

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

HARVEY HERRING III,

1:05-cv-00079-LJO-SMS PC

Plaintiff,

ORDER GRANTING PLAINTIFF'S
REQUEST FOR RELIEF FROM
JUDGMENT, PURSUANT TO FEDERAL
RULE OF CIVIL PROCEDURE 60(b)(1)

v.

MIKE CLARK, et al.,

[Docs. 113, 115]

Defendants,

Harvey Herring III ("Plaintiff") is a state prisoner proceeding pro se and in forma pauperis in this civil rights action filed pursuant to 42 U.S.C. § 1983. Plaintiff filed the complaint commencing this action on January 19, 2005. (Doc. 1.) On January 21, 2010, an order issued requiring Plaintiff to file an opposition, or statement of non-opposition to Defendants' motion for summary judgment, within twenty-one days. (Doc. 110.) More than forty days passed without Plaintiff filing an opposition or statement of non-opposition, or otherwise responding such that an order issued dismissing the action with prejudice for Plaintiff's failure to obey a court order and failure to prosecute. (Doc. 111.)

On May 26, 2010, Plaintiff filed a notice and motion to set aside the order and be relieved from judgment, pursuant to Rule 60(b)(1) of the Federal Rules of Civil Procedure. (Doc. 113.) In his motion, Plaintiff states under penalty of perjury that he never received the January 21, 2010 order, was unaware of its existence, and therefore was unable to respond to it. Plaintiff requests to be relieved from judgment based on inadvertent mistake.

Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of judgment."

1 In the instant action, Plaintiff's declaration shows that he did not receive the order requiring him
2 to file an opposition or declaration of non-opposition. It would be unjust to uphold judgment
3 against Plaintiff for Plaintiff's failure to respond to an order that he never received. The Court
4 finds that Plaintiff is entitled to relief from judgment and grants Plaintiff's motion.

5 Further, upon review of the record, the motion for summary judgment, filed July 28, 2009
6 (Doc. 107), is stricken from the record as it is duplicative of Defendants motion for summary
7 judgment, filed July 9, 2008 (Doc. 75), which has been fully briefed under Local Rule 230(l). It
8 is noted that there is a motion to quash and a request to modify the scheduling order pending
9 which, along with dispositive motions, are appropriately referred back to the Magistrate Judge
10 for rulings.

11 Accordingly, it is HEREBY ORDERED that:

- 12 1. Plaintiff's motion for relief from judgment, filed May 26, 2010, is
13 GRANTED;
- 14 2. the judgment, entered March 4, 2010, is VACATED;
- 15 3. the order dismissing the action with prejudice for Plaintiff's failure to obey
16 a court order and failure to prosecute, issued March 4, 2010, is
17 VACATED;
- 18 4. the order requiring Plaintiff to file an opposition or statement of non-
19 opposition to Defendants' motion for summary judgment, issued January
20 21, 2010 is VACATED;
- 21 5. the motion for summary judgment, filed July 28, 2009 (Doc. 107) is
22 duplicative of a previously filed motion and is hereby STRICKEN from
23 the record; and
- 24 6. the case is referred back to the Magistrate Judge to rule on pending issues.

25 IT IS SO ORDERED.

26 **Dated: May 12, 2011**

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE