IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RICHARD RALPH,

Plaintiff,

v.

ALAN ADAMS, Acting Commissioner of the Georgia Department of Corrections, and MICHELLE MARTIN, Warden of Phillips State Prison, in their official capacities,

Defendants.

CIVIL ACTION NO.
1:02-CV-479-JEC

O R D E R

This case is presently before the Court on defendants' Motion to Dismiss [38]. The Court has reviewed the record and the arguments of the parties and, for the reasons set out below, concludes that defendants' Motion to Dismiss should be **DENIED**.

BACKGROUND

This case began its life under the style *Fluellen v. Wetherington*, No. 1:02-CV-479-JEC, and was filed as a purported class action. The would-be class was composed of mentally ill and/or mentally retarded prisoners at Phillips State Prison. These plaintiffs alleged that they were subject to physical, mental, and

AO 72A
(Rev.8/82)

41

sexual abuse, excessive use of force, improper and prolonged placement in administrative and disciplinary segregation, and to an on-going risk of suicide, self-injury, and death. Plaintiffs sought class certification under Federal Rule of Civil Procedure 23(b)(2) for a class consisting of "all individuals whose abilities to cope with the demands of life within the correctional environment are impaired or in need of monitoring due to mental illness and/or mental retardation, who are now or will be in the future incarcerated at Phillips State Prison." (First Amended Compl. [10] at ¶ 17.)

In an Order [32] dated March 21, 2003, the Court determined that the would-be class did not meet all four of the requirements of Rule 23(a) and therefore denied without prejudice plaintiffs' motion for class certification. (Order [32] at 43.) The Court stated that it would maintain, as a single case, the action styled *Fluellen, et al. v. Wetherington, et al.*, 1:02-CV-479-JEC, and ordered plaintiff Fluellen to file an amended complaint within thirty days from the date of that Order. (*Id.*) The Court further severed the claims of the remaining twenty plaintiffs and directed them to file individual complaints within thirty days of the date of the Order. (*Id.*) The Court emphasized that the denial of class certification was without prejudice and stated that if the plaintiffs, at some point in the future, developed a more cohesive

class that could meet the requirements of Rule 23, the Court would entertain again a motion for class certification. (*Id.* at 44.)

Plaintiff Lacoya Fluellen subsequently decided to accept a transfer from Phillips State Prison because he feared for his safety there. (Notice of Voluntary Dismissal Pursuant to Fed. R. Civ. P. 41(a) at 2.) Because Phillips officials had informed him that he could not be transferred while his lawsuit was still pending, Fluellen dismissed his action without prejudice, pursuant to Rule 41(a)(1). (*Id.* at 2-3.) On April 9, 2003, this Court therefore entered an Order [35] dismissing without prejudice Fluellen's lawsuit against Jim Wetherington, James DeGroot, Michelle Martin, Cynthia Nelson, Eleanor Brown, and James Brown. The case was terminated the same day.

On April 10, 2003, the Court held a status conference with counsel for all parties present. The purpose of the conference was both to consider a motion for a preliminary injunction that plaintiffs had filed before the dismissal by Fluellen and to determine how best to proceed with the case. The Court noted the awkward procedural posture that had been created because the voluntary dismissal by plaintiff Fluellen meant that there was really no longer any case. (Hearing Tr. at 3.) The Court stated that it would like to have some sort of action started and for the parties to begin discovery. (*Id.* at 23.) The Court noted that a

complaint would need to be filed and that the next step would then be to conduct discovery with regard to the particular complaint. (*Id.* at 24.) The Court therefore instructed plaintiffs' counsel to pick the plaintiff that they wanted to go with and to file an amended complaint "in the next few days." (*Id.* at 28.) The Court stated that discovery would proceed as to that one individual and that any decision on class status would be deferred. (*Id.*)

Plaintiffs' counsel subsequently submitted an amended complaint to the Clerk's Office on July 8, 2003. This complaint has apparently not actually been filed, however, and it does not appear on the docket sheet. Moreover, no discovery appears to have been conducted in the intervening period. Plaintiffs' counsel stated at the conference that they would like to begin discovery as soon as they could. (Hearing Tr. at 31.) The Court stated specifically that it wanted discovery to start. (*Id.* at 33.) The Court's understanding was therefore that the parties would go ahead and conduct a ninety-day discovery period after the filing of the new complaint. (Hearing Minute Sheet [36].) Yet, for reasons unclear to the Court, the amended complaint appears never to have been officially filed, and no discovery has occurred.

