UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LAWRENCE PELLETIER,	:	
Plaintiff,	:	
v.	:	CIV. NO. 3:99 CV 1559 (AHN)
JOHN J. ARMSTRONG, et al	:	
Defendants.	:	

RECOMMENDED RULING ON DEFENDANTS' MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

I. Introduction

Plaintiff filed this civil rights action against defendants pursuant to 42 U.S.C. §§ 1983 and U.S. Const. amend. VIII and XIV, alleging violations of plaintiff's right to be free from cruel and unusual punishment and his right to substantive due process. Plaintiff's claims arise from the defendants' alleged denial of adequate medical treatment to plaintiff for hemochromatosis and hepatitis C. Defendants move to dismiss or for summary judgment on the grounds that plaintiff failed to exhaust his administrative remedies under the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a). [See Def.s' Mem. (doc. #62) at 1.] Plaintiff objects on the grounds that issues arising from or related to health

care service diagnosis and treatment are "non-grievable," rendering the exhaustion requirement inapplicable to his case. [See Pl.'s Opp. (doc # 70) (unpaginated).] Defendants' motion **[doc #61]** is **denied** for the reasons stated herein.

II. Facts

The plaintiff, Lawrence Pelletier, was an inmate in the custody of the Connecticut Department of Corrections ("DOC") at all times relevant to this complaint. [Pl.'s Third Amended Complaint ("Pl.'s Compl.")(doc # 58) ¶ 3.] Plaintiff filed the instant action on April 16, 1999. His Third Amended Complaint alleges, inter alia, that defendants were deliberately indifferent to his serious medical illness arising from hemochromatosis and hepatitis C, causing irreparable harm to this liver. [Id. ¶ 1.] Plaintiff alleges that the DOC was on notice of his serious medical conditions after the results of a blood test administered on April 6, 1993 indicated extraordinarily high levels of iron and ferritin in his blood. [Id. ¶ 17.] Plaintiff alleges that despite his repeated complaints and requests, he was not actually diagnosed with hemochromatosis until approximately eight and one half years after his initial blood test. [Id. ¶ 19.] Plaintiff alleges he was diagnosed with hepatitis C around the time of the blood

test in 1993 and that, as of the date of filing of the complaint, he had received nominal treatment for this condition, suffering severe liver damage as a result. [Id. ¶¶ 21,22,33.] Plaintiff alleges that he repeatedly complained to medical staff about his condition in the period between 1994-1999. [Id. ¶ 24.] He filed three official inmate grievance forms on July 19, 2002, October 11, 2002, and October 28, 2002. [Defs.' Local Rule 9(c)(1) Statement of Material Facts Not in Dispute ("Defs.' 9(c)(1) Stmt.")(doc # 63)¶ 8.]

III. Legal Standard

Defendants move to dismiss or for summary judgment pursuant to Rules 12(b) and 56 of the Federal Rules of Civil Procedure. In Torrence v. Pesanti, 239 F. Supp. 2d. 230 (D. Conn. 2003), this court held that failure to exhaust administrative remedies under the PLRA is an affirmative defense, and should not be grounds for dismissal unless it is readily apparent from plaintiff's pleadings or attachments. Id. at 231-232. When the failure to exhaust is suggested, but not unambiguously established in a motion to dismiss, the court should convert the motion to dismiss into a motion for summary judgment and order further briefing and/or evidence. Id. at 232. In this case, defendants move to dismiss and/or

for summary judgment. Both parties have briefed the motion as a motion for summary judgment and have offered evidence accordingly. The court will therefore treat the motion as a motion for summary judgment.

