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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOHN DURRELL HOLCOMB,

Plaintiff,

No. CIV S-02-2417 LKK KJM P

vs.

HIGH DESERT STATE PRISON, et al.,

Defendants.

ORDER TO SHOW CAUSE AND

FINDINGS AND RECOMMENDATIONS

_____ /

Plaintiff is a California prisoner proceeding pro se with an action for violation of civil rights under 42 U.S.C. § 1983. Defendants Crofoot, Sanders and Hibbits (defendants) are current or former employees of the California Department of Corrections and Rehabilitation (CDCR). Their motion for enforcement of a settlement agreement is before the court. Specifically, defendants ask that this action be dismissed once defendants tender the consideration for dismissal set forth in the settlement agreement. An evidentiary hearing was conducted concerning the motion on April 14, 2010. At the hearing defendants' counsel John Riches testified on cross-examination, as did plaintiff's former counsel Brian Chavez-Ochoa.

I. Factual Background

The agreement defendants seek to have enforced is the agreement attached to their motion. At this point it is undisputed that the agreement, in the form submitted by defendants

1 with their motion, is not the agreement plaintiff signed. In the agreement signed by plaintiff,
2 paragraph 8 was not stricken, as it is in the copy submitted by defendants. See March 10, 2010
3 Decl. of John Riches (Riches Decl. III); Pl.'s March 24, 2010 Decl. (Pl.'s Decl. II) ¶¶ 1-5.
4 Counsel for defendants has admitted that paragraph 8 was lined out after plaintiff signed the
5 agreement, but before defendants did. See Riches Decl. III. Counsel for defendants takes the
6 position, ultimately, that he lined out paragraph 8 with the understanding that plaintiff had agreed
7 to the paragraph's deletion, based on conversations with plaintiff and his counsel. Riches Decl.
8 III ¶¶ 5-11; see also Evidentiary Hearing at 10:55. Plaintiff opposes enforcement of the
9 agreement with the deletion of paragraph 8, and says he never agreed to its deletion. Plaintiff
10 consistently has said, under oath, that he did not agree to the deletion. See November 23, 2009
11 Decl. of John Holcomb (Holcomb Decl. I); Holcomb Decl. II.

12 The factual record is complicated by inconsistencies in declarations filed by
13 defendants' counsel. Originally, counsel for defendants provided a declaration simply saying
14 paragraph 8 was lined out with the consent of plaintiff's counsel, without saying when it was lined
15 out. July 30, 2009 Decl. of John Riches (Riches Decl. I) ¶ 6. Counsel later clarified that he had
16 lined out paragraph 8 before plaintiff signed the agreement, based on plaintiff's counsel's consent.
17 October 22, 2009 Decl. of John Riches (Riches Decl. II) ¶ 3. More recently, however, counsel
18 asserts paragraph 8 was not struck when plaintiff signed it, but he told plaintiff it would be struck
19 after plaintiff and his attorney consented; counsel says plaintiff told him he consented on
20 November 24, 2008, and plaintiff's counsel consented thereafter, on November 26, 2008. Riches
21 Decl. III ¶¶ 5-6, 10. At hearing, defendants' counsel confirmed this latter version but did not
22 provide any testimony that reconciled the inconsistencies between his second and third
23 declarations.

24 Plaintiff's counsel testified at hearing that he understood he was unable to visit
25 plaintiff personally because of a prison lockdown and so he authorized defendants' counsel to
26 provide the agreement to plaintiff. He also testified, consistently with the contents of his

1 declaration, that he understood from defendants' counsel that plaintiff consented to the deletion of
2 paragraph 8 on November 24, 2008, and he also understood paragraph 8 was lined out on
3 November 26, 2008. When he signed the agreement and consented himself to the deletion of
4 paragraph 8, on November 26, 2008, plaintiff's counsel testified he did so with the understanding
5 plaintiff had consented to the deletion.

6 II. Analysis

7 Issues regarding the construction or enforcement of settlement agreements are
8 generally governed by local contract law. See Jeff D. v. Andrus, 899 F.2d 753, 759 (9th Cir.
9 1989). In California, when a material modification has been made to a contract by one party after
10 the other has signed the agreement, the agreement is voidable by the non-modifying party. Houk
11 v. Williams Bros., 58 Cal.App.2d 573, 578-79 (3d Dist. 1943). A modification is "material" if
12 "it works some change in the rights, interests, or obligations of the parties. . ." Consolidated
13 Loan Co. v. Harman, 150 Cal.App.2d 488, 491-92 (2d Dist. 1957).

14 Paragraph 8 of the agreement reads as follows:

15 This agreement is confidential. However, should there be any
16 dispute concerning the performance or interpretation of this
17 agreement, the parties agree to promptly meet together with
18 counsel to attempt to in good faith resolve such disputes. If no
19 resolution is reached, the parties will bring the matter to the court
20 for resolution. The court shall retain jurisdiction for the purpose of
21 resolving any dispute concerning the agreement.

