

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

September 11, 2018

Elisabeth A. Shumaker
Clerk of Court

VICTOR ANDREW APODACA, SR.,

Plaintiff - Appellant,

v.

GERMAN FRANCO; MICHELLE
BOYER; VINCENT VIGIL; GREGG
MARCANTEL; TISHA ROMERO,

Defendants - Appellees.

No. 18-2007
(D.C. No. 1:15-CV-00061-JAP-LF)
(D. N.M.)

ORDER AND JUDGMENT*

Before **PHILLIPS, McKAY**, and **BALDOCK**, Circuit Judges.

After examining the briefs and the appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). This case is therefore ordered submitted without oral argument.

Plaintiff Victor Apodaca, Sr., a state prisoner proceeding pro se, filed this 42 U.S.C. § 1983 complaint to challenge the allegedly unconstitutional actions of

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

various prison officials and a nurse who worked at the prison. The district court dismissed Plaintiff's claims against the nurse based on *res judicata*, since Plaintiff had raised the same claims against the same nurse in a prior state action. The court dismissed a second defendant from the action because the complaint only mentioned this defendant in passing and did not state any allegations against him. The remaining defendants filed a *Martinez* report and request for summary judgment. *See Martinez v. Aaron*, 570 F.2d 317, 318–19 (10th Cir. 1978). The district court permitted Plaintiff to file an untimely response, with attached exhibits, to the defendants' *Martinez* report due to his alleged difficulties with the prison mail system. Considering all of the documents submitted by both parties, the court then held that all of Plaintiff's claims against the remaining defendants, with one exception, were subject to dismissal for failure to exhaust administrative remedies. The court further held that even if the claims had been properly exhausted, they each failed on the merits because Plaintiff had not submitted or identified evidence that would establish a material dispute of fact as to any of these claims. The court therefore dismissed all of Plaintiff's remaining claims.

After reviewing all of the filings on appeal, the appellate record, and the relevant cases, we are not persuaded that the district court erred in dismissing Plaintiff's claims against each of the defendants named in his complaint. Therefore, for substantially the same reasons given by the district court in its comprehensive rulings, we **AFFIRM** the dismissal of this case. We **GRANT**

Plaintiff's motion to supplement his opening brief and have considered his supplementary materials in ruling on this appeal. We **GRANT** Plaintiff's motion to proceed *in forma pauperis* on appeal but remind him of his obligation to continue making partial payments until the entire filing fee has been paid in full.

Entered for the Court

Monroe G. McKay
Circuit Judge