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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DWAYNE MEREDITH,
Plaintiff,
v.
D. OVERLY, et al.,
Defendants.

Case No. 1:12-cv-0455-LJO-MJS (PC)
**ORDER DENYING MOTION FOR
RECONSIDERATION**
(ECF No. 73)

I. PROCEDURAL HISTORY

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action brought pursuant to 28 U.S.C. § 1983. (ECF Nos. 5 & 8.) The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302 of the United States District Court for the Eastern District of California.

On December 4, 2014, the Magistrate Judge issued Findings and Recommendations to deny Defendants' motion for summary judgment, deny Defendants' motion to strike, and deny Plaintiff's motion for summary judgment. (ECF No. 69.) The deadline for filing objections passed with none being filed. On December 29, 2014, the undersigned adopted the findings and recommendations in full. (ECF No. 72.)

1 Later on December 29, 2014, Plaintiff filed objections to the findings and
2 recommendation that his motion for summary judgment be denied. (ECF No. 73.) The
3 Court construes the objections as a motion for reconsideration.

4 **II. LEGAL STANDARD**

5 “A motion for reconsideration should not be granted, absent highly unusual
6 circumstances, unless the district court is presented with newly discovered evidence,
7 committed clear error, or if there is an intervening change in the controlling law.” Marlyn
8 Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 880 (9th Cir. 2009).

9 “A motion for reconsideration may not be used to raise arguments or present evidence
10 for the first time when they could reasonably have been raised in earlier litigation.” Id.

11 Moreover, “recapitulation of the cases and arguments considered by the court before
12 rendering its original decision fails to carry the moving party's burden.” U.S. v.
13 Westlands Water Dist., 134 F. Supp. 2d 1111, 1131 (9th Cir. 2001) (quoting
14 Birmingham v. Sony Corp. of Am., Inc., 820 F. Supp. 834, 856-57 (D.N.J. 1992)).

15 Similarly, Local Rule 230(j) requires that a party seeking reconsideration show that “new
16 or different facts or circumstances are claimed to exist which did not exist or were not
17 shown upon such prior motion, or what other grounds exist for the motion”

18 **III. ANALYSIS**

19 **A. Plaintiff's Claims**

20 The action proceeds against Defendants Benevidez, Gamboa, and Overlay on
21 Plaintiff's Eighth Amendment conditions of confinement claim. (ECF No. 9.) The
22 allegations in Plaintiff's first amended complaint (ECF No. 8) may be summarized
23 essentially as follows:

24 Plaintiff currently is incarcerated at California State Prison, Corcoran, where the
25 events giving rise to his complaint occurred. On September 19, 2010, Plaintiff began a
26 ninety-day punitive segregated confinement with Loss of Privileges (“LOP”). Plaintiff
27 was not permitted to leave his cell for any reason until November 3, 2010. On the days
28

1 Plaintiff was confined to his cell, he had no opportunity to exercise, shower, interact with
2 others, breathe fresh air, or enjoy natural light.

3 Defendant Benavidez staffed the floor where Plaintiff was confined and knew of
4 Plaintiff's circumstances. Plaintiff complained directly to Defendants Overley and
5 Gamboa. Defendants took no action to correct the deprivations.

6 **B. Plaintiff's Motion for Summary Judgment**

7 Plaintiff contended it was undisputed he was not allowed out of his cell for any
8 reason from September 19, 2010 to November 3, 2010, a total of 45 consecutive days.
9 Plaintiff supported this assertion with declarations from himself and two other inmates.
10 Plaintiff also contended that Defendants had no documentary evidence to rebut
11 Plaintiff's claims. Plaintiff argued that the Daily Activity Log produced by Defendants did
12 not show that LOP or C status inmates, such as Plaintiff, were released for out-of-cell
13 time during the relevant period. Nor did the Daily Activity Log directly state that Plaintiff
14 was released at any time. Finally, Plaintiff argued that he had established deliberate
15 indifference through his declaration that he informed Defendants that his confinement
16 violated his rights, but they took no action.

17 Defendants disputed that Plaintiff did not leave his cell for 45 days. They
18 provided a declaration from Defendant Benevidez stating that Plaintiff was let out of his
19 cell to shower and "would have had the opportunity to exit his cell and go to the
20 dayroom . . . except when he was restricted by a loss-of-privileges." They also
21 submitted records stating that Plaintiff was assessed sixty days LOP status from
22 October 20, 2010 to December 20, 2010 (rather than the ninety day LOP beginning
23 September 19, 2010 that Plaintiff claims). Finally, they referred to a Daily Activity
24 Schedule from April 2010 that showed when C status and LOP inmates were scheduled
25 for yard, and argued that Plaintiff was let out of his cell for exercise according to the
26 Schedule.

1 **C. Findings and Recommendations**

2 The Magistrate Judge concluded that summary judgment was inappropriate
3 because there was a genuine dispute of fact as to whether Plaintiff was restricted to his
4 cell for 45 days.

5 **D. Motion for Reconsideration**

6 Plaintiff now argues that Defendant Benavidez’s declaration should be stricken
7 because it created a “sham fact issue” pursuant to DeSpain v. Uphoff, 264 F.3d 965,
8 972 n.1 (10th Cir. 2001) (citing Hollis v. Delta Airlines, 238 F.3d 1255, 1259 (10th Cir.
9 2001)). Plaintiff contends that the declaration is contrary to Defendant Benavidez’s
10 discovery responses, which stated that Defendant Benavidez had insufficient
11 information to respond as to whether Plaintiff was allowed out of cell during his LOP
12 status.

13 **E. Analysis**

14 The “sham affidavit” doctrine prevents a non-moving party from creating a
15 genuine issue of fact “simply by submitting an affidavit contradicting his [or her] own
16 prior testimony.” Van Asdale v. Int'l Game Tech., 577 F.3d 989, 998 (9th Cir. 2009). Two
17 requirements must be met before the Court can strike an affidavit alleged to be a sham:
18 (1) the Court must make a factual determination that the contradiction was indeed a
19 “sham” produced to avoid summary judgment and (2) the inconsistencies must be clear
20 and unambiguous. Id. at 998-99. If either requirement is not met, the court must
21 consider the non-moving party's affidavit in its determination to grant or deny summary
22 judgment. Id. at 999.

23 Plaintiff has not submitted the allegedly contradictory discovery responses.
24 Accordingly, there is no basis for the Court to make factual determinations as to
25 whether there are inconsistencies between Defendant Benavidez’s discovery responses
26 and his declaration, whether any inconsistencies are clear and unambiguous, and
27 whether the inconsistencies were created for the purpose of avoiding summary
28 judgment.

1 Furthermore, even setting aside Defendant Benavidez's declaration, Defendants
2 produced sufficient documentary evidence to create a genuine issue of material fact as
3 to whether Plaintiff was restricted to his cell for 45 days. Accordingly, Plaintiff's motion
4 for summary judgment properly was denied.

5 **IV. CONCLUSION AND ORDER**

6 Plaintiff's arguments do not present a basis for granting reconsideration.
7 Accordingly, Plaintiff's objections (ECF No. 73), which the Court construes as a motion
8 for reconsideration, are HEREBY DENIED.

9
10 IT IS SO ORDERED.

11 Dated: January 12, 2015

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