MANDATE

23-295
Colley v. Garland

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

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 1st day of March, two thousand twenty-four.

PRESENT:

SUSAN L. CARNEY,
RICHARD J. SULLIVAN,
EUNICE C. LEE,
Circuit Judges.

KHARI DEVON COLEY,

Plaintiff-Appellant,

v. No. 23-295

CORRECTIONAL OFFICER WAYNE L. GARLAND, CORRECTIONAL OFFICER JOSEPH R. GRANGER, CORRECTIONAL OFFICER RANDY J. RUSSELL, SERGEANT WILLIAM HOFFNAGLE, CORRECTIONAL OFFICER NATHAN T. LOCKE,

*Defendants-Appellees.**

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

For Plaintiff-Appellant: Khari Devon Coley, *pro se*, Comstock, NY.

For Defendants-Appellees: Barbara D. Underwood, Solicitor General, Andrea Oser, Deputy Solicitor General, Joseph M. Spadola, Assistant Solicitor General, *for* Letitia James, Attorney General of the State of New York, New York, NY.

Appeal from a judgment of the United States District Court for the Northern District of New York (Lawrence E. Kahn, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the January 20, 2023 judgment of the district court is **AFFIRMED**.

Khari Devon Coley, who is incarcerated and proceeding *pro se*, appeals from the district court's grant of summary judgment in favor of Wayne L. Garland, Joseph R. Granger, Randy J. Russell, William Hoffnagle, and Nathan T. Locke (collectively, "Defendants") on Coley's claims under 42 U.S.C. § 1983. Coley alleged that Defendants – all of whom are corrections officers at Upstate Correctional Facility ("Upstate") in New York – assaulted him in his cell in October 2016, leading to substantial physical injuries for which Coley now seeks damages. The district court granted summary judgment to Defendants because Coley failed to offer sufficient evidence that he had exhausted his administrative remedies

before filing suit, as is required under the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a). The district court additionally found that Coley could not establish that administrative remedies were not available to him. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

We review a grant of summary judgment *de novo*, "resolv[ing] all ambiguities and draw[ing] all inferences against the moving party." *Garcia v. Hartford Police Dep't*, 706 F.3d 120, 126–27 (2d Cir. 2013). "Summary judgment is proper only when, construing the evidence in the light most favorable to the non-movant, there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Doninger v. Niehoff*, 642 F.3d 334, 344 (2d Cir. 2011) (quoting Fed. R. Civ. P. 56(a)). Although "a district court may not discredit a witness's deposition testimony on a motion for summary judgment, . . . there is an exception for 'the rare circumstance where the plaintiff relies almost exclusively on his own testimony, much of which is contradictory and incomplete.'" *Fincher v. Depository Tr. & Clearing Corp.*, 604 F.3d 712, 725 (2d Cir. 2010) (quoting *Jeffreys v. City of New York*, 426 F.3d 549, 554 (2d Cir. 2005)). Under this exception, "we are not required to assume the truth of testimony so replete

with inconsistencies and improbabilities that a reasonable jury could not base a favorable finding on it." *Saeli v. Chatauqua County*, 36 F.4th 445, 457 (2d Cir. 2022) (alterations and internal quotation marks omitted) (applying this rule to grant summary judgment against a *pro se* inmate on exhaustion); *see also Jeffreys*, 426 F.3d at 555 ("[W]hen the facts alleged are so contradictory that doubt is cast upon their plausibility, the court may pierce the veil of the complaint's factual allegations . . . and dismiss the claim." (quoting *Aziz Zarif Shabazz v. Pico*, 994 F. Supp. 460, 470 (S.D.N.Y. 1998) (Sotomayor, *J.*) (alteration omitted))).

