

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

ERIC PAUL CLARK,	:	
Plaintiff	:	
	:	
v.	:	CIVIL NO. 3:CV-07-1263
	:	
	:	(Judge Conaboy)
COMMONWEALTH OF PENNSYLVANIA,	:	
ET AL.,	:	
Defendants	:	

MEMORANDUM
Background

This *pro se* civil rights action pursuant to 42 U.S.C. § 1983 was filed by Eric Paul Clark, an inmate presently confined at the State Correctional Institution, Frackville, Pennsylvania (SCI-Frackville).

By Memorandum and Order dated August 19, 2008, this Court granted a motion to dismiss filed by Defendants Commonwealth of Pennsylvania and SCI-Frackville Food Service Manager Lawrence Stritz. Remaining Defendant is Miguel Solomon, M.D., who is identified as being a member of the SCI-Frackville Medical Department.¹

In his Complaint, Plaintiff states that at the time he entered prison, he was "healthy as could be." Doc. 1, ¶ IV(1). However, Clark alleges that he developed a lump on his left

¹ It is presently undisputed that Doctor Solomon provided medical care to Clark at SCI-Frackville.

hand, purportedly as a result of drinking juice made from packets containing sodium saccharin which were served to the inmate population.² Upon developing the lump, Plaintiff went to Doctor Solomon and requested the taking of an ultrasound. Although Solomon allegedly agreed to order an ultrasound, the physician instead directed that an x-ray be taken. *See id.* at (2)&(3). The results of the x-ray simply confirmed that Clark's left hand was not fractured.

His Complaint next claims that he also discovered a lump on his right testicle. He acknowledges that Doctor Solomon ordered the taking of a urine sample and an ultrasound. When those tests were performed, Plaintiff was allegedly advised that he would get the results in about two (2) weeks. Despite having made multiple requests as to the outcome of those tests, at the time his present Complaint was filed (approximately five weeks after the ultrasound was performed), Plaintiff asserts that he had still not been advised of those test results.³

Presently pending is Doctor Solomon's motion to dismiss.

² According to the Complaint, saccharin is a known carcinogen.

³ One day after his Complaint was filed, Clark submitted a letter to the Court stating that based upon the results of the ultrasound of his testicle, he was diagnosed as having "two right epididymis cyst [sic]" with "satisfactory color." Doc. 3, p. 2.

It is also noted that various letters subsequently filed by Plaintiff assert that he also suffers from seizures, cataracts, mental illness (which is controlled) and has metal in his right elbow. However, his Complaint raises no claims against Doctor Solomon with respect to those alleged medical problems.

See Doc. 25. A review of the docket shows that Clark has not submitted an opposing brief nor sought an enlargement of time in which to do so. The unopposed motion is ripe for consideration.⁴

Discussion

Defendant Solomon argues that he is entitled to an entry of dismissal because: (1) Plaintiff failed to exhaust his available administrative remedies; (2) the Complaint fails to identify the existence of a serious medical need; (3) Plaintiff has not set forth a viable claim of deliberate indifference; and (4) the Complaint at best asserts a claim of medical negligence which is not actionable under § 1983.

Standard of Review

A court, in rendering a decision on a motion to dismiss, must accept the veracity of the plaintiff's allegations. See White v. Napoleon, 897 F.2d 103, 106 (3d Cir. 1990). In Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996), the Court of Appeals for the Third Circuit added that when considering a motion to dismiss based on a failure to state a claim argument, a court

⁴ In an informal response to Commonwealth Defendants' motion to dismiss, Plaintiff asked that Defendant Stritz be charged with perjury because Clark "never complained of having ever contracted cancer" and is only alleging that he **may** have some form of cancer because his two cysts have not been removed and biopsied. Doc. 29, p. 1 (emphasis added).

However, Plaintiff has not responded in any manner to the pending motion to dismiss.

should "not inquire whether the plaintiffs will ultimately prevail, only whether they are entitled to offer evidence to support their claims." "[W]hen a complaint adequately states a claim, it may not be dismissed on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder." Bell Atlantic v. Twombly, 127 S.Ct. 1955, 1969 (2007).

"The test in reviewing a motion to dismiss for failure to state a claim is whether, under any reasonable reading of the pleadings, plaintiff may be entitled to relief." Holder v. City of Allentown, 987 F.2d 188, 194 (3d Cir. 1993) (citation omitted). Additionally, a court must "accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn from them." Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990); Independent Enters., Inc. v. Pittsburgh Water & Sewer Auth., 103 F.3d 1165, 1168 (3d Cir. 1997). Finally, it is additionally well-settled that *pro se* complaints should be liberally construed. See Haines v. Kerner, 404 U.S. 519, 520 (1972). This Court will now discuss Doctor Solomon's motion in light of the standards set forth above and Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Administrative Exhaustion

Doctor Solomon maintains that he is entitled to entry of dismissal because Plaintiff acknowledges in his Complaint that

the has not filed a grievance concerning the facts relating to his present claims.