In a motion for summary judgment, the burden is on the moving party to establish that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986); White v. ABCO Engineering Corp., 221 F.3d 293, 300 (2d Cir. 2000). A court must grant summary judgment "'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact . . . .'" Weinstock v. Columbia Univ., 224 F.3d 33, 41 (2d Cir. 2000) (quoting Fed. R. Civ. P. 56(c)). A dispute regarding a material fact is genuine if "'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Konikoff v. Prudential Ins. Co., 234 F.3d 92, 97 (2d Cir. 2000) (quoting Anderson, 477 U.S. at 248). After discovery, if the nonmoving party "has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof," then summary judgment is appropriate.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

Under the PLRA, prisoners must exhaust all available administrative remedies before filing suit in federal court. See Calca v. Keefe, 2001 U.S. Dist. LEXIS 3401 (D. Conn. 2001). The PLRA provides that, "No action shall be brought with respect to prison conditions under...any...Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The Second Circuit has held that where exhaustion is required, failure to do so must result in dismissal, notwithstanding efforts by the inmate-plaintiff to pursue administrative remedies while simultaneously seeking relief in federal court. Neal v. Goord, 267 F.3d 116, 117-118 (2d Cir. 2001). In other words, complete exhaustion of administrative remedies must occur prior to the initiation of the federal suit. Id. at 122.

"A court considering dismissal of a prisoner's complaint for non-exhaustion must first establish from a legally sufficient source that an administrative remedy is applicable and that the particular complaint does not fall within an exception." Mojias v. Johnson, No. 03-0121, 2003 WL 22889706, at *3 (2d Cir. 2003); see also Snider v. Melindez, 199 F.3d 108 at 114 (2d Cir. 1999). In making this determination,

"courts should be careful to look at the applicable set of grievance procedures, whether city, state or federal." Mojias, 2003 WL 22889706, at *3.

IV. Discussion

Plaintiff does not plead exhaustion; rather, he asserts that no administrative remedies were available within the DOC for him to exhaust, rendering the PLRA provisions inapplicable to his case. He contends that his complaint alleges a denial of proper *diagnosis and treatment* for his liver conditions. [See Pl.'s Opp.] Plaintiff argues that according to the plain language of the DOC Administrative Directive ("A.D.") 9.6(6)(B)(6) (effective August 3, 1998), "medical diagnosis and treatment" issues are specifically listed as "non-grievable." [Id.]

Defendants, on the other hand, argue that dismissal is appropriate because there were administrative remedies available to plaintiff, which he failed to exhaust. [See Defs.' Mem. at 3.] Defendants' position is that plaintiff's claims are grievable under A.D. 9.6(6)(A)(5), under the category headed "any other matter related to access to...services, conditions of care...." [Defs.' Mem. at 3.] In the alternative, defendants argue that even if plaintiff's

claim were classified as a "treatment and diagnosis" matter, that such matters are grievable under the inmate grievance procedure, notwithstanding the language to the contrary in the A.D. [Id.] To support this contention, defendants proffer the affidavit of Nurse Schwink stating that:

> The plaintiff is able to file a grievance on treatment and/or diagnosis because many such grievances of this nature are filed by inmates. In general, the inmate grievance forms are available to the inmates within the housing unit, and a fair number of grievances are received concerning diagnosis and treatment. These are generally denied with the remark 'Diagnosis and treatment decisions are not grievable.' In any event, such decisions may be appealed by submitting an appeal to the Health Services Administrator." [Affidavit of Sheryl Schwink,R.N. ("Schwink Aff.") (doc # 64) at ¶ 8.]

Defendants argue that, because plaintiff filed this lawsuit in April 1999 and did not file his first grievance until 2001, he clearly did not meet the exhaustion requirement. Plaintiff does not dispute this description of the procedure, but argues that it demonstrates the opposite, that plaintiff's claim was in fact *not* grievable.