Under the PLRA, inmates must exhaust all available administrative remedies before bringing suit over mistreatment by corrections officers. *See Jones v. Bock*, 549 U.S. 199, 204 (citing 42 U.S.C. § 1997e(a)). To that end, inmates must comply with all "prison grievance procedures" in place, *id.* at 218, including exhausting any right to appeal, *Davis v. Barrett*, 576 F.3d 129, 132 (2d Cir. 2009). Exhaustion is ultimately a question of law, which a district court may resolve at summary judgment when there is no genuine dispute that an inmate-plaintiff failed to pursue available administrative remedies. *See Hubbs v. Suffolk Cnty. Sheriff's Dept.*, 788 F.3d 54, 59 (2d Cir. 2015). "Because failure to exhaust is an affirmative defense, defendants bear the initial burden of establishing . . . that a

grievance process exists and applies to the underlying dispute." *Saeli*, 36 F.4th at 453 (alterations and internal quotation marks omitted). "If the defendant has met its burden of establishing the existence and applicability of the grievance policy, the plaintiff bears the burden of establishing" that the grievance process was rendered "unavailable as a matter of fact." *Id.* (emphasis and internal quotation marks omitted). For instance, a plaintiff can make that showing of unavailability – and excuse his failure to exhaust – by establishing that the grievance process was too "opaque" to navigate or that "prison officers thwart[ed]" inmates' attempts to use it. *Id.* (quoting *Ross v. Blake*, 578 U.S. 632, 643–44 (2016)).

Here, the district court granted summary judgment on the ground that Coley failed to exhaust. We agree. To begin, Defendants met their initial burden of establishing that Upstate had an applicable grievance policy, which they did by demonstrating that New York "has a well-established three-step" process through which inmates can file complaints and appeals. Dist. Ct. Doc. No 93-8 at 10–11 (citing N.Y. Comp. Codes R. & Regs. tit. 7, § 701.5 (2024) ("Inmate Grievance Program")). As to Coley specifically, Defendants also established that he had not fully exhausted his claims through the three-step process, given that neither

Upstate nor the central grievance committee had any record of Coley filing a timely grievance (or appeal) over the October 2016 incident.

This shifted the burden to Coley to show that the grievance process was "not in fact available to him." *Saeli*, 36 F.4th at 453. Coley insists just that, claiming that "correctional officers intentionally discarded the grievance" he tried to submit over the October 2016 incident. Coley Br. at 8. But Coley's account of this supposed interference is far too "implausible and internally contradictory" for us to credit it. *Saeli*, 36 F.4th at 454.

First off, Coley did not assert that he filed the grievance himself but instead that another inmate wrote and mailed it on his behalf. At Coley's deposition, he recounted how he spoke to "Reggie" through a hospital cell door, who then wrote the grievance with a pencil and paper. Dist. Ct. Doc. No. 93-2 ("Coley Dep.") at 94. Coley was then asked whether he signed the grievance. At first, Coley proclaimed that there "no way for [him] to sign it" so he had to sign it "later." *Id.* at 96. But then Coley appeared to shift his story, claiming that he *did* sign the grievance – by reaching through the cell door to Reggie – with a "piece of a pencil" that he had concealed from the officer on duty. *Id.* Arguably, Coley's equivocation could be attributed to the spotty connection during his remote

deposition, which broke up in between these conflicting statements. But even that would not reconcile his ultimate testimony – that he signed a grievance with a hidden piece of pencil – with his Rule 56.1 statement, in which Coley stated that "he did not have . . . [a] pencil" to write the grievance. Dist. Ct. Doc. No. 100 at 2–3 ¶ 24. Moreover, it would beg the question of how Coley was able to use a contraband pencil while he was on "one-on-one [suicide] watch." *Id.* at 97; *see also id.* at 93 (stating that the officer was "right there" during the Reggie conversation). When pressed on this, Coley pivoted and asserted that the officer on duty "walked away" when he signed the paper. *Id.* at 97.

