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

JEROME DONALD CLARK,

Plaintiff,
vs.

No. CIV S-09-1638 WBS GGH P

TRAN, et al.,

Defendants.

ORDER &
FINDINGS AND RECOMMENDATIONS

_____ /

I. Introduction

Plaintiff, a state prisoner proceeding pro se, seeks relief pursuant to 42 U.S.C. § 1983. Pending before the court is plaintiff's motion for summary judgment filed on December 14, 2009 (Doc. 27) to which defendants filed an opposition.¹ Plaintiff has also filed a motion for default judgment (Doc. 32) and a motion to strike (Doc. 33).

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¹ Defendants filed a motion for summary judgment on June 11, 2010, that is not yet fully briefed.

1 II. Motion for Summary Judgment

2 Legal Standard for Summary Judgment (Moving Party Has the Burden of Proof
3 at Trial

4 Burdens on summary judgment motion differ depending on who will carry the
5 burden of persuasion at trial. “As the party with the burden of persuasion at trial, the [moving
6 party] must establish “beyond controversy every essential element of its’ [] claim. [The non-
7 moving party] can defeat summary judgment by demonstrating the evidence, taken as a whole,
8 could lead a rational trier of fact to find in its favor.” Southern California Gas Co. v. City of
9 Santa Ana, 336 F.3d 885, 888 (9th Cir. 2003).

10 Analysis

11 Plaintiff moves for summary judgment against two of the four defendants in this
12 case, Dr. Rohrer and Dr. Collinsowrth, stating that they were deliberately indifferent to his
13 serious medical needs. Plaintiff believes that delay in some treatment for his broken hand caused
14 harm and his pain medication expired and was not renewed. However, plaintiff’s motion for
15 summary judgment is essentially a copy of plaintiff’s complaint, including the same exhibits.
16 While plaintiff does set out undisputed facts, plaintiff only provides approximately two pages of
17 analysis and concludes that summary judgment should be granted in his favor. Plaintiff’s motion
18 fails to cite to evidence describing how these defendants were in violation of the Eighth
19 Amendment.

20 While defendants do not dispute the majority of plaintiff’s undisputed facts,
21 plaintiff still fails to describe how the defendants are liable. Plaintiff concludes that these
22 defendants were liable for not renewing the pain medication prescription, but fails to identify the
23 connection to these defendants.

24 Plaintiff also contends that because there was a delay in treatment for his hand
25 surgery, defendants were liable, though plaintiff never explains how. Plaintiff states that a non-
26 defendant doctor who performed surgery on the hand stated that because the hand had begun to

1 heal, the hand had to be re-broken during surgery. However, plaintiff does not even state the
2 name of the doctor or point to any evidence that this is in fact what the doctor said.

3 Assuming arguendo that plaintiff did have evidence that a delay in medical
4 treatment caused an injury, mere delay in medical treatment without more is insufficient to state a
5 claim of deliberate medical indifference. Shapley v. Nevada Bd. of State Prison Com'rs, 766
6 F.2d 404, 407 (9th Cir. 1985). Plaintiff has not even attempted to demonstrate that defendants
7 were deliberately indifferent to his medical needs through this delay in treatment.²

8 For all these reasons, plaintiff has failed to meet his burden and the motion for
9 summary judgment should be denied.

10 III. Motion for Default Judgment

11 On January 7, 2010, plaintiff moved for an order of default judgment alleging that
12 defendants answered the complaint twenty days late and had not taken part in the proceedings.
13 Plaintiff's motion is devoid of merit and is denied as frivolous.

14 IV. Motion to Strike

15 On January 7, 2010, plaintiff filed a motion to strike defendants' answer to the
16 complaint alleging that defendants' answer was filed in bad faith as was defendants' December
17 18, 2009, request for an extension of time. This motion is also denied as meritless and frivolous.

18 Accordingly, IT IS HEREBY ORDERED that plaintiff's January 7, 2010 motions
19 for default judgment and to strike (Doc. 32, 33) be denied.

20 IT IS HEREBY RECOMMENDED that plaintiff's December 14, 2009 motion for
21 summary judgment (Doc. 27), be denied.

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24 ² In fact, plaintiff states in his undisputed facts that a delay in receiving an orthopedic
25 consultation was delayed due to paperwork being misplaced by defendants. In Farmer v.
26 Brennan, 511 U.S. 825 (1994) the Supreme Court defined a very strict standard which a plaintiff
must meet in order to establish "deliberate indifference." Of course, negligence is insufficient.
Farmer, 511 U.S. at 835.

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These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned “Objections to Magistrate Judge's Findings and Recommendations.” Any reply to the objections shall be served and filed within fourteen days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: 06/28/2010

/s/ Gregory G. Hollows

UNITED STATES MAGISTRATE JUDGE

GGH: AB
clar1638.sj