

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-02203-RM-KLM

SALVADOR MAGLUTA,

Plaintiff,

V.

CHARLES DANIELS, Former Warden, FCC Florence, in his individual and official capacities;
DAVID ALLRED, DO, Former Clinical Director, FCC Florence, in his individual and official capacities;
GEORGE SANTINI, MD, Clinical Director, FCC Florence, in his individual and official capacities;
LISA McDERMOTT, Assistant Health Services Administrator, FCC Florence, in her individual and official capacities;
TERESA NEHLS, Former Nurse Practitioner, FCC Florence, in her individual and official capacities;
NIXON ROBERTS, DDS, Dentist, FCC Florence, in his individual and official capacities; and
JOHN DOE #1 – 15, Unknown Staff, FCC Florence, in their individual and official capacities;

Defendants.

**MOTION PURUSANT TO FED. R. CIV. P. 56(d) TO ALLOW PLAINTIFF TIME TO
TAKE DISCOVERY ON ISSUES RELATED TO DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT**

Salvador Magluta, through his counsel Adam Frank and Faisal Salahuddin of FRANK & SALAHUDDIN LLC, hereby respectfully requests that, pursuant to Fed. R. Civ. P. 56(d), this Court allow Plaintiff time to take discovery on issues related to Defendants' motion for partial summary judgment [#54] before filing a response to that motion. As this is a motion under Rule 56 but is not a motion for summary judgment, in an abundance of caution Plaintiff has conferred with opposing counsel concerning this motion pursuant to D.C.COLO.L.Civ.R. 7.1. Opposing counsel objects to this motion. As grounds for this motion, Plaintiff states the following:

INTRODUCTION

Plaintiff has filed a motion for leave to amend his complaint [#69]. If this motion is granted, Defendants' motion for partial summary judgment should be denied as moot. *Crumpton v. Finnin*, Nos. 05-cv-00653-MSK-PAC, 05-cv-02343-MSK-PAC, 05-cv-02555-MSK-PAC, 2007 U.S. Dist. LEXIS 67151, at *28 (D. Colo. Sep. 11, 2007); *see also Young v. UAW-Labor Empl. & Training Corp.*, 95 F.3d 992, 995-96 (10th Cir. 1996). However, as Plaintiff's motion for leave to amend was opposed, in an abundance of caution Plaintiff files this motion to address Defendants' pending motion for partial summary judgment.

Plaintiff is incarcerated at the Administrative Maximum facility at FCC Florence. Since being retained, counsel has had multiple visits with Plaintiff and has reviewed the documents Plaintiff has in his possession that relate to the exhaustion issues that Defendants raise in their motion for partial summary judgment [#54]. However, as the attached affidavit demonstrates, neither Plaintiff nor his counsel are in possession of certain documents that counsel must have in order to respond to Defendants' motion. In addition, as the attached affidavit further demonstrates, Plaintiff must take depositions of witnesses who possess information related to Defendants' efforts to prevent Plaintiff from exhausting his administrative remedies. For these reasons, Plaintiff moves pursuant to Fed. R. Civ. P. 56(d) that this Court permit him to obtain this necessary information before responding to Defendants' motion.

LEGAL STANDARDS

"The general principle of Rule 56(d) is that summary judgment [should] be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Price v. W. Res., Inc.*, 232 F.3d 779, 783 (10th Cir. 2000) (internal quotation omitted). Under Rule 56(d), the moving party must "provide an affidavit explaining why facts precluding

summary judgment cannot be presented.” *Valley Forge Ins. Co. v. Health Care Mgmt. Ptnrs, LTD.*, 616 F.3d 1086, 1096 (10th Cir. 2010) (internal quotations and brackets omitted). “This includes identifying (1) the probable facts not available, (2) why those facts cannot be presented currently, (3) what steps have been taken to obtain these facts, and (4) how additional time will enable the party to obtain those facts and rebut the motion for summary judgment.” *Id.* (internal quotations and brackets omitted).

When an inmate such as Plaintiff is facing a motion for summary judgment based on a claim by Defendants that Plaintiff failed to exhaust his administrative remedies under the Prison Litigation Reform Act (“PLRA”), 42 U.S.C. §§ 1997e, *et seq.*, Plaintiff may not rely on his own sworn statements to stave off summary judgment. *Conaway v. Smith*, 853 F.2d 789, 792 n.4 (10th Cir. 1988) (“[A] nonmoving party may not rely merely on the unsupported or conclusory allegations contained in pleadings to rebut the movant’s factual proof in support of the motion for summary judgment.”); *Radick v. Ippolito*, No. 10-cv-02504-DME-KLM, 2011 U.S. Dist. LEXIS 153899, at *12-13 (D. Colo. June 28, 2011) (“The Court may reject ‘conclusory and self-serving statements [from an] affidavit and pleadings’ that are offered to explain a prisoner’s failure to exhaust. A plaintiff’s ‘conclusory and self-serving statements, even if presented in an affidavit, are insufficient to create a genuine issue of fact to survive summary judgment.’” (quoting *Thomas v. BOP*, 282 F. App’x. 701, 704 (10th Cir. 2008))). As a result, Plaintiff must present documents and testimony from people other than himself in order to demonstrate that he has exhausted his administrative remedies.