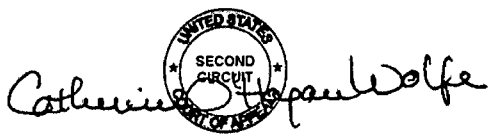
More problematically, this narrative still would not show that officers *prevented* this particular grievance from being filed. Indeed, Coley offers only "unsubstantiated speculation" that officers threw away the grievance after Reggie mailed it, without offering any details or "hard evidence" as to how that might have occurred. *Saeli*, 36 F.4th at 455. To be sure, Coley asserted in his deposition that Officer Garland had intercepted Coley's grievances in the past, apparently because Garland was targeting Coley. But Garland's targeting of Coley would not explain how Garland intercepted a grievance filed by someone else – Reggie – especially when nothing suggests that Garland was aware that Coley had spoken

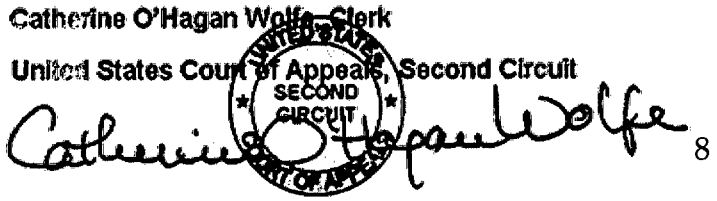
to Reggie, much less asked him to write a grievance. "[W]e are not required to assume the truth of testimony so replete with inconsistencies and improbabilities that a reasonable jury could not base a favorable finding on it." *Saeli*, 36 F.4th at 457 (alterations and internal quotation marks omitted).

Finally, we reject Coley's contention that he was entitled to a pretrial evidentiary hearing on the exhaustion issue. We review a district court's decision to deny an evidentiary hearing for abuse of discretion. *See Kolel Beth Yechiel of Tartikov, Inc. v. YLL Irrevocable Tr.*, 729 F.3d 99, 103 (2d Cir. 2013). In general, district courts need not grant evidentiary hearings based on "uncorroborated averments" and "conclusory allegations." *Zappia Middle East Constr. Co. Ltd. v. Emirate of Abu Dhabi*, 215 F.3d 247, 253 (2d Cir. 2000). Because that is all Coley offered below, the district court acted well within its discretion in declining to hold such a hearing.

We have considered Coley's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court





United States District Court
Northern District of New York

JUDGMENT IN A CIVIL CASE

KHARI DEVON COLEY,

Plaintiff,

V. CASE NUMBER: 9:19-CV-382 (LEK/ATB)

W. GARLAND, et. al.,

Defendants.

[x] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED, that this action is dismissed pursuant to the Memorandum-Decision and Order filed January 20, 2023 of Senior Judge Lawrence E. Kahn which ORDERED that Defendants' motion for summary judgment (Dkt. No. 93) is GRANTED because of Plaintiff's failure to exhaust administrative remedies.

January 20, 2023
DATE

John Domurad
Clerk of Court

s/Nancy A. Steves
(BY) DEPUTY CLERK

Federal Rules of Appellate Procedure
Rule 4. Appeal as of Right

(a) Appeal in a Civil Case.

1. (1) *Time for Filing a Notice of Appeal.*

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;
(ii) a United States agency;
(iii) a United States officer or employee sued in an official capacity; or
(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf—including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an application for a writ of error *coram nobis* is an appeal in a civil case for purposes of Rule 4(a).

(2) *Filing Before Entry of Judgment.* A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) *Multiple Appeals.* If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) *Effect of a Motion on a Notice of Appeal.*

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(5) *Motion for Extension of Time.*

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

(6) *Reopening the Time to File an Appeal.* The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77 (d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77 (d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) *Entry Defined.*

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58 (a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79 (a); or

(ii) if Federal Rule of Civil Procedure 58 (a) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79 (a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58 (a) does not affect the validity of an appeal from that judgment or order.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

KHARI DEVON COLEY,

Plaintiff,

-against- 9:19-CV-00382 (LEK/ATB)

W. GARLAND, *et al.*,

Defendants.