19 See Mot., Attach. (Docket No. 157-2 at 3). Without expressing an opinion as to the other terms
20 of paragraph 8, the court considers the striking of the provision that the court retain jurisdiction
21 to resolve any disputes regarding the settlement agreement as a material alteration of the
22 agreement plaintiff signed. The court's retention of jurisdiction is a significant right; among other
23 things, it would relieve plaintiff of paying the filing fees for a new action if he sought judicial
24 intervention to enforce the settlement agreement.

25 In light of the unexplained inconsistencies in defendants' counsel's testimony,
26 plaintiff's consistent testimony contrary to that of defendants' counsel, and the fact that plaintiff's

1 counsel relied entirely on defendants' counsel's reports, the court cannot credit defendants'
2 counsel's declaration and hearing testimony that plaintiff orally consented, or consented
3 otherwise, to the striking of paragraph 8 before he signed the settlement agreement. Moreover,
4 the agreement the parties signed includes a clause indicating that the written agreement is the
5 complete agreement and any modification to that agreement must be in writing and signed by all
6 the parties. May 26, 2009 Mot. to Enforce, Attach. 1 ¶ 11(b). To the extent the lining out of
7 paragraph 8 is a modification, it is undisputed that plaintiff never agreed in writing to the
8 modification.

9 Defendants have made other arguments, based on defendants' counsel's first and
10 second declarations, that plaintiff's attorney had the authority to bind plaintiff to paragraph 8 and
11 that plaintiff ratified the striking of paragraph 8 by signing the agreement after the paragraph was
12 lined out. See October 22, 2009 Mem. at 2-4. Although defendants have not withdrawn these
13 arguments, they are rendered unavailing by defendants' counsel's third declaration.

14 In light of the foregoing, the court finds that the settlement agreement signed by
15 plaintiff is voidable by plaintiff. In response to the court's questioning, plaintiff has indicated he is
16 prepared to abide by paragraph 8 in its entirety, in the form he signed. He also is willing to abide
17 by paragraph 8 with the first sentence only deleted, regarding confidentiality. Defendants,
18 however, are not prepared to agree to the inclusion of paragraph 8 or any portion thereof. Under
19 these circumstances, plaintiff has indicated he wants the agreement voided. Defendants have not
20 pointed to any reason plaintiff should not be allowed to void the agreement. Therefore, the
21 agreement should be deemed void.

22 For the foregoing reasons, the court will recommend that defendants' motion to
23 enforce be denied.

24 III. Order To Show Cause

25 In light of the unexplained and significant inconsistency in counsel's declaration
26 testimony with respect to whether he crossed out paragraph 8 of the settlement agreement before

1 or after plaintiff signed it, and his failure to withdraw arguments based on a declaration he himself
2 later amended, counsel will be ordered to show cause within fourteen days why he should not be
3 sanctioned in the amount of \$750.00 under Rule 11(b) of the Federal Rules of Civil Procedure for
4 making materially false representations to the court.

5 IV. Trial Setting And Possible Future Settlement

6 If the district court judge assigned to this case adopts the recommendation that
7 defendants' motion for enforcement of the settlement agreement be denied, this matter will
8 proceed to trial forthwith. As noted, at the April 14, 2010 evidentiary hearing, plaintiff indicated
9 he agreed to the deletion of the first sentence of paragraph 8, which required that the settlement
10 agreement be kept confidential. Plaintiff also indicated in his closing argument at hearing that he
11 is still willing to agree to all the other terms of the agreement as he signed it. If the parties are
12 able to conclude a new agreement to settle the case, on verifiable mutually agreeable terms, they
13 shall notify the court as required by Local Rules 160 and 272.

14 In accordance with the above, IT IS HEREBY ORDERED that counsel for
15 defendants show cause within fourteen days why he should not be sanctioned in the amount of
16 \$750.00 for violations of Rule 11(b)(2) of the Federal Rules of Civil Procedure; and

17 IT IS HEREBY RECOMMENDED that:

18 1. Defendants' motion for enforcement of the parties' settlement agreement (#157)
19 be denied and the settlement agreement be voided; and

20 2. Trial be set for December 7, 2010 at 10:30 a.m., with a trial confirmation
21 hearing set for September 13, 2010 at 11:15 a.m.

22 These findings and recommendations are submitted to the United States District
23 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-
24 one days after being served with these findings and recommendations, any party may file written
25 objections with the court and serve a copy on all parties. Such a document should be captioned
26 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections

1 shall be served and filed within fourteen days after service of the objections. The parties are
2 advised that failure to file objections within the specified time may waive the right to appeal the
3 District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

4 DATED: July 2, 2010.

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7 U.S. MAGISTRATE JUDGE
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