Defendants have now filed a motion to dismiss this case based upon the new plaintiff's failure to exhaust his administrative remedies. At the April 10, 2003, conference, the Court noted that

it did not want to get bogged down on the issue of whether the proper grievances had been filed at the prison. (Hearing Tr. at 33.) The Court stated that the defendants might win on the grievance issue at summary judgment, but that it is a summary judgment issue because it is not always obvious at the outset whether someone has filed a grievance or not. (*Id.*) Nonetheless, the Court did tell defense counsel, "As to filing motions to dismiss on things like grievances, you can go ahead and file it up front or you can wait and file it later. ... Whatever you want to do is fine with me." (*Id.* at 34-35.) The Court concluded the conference by denying without prejudice the motion for a preliminary injunction and stating that it would conduct a conference call with counsel after the close of the ninety-day discovery period. (*Id.* at 37.) This call has obviously not taken place, as no discovery has taken place to date.

DISCUSSION

Defendants do not specify under which subsection of Federal Rule of Civil Procedure 12(b) they bring this motion to dismiss. The Court will therefore address the motion under both Rule 12(b)(1) and Rule 12(b)(6).

I. Rule 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) provides for the dismissal of a complaint on the basis of "lack of jurisdiction over

the subject matter." Fed. R. Civ. P. 12(b)(1). In this case, defendants argue that plaintiff's Complaint must be dismissed because he has not exhausted his administrative remedies under 42 U.S.C. § 1997e(a). (Br. in Supp. of Mot. to Dismiss [38] at 4.) The Prison Litigation Reform Act of 1996 (PLRA) provides, in relevant part:

> No action shall be brought with respect to prison conditions under section 1983 of this title, 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.

42 U.S.C. § 1997e(a).

The exhaustion requirement of 42 U.S.C. § 1997e(a) does not limit this Court's subject matter jurisdiction. Though the Eleventh Circuit has not yet decided whether a dismissal under 1997e(a) amounts to a dismissal for failure to state a claim upon which relief may be granted, under Rule 12(b)(6), or for lack of subject matter jurisdiction over the unexhausted claims, under Rule 12(b)(1), it has recognized that "[m]ost courts addressing this issue have decided that § 1997e(a) is not a jurisdictional mandate." *Brown v. Sikes*, 212 F.3d 1205, 1207 n.2 (11th Cir. 2000) (citing *Nyhuis v. Reno*, 204 F.3d 65, 69 n.4 (3d Cir. 2000)). The clear majority of circuit courts that have ruled on the issue have held that section 1997e(a) is not a jurisdictional requirement, such that failure to comply with the section would deprive federal

courts of subject matter jurisdiction. *See Foulk v. Charrier*, 262 F.3d 687, 697 (8th Cir. 2001); *Nyhuis v. Reno*, 204 F.3d 65, 69 n.4 (3d Cir. 2000); *Massey v. Helman*, 196 F.3d 727, 732 (7th Cir. 1999); *Wyatt v. Leonard*, 193 F.3d 876, 879 (6th Cir. 1999); *Rumbles v. Hill*, 182 F.3d 1064, 1068 (9th Cir. 1999), *overruled on other grounds, Booth v. Churner*, 532 U.S. 731 (2001); *Underwood v. Wilson*, 151 F.3d 292, 294-95 (5th Cir. 1998); *Basham v. Uphoff*, No. 98-8013, 1998 WL 847689, at *3 (10th Cir. Dec. 8, 1998) (unpublished decision). This Court will therefore not dismiss plaintiff's claims under Rule 12(b)(1), but will consider defendants' motion to dismiss under Rule 12(b)(6).