The first issue that the court must resolve is whether plaintiff's claim is properly considered a complaint concerning *medical treatment and diagnosis* or whether it is involves a *complete denial of medical care.* Complete medical

records laying out a chronology of plaintiff's visits to DOC medical staff are not available for review. It is not in dispute, however, that prior to filing this lawsuit in 1999, plaintiff was seen by DOC medical staff about conditions relating to what has now been diagnosed as hepatitis C and hemochromotosis. The court agrees with plaintiff that this lawsuit therefore concerns his *medical diagnosis and treatment* and does not allege a *complete denial of care*. A claim for the complete denial of care might have resulted if plaintiff had alleged that he was never seen by DOC medical staff for his illnesses. In this case, plaintiff did have some access to health services, and it is the adequacy of this treatment that he is contesting. It follows, therefore, that the complaint was not grievable more generally as "condition of care" under A.D. 9.6(6)(A)(5).

Secondly, the court must determine if there was an administrative remedy within the DOC available to plaintiff in April 1999 for complaints about *medical treatment and diagnosis*. Defendants cite Porter v. Nussle, 534 U.S. 516 (2002), and Neal v. Goord, 267 F.3d 116 (2d. Cir. 2001) to support their assertion that plaintiff's claim can be considered a complaint about conditions of confinement and was, therefore, open to exhaustion through administrative

remedies. In Nussle, the Supreme Court held that the exhaustion requirement applies to all lawsuits seeking redress for "prison circumstances and occurrences." Id. at 520. At issue in that case was an alleged incident of excessive force against the plaintiff, which the Court found to be subject to the administrative exhaustion requirement. In Neal, the Second Circuit held that complaints about medical treatment in prison are complaints about "prison conditions", and that available administrative remedies must be exhausted prior to filing suit in federal court. See Neal, 267 F.3d at 119 (citing Lawrence v. Goord, 238 F.3d 182, 185 (2d Cir. 2001)(per curiam)). In Neal, however, the parties did not dispute that the plaintiff had administrative remedies available to him, which he only partially exhausted. In this case, the issue about whether an administrative remedy was in fact available to plaintiff is in dispute. The holdings in neither case mandate a conclusion here that administrative remedies were available to plaintiff under the DOC policy.

The court must next determine whether the DOC has established, based upon a legally sufficient source, that plaintiff had an administrative remedy available to him. A.D. 9.6 states on its face that decisions concerning medical

treatment and diagnosis are "non-grievable." [See A.D. 9.6(6)(B)(6) (August 3, 1998)(appendix to Schwink Aff.).] Defendants have not provided copies of any additional grievance procedures or official written policies concerning a special "health services appeals process" described in Nurse Schwink's affidavit. Instead, defendants present the inconsistent argument that issues concerning treatment and diagnosis are grievable despite contrary language in the A.D., and despite the fact that the grievance forms are routinely returned to prisoners with the note "treatment and diagnosis decision are not grievable."[1] The Schwink affidavit does not demonstrate by a legally sufficient source the existence of an administrative remedy applicable to plaintiff's claim that he was denied proper medical treatment and diagnosis. Based upon the plain language of A.D. 9.6 and the lack of additional evidence establishing the availability of an alternate grievance procedure, the court finds that plaintiff did not have an administrative remedy available to him. His claim, therefore, is not barred by the exhaustion provisions of the PLRA. Accordingly, defendants' motion for summary judgment [doc # 62] is denied.

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[1] The court notes that such a policy is potentially confusing and prejudicial to prisoners attempting to exhaust their administrative remedies prior to filing a federal suit.

V. Conclusion

For the reasons stated above, defendants' motion for summary judgment **[doc # 62]** is **denied.**

Any objection to this recommended ruling must be filed with the Clerk of Court within ten (10) days of its receipt by the parties. Failure to object within ten (10) days will preclude appellate review. See 28 U.S.C. § 636(b)(1); Rules 72, 6(a) and 6(e) of the Federal Rules of Civil Procedure; Rule 2 of the Local Rules for United States Magistrates; Small v. Secretary of HHS, 892 F.2d 15, 16 (2d Cir. 1989).

SO ORDERED at Bridgeport this ____ day of March 2004.

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HOLLY B. FITZSIMMONS
UNITED STATES MAGISTRATE

JUDGE