Apart from demonstrating that a Plaintiff has exhausted his administrative remedies, a Plaintiff may also defeat a motion for summary judgment grounded in PLRA exhaustion by demonstrating that there is a genuine issue of fact regarding whether administrative remedies were “unavailable” because Defendants attempted to thwart or hinder Plaintiff in his pursuit of his administrative remedies. *Tuckel v. Grover*, 660 F.3d 1249, 1252 (10th Cir. 2011). Under Rule 56(d), a

plaintiff should be allowed discovery to inquire into the existence of such evidence. *Brosh v. Duke*, No. 12-cv-00337-RM-MJW, 2013 U.S. Dist. LEXIS 64340, at *5 (D. Colo. May 6, 2013).

ARGUMENT

I. Facts that Are Necessary for Plaintiff to Respond to Defendants' Motion for Partial Summary Judgment Are Not Available to Plaintiff

Plaintiff cannot respond to Defendants' pending motion for partial summary judgment [#54] without conducting discovery concerning the issues that are the subject of Defendants' motion. Since current lead counsel was retained, counsel has had multiple visits with Plaintiff. Counsel has had the opportunity to review the documents in Plaintiff's possession that relate to his efforts to exhaust his administrative remedies under the PLRA. However, there are documents Plaintiff knows to exist that are not in his possession that Plaintiff must have in order to demonstrate that there is a genuine issue of fact concerning the issues Defendants raise in their motion for partial summary judgment. For example, in certain instances, Defendants did not return exhaustion-related documents to Plaintiff. *See, e.g.*, [#68], p. 5 n.1. Based on such examples – as attested to in the attached affidavit – Plaintiff cannot present facts that are essential to Plaintiff's ability to respond to Defendants' motion. *See* Fed. R. Civ. P. 65(d).

In addition to failing to return documents to Plaintiff, Defendants and their agents and John Doe Co-Defendants have engaged in a willful campaign designed to trick and mislead Plaintiff into failing to exhaust his administrative remedies. They have improperly rejected Plaintiff's Administrative Remedies, refused to docket Plaintiff's Administrative Remedies in a timely fashion, engaged in administrative trickery designed to make it appear that Plaintiff had missed deadlines, and have repeatedly delayed resolution of the Administrative Remedies. By way of example:

- Administrative Remedy (“AR”) 728409 – filed on March 29, 2013, improperly rejected.
- AR 730350 – Filed April 15, 2013, Defendants delayed nine months in their responses.

- AR 732615 – Filed April 30, 2013, Defendants delayed 25 months in their responses.
- AR 737155 – Filed June 5, 2013, improperly rejected.
- AR 738346 – Filed June 14, 2013, Defendants delayed four months in their responses.
- AR 746609 – Filed August 19, 2013, Defendants delayed 20 months in their responses.
- AR 746610 – Filed August 19, 2013, Defendants delayed 14 months in their responses. Defendants delayed docketing Plaintiff's second-level AR for ten days, and delayed giving Plaintiff their response to Plaintiff's second-level AR for 40 days. *See* [#68-3].
- AR 779284 – Filed May 5, 2014, still pending.
- AR 789015 – Filed July 28, 2014, Defendants delayed 11 months in their responses.
- AR 793416 – Filed August 29, 2014, still pending.
- AR 795894 – Filed September 16, 2014, still pending.
- AR 799224 – Filed October 20, 2014, still pending.
- AR 800147 – Filed October 24, 2014, Defendants delayed 11 months in their responses.
- AR 803416 – Filed December 1, 2014, Defendants delayed 5 months in their responses.
- AR 806117 – Filed December 24, 2014, still pending.
- AR 821970 – Filed May 20, 2015, still pending.
- AR 821971 – Filed May 20, 2015, still pending.
- AR 824675 – Filed June 11, 2015, still pending.
- AR 828058 – Filed July 7, 2015, still pending.
- AR 831481 – Filed July 29, 2015, still pending.
- AR 829489 – Filed August 2, 2015, still pending.
- AR 834627 – Filed August 31, 2015, still pending.
- AR 834891 – Filed September 1, 2015, still pending.