II. Rule 12(b)(6)

A. Motion to Dismiss Standard

In deciding a motion to dismiss brought pursuant to Federal Rule of Procedure 12(b)(6), the Court shall not dismiss the complaint for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Motions to dismiss for failure to state a claim will rarely be granted because of the liberal pleading requirements of the federal rules. *Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp., S.A.*, 711 F.2d 989, 995

(11th Cir. 1983). Furthermore, courts must "accept the well pleaded facts as true and resolve them in the light most favorable to the plaintiff." *Beck v. Deloitte & Touche*, 144 F.3d 732, 735 (11th Cir. 1998) (citation omitted). The Eleventh Circuit has stated:

> The purpose of a Rule 12(b)(6) motion is to test the facial sufficiency of the statement of claim for relief. It is read alongside Fed. R. Civ. P. 8(a), which requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." The rule is not designed to strike inartistic pleadings or to provide a more definite statement to answer an apparent ambiguity, and the analysis of a 12(b)(6) motion is limited primarily to the face of the complaint and attachments thereto.

Brooks v. Blue Cross & Blue Shield of Florida, Inc., 116 F.3d 1364, 1368 (11th Cir. 1997) (citing 5 Charles A. Wright & Arthur Miller, Federal Practice and Procedure § 1356 at 590-92 (1969)). Thus, in general, "the threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is exceedingly low." *Quality Foods*, 711 F.2d at 995. Defendants bear the "very high burden" of showing that a plaintiff cannot conceivably prove any set of facts that would entitle him to relief. *Beck*, 144 F.3d at 735-36.

B. Exhaustion of Administrative Remedies

As noted above, defendants argue that plaintiff's Complaint must be dismissed because he has not exhausted his administrative remedies under the PLRA, 42 U.S.C. § 1997e(a). The Supreme Court

has held that the PLRA exhaustion requirement applies to all prisoners seeking redress for prison conditions or occurrences. *Porter v. Nussle*, 534 U.S. 516, 520 (2002). All available remedies must be exhausted, even if those remedies would not meet federal standards, even if the available remedies are not quick or effective, and even when the prisoner seeks relief that may not be available in grievance proceedings. *Id.* at 524. Furthermore, the exhaustion requirement of the PLRA applies to all inmate suits about prison life, no matter the nature of the complaint. *Id.* at 532.

The exhaustion requirement cannot be waived merely because the prisoner believes that pursuing administrative procedures would be futile. *Higginbottom v. Carter*, 223 F.3d 1259, 1261 (11th Cir. 2000) (citation omitted). As Congress has mandated exhaustion in section 1997e(a), courts have no discretion to waive the exhaustion requirement. *Alexander v. Hawk*, 159 F.3d 1321, 1325 (11th Cir. 1998). Further, section 1997e(a)'s requirement that a prisoner exhaust such administrative "remedies" as are available simply acknowledges that not all prisons actually have administrative remedy programs. *Id.* at 1326. If a state penal institution does not have an administrative remedy program to address prison conditions, there would be no "available" administrative remedies to exhaust. Thus, section 1997e(a) would permit these prisoners to

pursue their claims directly in federal court. *Id.* at 1326-27. Nevertheless, if a prison has an internal administrative grievance system through which a prisoner can seek to correct a problem, then the prisoner must utilize that administrative system before filing a claim. *Massey v. Helman*, 196 F.3d 727, 733 (7th Cir. 1999).

Defendant argues that, even if he has not exhausted all of his administrative remedies, the grievance system at Phillips should be construed as being "unavailable" to him, because he is severely mentally impaired due to both mental illness and mental retardation and has great difficulty thinking logically and expressing himself rationally. (Pl.'s Resp. to Defs.' Mot. to Dismiss [39] at 3-4.) Plaintiff asserts that these impairments prevent him from always understanding and complying with the grievance procedure. (*Id.* at 4.) Plaintiff further avers that his grievance counselor told him to stop filing grievances because she cannot understand what he is trying to stay. (*Id.*) More importantly at the moment, however, plaintiff alleges in his Amended Complaint that he has exhausted all of his administrative remedies to the extent that they were available. (Am. Compl. at ¶ 29.) In addition, plaintiff asserts that "he has filed numerous grievances and appeals detailing his fear of assault from other prisoners and from officers describing actual physical and sexual assaults to which he has been victim during the past six - eight months at Phillips State Prison."

(*Id.*) Thus, taking the well pleaded facts as true and resolving them in the light most favorable to the plaintiff, as the Court must do on this motion to dismiss, this paragraph is sufficient to allege exhaustion of administrative remedies and to avoid dismissal. Based on the face of the Amended Complaint, it does not appear beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *See Conley*, 355 U.S. at 45-46.

