

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

George Allen Hartman,
Plaintiff,

v.

United States Customs and Border
Protection, et al.,
Defendants.

No. CV-14-02090-TUC-DCB (BGM)

ORDER

Plaintiff's Second Amended Complaint asserts a battery claim based on the Federal Tort Claims Act (FTCA). "Plaintiff alleges that on April 11, 2011, he was physically injured during an encounter with federal agents from United States Customs and Border Protection (CBP) or United States Immigration and Customs Enforcement (ICE). Plaintiff alleges he suffered a severe head injury diagnosed as a post-concussive syndrome that resulted in episodes over the following year of passing out, hearing and sight problems, and forgetting things, and resulted in his passing out while riding his motorcycle on April 12, 2012." (Order (Doc. 38) at 1.)

This Court previously required the Plaintiff to disclose an expert who would attest to a causal link between the battery and the motorcycle accident. When he failed to produce such an expert, the Government filed a Motion for Partial Summary Judgment on its liability for Plaintiff's motorcycle accident injuries. Plaintiff failed to file a Response to the Motion for Partial Summary Judgment. On March 7, 2016, the Government filed a

1 motion asking this Court to rule summarily, pursuant to Local Rule 7.2(i), to grant the
2 Motion for Partial Summary Judgment.

3 Under Rule 7.2(i) of this Court's Local Rules of Practice, a failure to file a
4 responsive pleading may be deemed consent to the motion and this Court may dispose of
5 the motion summarily. "A motion for summary judgment cannot be granted simply
6 because the opposing party violated a local rule." *Marshall v. Gates*, 44 F.3d 722, 725
7 (9th Cir. 1995) (citing *Henry v. Gill Industries Inc.*, 983 F.2d 943, 950 (9th Cir. 1993)).
8 This is so because a party may oppose a motion for summary judgment without offering
9 affidavits or any other materials in support of its opposition. "Summary judgment may
10 be resisted and must be denied on no other grounds than that the movant has failed to
11 meet its burden of demonstrating the absence of triable issues." *Id.* at 106 (quoting
12 *Henry*, 983 F.2d at 950).

13 Here, the Court has reviewed the Second Amended Complaint and considered the
14 merits of the Government's Motion for Partial Summary Judgment. As Magistrate Judge
15 MacDonald noted in his Report and Recommendation (R&R), the Plaintiff will have the
16 burden of persuasion at trial. The Government has challenged the sufficiency of his
17 evidence to establish a causal connection between the alleged battery and the motorcycle
18 accident. He has not responded. A trial would be useless as Plaintiff has no evidence to
19 rebut the Government's assertion that he cannot establish this essential element for
20 liability related to the motorcycle accident. The Government is entitled to partial
21 summary judgment as a matter of law. (R&R (Doc. 69) at 6.)

22 The Plaintiff was also afforded an opportunity to object to the Magistrate Judge's
23 recommendation that this Court grant the Government's Motion for Partial Summary
24 Judgment. Plaintiff did not file an Objection. Pursuant to 28 U.S.C. § 636(b), this Court
25 makes a *de novo* determination as to those portions of the R&R to which there are
26 objections. 28 U.S.C. § 636(b)(1) ("A judge of the court shall make a *de novo*
27 determination of those portions of the report or specified proposed findings and
28 recommendations to which objection is made.") To the extent that no objection has been

1 made, arguments to the contrary have been waived. *McCall v. Andrus*, 628 F.2d 1185,
2 1187 (9th Cir. 1980) (failure to object to Magistrate's report waives right to do so on
3 appeal); see also, Advisory Committee Notes to Fed. R. Civ. P. 72 (citing *Campbell v.*
4 *United States Dist. Court*, 501 F.2d 196, 206 (9th Cir. 1974) (when no timely objection is
5 filed, the court need only satisfy itself that there is no clear error on the face of the record
6 in order to accept the recommendation).

7 While there are no objections and review has, therefore, been waived, the Court
8 nevertheless reviews at a minimum, *de novo*, the Magistrate Judge's conclusions of law.
9 *Robbins v. Carey*, 481 F.3d 1143, 1147 (9th Cir. 2007) (citing *Turner v. Duncan*, 158
10 F.3d 449, 455 (9th Cir. 1998) (conclusions of law by a magistrate judge reviewed de
11 novo); *Martinez v. Ylst*, 951 F.2d 1153, 1156 (9th Cir. 1991) (failure to object standing
12 alone will not ordinarily waive question of law, but is a factor in considering the
13 propriety of finding waiver)). Here, the Court finds that the Magistrate Judge's
14 recommendation to grant the Government partial summary judgment is thorough and
15 well-reasoned, without any clear error in law or fact. See *United States v. Remsing*, 874
16 F.2d 614, 617-618 (9th Cir. 1989) (*United States v. Remsing*, 874 F.2d 614, 617-618 (9th
17 Cir. 1989) (citing 28 U.S.C. § 636(b)(1)(A) as providing for district court to reconsider
18 matters delegated to magistrate judge when there is clear error or recommendation is
19 contrary to law). The Court finds that the Government's motion for a summary ruling,
20 pursuant to Rule 7.2(i), may be granted in respect to the motion for partial summary
21 judgment on the question of the Government's liability for the motorcycle accident. The
22 Court remands this case to the ALJ for further consideration.

23 **Accordingly,**

24 **IT IS ORDERED** that the Court adopts the Report and Recommendation (Doc.
25 69).

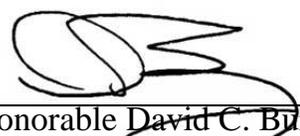
26 **IT IS FURTHER ORDERED** that the Defendant's Motion for Summary
27 Disposition of the Motion for Partial Summary Judgment, pursuant to Rule 7.2(i), (Doc.
28 57), is GRANTED.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IT IS FURTHER ORDERED that the Defendant's Motion for Partial Summary Judgment (Dc. 52) is GRANTED.

IT IS FURTHER ORDERED that Plaintiff's battery claim remains pending and the case remains referred to Magistrate Judge Bruce MacDonald.

Dated this 12th day of September, 2016.



Honorable David C. Bury
United States District Judge