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Plaintiff Khari Coley commenced this action pro se on April 1, 2019, alleging violations of his Eighth Amendment rights arising out of his confinement at Upstate Correctional Facility. Dkt. No. 1 ("Complaint").[1] On May 8, 2019, the Court issued a Decision and Order granting Plaintiff's IFP application and directing Plaintiff to file an amended complaint to "properly name [the unidentified] individuals as parties" to the action. Dkt. No. 7 ("May Order") at 6. In response to the May Order, Plaintiff filed an amended complaint, Dkt. No. 28 ("First Amended Complaint"), but failed to include his signature. Plaintiff later signed the Amended Complaint, Dkt. No. 31, and shortly thereafter, filed another Amended Complaint, Dkt. No. 34 ("Second Amended Complaint" or "Amended Complaint"), alleging violations of his Eighth Amendment rights including: (1) deliberate indifference to serious medical needs; (2) excessive force; and (3) failure to intervene, against defendants W. Garland, Nathan T. Locke, William Hoffnagle, Joseph R. Ranger, and Randy Russell (collectively, "Defendants").[2]

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[1] Plaintiff is now represented by counsel. Dkt. Nos. 77, 81.

[2] Plaintiff also filed a motion to appoint counsel, Dkt. No. 30, which the Court denied. Dkt. No. 38.

On January 21, 2020, Defendants filed a motion to dismiss Plaintiff's medical indifference claim for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). Dkt. No. 57. In a Decision and Order dated September 16, 2020, the Court granted Defendants' motion to dismiss.[3] Dkt. No. 80 ("September Order").

Now before the Court is Defendants' motion for summary judgment, Dkt. No. 93 ("Motion") regarding Plaintiff's two remaining Eighth Amendment claims alleging excessive force and failure to intervene. Defendants have also submitted a statement of material facts. Dkt. No. 93-9 ("Defendants' Statement of Material Facts"). Plaintiff has filed a response to Defendants' statement of material facts, Dkt. No. 100 ("Plaintiff's Response to Defendants' Statement of Material Facts") and a memorandum of law, Dkt. No. 100-1 ("Plaintiff's Memorandum"). Defendants filed a reply. Dkt. No. 101 ("Defendants' Reply"). For the reasons that follow, Defendants' Motion is granted.

II. BACKGROUND

A. Factual Background

The following facts are taken from Defendants' statement of material facts, Dkt. No. 93-2, and are undisputed unless otherwise noted. Facts unrelated to the current motion are detailed in the Court's September Order. Dkt. No. 80 at 3–5.

At all times relevant to this action, Plaintiff was confined at Upstate Correctional Facility ("Upstate C.F."). Defs.' SMF ¶ 2. At approximately 6:00 PM on October 31, 2016, Correction Officer ("C.O.") Russell was completing security rounds and passed by Plaintiff's cell. Id. ¶ 3. As Russell passed by Plaintiff's cell, he observed that a bed sheet was tied around Plaintiff's

[3] In its Decision and Order, the Court also denied Plaintiff's motion to amend, Dkt. No. 68, and denied Plaintiff's letter motion for injunctive relief, Dkt. No. 70.

neck and that the sheet was secured to the inside of the cell door. Id. ¶ 4. Plaintiff, however, maintains that he never tied anything around his neck during this incident. Pl.'s Resp. to Defs.' SMF ¶ 4.

According to Defendants, Russell then ordered Plaintiff to untie "the noose," but Plaintiff did not comply. Defs.' SMF ¶ 5. In response, Russell immediately called for assistance. Id. ¶ 6. Plaintiff contests these facts and denies that this conversation occurred because he asserts that he did not have anything around his neck. Pl.'s Resp. to Defs.' SMF ¶ 5.

Sergeant William Hoffnagle and other security staff responded to Russell's call for assistance. Id. ¶7. Hoffnagle ordered staff to enter the cell and free Plaintiff of the bed sheet around his neck. Id. ¶ 8. According to Defendants, after Garland and Locke entered Plaintiff's cell, they assisted Plaintiff to his feet and Garland removed the sheet from Plaintiff's neck. Id. ¶¶ 9–10. Plaintiff, however, disputes that anything was around his neck during this incident. See generally Pl.'s Resp. to Defs.' SMF.