Based on this conduct by Defendants (including John Doe Defendants), Plaintiff must discover the individuals who were responsible for processing his Administrative Remedies and depose them. Plaintiff must learn whether these individuals undertook their unlawful conduct at the behest of any current Defendant. Plaintiff must be permitted to discover facts “concerning attempts to prevent, thwart, or hinder a prisoner from availing himself of an administrative remedy” as such facts “may be relevant to a determination of whether the prisoner exhausted his remedies.” *Brush*, 2013 U.S. Dist. LEXIS 64340, at *5. None of these facts are presently available to Plaintiff.

II. Plaintiff Cannot Currently Present Necessary Facts Because they Are Solely Within the Control of Defendants

Certain facts Plaintiff needs in order to address Defendants’ motion for partial summary judgment are wholly within the control of Defendants. Plaintiff had no control over Defendants’

failure to return Administrative Remedy forms to him. Plaintiff also has no ability to see into the thought processes of Defendants and their John Doe Co-Defendants concerning why they have (1) engaged in their willful campaign to try to trick and mislead Plaintiff into failing to exhaust his administrative remedies, (2) improperly rejected Plaintiff's Administrative Remedies, (3) refused to docket Plaintiff's Administrative Remedies in a timely fashion, (4) engaged in administrative trickery designed to make it appear that Plaintiff had missed deadlines, and (5) repeatedly delayed resolution of Plaintiff's Administrative Remedies. However, in order to prevail against Defendants' pending motion for partial summary judgment, he needs to be permitted to discover these facts.

III. Plaintiff Has Conferred with Opposing Counsel Concerning Plaintiff's Request for Discovery of These Facts and Has Been Rebuffed

Plaintiff has informed counsel for Defendants the documents and discovery that are within Defendants' control that Plaintiff believes he needs in order to respond to Defendants' motion for partial summary judgment. Defendants' counsel has informed Plaintiff that Defendants object to Plaintiff's request to engage in this discovery. As the facts Plaintiff needs are wholly within the control of Defendants, Plaintiff has no method to gain access to these facts other than this motion.

IV. Three Months of Discovery Will Allow Plaintiff Enough Time to Gain Access to the Documents Plaintiff Needs, to Learn the Identities of the Witnesses who Handled Plaintiff's Administrative Remedies, and to Depose Those Witnesses

If Plaintiff is permitted to engage in discovery pursuant to this motion, Plaintiff believes that – barring obstruction by the Defendants – he can learn the information he needs in order to respond to Defendants' motion for partial summary judgment within three months of this Court's order granting this motion. First, Plaintiff will need document discovery concerning the administrative remedies Plaintiff has filed since he arrived at FCC Florence. While Plaintiff either received a copy of many of these documents when he filed them or had a copy returned to him, there are relevant documents where Plaintiff was given no copy. Plaintiff will also need document discovery concerning when staff at FCC Florence received Plaintiff's Administrative Remedies, as

well as when these staff members entered Plaintiff's Administrative Remedies into their internal tracking system. Plaintiff will need to be informed who these staff members were, and Plaintiff will then need time to depose these staff members. Plaintiff will need document discovery concerning the processing of his Administrative Remedies to address how they became the subject of such extensive delays. He will then need to be informed which staff members were responsible for these delays and be permitted time to depose the relevant witnesses. Assuming Defendants comply with Plaintiff's discovery requests in a timely fashion and make the relevant witnesses available for depositions, Plaintiff believes he can accomplish the needed discovery in three months.

V. District of Colorado Precedent from Judge Moore Holds that Plaintiff Should Be Allowed to Conduct the Discovery He Requests

The above argument and attached affidavit demonstrate that, under the law of the District of Colorado, Plaintiff should be permitted to engage in discovery related to Defendants' motion for partial summary judgment before being required to respond to Defendants' motion. Just as in a prior case in front of Judge Moore where a plaintiff was permitted discovery on issues related to exhaustion on a Rule 56(d) motion:

The additional facts sought by plaintiffs include, among other things, information as to any threats or attempts by CDOC personnel to prevent [plaintiff] from exhausting his administrative remedies. Accordingly, the additional discovery may serve to rebut defendant's allegations of no genuine issue of fact. Further, it is possible that the additional witnesses plaintiffs seek to depose have information plaintiffs do not possess, e.g., they have knowledge of actions taken to thwart [plaintiff] from exhausting his remedies, while [plaintiff] is not personally aware of those actions. The court finds that plaintiffs' affidavit establishes why these facts cannot be currently presented, the steps taken to obtain them, and how additional time will help obtain these facts.

Id. at *5-6 (internal citations and quotations omitted). Under the four corners of this precedent, Plaintiff should be permitted to engage in discovery to discover the facts he needs in order to respond to Defendants' motion for partial summary judgment.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests, pursuant to Fed. R. Civ. P. 56(d), that this Court allow Plaintiff time to take discovery related to Defendants' motion for partial summary judgment, or that this Court deny Defendants' motion.

Respectfully submitted, September 14, 2016.

