

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DANIEL WEBB :
 :
 Plaintiff, :
 :
 v. : Case No. 3:11-cv-1557 (RNC)
 :
 JOHN ARMSTRONG, ET AL. :
 :
 Defendants. :

RULING AND ORDER

Plaintiff, an inmate at Northern Correctional Institution, brings this action under 42 U.S.C. § 1983 against current or former employees of the Department of Correction seeking damages for excessive force, deliberate indifference to a serious medical need, retaliation and invasion of privacy.

Pending are cross-motions for partial summary judgment. Since these motions were filed, defendants have moved to modify the scheduling order to permit them to file a supplemental motion for summary judgment based on plaintiff's failure to exhaust administrative remedies. They have also filed a motion for an evidentiary hearing to determine whether his failure to exhaust was justified. Plaintiff opposes both motions on the grounds that defendants have not acted with due diligence and further delay will cause undue prejudice to him.

After considering the parties' submissions, I conclude that defendants should be granted leave to file the proposed supplemental motion for summary judgment. They have pleaded the

defense of failure to exhaust, the defense has not been waived, they indicate that the defense applies to all the claims, their failure to raise the defense as a ground for summary judgment at an earlier stage is excusable, and the delay likely to result from further briefing will not cause undue prejudice to the plaintiff. Whether a hearing is necessary can be determined after the briefing is completed.

Accordingly, the motion to modify the scheduling order (ECF 164) is granted and the motion for a hearing (ECF 165) is denied without prejudice. The pending cross-motions (ECF 124, 128) are denied without prejudice. Defendants will file a new summary judgment motion that incorporates the grounds asserted in the prior motion (ECF 124) and adds exhaustion as a further ground for summary judgment. Plaintiff will file an opposition that addresses all the grounds presented in the new motion. If plaintiff wishes to do so, he may reinstate his motion for partial summary judgment (ECF 124), in which case defendants will file an appropriate response that takes account of their defense based on the alleged failure to exhaust. The parties will confer on a briefing schedule and submit a proposed schedule for consideration by the Court on or before October 16, 2017.

So ordered this 30th day of September 2016.

/s/ RNC
Robert N. Chatigny
United States District Judge