Prison staff applied mechanical restraints to Plaintiff, id. ¶ 11, and Russell retrieved a gurney that the prison staff placed Plaintiff on to transport him to the infirmary. Id. ¶¶ 12–13. Plaintiff was examined in the infirmary and later transported by ambulance to an outside hospital. Id. ¶ 15. Plaintiff did not lose consciousness "during the incident." Id. ¶ 16.

Defendants state that Plaintiff told a mental health professional at Upstate C.F. that his purpose in his attempt to "hang up" was to "avoid a double cell." Id. ¶ 17. According to Defendants, when the prison staff opened the cell to stop Plaintiff from "hang[ing] up," the cell gate pulled the makeshift-noose on Plaintiff's neck and strangulated Plaintiff for a moment. Id. ¶ 18. Plaintiff again disputes that he placed anything around his neck and also denies stating that he admitted that he tried to hang himself. Pl.'s Resp. to Defs.' SMF ¶¶ 17–18.

Rachel Seguin is the Assistant Director of the Inmate Grievance Program ("IGP") of the New York State Department of Corrections and Community Supervision ("DOCCS"). Id. ¶ 20. In her capacity as Assistant Director of IGP, Seguin is the custodian of the records maintained by the Central Office Review Committee ("CORC"), the body that renders final administrative decisions under DOCCS's three-step grievance program. Id. ¶ 21. Seguin searched CORC records and determined that Plaintiff did not file a grievance appeal with CORC related to any issue connected to Plaintiff's claims in this action. Id. ¶ 22.[4]

Similarly, Sherri Debyah is an Inmate Grievance Program Supervisor at Upstate C.F. and is responsible for keeping records of grievances filed by inmates at that facility. Id. ¶ 23. At all times relevant to this action, Upstate C.F. had a fully functioning inmate grievance process available. Id. ¶ 24.[5] Based upon her search of the Inmate Grievance Program files, Debyah concluded that the Upstate C.F. Inmate Grievance Program did not contain records of any grievance filed by Plaintiff relating to the issues in the present action. Id. ¶ 25. Additionally, Plaintiff was familiar with the different steps of the inmate grievance process, id. ¶ 26, and had filed grievances at Upstate C.F. about other incidents. Id. ¶ 27.

III. STANDARD OF REVIEW

Rule 56 of the Federal Rules of Civil Procedure instructs courts to grant summary judgment if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if it "might affect the

[4] Plaintiff disputes that these searches occurred but fails to provide any evidence to the contrary. See Pl.'s Resp. to Defs.' SMF ¶¶ 21–22.

[5] Plaintiff disputes that Upstate C.F.'s grievance process functioned properly but fails to specifically point to any issues associated with Upstate C.F.'s grievance process beyond a general citation to Plaintiff's deposition. See Pl.'s Resp. to Defs.' SMF ¶ 24.

outcome of the suit under the governing law," and a dispute 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). Thus, while "[f]actual disputes that are irrelevant or unnecessary" will not preclude summary judgment, "summary judgment will not lie if . . . the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.; see also Taggart v. Time, Inc., 924 F.2d 43, 46 (2d Cir. 1991) ("Only when no reasonable trier of fact could find in favor of the nonmoving party should summary judgment be granted.").

