

**UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
CALIFORNIA**

Garcia v. Allison

Garcia · No. 2:22-cv-1051 DC CKD P · Decided April 22, 2025

OPINION

1 2 3 4 5 6 7 8 UNITED STATES DISTRICT COURT 9 FOR THE EASTERN DISTRICT OF
CALIFORNIA 10 11 MICHAEL LUCIEN GARCIA, No. 2:22-cv-1051 DC CKD P 12 Plaintiff,
13 v. FINDINGS AND RECOMMENDATIONS 14 KATHLEEN ALLISON, et al., 15
Defendants. 16 17 Plaintiff is a California prisoner proceeding pro se with an action for violation
of civil 18 rights under 42 U.S.C. § 1983.

This action proceeds on a claim for use of excessive force in 19 violation of the Eighth
Amendment against defendant Kurgan. Specifically, plaintiff alleges that 20 Kurgan dragged
plaintiff by his injured right ankle. Defendant Kurgan moves for summary 21 judgment arguing
that plaintiff did not exhaust available administrative remedies prior to filing 22 suit.

Good cause appearing, the court recommends that the motion be granted. 23 I. Standards 24
Summary judgment is appropriate when it is demonstrated that there “is no genuine 25 dispute as
to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. 26 Civ. P.
56(a). A party asserting that a fact cannot be disputed must support the assertion by 27 “citing to
particular parts of materials in the record, including depositions, documents, 28 electronically
stored information, affidavits or declarations, stipulations (including those made for 1 purposes of
the motion only), admissions, interrogatory answers, or other materials...” Fed.

R. 2 Civ. P. 56(c)(1)(A). 3 Summary judgment should be entered, after adequate time for
discovery and upon motion, 4 against a party who fails to make a showing sufficient to establish
the existence of an element 5 essential to that party’s case, and on which that party will bear the
burden of proof at trial. See 6 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). “[A] complete
failure of proof concerning an 7 essential element of the nonmoving party’s case necessarily
renders all other facts immaterial.” 8 *Id.* 9 If the moving party meets its initial responsibility, the
burden then shifts to the opposing 10 party to establish that a genuine issue as to any material fact
actually does exist.

See *Matsushita 11 Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In attempting
to establish the 12 existence of this factual dispute, the opposing party may not rely upon the
allegations or denials 13 of their pleadings but is required to tender evidence of specific facts in
the form of affidavits, 14 and/or admissible discovery material, in support of its contention that the

dispute exists or show 15 that the materials cited by the movant do not establish the absence of a genuine dispute.

See Fed. 16 R. Civ. P. 56(c); Matsushita, 475 U.S. at 586 n.11. The opposing party must demonstrate that the 17 fact in contention is material, i.e., a fact that might affect the outcome of the suit under the 18 governing law, see *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir.

1987), and that the dispute is 20 genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving 21 party, see *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1436 (9th Cir. 1987). 22 In the endeavor to establish the existence of a factual dispute, the opposing party need not 23 establish a material issue of fact conclusively in its favor.

It is sufficient that “the claimed factual 24 dispute be shown to require a jury or judge to resolve the parties’ differing versions of the truth at 25 trial.” *T.W. Elec. Serv.*, 809 F.2d at 631. Thus, the “purpose of summary judgment is to ‘pierce 26 the pleadings and to assess the proof in order to see whether there is a genuine need for trial.’” 27 *Matsushita*, 475 U.S. at 587 (quoting Fed.

R. Civ. P. 56(e) advisory committee’s note on 1963 28 amendments). 1 In resolving the summary judgment motion, the evidence of the opposing party is to be 2 believed. See *Anderson*, 477 U.S. at 255. All reasonable inferences that may be drawn from the 3 facts placed before the court must be drawn in favor of the opposing party. See *Matsushita*, 475 4 U.S. at 587.

Nevertheless, inferences are not drawn out of the air, and it is the opposing party’s 5 obligation to produce a factual predicate from which the inference may be drawn. See *Richards v. Nielsen Freight Lines*, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), *aff’d*, 810 F.2d 898, 902 7 (9th Cir. 1987).

