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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

QUILLIE L. HARVEY, JR.,
Plaintiff,
v.
A. AYALA, et al.,
Defendants.

CASE NO. 1:10-cv-02343-LJO-MJS (PC)
**ORDER DENYING PLAINTIFF'S MOTION
FOR RELIEF FROM JUDGMENT
(ECF No. 45)**

I. PROCEDURAL HISTORY

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. The action concerned Plaintiff's Eighth Amendment excessive force claim against Defendants Ayala and Martinez. (ECF No. 13.)

On June 13, 2012, Defendants moved to dismiss the action on the ground Plaintiff failed to exhaust his administrative remedies. (ECF No. 18.) On January 30, 2013, the Magistrate Judge assigned to the case issued findings and a recommendation to grant the motion. (ECF No. 41.) On March 22, 2013, the undersigned adopted the findings and recommendation and granted Defendants' motion (ECF No. 43), judgment was entered (ECF No. 44), and the action was closed.

Before the Court is Plaintiff's May 12, 2014 motion for relief from judgment. (ECF No. 45.) No opposition was filed. This matter is deemed submitted. Local Rule 230(l).

1 **II. PLAINTIFF’S ARGUMENTS**

2 Plaintiff seeks relief based on Albino v. Baca, 747 F.3d 1162 (9th Cir. 2014) (en
3 banc), which held that the proper procedural device for raising the issue of administrative
4 exhaustion generally is a motion for summary judgment, rather than a motion to dismiss.
5 He argues that his case presented a genuine issue of material fact regarding exhaustion
6 that was not fully considered by the Court in reviewing Defendants’ motion to dismiss.

7 **III. LEGAL STANDARD**

8 Plaintiff seeks relief pursuant to Federal Rule of Civil Procedure 60(b)(5). Plaintiff
9 contends that Rule 60(b)(5) applies because the judgment in his case was based on
10 Wyatt v. Terhune, 315 F.3d 1108 (9th Cir. 2003), which was overruled in relevant part in
11 Albino.

12 Rule 60(b) allows the Court to relieve a party from a final judgment on grounds of:
13 “(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered
14 evidence . . . ; (3) fraud . . . , misrepresentation, or misconduct by an opposing party;
15 (4) the judgment is void; (5) the judgment has been satisfied . . . ; it is based on an
16 earlier judgment that has been reversed or vacated; or applying it prospectively is no
17 longer equitable; or (6) any other reason that justifies relief.” Fed. R. Civ. P. 60(b)
18 (emphasis added). Motions brought for reasons (1), (2) and (3) must be brought “no
19 more than a year after the entry of judgment or order or the date of the proceeding.” Fed.
20 R. Civ. P. 60(c)(1). All other Rule 60(b) motions must be brought within a “reasonable
21 time.” Id. The moving party bears the burden of demonstrating that relief under Rule
22 60(b) is appropriate. Cassidy v. Tenorio, 856 F.2d 1412, 1415 (9th Cir. 1988).

23 Plaintiff’s reliance on subsection (b)(5) is misplaced. “This ground is limited to
24 cases in which the present judgment is based on the prior judgment in the sense of claim
25 or issue preclusion. It does not apply merely because a case relied on as precedent by
26 the court in rendering the present judgment has since been reversed.” 11 C. Wright & A.
27 Miller, M. Kane, Federal Practice and Procedure § 2863, at 334-35 (3d ed. 1973)

1 (footnotes omitted); Tomlin v. McDaniel, 865 F.2d 209, 210-11 (9th Cir. 1989), overruled
2 on other grounds by Gonzalez v. Crosby, 545 U.S. 524 (2005).

3 Instead, subsection (b)(6) is the proper means of bringing a motion for relief
4 based on an intervening change in law. See Phelps v. Alameida, 569 F.3d 1120, 1132
5 (9th Cir. 2009). Analysis under Rule 60(b)(6) requires a case-by-case inquiry, Phelps,
6 569 F.3d at 1133, and relief may be granted only in “extraordinary circumstances,”
7 Harvest v. Castro, 531 F.3d 737, 749 (9th Cir. 2008). The Court’s inquiry should consider
8 the following factors: (1) whether the initial ruling was correct under the then-prevailing
9 interpretation of the law; (2) the party’s diligence in pursuing review of the issue; (3)
10 “whether the final judgment being challenged has caused one or more of the parties to
11 change his legal position in reliance on that judgment”; (4) delay between the finality of
12 the judgment and the motion for relief; (5) the relationship between the decision
13 embodying the original judgment and that embodying the change in law; and (6) whether
14 the party seeking reconsideration of a judgment on the merits, or rather an erroneous
15 judgment that prevented the court from ever reaching the merits of the case.¹ Phelps,
16 569 F.3d at 1135-40.

17 **III. ANALYSIS**

18 The six Phelps factors weight equally on Plaintiff’s motion. Three of the factors
19 are in Plaintiff’s favor: it would not appear that any of the parties changed their legal
20 position in reliance on the judgment, there is a strong relationship between the decision
21 in this case and that in Albino, and the dismissal on exhaustion grounds prevented the
22 Court from reaching the merits of the case. On the other hand, the initial ruling was
23 correct under the then-prevailing interpretation of the law, Plaintiff did not appeal and
24 thus was not diligent in pursuing review of the issue, and there was a fourteen month
25 delay between the finality of the judgment and the motion for relief.

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28 ¹ Although the Ninth Circuit applied these factors to a Rule 60(b)(6) motion regarding a rejected petition for habeas corpus, it noted the factors also may be useful in other contexts. Phelps, 569 F.3d at 1135 n.19.

1 These factors essentially being equal, the Court finds significant the Ninth
2 Circuit's statement in Albino that its ruling requiring exhaustion to be raised in a
3 summary judgment motion "may be more a matter of a change of nomenclature than of
4 practical operation." 747 F.3d at 1166; see also Williams v. Paramo, 775 F.3d 1182,
5 1191 n.10 (2015) (construing the district court's order granting motion to dismiss on
6 exhaustion grounds as one granting summary judgment). Indeed, in this case, the Court
7 considered evidence beyond the complaint, presented by both Plaintiff and Defendants,
8 regarding Plaintiff's attempts to exhaust his administrative remedies. In so doing, the
9 Court effectively treated Defendants' motion to dismiss as a motion for summary
10 judgment. After reviewing the evidence, the Magistrate Judge concluded that "[n]othing
11 filed by Plaintiff creates any real question as to the accuracy of Defendants' history of his
12 administrative appeals." (ECF No. 41 at 7.) The undersigned adopted this finding. (ECF
13 No. 43.) Nothing in Plaintiff's motion convinces the Court that the result would be
14 different had the issue been presented in a motion for summary judgment.

15 Accordingly, Plaintiff fails to present "extraordinary circumstances" warranting
16 relief pursuant to Rule 60(b)(6).

17 **V. CONCLUSION AND ORDER**

18 Based on the foregoing, Plaintiff's motion for relief from judgment (ECF No. 45) is
19 HEREBY DENIED.
20 IT IS SO ORDERED.

21 Dated: February 26, 2015

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