19-2437-pr
Toliver v. Adner

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 10th day of December, two thousand twenty.

PRESENT: ROBERT D. SACK,
DENNY CHIN,
RAYMOND J. LOHIER, JR.,
Circuit Judges.

----------x

SAMUEL RASHEEN RAYMOND TOLIVER
(STATE PRISONER: 09-B-2037),
Plaintiff-Appellant,

-v- 19-2437-pr

K. ADNER, MAIL POSTAL CORRECTIONS
CARRIER,
*Defendant-Appellee.**

----------x

* The Clerk of the Court is respectfully directed to amend the caption as set forth above.

FOR PLAINTIFF-APPELLANT:	Samuel Rasheen Raymond Toliver, *pro se*, Gowanda, NY.
FOR DEFENDANT-APPELLEE:	Barbara D. Underwood, Solicitor General, Andrea Oser, Deputy Solicitor General, and Sarah L. Rosenbluth, Assistant Solicitor General, *for* Letitia James, Attorney General of the State of New York, Albany, NY.

Appeal from a judgment of the United States District Court for the Northern District of New York (Hurd, *J.*).

UPON DUE CONSIDERATION, IT IS ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Plaintiff-appellant Samuel Toliver, proceeding *pro se*, sued defendant-appellee Karen Adner and four other prison officials under 42 U.S.C. § 1983 for violations of his rights under the First, Fourth, Eighth, and Fourteenth Amendments and the New York Constitution, and for violations of the federal criminal mail theft statutes. The complaint alleged that, while an inmate at Riverview Correctional Facility, Toliver tried to mail samples of contaminated and undercooked prison food to government agencies for testing. Adner, a mail clerk, allegedly intercepted his mail, opened and read the letters accompanying these samples, and destroyed the letters and samples, after which she retaliated against him by filing a misbehavior report about the incident, which prompted a disciplinary hearing and punishment. The district court, *sua sponte*, dismissed all of Toliver's claims against Adner except his claims under the

First and Fourth Amendments, dismissed all claims against the other four officials, and allowed leave to replead the claims it had dismissed without prejudice. Toliver did not file an amended complaint. The district court then adopted a report and recommendation recommending dismissal of the two remaining claims based on Toliver's failure to exhaust administrative remedies. Toliver appeals from the district court's judgment dismissing his complaint. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.[1]

We review *de novo* the dismissal of a complaint pursuant to Rule 12(b)(6). *Forest Park Pictures v. Universal Television Network, Inc.*, 683 F.3d 424, 429 (2d Cir. 2012). The complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

While we "liberally construe pleadings and briefs submitted by pro se litigants, reading such submissions to raise the strongest arguments they suggest," *McLeod v. Jewish Guild for the Blind*, 864 F.3d 154, 156 (2d Cir. 2017) (per curiam) (internal quotation marks omitted), *pro se* appellants must still comply with Federal Rule of Appellate Procedure 28(a), which "requires appellants in their briefs to provide the court with a clear statement of the issues on appeal." *Moates v. Barkley*, 147 F.3d 207, 209 (2d Cir. 1998) (per curiam). Despite affording *pro se* litigants "some latitude in meeting

---

[1] As Toliver did not file an amended complaint below and does not address on appeal the claims dismissed by the district court at the outset of the case, we limit our discussion to the two claims dismissed for failure to exhaust administrative remedies.

the rules governing litigation," we "normally will not[] decide issues that a party fails to raise in his . . . appellate brief." *Id.; see also Terry v. Inc. Vill. of Patchogue*, 826 F.3d 631, 632-33 (2d Cir. 2016) ("Although we accord filings from pro se litigants a high degree of solicitude, even a litigant representing himself is obliged to set out identifiable arguments in his principal brief.") (internal quotation marks omitted); *LoSacco v. City of Middletown*, 71 F.3d 88, 93 (2d Cir. 1995) ("[W]e need not manufacture claims of error for an appellant proceeding *pro se*, especially when he has raised an issue below and elected not to pursue it on appeal."). Nor will we decide issues that a *pro se* appellant raises in his brief only conclusorily or in passing. *See Gerstenbluth v. Credit Suisse Sec. (USA) LLC*, 728 F.3d 139, 142 n.4 (2d Cir. 2013) (*pro se* appellant waived all claims against an appellee by mentioning the adverse district court ruling only "obliquely and in passing"). Finally, we will not typically address issues raised for the first time on appeal. *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 132 (2d Cir. 2008) (per curiam).

