

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

STEVEN NELSON MURRAY,
Appellant,
vs.
THE STATE OF NEVADA; JO GENTRY,
WARDEN; DR. ARANAS; AND SONYA
CLARK CARRILLO,
Respondents.

No. 75837-COA

FILED

DEC 27 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Steven Nelson Murray appeals a district court order dismissing a civil rights action. Eighth Judicial District Court, Clark County; Adriana Escobar, Judge.

Murray, an inmate, filed a civil rights complaint pursuant to 42 U.S.C. § 1983, alleging that respondents violated his First, Eighth, and Fourteenth Amendment rights by retaliating against him after he filed a grievance relating to his dental care, and continued to retaliate against him after he filed several additional grievances. The district court dismissed Murray's complaint for failure to exhaust his administrative remedies, and this appeal followed.

This court reviews a district court's order granting a motion to dismiss de novo. *Munda v. Summerlin Life & Health Ins. Co.*, 127 Nev. 918, 923, 267 P.3d 771, 774 (2011). An order granting a motion to dismiss is rigorously reviewed on appeal with all alleged facts in the complaint presumed true and all inferences drawn in favor of the complainant. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). To proceed with a civil rights action pursuant to 42 U.S.C. § 1983, an inmate must exhaust all available administrative remedies. See 42 U.S.C. § 1997e(a); *Berry v. Feil*, 131 Nev. 339, 341-42, 357 P.3d 344, 345 (Ct.

App. 2015). However, inmates need not exhaust their administrative remedies when the threat of retaliation renders the grievance process effectively unavailable. *See McBride v. Lopez*, 807 F.3d 982, 987 (9th Cir. 2015); *cf. Abarra v. State*, 131 Nev. 20, 23, 342 P.3d 994, 996 (2015).

Here, the district court dismissed Murray's complaint because he failed to exhaust his administrative remedies, but Murray alleged that he was retaliated against for filing his grievances, rendering the grievance process unavailable to him. And the district court's order dismissing the complaint fails to address this argument or its impact on Murray's failure to exhaust his administrative remedies. Thus, based on our review of the record, we conclude that the district court's failure to fully address the arguments presented below in its dismissal order leaves us unable to determine whether dismissal was proper in this case, and we necessarily must reverse and remand.¹ *See Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672


¹We note that on remand, the district court may need to convert the motion to one for summary judgment and allow limited discovery in order to properly determine whether Murray was required to exhaust under the facts of this case. *See Albino v. Baca*, 747 F.3d 1162, 1169-71 (9th Cir. 2014) (explaining that when an inmate's failure to exhaust is clear from the face of the complaint, dismissal for failure to state a claim is appropriate, but when exhaustion is not clear from the complaint, the matter should be determined by summary judgment and the court may, in its discretion, limit discovery to evidence concerning exhaustion); NRCMP 12(b) (stating that when considering motions to dismiss for failure to state a claim pursuant to NRCMP 12(b)(5), if "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment"); *see also Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993) ("As a general rule, the court may not consider matters outside the pleading being attacked. However, the court may take into account matters of public record, orders, items present in the record of the case, and any exhibits attached to the complaint when ruling on a

(concluding that a “complaint should be dismissed only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [him] to relief.”).

Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.²


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Adriana Escobar, District Judge
Steven Nelson Murray
Attorney General/Carson City
Attorney General/Las Vegas
Eighth District Court Clerk

motion to dismiss for failure to state a claim upon which relief can be granted.” (internal citations omitted)).

²Ordinarily we would direct respondents to file a responsive brief prior to providing relief, *see* NRAP 46A(c), but in light of the clear error in the challenged order, further briefing would not change our resolution of this matter, and we therefore conclude further briefing is not necessary.

Additionally, we have considered Murray’s remaining arguments on appeal and conclude that they do not warrant relief.