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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ESTER BURNETT,

Plaintiff,

v.

JACK ST. CLAIR, et al.,

Defendants.

CASE NO. 1:09-CV-00829-DLB PC

ORDER GRANTING MOTION FOR RELIEF FROM FINAL JUDGMENT (DOC. 11)

ORDER VACATING COURT’S JUNE 17, 2010 ORDER AND JUDGMENT (DOCS. 9, 10)

ACTION DISMISSED PURSUANT TO PLAINTIFF’S NOTICE OF VOLUNTARY DISMISSAL

Plaintiff Ester Burnett (“Plaintiff”) is a prisoner in the custody of the California Department of Corrections and Rehabilitation (“CDCR”). This action was dismissed on June 17, 2010 for failure to obey a court order and failure to state a claim. On August 2, 2010, Plaintiff filed a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b). (Pl.’s Mot., Doc. 11.) Plaintiff contends he is entitled to relief by reason of mistake, inadvertence, surprise, or excusable neglect. Plaintiff contends that on November 5, 2009, he submitted a motion to voluntarily dismiss this action. Plaintiff thus seeks to avoid accruing a strike pursuant to 28 U.S.C. § 1915(g).

Plaintiff submits a CDC-119, Special Purposes Letters form, labeled as Exhibit A. Plaintiff also contends that he submitted a motion to proceed in forma pauperis in a separate filing, Case No. 2:10-CV-01088-EFB, and included his motion to dismiss with that filing. Case No. 2:10-CV-01088-EFB was filed in the Sacramento Division of the Eastern District of California, and later transferred to the Fresno Division as case No. 1:10-CV-00822-SMS.

1 The Court finds sufficient evidence to support Plaintiff's motion for relief. Having
2 examined case No. 1:10-CV-00822-SMS, the Court finds that Plaintiff did attach his motion to
3 voluntarily dismiss in the other action. That motion to voluntarily dismiss was never received in
4 this action. Prior to Plaintiff's August 2, 2010 motion, the record shows Plaintiff's notice of
5 change of address to Pleasant Valley State Prison on September 30, 2009.¹ However, it appears
6 to be inadvertence on the part of the mailing system that the Court did not receive the motion to
7 voluntarily dismiss, and not on the part of Plaintiff.

8 Pursuant to Federal Rule of Civil Procedure 41(a), an action may be dismissed by
9 plaintiff by filing a notice of dismissal before service by the adverse party of an answer or of a
10 motion for summary judgment. None of the defendants named in this action have filed an
11 answer or other responsive pleading.

12 Accordingly, it is HEREBY ORDERED that

- 13 1. Plaintiff's motion for relief from a final judgment, filed August 2, 2010, is
14 GRANTED;
- 15 2. The Court's June 17, 2010 Order and Judgment are VACATED;
- 16 3. Pursuant to Federal Rule of Civil Procedure 41(a)(1), this action is voluntarily
17 DISMISSED, and the Clerk of Court is directed to close the file in this action.

18 IT IS SO ORDERED.

19 **Dated: August 4, 2010**

/s/ Dennis L. Beck
UNITED STATES MAGISTRATE JUDGE

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28 ¹ Plaintiff is currently incarcerated at High Desert State Prison.