Toliver's appellate brief generally repeats his First Amendment retaliation allegations and conclusorily asserts that he stated a retaliation claim (apparently against Adner, as his brief does not mention the dismissed defendants). But that claim went forward and he does not address the district court's reasons for its dismissal: his failure to exhaust administrative remedies. He also fails to address the dismissal of his Fourth Amendment claim for failure to exhaust. His conclusory statement that the "elements of

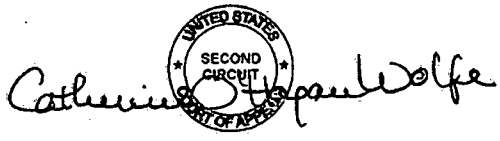
each of his causes of action do[ ] exist," Appellant's Br. at 17, does not explain why he believes the claims were improperly dismissed. Toliver has thus waived any challenge to the district court's dismissal orders. See *Terry*, 826 F.3d at 632-33; *Gerstenbluth*, 728 F.3d at 142 n.4; *Moates*, 147 F.3d at 209.

The one argument Toliver does raise -- that he exhausted his administrative remedies because exhaustion is not required for judicial review under N.Y. C.P.L.R Article 78 -- was asserted for the first time on appeal and is also waived. *Nortel*, 539 F.3d at 132. But even if we were to address that argument, it is meritless. Toliver is correct that New York law does not require exhaustion of administrative remedies if an Article 78 petitioner challenges the constitutionality of a statute or regulation pursuant to which an agency took a particular action. *See Watergate II Apartments. v. Buffalo Sewer Auth.*, 46 N.Y.2d 52, 57-58 (1978). The Prison Litigation Reform Act, however, is the controlling law in federal court, and it prohibits an inmate from bringing suit under 42 U.S.C. § 1983 implicating prison conditions "until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a);*see also Porter v. Nussle*, 534 U.S. 516, 532 (2002) ("[T]he PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes . . . or some other wrong."). Accordingly, Toliver may not avoid having to exhaust his administrative remedies.

* * *

We have considered Toliver's remaining arguments and conclude they are without merit. For the foregoing reasons, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SAMUEL RASHEEN RAYMOND TOLIVER,

Plaintiff,

-v- 9:18-CV-1420 (DNH/ATB)

K. ADNER, Mail Postal Corr. Carrier,

Defendant.

APPEARANCES: OF COUNSEL:

SAMUEL RASHEEN RAYMOND TOLIVER
Plaintiff pro se
09-B-2037
Gouverneur Correctional Facility
Scotch Settlement Road
P.O. Box 480
Gouverneur, NY 13642

HON. LETITIA JAMES
Attorney General for the State of New York
Attorney for Defendant
The Capitol
Albany, NY 12224

NICHOLAS LUKE ZAPP, ESQ.
Ass't Attorney General

DAVID N. HURD
United States District Judge

DECISION and ORDER

Pro se plaintiff Samuel Rasheen Raymond Toliver brought this civil rights action pursuant to 42 U.S.C. § 1983. On June 3, 2019, Magistrate Judge Andrew T. Baxter advised by Report-Recommendation that defendant's motion to dismiss be granted and that the action be dismissed in its entirety, with prejudice, for failure to exhaust administrative

remedies. Plaintiff timely filed objections to the Report-Recommendation.

Based upon a de novo review of the portions of the Report-Recommendation to which plaintiff objected, the Report-Recommendation is accepted and adopted in all respects. See 28 U.S.C. § 636(b)(1).