Finally, to demonstrate a genuine issue, the opposing party “must do more than 8 simply show that there is some metaphysical doubt as to the material facts.... Where the record 9 taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 10 ‘genuine issue for trial.’” *Matsushita*, 475 U.S. at 587 (citation omitted).

11 Section 1997(e)(a) of Title 42 of the United States Code provides that “[n]o action shall be 12 brought with respect to prison conditions under section 1983 of this title, or any other Federal 13 law, by a prisoner confined in any jail, prison, or other correctional facility until such 14 administrative remedies as are available are exhausted.” The exhaustion requirement demands 15 “proper” exhaustion.

Woodford v. Ngo, 548 U.S. 81, 90-91 (2006). In order to “properly 16 exhaust” administrative remedies, the prisoner must generally comply with department procedural 17 rules, including deadlines, throughout the administrative process. *Jones v. Bock*, 549 U.S. 199, 18 218 (2006);

Woodford, 548 U.S. at 90-91. 19 At the time of the incidents at issue in this case, administrative procedures with respect to 20 claims brought in this court by California Department of Corrections and Rehabilitation inmates 21 are exhausted once the second level of review is complete.

The second level of review is 22 conducted by the California Department of Corrections and Rehabilitation Office of Appeals in 23 Sacramento. Cal. Code Regs. tit. 15, §§ 3481-85. 24 II. Analysis 25 Defendant points to evidence indicating plaintiff submitted a grievance as to defendant's 26 dragging plaintiff by plaintiff's ankle on August 6, 2021, the same day the incident allegedly 27 occurred.

ECF 54-3 at 19-20. Plaintiff also alleged defendant tried to drag him upstairs, slam 28 him to the ground and punched plaintiff on the head and face. Id. On September 3, 2021, the 1 grievance was "disapproved." Id. at 23. Plaintiff received a copy of the decision on September 8, 2 2021. ECF No. 54-4 at 25. 3 Plaintiff appealed the decision to the Office of Appeals on October 10, 2021.

Id. at 15-16. 4 The appeal was rejected by the Office of Appeals on November 25, 2021, as untimely. Id. at 25. 5 Appeals to the second level must be submitted within 30 days. Cal. Code Regs. tit 15, § 3485(a). 6 In his opposition to defendant's motion, plaintiff asserts he turned in his appeal on 7 October 7, 2021, which rendered it timely. There are two problems with this assertion.

First, his 8 opposition is not made under the penalty of perjury, so the court cannot consider anything therein 9 as evidence. See Johnson v. Sandy, 2015 WL 1894400, at *1 (E.D. Cal. April 24, 2015) 10 (representations not signed under penalty of perjury should not be examined in determining 11 summary judgment) (citing 28 U.S.C. § 1746).

Second, plaintiff fails to explain how it is that he 12 dated his appeal October 10, 2021, yet submitted it on October 7, 2021. 13 Plaintiff makes other assertions of fact in his opposition which the court does not consider. 14 Even if the court were to accept the representations as true (other than plaintiff's representation as 15 to when he submitted his appeal), plaintiff does not point to anything excusing his failure to file a 16 timely appeal or that the appeal process was not available to him.

17 III. Conclusion 18 There is no genuine issue of material fact before the court as to whether plaintiff properly 19 exhausted all administrative remedies available to him with respect to his remaining Eighth 20 Amendment claim.

Accordingly, the court will recommend that defendant's motion for summary 21 judgment be granted and that this case be closed. 22 Accordingly, IT IS HEREBY RECOMMENDED that 23 1. Defendant Kurgan's motion for summary judgment, ECF No. 54, be GRANTED; and 24 2. This case be closed. 25 These findings and recommendations are submitted to the United States District Judge 26 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l).

Within fourteen days 27 after being served with these findings and recommendations, any party may file written 28 objections with the court and serve a copy on all parties. Such a document should be captioned 1 | “Objections to Magistrate Judge’s Findings and Recommendations.” Any response to the 2 || objections shall be served and filed within fourteen days after service of the objections.

The 3 || parties are advised that failure to file objections within the specified time may waive the right to 4 | appeal the District Court’s order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991). 5 | Dated: April 22, 2025 Card ft 4 LA g. ae 6 CAROLYN K DELANEY? 7 UNITED STATES MAGISTRATE JUDGE 8 9 10 garcl051.msg.fte 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28