The party seeking summary judgment bears the burden of informing a court of the basis for the motion and identifying those portions of the record that the moving party claims will demonstrate the absence of a genuine dispute of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

In attempting to defeat a motion for summary judgment after the moving party has met its initial burden, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts," Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The nonmoving party may not rely on mere conclusory allegations, speculation or conjecture, Fischer v. Forrest, 968 F.3d 216, 221 (2d Cir. 2020), and must present more than a mere "scintilla of evidence" supporting its claims, Anderson, 477 U.S. at 252. At the same time, a court must resolve all ambiguities and draw all reasonable inferences in favor of the nonmoving party, Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S 133, 150 (2000), and "eschew credibility assessments[,]" Amnesty Am. v. Town of W. Hartford, 361 F.3d 113, 122 (2d Cir. 2004) (quoting Weyant v. Okst, 101 F.3d 845, 854 (2d Cir. 1996)). Thus, a court's duty in reviewing a motion for summary judgment is "carefully limited" to finding genuine disputes

> 701.5(d)(1)(i). CORC is to render a written decision within thirty calendar days of receipt of the appeal. Id. § 701.5(d)(3)(ii).

Bryant v. Whitmore, No. 14-CV-1042, 2016 WL 7188127, at *4 (N.D.N.Y. Nov. 4, 2016), report and recommendation adopted, Bryant v. Thomas, 2016 WL 7187349 (N.D.N.Y. Dec. 9, 2016).

In the case of "harassment grievances," which are "grievances that allege employee misconduct meant to annoy, intimidate or harm an inmate," New York State regulations establish an expedited procedure by which the grievance clerk forwards the grievance directly to the facility superintendent for action. 7 N.Y.C.R.R. §§ 701.2(e), 701.8(d). The inmate, however, must still initially file the grievance with the prison's grievance clerk in accordance with ordinary procedure. Id. §§ 701.8(a)–(c). The grievance supervisor will then determine whether the grievance raises a bona fide issue of harassment meriting an expedited process. Id. § 701.5(a)(2). Once a grievance is designated a "harassment grievance," the superintendent must respond within a set time frame, and the inmate may appeal directly to the next step if he receives no response within that time frame. Id. §§ 701.8(f)–(g).

Moreover, the Second Circuit has held that factual disputes concerning exhaustion under the PLRA must be determined by courts rather than juries. Messa v. Goord, 652 F.3d 305, 308–09 (2d Cir. 2011) ("[Plaintiff] argues that, unlike other aspects of exhaustion, which he concedes are properly resolved by the court, determining whether an inmate asserts a valid excuse for non-exhaustion is a task for the jury. We are not persuaded."). Likewise, exhaustion is an affirmative defense, and the burden of proof at all times, remains on the defendant. See Ferguson v. Mason, No. 19-CV-927, 2021 WL 862070, at *3 (N.D.N.Y. Jan. 7, 2021), report and recommendation adopted, 2021 WL 531968 (N.D.N.Y. Feb. 12, 2021).

Here, the Court concludes that Defendants have satisfied their burden of proof. Defendants provide testimony from Seguin and accompanying records demonstrating that

Plaintiff did not file the required grievance appeal with CORC. Dkt. No. 93-3. Additionally, Defendants also submit testimony from Debyah, the inmate supervisor at Upstate C.F., stating that the prison has no record of grievances filed by Plaintiff related to his claims in this action. Dkt. No. 93-4. She also supported this testimony by providing a copy of Plaintiff's grievance list from Upstate C.F. Id. at 4.

Furthermore, the Court is unpersuaded that administrative remedies were unavailable to Plaintiff under Ross's first two exceptions. Indeed, Plaintiff testified that he had successfully filed and appealed grievances in the past at Upstate C.F., Dkt. No. 93-2 ("Plaintiff's Deposition") at 102–04, which suggests that the DOCCS grievance process was not a "dead end" or "incapable of use." Lurch v. Bui, No. 19-CV-895, 2020 WL 8450543, at *5 (N.D.N.Y. Dec. 8, 2020), report and recommendation adopted Lurch v. Jones, 2021 WL 392486 (N.D.N.Y. Feb. 4, 2021) ("[T]he Court notes that the record establishes that Plaintiff has filed other grievances and appealed at least one prior grievance denial to CORC. This shows that Plaintiff did not view the filing of grievances as a dead end. It also demonstrates that he clearly understood DOCCS' inmate grievance policy and could navigate it when he wished to pursue a grievance. As such the first two exceptions identified under Ross are not applicable here") (internal citations and quotations omitted); Gonzalez v. Coburn, No. 16-CV-6174, 2017 WL 6512859, at *6 (W.D.N.Y. Dec. 20, 2017) ("Plaintiff's decision to affirmatively participate at all three levels in the inmate grievance program demonstrates that the program was neither a dead-end or so opaque that Plaintiff could not avail himself of it.").