Therefore, it is

ORDERED that

1. Defendant's motion to dismiss is GRANTED;

2. Plaintiff's Complaint is DISMISSED WITH PREJUDICE; and

3. The Clerk is directed to enter judgment accordingly and close the file.

IT IS SO ORDERED.

United States District Judge

Dated: August 1, 2019
Utica, New York.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SAMUEL TOLIVER,

Plaintiff,

v.

9:18-CV-1420
(DNH/ATB)

KARA ADNER,

Defendant.

SAMUEL TOLIVER, Plaintiff, pro se
NICHOLAS ZAPP, Asst. Attorney General, for Defendant

ANDREW T. BAXTER
United States Magistrate Judge

REPORT-RECOMMENDATION

This matter has been referred to me for Report and Recommendation by the Honorable David N. Hurd, United States District Judge. Plaintiff brought this civil rights action pursuant to 42 U.S.C. § 1983, alleging that Defendant Adner falsified a misbehavior report and violated his Fourth Amendment rights. (Complaint ("Compl.") at 12, 15) (Dkt. No. 1).

Presently before the court is defendant's motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6), for failure to exhaust administrative remedies. (Dkt No. 16). Plaintiff responded in opposition to the motion. (Dkt. No. 18). Defendant filed a reply, and plaintiff filed a sur-reply.[1] (Dkt. Nos. 19, 20). For the following reasons, this court agrees with defendant and recommends dismissal of plaintiff's complaint.

I. Motion to Dismiss

A. Legal Standards

To survive a motion to dismiss for failure to state a claim, a complaint must

[1] Plaintiff's sur-reply was not authorized by the court.

contain sufficient factual matter to state a claim that is "plausible on its face" when taken as true. *Bell Atl. Corp. v. Twombly,* 127 S.Ct. 1955 (2007). Though all facts are read in the light most favorable to the non-moving party, "threadbare recitals of the elements of a cause of action, supported by mere conclusory elements, do not suffice." *Id.* When considering a motion to dismiss pursuant to Rule 12(b)(6), the court limits its consideration to the complaint and documents attached thereto as exhibits or incorporated thereto by reference. *Portillo v. Webb*, No. 16 Civ. 4731, 2017 WL 4570374, at *1 (S.D.N.Y). These documents must be sufficient to "nudge" plaintiff's claim "across the line from conceivable to plausible," or the claim must be dismissed. *Twombly*, 127 S.Ct. at 1960.

B. Application

In this case, the plaintiff has attached a substantial number of documents to his complaint, including his misbehavior report, and the disposition thereof. (Compl. Exs. A, C). Plaintiff has attached letters that he wrote to various recipients regarding allegedly contaminated food, including the letter that became the subject of the disciplinary hearing. (Compl. Ex. B). One of plaintiff's letters references a grievance that several inmates allegedly filed, complaining about contaminated food. (*Id.*). Plaintiff has also attached a grievance that he filed on May 22, 2017, complaining about an officer who allegedly used profanity against plaintiff when he complained about dirty trays. (Compl. Ex. C at 4). Plaintiff has also attached a copy of Department of Corrections and Community Supervision ("DOCCS") Directive No. 4422, governing the Inmate Correspondence Program. (Compl. Ex. D). Because plaintiff has attached these documents to the complaint, the court may consider them in analyzing the

defendant's motion to dismiss.

II. Facts

Judge Hurd previously summarized the facts as alleged by plaintiff. (Dkt. No. 8 at 5-7). On May 30, 2017, while confined at Riverview Correctional Facility ("Riverview C.F."), plaintiff attempted to mail a stamped, confidential complaint/ petition to the Federal Drug Administration ("FDA") and to the New York State Department of Health. In the letter, he alleged he had been served contaminated, raw, and spoiled food, and he included a "sample" of the food for testing. (Dkt. No. 8 at 5-6). On that day, defendant Adner intercepted, opened, and read plaintiff's mail when she noticed the envelope "secreting." (Dkt. No. 8 at 6). The mail was confiscated, copied, and destroyed by defendant. (*Id.* at 6). Defendant issued a Tier III misbehavior report, charging plaintiff with smuggling, misuse of state property, unhygienic act, contraband, and a violation of correspondence procedures. (Compl. Ex. A; Dkt. No. 19, Exhibit B).[2] Plaintiff claims the misbehavior report was false. *Id.*