42 U.S.C. § 1997e(a) provides as follows:

No action shall be brought with respect to prison conditions under Section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

Section 1997e(a) requires administrative exhaustion "irrespective of the forms of relief sought and offered through administrative avenues." Porter v. Nussle, 122 S.Ct. 983, 992 (2002); Booth v. Churner, 532 U.S. 731, 741 n. 6 (2001). Claims for monetary relief are not excused from the exhaustion requirement. Nyhuis v. Reno, 204 F.3d 65, 74 (3d Cir. 2000). Dismissal of an inmate's claim is appropriate when a prisoner has failed to exhaust his available administrative remedies before bringing a civil rights action. Ahmed v. Sromovski, 103 F. Supp. 2d 838, 843 (E.D. Pa. 2000). "[E]xhaustion must occur prior to filing suit, not while the suit is pending." Tribe v. Harvey, 248 F.3d 1152, 2000 WL 167468, *2 (6th Cir. 2000) (citing Freeman v. Francis, 196 F.3d 641, 645 (6th Cir. 1999)).

The Court of Appeals for the Third Circuit in Mitchell v. Horn, 318 F.3d 523, 529 (3d Cir. 2003), stated that "[f]ailure to exhaust administrative remedies is an affirmative defense for the defendant to plead." See also Massey v. Helman, 196 F.3d 727, 735

(7th Cir. 2000); Jenkins v. Haubert, 179 F.3d 19, 29 (2d Cir. 1999). Consequently, a prisoner does not have to allege in his complaint that he has exhausted administrative remedies. Ray v. Kertes, 285 F.3d 287 (3d Cir. 2002). Rather, it is the burden of a defendant asserting the defense to plead and prove it. *Id.*; Williams v. Runyon, 130 F.3d 568, 573 (3d Cir. 1997); Charpentier v. Godsil, 937 F.2d 859 (3d Cir. 1991); Fed. R. Civ. P. 8(c)).

Pennsylvania's Department of Corrections ("DOC") has a Consolidated Inmate Grievance Review System. DC-ADM 804 (effective January 1, 2001). With exception of allegations related to the issuance of misconduct charges, DC-ADM 804, Section VI ("Procedures") provides that, after attempted informal resolution of the problem, a written grievance may be submitted to the Grievance Coordinator; an appeal from the Coordinator's decision may be made in writing to the Facility Manager; and a final written appeal may be presented to the Secretary's Office of Inmate Grievances and Appeals.

A prisoner, in seeking review through the grievance system, may include requests for "compensation or other legal relief normally available from a court." (DC-ADM 804-4, issued April 29, 1998.) Furthermore, [g]rievances must be submitted for initial review to the Grievance Coordinator within fifteen (15) days after the events upon which the claims are based, but allowances of extensions of time for good cause, "will normally be granted if the events complained of would state a claim of a violation of a

federal right." *Id.* An inmate may appeal the initial review decision to the Facility Manager within ten (10) working days of receipt of the initial review decision. A request for final review by the Secretary's Office of Inmate Grievances and Appeals must be submitted within fifteen (15) days of receipt of the Facility Manager's decision.

Doctor Solomon states that it is "clear and undisputed from Clark's Complaint" that he has not initiated an administrative grievance with respect to his present claims prior to filing this action. See Doc. 26, p. 6. Therefore, since Plaintiff admits that he has not filed any grievances "let alone exhausted the available administrative remedies," entry of dismissal is appropriate. *Id.*

Based upon a review of the Complaint, Plaintiff clearly admits that he has not filed a grievance concerning the facts relating to this Complaint. See Doc. 1, ¶ II(B). Correspondence filed by Plaintiff indicates that he has filed at least two sick call requests. See Docs. 3, 6, & 14. However, those submissions clearly do not establish that Plaintiff has administratively exhausted a grievance in accordance with DOC procedures.

Accordingly, since the Complaint itself acknowledges that an administrative grievance has not been filed regarding the pending claims, Remaining Defendant Solomon has satisfied his burden under Williams and Charpentier of showing that Clark's present claims are unexhausted. Second, in light of Plaintiff's failure to oppose the motion to dismiss, he has not countered the admission made in his

Complaint or made any showing that he should be excused from exhaustion.

In conclusion, the non-exhaustion argument will be granted with respect to Doctor Solomon. Clark's allegations against Defendant Solomon will be dismissed for non-exhaustion.⁵ An appropriate Order will enter.

S/Richard P. Conaboy
RICHARD P. CONABOY
United States District Judge

DATED: AUGUST 28, 2008

⁵ In light of the Court's determination, discussion of Defendant Solomon's remaining arguments for dismissal is not necessary.

UNITED STATES DISTRICT COURT
FOR THE
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ERIC PAUL CLARK, :
Plaintiff :
 :
v. : CIVIL NO. 3:CV-07-1263
 :
 : (Judge Conaboy)
COMMONWEALTH OF PENNSYLVANIA, :
ET AL., :
Defendants :

ORDER

AND NOW, THIS 28th DAY OF AUGUST, 2008, in accordance with
the accompanying Memorandum, IT IS HEREBY ORDERED THAT:

1. Defendant Miguel Solomon, M.D.'s unopposed motion to dismiss (Doc. 25) is granted.
2. Dismissal is entered in favor of Remaining Defendant Doctor Solomon.
3. The Clerk of Court is directed to close the case.
4. Any appeal from this Order will be deemed frivolous, without probable cause, and not taken in good faith.

S/Richard P. Conaboy
RICHARD P. CONABOY
United States District Judge