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ON
10/31/2023
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

A.B.O. Comix, Kenneth Roberts, Zachary Greenberg, Ruben Gonzalez-Magallanes, Domingo Aguilar, Kevin Prasad, Malti Prasad, and Wumi Oladipo,

Plaintiffs,

v.

County of San Mateo and Christina Corpus, in her official capacity as Sheriff of San Mateo County,

Defendants.

Case No.: 23-CIV-01075

PLAINTIFFS' SUR-REPLY TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

Judge: Hon. V. Raymond Swope
Hearing: December 4, 2023
Time: 2:00 pm
Dept.: 23

Action Filed: March 9, 2023
Trial Date: None Set

ARGUMENT

Plaintiff Zachary Greenberg filed a grievance protesting Defendants' mail policy on or about October 20, 2022. (Declaration of Cara Gagliano in Support of Plaintiffs' Sur-Reply ¶¶ 2–4, Exhibit 1 ("Gagliano Decl.").) Plaintiffs pled as much in their Amended Complaint. (*See* Amended Compl. ("AC") ¶ 82.) Yet Defendants' reply brief attempts to further their baseless administrative exhaustion argument by falsely claiming that he did not and introducing new evidence through a request for judicial notice. (Defs.' MJP Reply 15; Defs.' Supp. RJN 3–4 & Exs. I–KK.) The Court should disregard Defendants' claim that Mr. Greenberg failed to file a grievance and the evidence proffered in support because Defendants' submission is procedurally improper and factually inaccurate. Should the Court consider Defendants' evidence, however, it must also review Mr. Greenberg's grievance that directly refutes Defendants' claim.

At the outset, Defendants' evidentiary submission is inappropriate on a motion for judgment *on the pleadings*. In deciding Defendants' motion, the Court must assume the truth of all factual allegations in the Amended Complaint. (*See Hopp v. City of Los Angeles* (2010) 183 Cal.App.4th 713, 717.) Ignoring this well-settled law, Defendants' reply brief attempts to dispute Plaintiffs' allegation that Mr. Greenberg filed a formal grievance protesting the mail policy, (AC ¶ 82). While the Court may consider certain factual matter that meets the standard for judicial notice, (*Post v. Prati* (1979) 90 Cal.App.3d 626, 633), the grievance forms filed by Defendants fail that test for the reasons set forth in Plaintiffs' Opposition to Defendants' Supplemental Request for Judicial Notice.

Moreover, even if Defendants' factual claim were appropriate at the pleadings stage, it should have been raised in their opening brief. (Code Civ. Proc., § 438; *see Bezirdjian v. O'Reilly* (2010) 183 Cal.App.4th 316, 321 ["Matters which are subject to permissive judicial notice must be specified in the *notice of motion*, the supporting points and authorities, or as the court otherwise permits" (emphasis added)].) Plaintiffs' Amended Complaint unambiguously alleged the existence of Mr. Greenberg's grievance. (AC ¶ 82.) Because Defendants' submission is not responsive to any new allegation or contention made in Plaintiffs' opposition to the Motion for Judgment on the Pleadings, the time for Defendants to submit any evidence challenging the allegation was in their opening brief. (*Golden Door Props., LLC v. Superior Court of San Diego Cnty.* (2020) 53

Cal.App.5th 733, 774 [the only exception to the general rule that "new evidence is not permitted with reply papers" is if the new evidence is "'strictly responsive' to arguments made for the first time in the opposition" (quoting *Singh v. Lipworth* (2005) 132 Cal.App.4th 40, 43, fn. 2)].)

The Court should also disregard Defendants' claim because it is demonstrably false. Mr. Greenberg in fact *did* file a grievance protesting the County's mail policy. (Gagliano Decl. ¶¶ 2–4, Ex. 1.) Exhibit 1 to the accompanying declaration is a scanned copy of a grievance filed by Mr. Greenberg on or about October 20, 2022 ("October 20 grievance") and marked as received by jail staff. Exhibit 1 is the same type of evidence that Defendants argue should be subject to judicial notice. (*See* Defs.' Supp. RJN 3.) In the grievance, Mr. Greenberg describes the mail policy, asserts that the policy's operation violates his rights, withdraws his consent to the policy, and requests that he receive all of his mail directly. (Gagliano Decl. ¶ 4, Ex. 1.) As explained in Plaintiffs' opposition, (Pls.' MJP Opp'n 10), Defendants' exhaustion argument lacks merit because the County prohibits inmates from administratively challenging its mail policy, as the County's own regulations foreclose grievances against "the rules and policies themselves." (Defs.' RJN, Ex. B at § 612.2.) That the County never responded to Mr. Greenberg's grievance—and apparently did not even keep a record of it—reinforces the conclusion that no formal grievance procedure was available for exhaustion purposes.

Because Defendants' assertion that Mr. Greenberg failed to grieve the County's mail policy is both procedurally improper and demonstrably false, the Court should disregard that claim, reject Defendants' exhaustion argument, and deny their Motion for Judgment on the Pleadings. Should the Court consider Defendants' assertion and the evidence Defendants submitted in support, the Court must also review the October 20 grievance.

DATED: October 30, 2023

Respectfully submitted,

/s/ Cara Gagliano

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