At the conclusion of the resulting disciplinary hearing, plaintiff was sentenced to sixty days in the Special Housing Unit ("SHU") with a corresponding loss of recreation, commissary, packages, and telephone privileges. Plaintiff appealed the disposition, but it was affirmed by the Acting Director of the SHU. (Dkt. No. 8 at 6-7, Def.'s Ex. A (Dkt. No. 19)).

In the complaint, plaintiff also alleged that other defendants conspired with defendant Adner to falsify the misbehavior report and confine him to the SHU. The

[2] As stated above, plaintiff attached a copy of the misbehavior report to his complaint. However, it is difficult to read because the quality of the copy is poor. Defendant has attached a legible copy of the misbehavior report to his reply papers. (Def.'s Ex. B) (Dkt. No. 19).

other defendants and the conspiracy claims were dismissed by Judge Hurd. (Dkt. No. 8 at 34). Judge Hurd also dismissed claims asserting unconstitutional conditions of confinement in SHU. (Dkt. No. 8 at 2-7). The only claims to survive Judge Hurd's initial review, were plaintiff's allegation that defendant Adner falsified the misbehavior report against him in retaliation for his complaint to the FDA, and his claim that the defendant violated plaintiff's Fourth Amendment rights by opening his mail. (*Id.*at 34).

III. Exhaustion of Administrative Remedies

A. Legal Standards

The Prison Litigation Reform Act, ("PLRA"), 42 U.S.C. §1997e(a), requires an inmate to exhaust all available administrative remedies prior to bringing a federal civil rights action. The exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and regardless of the subject matter of the claim. *See Giano v. Goord*, 380 F.3d 670, 675-76 (2d Cir. 2004) (citing *Porter v. Nussle,* 534 U.S. 516, 532 (2002). Inmates must exhaust their administrative remedies even if they are seeking only money damages that are not available in prison administrative proceedings. *Id.* at 675.

The failure to exhaust is an affirmative defense that must be raised by the defendants. *Jones v. Bock*, 549 U.S. 199, 216 (2007); *Johnson v. Testman*, 380 F.3d 691, 695 (2d Cir. 2004). As an affirmative defense, it is the defendants' burden to establish that plaintiff failed to meet the exhaustion requirements. *See, e.g., Key v. Toussaint*, 660 F. Supp. 2d 518, 523 (S.D.N.Y. 2009) (citations omitted).

The Supreme Court has held that in order to properly exhaust an inmate's administrative remedies, the inmate must complete the administrative review process in

accordance with the applicable state rules. *Jones*, 549 U.S. at 218-19 (citing *Woodford v. Ngo*, 548 U.S. 81 (2006)). In *Woodford*, the Court held that "proper" exhaustion means that the inmate must complete the administrative review process in accordance with the applicable procedural rules, including deadlines, as a prerequisite to bringing suit in federal court. 548 U.S. at 90-103.

The grievance procedure in New York is a three-tiered process. The inmate must first file a grievance with the Inmate Grievance Resolution Committee ("IGRC"). N.Y. Comp. Codes R. & Regs., tit. 7 §§ 701.5(a)(1) and (b). An adverse decision of the IGRC may be appealed to the Superintendent of the Facility. *Id.* § 701.5(c). Adverse decisions at the Superintendent's level may be appealed to the Central Office Review Committee ("CORC"). *Id.* § 701.5(d). The court also notes that the regulations governing the Inmate Grievance Program encourage the inmate to "resolve his/her complaints through the guidance and counseling unit, the program area directly affected, or other existing channels (informal or formal) prior to submitting a grievance." *Id.* § 701.3(a) (Inmate's Responsibility). There is also a special section for complaints of harassment. *Id.* § 701.8. Complaints of harassment are handled by an expedited procedure which provides that such grievances are forwarded directly to the superintendent of the facility, after which the inmate must appeal any negative determination to the CORC. *Id.* §§ 701.8(h) & (i), 701.5.

