

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 03 2015

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

BOB BEJARANO,

Plaintiff - Appellant,

v.

KATHLEEN ALLISON, Warden at
CSATF/Corcoran State Prison; et al.,

Defendants - Appellees.

No. 13-16952

D.C. No. 1:11-cv-00589-LJO-DLB

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Lawrence J. O'Neill, District Judge, Presiding

Submitted July 21, 2015**

Before: CANBY, BEA, and MURGUIA, Circuit Judges.

Bob Bejarano, a California state prisoner, appeals pro se from the district court's judgment dismissing for failure to exhaust administrative remedies his 42 U.S.C. § 1983 action alleging that defendants subjected him to a contraband watch

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

in retaliation for exercising his First Amendment rights. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Albino v. Baca*, 747 F.3d 1162, 1171 (9th Cir. 2014) (en banc). We vacate and remand.

In granting the motion to dismiss for failure to exhaust administrative remedies, the district court did not have the benefit of our recent decision in *Albino*, where we held that a failure to exhaust defense should be raised in a motion for summary judgment, not in an “unenumerated” Fed. R. Civ. P. 12(b) motion, with the court viewing the evidence in the light most favorable to the nonmoving party. *See Albino*, 747 F.3d at 1166, 1168-71. If there are disputed issues of material fact, the district court should deny the summary judgment motion; however, the court may decide the disputed factual issues in a separate proceeding upon consideration of the evidence presented, and further discovery if necessary. *See id.* We remand for the district court to follow the framework outlined in *Albino* for deciding whether Bejarano failed to exhaust, and to ensure that Bejarano is advised of Rule 56’s requirements. *See Rand v. Rowland*, 154 F.3d 952, 960-61 (9th Cir. 1998) (en banc).

We do not consider matters not specifically and distinctly raised and argued in the opening brief, or arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009) (per curiam).

Each party shall bear its own costs on appeal.

VACATED and REMANDED.