Similarly, the PLRA's third textual exception is also inapplicable here. Plaintiff argues that his grievances against Defendants never received a response, which is evidence that Defendants "destroyed his grievances and disallowed him from filing grievances." Pl.'s Mem. at

11. Because of this absence of response and presence of alleged interference, Plaintiff argues he should be excused from the PLRA's exhaustion requirement. However, Plaintiff does not provide evidence of Garland or any other Defendant meddling with his grievances that suggests the presence of interference. Id. at 10–13.

The Second Circuit's decision in Cicio v. Wenderlich is instructive. 714 Fed. App'x 96 (2d Cir. 2018). There, the plaintiff argued that the PLRA's exhaustion requirement should be waived because he never received a response to the grievance he purportedly filed. Id. at 97. The Second Circuit noted, "When a prisoner has filed a grievance, but receives no response, the regulations provide a right of appeal. Because [the plaintiff] did not exercise his right of appeal, he did not exhaust his available administrative remedies. Accordingly, the PLRA bars the instant action." Id. at 97–98. The Second Circuit further reasoned, "We also reject Cicio's argument that the non-response to his grievance constituted manipulation, so as to excuse the exhaustion requirement." Id. at 98. Here, like Cicio, it is undisputed that Plaintiff did not file an appeal after his grievances allegedly went unheard by prison staff. And because Plaintiff did not "exercise his right of appeal, he did not exhaust his available administrative remedies," and accordingly, the Court "rejects [Plaintiff's] argument that the non-response to his grievance constituted manipulation, so as to excuse the exhaustion requirement." Cicio, 714 Fed. App'x at 97–98. As a result, because Plaintiff did not comply with DOCCS's grievance process and because he failed to provide evidence that Defendants interfered with his grievances, he has not demonstrated that the Court should waive the exhaustion requirement pursuant to the PLRA's third textual exception.

As a final matter, Plaintiff argues that the exhaustion requirement should be waived because he mailed letters and appealed to other officials outside DOCCS's formal grievance

process. Pl.'s Mem. at 12. However, "the law is well-settled that informal means of communicating and pursuing a grievance, even with senior prison officials, are not sufficient under the PLRA." Timmons v. Schriro, No. 14-CV-6606, 2015 WL 3901637, at *3 (S.D.N.Y. June 23, 2015); Simons v. Campos, No. 09-CV-6231, 2010 WL 1946871, at *6 (S.D.N.Y. May 10, 2010) ("Assuming the truth of the Complaint, the plaintiff's oral statements to various officials and his letter to the superintendent fail to satisfy the . . . exhaustion requirement."). Consequently, Plaintiff's informal letters outside DOCCS's grievance process are insufficient under the PLRA's exhaustion regime.

As a result, the Court grants Defendants' motion for summary judgment because Plaintiff has failed to exhaust his administrative remedies under the PLRA. Because the Court grants summary judgment on the basis of failure to exhaust, the Court declines to address Defendants' alternative arguments.

V. CONCLUSION

Accordingly, it is hereby:

ORDERED, that Defendants' motion for summary judgment (Dkt. No. 93) is **GRANTED** because of Plaintiff's failure to exhaust administrative remedies; and it is further

ORDERED, that the Clerk close this action; and it is further

ORDERED, that the Clerk serve a copy of this Memorandum-Decision and Order on all parties in accordance with the Local Rules.

IT IS SO ORDERED.

DATED: January 20, 2023
Albany, New York

LAWRENCE E. KAHN
United States District Judge