Until recently, the Second Circuit utilized a three-part inquiry to determine whether an inmate had properly exhausted his administrative remedies. *See Brownell v. Krom*, 446 F.3d 305, 311-12 (2d Cir. 2006) (citing *Hemphill v. State of New York*, 380 F.3d 680, 686 (2d Cir. 2004). The *Hemphill* inquiry asked (1) whether the

administrative remedies were available to the inmate; (2) whether defendants' own actions inhibiting exhaustion estops them from raising the defense; and (3) whether "special circumstances" justify the inmate's failure to comply with the exhaustion requirement. *Id.*

The Supreme Court has now made clear that courts may not excuse a prisoner's failure to exhaust because of "special circumstances." *Ross v. Blake*, __ U.S. __, 136 S. Ct. 1850, 1857 (June 6, 2016). "'[M]andatory exhaustion statutes like the PLRA establish mandatory exhaustion regimes, foreclosing judicial discretion.'" *Riles v. Buchanan*, 656 F. App'x 577, 580 (2d Cir. 2016) (quoting *Ross*, __ U.S. at __, 136 S. Ct. at 1857). Although *Ross* has eliminated the "special circumstances" exception, the other two factors in *Hemphill* – availability and estoppel – are still valid. The court in *Ross* referred to "availability" as a "textual exception" to mandatory exhaustion, and "estoppel" has become one of the three factors in determining availability. *Ross*, __ U.S. at __, 136 S. Ct. at 1858. Courts evaluating whether an inmate has exhausted his or her administrative remedies must focus on whether those remedies were "available" to the inmate. *Id. See also Riles*, 656 F. App'x at 580-81. Defendants bear the burden of proving the affirmative defense of failure to exhaust. *Williams v. Priatno*, 829 F.3d 118, 122 (2d Cir. 2016).

B. Application

In this case, plaintiff does not allege that the grievance process was "unavailable" to him due to any of the circumstances outlined in *Ross*, nor does he allege that the procedure was too confusing, as the inmate in alleged *Williams*. *See Ross*, 136 S. Ct. at 1859-1860; *Williams* 829 F.3d at 119. Rather, plaintiff cites two

reasons that he believes he is exempt from utilizing the grievance procedure. Plaintiff alleges first, that the appeal of his disciplinary hearing sufficed to exhaust his remedies against defendant. In the alternative, plaintiff alleges that his transfer to another facility exempts him from filing a grievance. Neither argument has merit.

1. Disciplinary Appeal

Plaintiff argues that the result of the disciplinary hearing is not "grievable." (Dkt. No. 18-3, Pl.'s Ex. C at 21) (citing DOCCS Directive. No. 4040; 7 NYCRR § 701.3(e)(1), (e)(2)). Although plaintiff is correct that the "result" of the disciplinary hearing is not grievable because the disciplinary proceeding has its own appeal mechanism, plaintiff is ***not*** challenging the due process related to the result of the disciplinary hearing. He is challenging defendant Adner's alleged retaliation in issuing the misbehavior report against plaintiff, and her conduct in opening his mail.

