

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Philip A. Brimmer

Civil Action No. 11-cv-00250-PAB-KLM

MICHAEL MILLIGAN,

Plaintiff,

v.

LOU ARCHULETA,
CHARLES SANCHEZ,
LANCE MIKLICH, and
KEVIN FURTON,

Defendants.

ORDER

This matter is before the Court on the Motion to Alter or Amend Judgment [Docket No. 68] filed by plaintiff Michael Milligan. In light of plaintiff's pro se status, the Court construes his filings liberally. See *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (citing *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972)).

On September 6, 2013, United States Magistrate Judge Kristen L. Mix recommended [Docket No. 65] that the Court grant the Motion to Dismiss Third Amended Complaint (Doc. #60) [Docket No. 61] filed by defendants Lou Archuleta, Charles Sanchez, Lance Miklich, and Kevin Furton on the basis that (1) plaintiff failed to allege that he was subjected to a chilling injury; (2) plaintiff failed to allege that the injury he suffered was by reason of engaging in speech protected by the First Amendment; and (3) the Court should decline to exercise jurisdiction over plaintiff's state law claims. Docket No. 65. On September 27, 2013, having received no objections to the

magistrate judge's recommendation (the "Recommendation") from either party, the Court reviewed it for clear error and, finding none, adopted it. Docket No. 66. Final judgment entered against plaintiff the same day. Docket No. 67.

On October 16, 2013,¹ Plaintiff filed the Motion to Alter or Amend Judgment [Docket No. 68], asserting that he had not yet been served with a copy of the Recommendation and was thus deprived of the requisite fourteen days in which to file a response before the Court ordered the case dismissed. Docket No. 68 at 1; see FED. R. CIV. P. 72. Plaintiff states that he became aware of the Court's Order dismissing the case on October 10, 2013 "in the Sterling Correctional Facility law library when he checked on the status of this case." Docket No. 68 at 1. He requests that the Court vacate the order accepting the Recommendation to permit him time to file objections. *Id.* at 2.

"Rule 59(e) allows a party to direct the district court's attention to newly discovered material evidence or a manifest error of law or fact, and enables the court to correct its own errors and thus avoid unnecessary appellate procedures." *Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir. 1996). Such a motion is appropriate in the event of "(1) an intervening change in the controlling law, (2) new evidence previously unavailable, [or] (3) the need to correct clear error or prevent manifest injustice," and may be granted "where the court has misapprehended the facts, a party's position, or the controlling law." *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). The decision to grant or deny a Rule 59 motion is committed to the Court's

¹The Court notes that the motion is dated October 11, 2013, indicating that it was prepared the day after plaintiff learned of the entry of judgment.

discretion. *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997).

Plaintiff requests that the Court amend its judgment because he was not served with the Recommendation before the entry of judgment. Docket No. 68 at 1-2. A similar situation arose previously in this case and the Court's reasoning in that instance holds true here: given the logistical challenges inherent in obtaining proof of when and whether the Recommendation reached plaintiff in prison, and plaintiff's diligence in prosecuting this case throughout the course of the litigation, the Court finds there is no reason not to credit plaintiff's assertion regarding the lack of service. Thus, sufficient grounds exist to grant plaintiff's motion to set aside the Court's judgment and permit him to file a response to the Recommendation. *See Servants of the Paraclete*, 204 F.3d at 1012.

III. CONCLUSION

For the foregoing reasons, it is

ORDERED that Plaintiff's Motion to Alter or Amend Judgment [Docket No. 68] is GRANTED. It is further

ORDERED that the Order Accepting Magistrate Judge's Recommendation [Docket No. 66] and the Final Judgment [Docket No. 67] are VACATED and this case is reopened. Plaintiff shall file objections to the Recommendation on or before **Friday, November 15, 2013**.

DATED November 1, 2013.

BY THE COURT:

s/Philip A. Brimmer
PHILIP A. BRIMMER
United States District Judge