FRANK & SALAHUDDIN LLC

s/ Adam Frank _____

Adam Frank

Faisal Salahuddin

1741 High Street

Denver, CO 80218

(303) 974-1084

adam@fas-law.com

faisal@fas-law.com

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. I further certify that a copy of the foregoing was served via electronic mail through the CM/ECF system, addressed to the following:

Mark Pestal, Esq.
Mark.pestal@usdoj.gov

Paul D. Petruzzi, Esq.
Petruzzi-law@msn.com

s/ Adam Frank

FRANK & SALAHUDDIN LLC

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-02203-RM-KLM

SALVADOR MAGLUTA,

Plaintiff,

V.

CHARLES DANIELS, Former Warden, FCC Florence, in his individual and official capacities;
DAVID ALLRED, DO, Former Clinical Director, FCC Florence, in his individual and official capacities;
GEORGE SANTINI, MD, Clinical Director, FCC Florence, in his individual and official capacities;
LISA McDERMOTT, Assistant Health Services Administrator, FCC Florence, in her individual and official capacities;
TERESA NEHLS, Former Nurse Practitioner, FCC Florence, in her individual and official capacities;
NIXON ROBERTS, DDS, Dentist, FCC Florence, in his individual and official capacities; and
JOHN DOE #1 – 15, Unknown Staff, FCC Florence, in their individual and official capacities;

Defendants.

AFFIDAVIT OF FAISAL SALAHUDDIN

I, Faisal Salahuddin, swear and affirm that the following is true to the best of my knowledge:

I have visited with my client, Salvador Magluta, on multiple occasions since my partner and I were retained to represent him in this case. In the course of my visits with Mr. Magluta and through my review of documents in Mr. Magluta's possession related to his efforts to exhaust Administrative Remedies related to the allegations in this case, I have come to the conclusions that:

- (1) Mr. Magluta has filed many Administrative Remedies that relate to the allegations at issue in this case, as well as appeals of the denials of his Administrative Remedies.

- (2) Filing an Administrative Remedy or an appeal each involved Mr. Magluta giving a staff member at FCC Florence a document detailing the issue about which Mr. Magluta sought a remedy.
- (3) While Mr. Magluta does not know for sure what the staff members who took these documents from Mr. Magluta did with them, the last time Mr. Magluta saw these documents was in the possession of various staff members at FCC Florence.
- (4) There therefore exist documents that Mr. Magluta does not possess that he last saw in the possession of FCC Florence staff members that are directly relevant to Mr. Magluta's efforts to exhaust his Administrative Remedies related to this case.

In addition to the issues surrounding Administrative Remedy documents that were not given to Mr. Magluta, I have reviewed documentation that leads me to believe that staff members at FCC Florence undertook efforts to prevent Mr. Magluta from successfully exhausting his Administrative Remedies related to the allegations in this case. If Mr. Magluta is permitted to discover the names of the John Doe Defendants who undertook these actions and then depose them, he will learn:

- (1) What steps each individual staff member who handled Mr. Magluta's Administrative Remedies took to prevent, thwart, or hinder Mr. Magluta from successfully exhausting them.
- (2) Why and at whose direction these staff members delayed resolving Mr. Magluta's administrative remedies for unreasonably long periods of time.
- (3) What testimony exists apart from Mr. Magluta's own statements regarding attempts Mr. Magluta made to try to seek resolution of his Administrative Remedies that were not documented on paper by these staff members.

To properly respond to Defendants' pending motion for partial summary judgment, Plaintiff will need document discovery concerning the administrative remedies Plaintiff has filed since he arrived at FCC Florence. Plaintiff will also need document discovery concerning when staff at FCC Florence received Plaintiff's Administrative Remedies, as well as when these staff members entered Plaintiff's Administrative Remedies into their internal tracking system. Plaintiff will need to be informed who these staff members were, and Plaintiff will then need time to depose these staff members. Plaintiff will need document discovery concerning the processing of his Administrative Remedies to address how they became the subject of such extensive delays. He will then need to be informed of which staff members were responsible for these delays and be permitted time to depose the relevant witnesses.

Without these pieces of information, Plaintiff is at a significant disadvantage and is substantially hindered in his ability to respond to the Defendants' pending motion for partial summary judgment. These pieces of information are wholly within the control of the Defendants. Plaintiff thus has no way to access this information other than through discovery.

If my co-counsel and I are permitted three months to conduct discovery, so long as Defendants cooperate with our requests, I believe we will be able to learn the facts we need to allow Plaintiff to respond to the Defendants' pending motion for partial summary judgment.

Respectfully submitted, September 14, 2016.

FRANK & SALAHUDDIN LLC

s/ Faisal Salahuddin

Faisal Salahuddin
1741 High Street
Denver, CO 80218

(303) 974-1084

faisal@fas-law.com

ATTORNEY FOR PLAINTIFF