The grievance process applies to all claims of retaliation and staff misconduct which are related to incidents giving rise to inmate discipline. *Waters v. Melendez*, No. 15-CV-805, 2018 WL 3079764, at *6 (N.D.N.Y May 18, 2018); *Scott v. Gardner*, 287 F. Supp. 2d 477 (S.D.N.Y. 2003). The grievance process is separate from the process of appealing the outcome of a disciplinary hearing, and an inmate "cannot adequately exhaust his remedies for PLRA purposes through his administrative appeal of the hearing decision; he must separately grieve the [defendant's] alleged misconduct . . . ." *Kimbrough v. Fischer*, No. 9:13-CV-100, 2014 WL 12684106, at *6 (N.D.N.Y. Sept. 29, 2014) (quoting *Rosales v. Bennett*, 297 F. Supp. 2d 637, 639 (W.D.N.Y. 2004)), *(Rep't Rec), adopted*, 2016 WL 660919 (N.D.N.Y. Feb. 18, 2016). *See also Barker v.*

Smith No. 16-CV-76, 2017 WL 3701495, at *7 (S.D.N.Y. Aug. 24, 2017) (and cases cited therein).

In *Waters,* the inmate alleged that the defendant had falsified a misbehavior report, charging plaintiff with taking compensation for law library services in retaliation for the plaintiff's filing of a Prison Rape Elimination Act action against another officer. 2018 WL 3079764, at *3. Plaintiff was found not to have exhausted all administrative remedies because he did not file a grievance against the defendant, separate from exhausting his disciplinary appeals. *Id.* at *8. *See also Crosby v. LaValley,* No. 9:15-CV-1125, 2017 WL 7050647, at *2, 7 (N.D.N.Y. Dec. 15, 2017) (a separate grievance was required with respect to plaintiff's claim of retaliation involving an assault by correction officers and the subsequent issuance of a false misbehavior report to cover up the assault, even though plaintiff appealed the result of his disciplinary hearing).

In *Barker*, the plaintiff alleged that the defendant falsified a misbehavior report, stating plaintiff was responsible for an attack on another inmate (for which plaintiff was adjudicated responsible at a disciplinary hearing). Plaintiff was found not to have satisfied the PLRA's exhaustion requirement by asserting allegations of misconduct against the defendant at his disciplinary hearing and appealing the result of that hearing, as he was required to file a separate grievance. *Barker v. Smith*, 2017 WL 3701495, at *3. Simply put, "allegations of staff misconduct related to the incidents giving rise to the discipline *must be grieved*." *Waters*, 2018 WL 3079764 at *8 (quoting, inter alia, *Barker*, *supra*; *Scott*, 287 F. Supp. 2d 477 at 489) (emphasis added).

2. Transfer

Plaintiff also argues that he does not need to separately grieve his allegations against defendant to satisfy the exhaustion requirement because he was transferred from Riverview C.F. to Gouverneur Correctional Facility ("Gouverneur C.F."). (Dkt. No. 18 at 4). Plaintiff interprets Directive 4040's definition of an "institutional grievance" ("a grievance in which the grievant is only affected as long as he or she remains a resident of the facility") to mean that he did not need to file a grievance against defendant because he was subsequently transferred from Riverview C.F. *Id.* at 4. Plaintiff's interpretation of the regulations is incorrect.

The court would first note that plaintiff's grievance against Defendant Adner would likely have been a "Harassment Grievance," not an "Institutional Grievance." *See* 7 NYCRR § 701.2 (c), § 701.2 (e). In any event, the transfer of an inmate does not necessarily negate the necessity to file a grievance. *Rodriguez v. Senkowski*, 103 F. Supp. 2d 131, 134 (N.D.N.Y. 2000). The issue is whether the grievance process would have been "available" to the plaintiff either at Riverview or at Gouverneur. *Williams, supra.*

In this case, plaintiff had 21 days to file a grievance against defendant Adner under the regulations cited above. Twenty-one days from May 30, 2017 was June 20, 2017. Plaintiff was still at Riverview C.F. on June 20, 2017. In fact, on June 22, 2017, while he was still at Riverview C.F., plaintiff signed the appeal of a related grievance that he filed on May 22, 2017, in which complained about the food in the mess hall that ultimately led plaintiff to mailing the letter containing the "sample." (Compl. Exh. C at 4). His deadline to file a grievance about the incident involving defendant Adner

would have expired prior to his transfer, thus, plaintiff had ample time to file a grievance before his transfer. At that time, the regulations provided that "[a]n inmate transferred to another facility may continue an appeal of any grievance."[1] 7 NYCRR § 701.6(h)(2). Thus, plaintiff's argument that a grievance or an appeal was unavailable because he was transferred is distinguishable from *Williams* and is meritless. *See also Rodriguez v. Westchester Cty. Jail Corr. Dep't Assoc.*, No. 98 Civ. 2743, 2002 WL 1933953, at *3 (S.D.N.Y. Aug. 21, 2002) (finding that the plaintiff had ample time to file a grievance notwithstanding his subsequent transfer) (other citations omitted).

