However, in light of def. Medina['s] trustworthiness he will deny it.

Id.

Relying on plaintiff's statement that he submitted another appeal a few weeks after the April 22, 2012 appeal, the court concluded that he was referring to his June 3, 2012, filing in the inmate appeal system that inquired about the status of the appeal. Docket No. 103 at 23; Docket No. 105 at 7. Plaintiff repeatedly referred to his June 3, 2012, appeal inquiry and June 3 can be classified as a "few weeks" after April 22. Plaintiff now argues that his statement in the summary judgment opposition that he filed an appeal a few weeks after April 22, actually refers to an August 14, inmate appeal. The court does not find this explanation supported by the record. The court does not find any mistake in analyzing the summary judgment motion and this evidence presented by plaintiff is new evidence that could have been provided in the original opposition, but plaintiff did not provide it. This evidence could have been discovered with due diligence as it is precisely on point with respect to defendants' motion for summary judgment. The court is also troubled that the actual inmate appeal that was allegedly submitted is not in evidence, rather plaintiff recreated the appeal and it was submitted to the court after the order on the motion for summary judgment describing the deficiencies in plaintiff's argument. For all these reasons, plaintiff has not met his burden under Fed. R. C. P. 60(b)(1) or (2). Plaintiff's remaining contentions are unpersuasive.[1]

Plaintiff has also filed a motion to proceed in forma pauperis ("IFP"). Plaintiff was originally granted IFP status when he filed this action. Defendants' filed a motion to revoke plaintiff's IFP status because he has filed three or more strikes under the Prison Litigation Reform Act. Plaintiff expressed his desire to pay the full filing fee; therefore, the

[1] His letter from the Prison Law Office that discussed misconduct in 2016 and 2017 is not relevant to the exhaustion issue from 2012.

court vacated plaintiff's IFP status and plaintiff paid the full filing fee for this case. Plaintiff has submitted an incomplete IFP application and he appears to be three strikes barred. The motion to proceed IFP is denied.

CONCLUSION

1. Plaintiff's motion for relief from a final judgment (Docket No. 114) is **DENIED** in part and in granted in part. The case remains dismissed for the reasons set forth above and in the court's prior order. The judgment in this case stated the case was dismissed with prejudice; however, the case was dismissed for failure to exhaust. If plaintiff properly and fully exhausts his claims in the inmate grievance system, he may file a new case. The judgment (Docket No. 113) is **VACATED** and the court will issue a new judgment concurrently with this order.

2. Plaintiff's motion to proceed IFP (Docket No. 115) is **DENIED**.

IT IS SO ORDERED.

Dated: November 6, 2017

PHYLLIS J. HAMILTON
United States District Judge

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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ROBERT TREVINO,

Plaintiff,

v.

E. DOTSON, et al.,

Defendants.

Case No. 15-cv-05373-PJH

JUDGMENT

Pursuant to the order of dismissal signed today, this case is dismissed with prejudice.

IT IS SO ORDERED.

Dated: October 6, 2017

PHYLLIS J. HAMILTON
United States District Judge

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ROBERT TREVINO,

Plaintiff,

v.

E. DOTSON, et al.,

Defendants.

Case No. 15-cv-05373-PJH

ORDER DENYING MOTION FOR RELIEF FROM A FINAL JUDGMENT IN PART AND DENYING MOTION TO PROCEED IFP

Re: Dkt. Nos. 114, 115

Plaintiff, a California prisoner, filed a civil rights case under 42 U.S.C. § 1983. The court granted defendants' motion for summary judgment and dismissed the case as unexhausted. Plaintiff has now filed a motion for relief from a final judgment pursuant to Fed. R. Civ. P. 60(b).

Rule 60(b) lists six grounds for relief from a judgment. Such a motion must be made within a "reasonable time," and as to grounds for relief (1) - (3), no later than one year after the judgment was entered. *See* Fed. R. Civ. P. 60(b). A Rule 60(b) motion does not affect the finality of a judgment or suspend its operation, *see id.*; therefore, a party is not relieved of its obligation to comply with the court's orders simply by filing a Rule 60(b) motion. *See Hook v. Arizona Dep't of Corrections*, 107 F.3d 1397, 1404 (9th Cir. 1997).

Rule 60(b) provides for reconsideration where one or more of the following is shown: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial; (3) fraud by the adverse party; (4) the judgment is void; (5) the judgment has been satisfied; (6) any other reason justifying relief. Fed. R. Civ. P. 60(b); *School Dist. 1J*

Appendix C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ROBERT TREVINO,

Plaintiff,

v.

E. DOTSON, et al.,

Defendants.

Case No. 15-cv-05373-PJH

AMENDED JUDGMENT

Pursuant to the order of dismissal, this case is dismissed without prejudice for failure to exhaust administrative remedies.

IT IS SO ORDERED.

Dated: November 6, 2017

PHYLLIS J. HAMILTON
United States District Judge

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT TREVINO, Plaintiff-Appellant, v. E. DOTSON; D. AMBRIZ; D. VEGA; D. ANGUIANO; G. COLLIER; E. ELIAS; S. MILENEWICZ; M. PEREZ; P. LORD; W. WATERMAN; W. KEKU; C. SEVIER; B. HOPKINS; E. MEDINA; DOES, Defendants-Appellees.	No. 18-15032 D.C. No. 4:15-cv-05373-PJH Northern District of California, Oakland ORDER

Before: PAEZ and CLIFTON, Circuit Judges, and HARPOOL,* District Judge.

Plaintiff-Appellant's Petition for Panel Rehearing (Docket Entry No. 67) is DENIED.

* The Honorable M. Douglas Harpool, United States District Judge for the Western District of Missouri, sitting by designation.

Appendix D

Case: 18-15032
Case: 15-CV-05373

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ROBERT TREVINO,

Petitioner,

v.

JEFF BEARD,

Respondent.

Case No. 15-cv-04837-EMC

JUDGMENT

This action is dismissed without prejudice to Petitioner pursuing his claims in a civil rights action.

IT IS SO ORDERED AND ADJUDGED.

Dated: November 23, 2016

EDWARD M. CHEN
United States District Judge

Appendix E