Defendants attached to their motion to dismiss the record of an exhausted grievance filed by plaintiff in May of 2002. Defendants also attached additional records of five other unexhausted grievances filed by plaintiff over the past eight years. Defendants argue that these records establish that plaintiff has access to the grievance procedure and that he knows how to use it and exhaust his administrative remedies. (Br. in Supp. of Mot. to Dismiss [38] at 2.) "Having filed six grievances with three of them being within the last three years and none of them asserting a safety concern, this Plaintiff can not now complain of a lack of access to the grievance procedure due to invented assertions." (*Id.* at 5.)

Of course, the problem for defendants is that it is not appropriate for the Court to consider this type of evidentiary submission on a Rule 12(b)(6) motion to dismiss. These attached

grievance records clearly constitute "the sort of evidentiary material that is not appropriate at the 12(b)(6) stage." *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1280 (11th Cir. 1999). The Court did not consider these records, as considering these matters outside of the pleading would have converted this Rule 12(b)(6) motion to a motion for summary judgment. *Ware v. Associated Milk Producers, Inc.*, 614 F.2d 413, 414-415 (5th Cir. 1980).[1] The Court has discretion as to whether to accept material beyond the pleading that is offered in association with a 12(b)(6) motion. *Prop. Mgmt. & Invs., Inc. v. Lewis*, 752 F.2d 599, 604 (11th Cir. 1985) (citing *Ware*, 614 F.2d at 415)). If the district court chooses to ignore any supplementary materials outside the pleadings that are filed and determines the motion under the Rule 12(b)(6) standard, the motion to dismiss is not transformed into a motion for summary judgment. *Garita Hotel Ltd. P'ship v. Ponce Fed. Bank*, 958 F.2d 15, 18 (1st Cir. 1992) (citations omitted). This is exactly what the Court has done in this case.

Defendants argue that the records attached to their motion are used only in connection with their jurisdictional challenge, and so the Court could consider these items without converting the motion

---

[1] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business on September 30, 1981.

to dismiss to a motion for summary judgment. (Br. in Supp. of Mot. to Dismiss [38] at 2 n.1.) In support of this argument, defendants cite *Colonial Pipeline Co. v. Collins*, 921 F.2d 1237 (11th Cir. 1991). In that case, the Eleventh Circuit held that, in assessing a motion to dismiss under Rule 12(b)(1), a "district court is not limited to an inquiry into undisputed facts; it may hear conflicting evidence and decide for itself the factual issues that determine jurisdiction." *Id.* at 1243 (citations omitted); *see also Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995) (holding that, when reviewing a factual attack on subject matter jurisdiction under Rule 12(b)(1), a district court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts). As explained above, however, section 1997e(a) of the PLRA is not a jurisdictional requirement, such that failure to comply with its administrative exhaustion mandate would deprive federal courts of subject matter jurisdiction. Defendants thus do not have a cognizable jurisdictional argument and cannot have this case dismissed under Rule 12(b)(1). Thus, it is immaterial that the Court perhaps could have considered the records attached to defendants' motion to dismiss without converting it to a motion for summary judgment under this subsection of the rule. In its consideration of the motion under Rule 12(b)(6), the Court could

not consider matters outside the pleadings without converting the motion to one for summary judgment, and so the Court has not done so.

In sum, defendants' Motion to Dismiss [38] must fail under both Rules 12(b)(1) and 12(b)(6). Defendants have not raised a successful challenge to the jurisdiction of this Court and have further not met their "very high burden" of showing that plaintiff cannot conceivably prove any set of facts that would entitle him to relief. *Beck*, 144 F.3d at 735-36.

CONCLUSION

For the foregoing reasons, the Court **DENIES** defendants' Motion to Dismiss [38]. The Court **DIRECTS** the clerk to file plaintiff's Amended Complaint effective July 8, 2003. The Court further **DIRECTS** the clerk to assign the Amended Complaint a new civil action number and to establish *Richard Ralph v. Alan Adams and Michelle Martin* as a new case. In addition, the Court **ORDERS** the parties to begin discovery as soon as possible. The discovery period shall be ninety days. At the close of this time, the Court will conduct a conference with counsel to determine the status of the case and how best to proceed with regard to class certification or other issues.

SO ORDERED, this 29 day of January, 2004.

JULIE E. CARNES
UNITED STATES DISTRICT JUDGE