IV. Dismissal

The Second Circuit has stated that "failure to exhaust administrative remedies is often a temporary, curable procedural flaw. If the time permitted for pursuing administrative remedies has not expired, a prisoner who brings suit without having exhausted these remedies can cure the defect simply by exhausting them and then reinstituting his suit . . . ." *Berry v. Kerik*, 366 F.3d 85, 87 (2d Cir. 2004) (quoting *Snider v. Melindez*, 199 F.3d 108, 111-112 (2d Cir. 1999)). Thus, where a claim is dismissed for failure to exhaust, dismissal without prejudice is appropriate if the time permitted for pursuing administrative remedies has not expired. *Berry*, 366 F.3d at 87.

However, if a prisoner has failed to exhaust available administrative remedies, and the time in which to exhaust has expired, it is proper for the court to dismiss the complaint with prejudice because any attempt to exhaust would be futile. *Id.* at 88. The court in *Hilbert v. Fischer*, No. 12 Civ. 3843, 2013 WL 4774731, at *7 (S.D.N.Y.

[1] The prior regulation did not allow such an appeal after transfer. *See Land v. Kaufman*, No. 07 Civ. 8070, 2009 WL 1106780, at *3 (S.D.N.Y. Apr. 23, 2009) (discussing prior law).

Sept. 4, 2013), explained why, in circumstances essentially the same as in this case, the dismissal of plaintiff's claims for failure to exhaust, well after the DOCCS deadlines for filing grievances or requests for late filing have expired, should be with prejudice:

> [New York] [p]risoners have 21 days from the date of the alleged occurrence to initiate the first formal step of the IGP, subject to exceptions "based on mitigating circumstances." 7 NYCRR §§ 701.5(a)(1), 701.6(g)(1)(i)(a). However, an exception to the time limit may not be granted if the request is made more than 45 days after the alleged occurrence. 7 NYCRR § 701.6(g)(1)(i)(a). Accordingly, because the time to both file a grievance and request an exception to the time limit has long expired, and because Plaintiff has not offered any reason for his delay in filing a grievance with respect to his deliberate indifference claim, the claim is dismissed with prejudice.

See also Felix v. Simon, 303 F. App'x 21, 22 (2d Cir. 2008) (upholding dismissal of a civil rights action with prejudice where the time permitted for filing a grievance had expired because "dismissal with prejudice, when remedies are no longer available, is required in the absence of any justification for not pursuing such remedies" (citation omitted). In this case, it is clear the plaintiff has failed to exhaust his administrative remedies, and that the time for him to file a grievance has long since expired. Thus, the court may dismiss this action against defendant Adner with prejudice.

WHEREFORE, based on the findings above, it is

RECOMMENDED, that defendant's motion to dismiss (Dkt. No. 16) be **GRANTED**, and that plaintiff's complaint (Dkt. No. 1) be **DISMISSED WITH PREJUDICE**.

Pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 72.1(c), the parties have fourteen (14) days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO**

THIS REPORT WITHIN FOURTEEN DAYS WILL PRECLUDE APPELLATE REVIEW. *Roldan v. Racette*, 984 F.2d 85, 89 (2d Cir. 1993) (citing *Small v. Secretary of Health and Human Services*, 892 F.2d 15 (2d Cir. 1989)); 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 6(a), 6(e), 72.

Dated: June 3, 2019

Andrew T. Baxter

Hon. Andrew T. Baxter
U.S. Magistrate Judge

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