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3 UNITED STATES DISTRICT COURT
4 EASTERN DISTRICT OF CALIFORNIA
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6 C. DWAYNE GILMORE,

7 Plaintiff,

8 vs.

9 D. AUGUSTUS, et al.,

10 Defendants.
11

1:12-cv-00925-LJO-GSA-PC

ORDER GRANTING PLAINTIFF'S MOTION
FOR RECONSIDERATION
(ECF No. 130.)

ORDER TO SHOW CAUSE
ORDER REQUIRING DEFENDANT
LOCKARD TO SHOW CAUSE WHY
DEFAULT SHOULD NOT BE ENTERED
AGAINST HIM

THIRTY DAY DEADLINE FOR
DEFENDANT LOCKARD TO FILE
RESPONSE TO ORDER TO SHOW CAUSE

ORDER REQUIRING DEFENSE COUNSEL
TO SERVE THIS ORDER ON DEFENDANT
LOCKARD AND FILE PROOF OF SERVICE

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17 **I. RELEVANT PROCEDURAL HISTORY**

18 C. Dwayne Gilmore ("Plaintiff") is a state prisoner proceeding pro se and in forma
19 pauperis with this civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff filed the Complaint
20 commencing this action on June 7, 2012. (ECF No. 1.) This action now proceeds on the First
21 Amended Complaint filed on March 8, 2013, against defendants Correctional Officer (C/O) C.
22 Lockard, C/O C. Lopez, and C/O J. Hightower, for use of excessive force.¹ (ECF No. 12.)
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25 ¹ On November 18, 2013, the court issued an order dismissing claims and defendants from this
26 action for failure to state a claim. (ECF No. 17.) Defendants Lieutenant D. Augustus, Sergeant J. S. Diaz,
27 Licensed Vocational Nurse (LVN) A. Serna, LVN B. Ismat, LVN I. Bari, LVN J. Canada, LVN Z. Nartume, and
28 John Doe were dismissed from this action based on Plaintiff's failure to state any claims against them upon which
relief may be granted under §1983, and Plaintiff's claims based on supervisory liability and claims for conspiracy
and violation of due process were dismissed from this action for Plaintiff's failure to state a claim under § 1983.
(Id.) On July 8, 2015, the court issued an order dismissing defendant Torres from this action, with prejudice,
based on notice of defendant Torres' death, and dismissing Plaintiff's Eighth Amendment medical claim as moot.
(ECF No. 131.)

1 On April 25, 2014, the court issued a Discovery and Scheduling Order establishing
2 pretrial deadlines for the parties, including a deadline of December 25, 2014 for the completion
3 of discovery, including motions to compel, and a deadline of March 5, 2015 for the filing of
4 dispositive motions. (ECF No. 36.) On June 5, 2015, discovery was reopened until September
5 30, 2015, for limited purpose. (ECF No. 125.) The deadlines have now expired.

6 On April 9, 2015, Plaintiff filed a request for entry of default against defendant C/O C.
7 Lockard. (ECF No. 116.) On June 2, 2015, the court issued an order denying Plaintiff's
8 request for entry of default. (ECF No. 124.) On July 1, 2015, Plaintiff filed a motion for
9 reconsideration of the court's order. (ECF No. 130.)

10 Plaintiff's motion for reconsideration of the court's June 2, 2015 order is now before the
11 court.

12 **II. LEGAL STANDARDS**

13 **A. Motion for Reconsideration**

14 Rule 60(b) allows the Court to relieve a party from an order for "(1) mistake,
15 inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with
16 reasonable diligence, could not have been discovered in time to move for a new trial under
17 Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or
18 misconduct by an opposing party; (4) the judgment is void; or (6) any other reason that justifies
19 relief." Fed. R. Civ. P. 60(b). Rule 60(b)(6) "is to be used sparingly as an equitable remedy to
20 prevent manifest injustice and is to be utilized only where extraordinary circumstances . . ." exist.
21 Harvest v. Castro, 531 F.3d 737, 749 (9th Cir. 2008) (internal quotations marks and
22 citation omitted). The moving party "must demonstrate both injury and circumstances beyond
23 his control . . ." Id. (internal quotation marks and citation omitted). In seeking
24 reconsideration of an order, Local Rule 230(k) requires Plaintiff to show "what new or different
25 facts or circumstances are claimed to exist which did not exist or were not shown upon such
26 prior motion, or what other grounds exist for the motion."

27 "A motion for reconsideration should not be granted, absent highly unusual
28 circumstances, unless the district court is presented with newly discovered evidence, committed

1 clear error, or if there is an intervening change in the controlling law,” Marlyn Nutraceuticals,
2 Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 880 (9th Cir. 2009) (internal quotations
3 marks and citations omitted, and “[a] party seeking reconsideration must show more than a
4 disagreement with the Court’s decision, and recapitulation . . . ” of that which was already
5 considered by the Court in rendering its decision,” U.S. v. Westlands Water Dist., 134
6 F.Supp.2d 1111, 1131 (E.D. Cal. 2001). To succeed, a party must set forth facts or law of a
7 strongly convincing nature to induce the court to reverse its prior decision. See Kern-Tulare
8 Water Dist. v. City of Bakersfield, 634 F.Supp. 656, 665 (E.D. Cal. 1986), affirmed in part and
9 reversed in part on other grounds, 828 F.2d 514 (9th Cir. 1987).

10 **B. Entry of Default and Default Judgment**

11 Entry of default is appropriate as to any party against whom a judgment for affirmative
12 relief is sought that has failed to plead or otherwise defend as provided by the Federal Rules of
13 Civil Procedure and where that failure is shown by affidavit or otherwise. See Fed. R. Civ. P.
14 55(a). Rule 12 of the Federal Rules of Civil Procedure provides, “[A] defendant must serve an
15 answer within 21 days after being served with the summons and complaint; or if it has timely
16 waived service under Rule 4(d), within 60 days after the request for a waiver was sent.” Fed.
17 R. Civ. P. 12(a)(1)(A). Under Rule 4(d), a defendant may waive service of a summons by
18 signing and returning a waiver of service. Fed. R. Civ. P. 4(d). If a defendant fails to plead or
19 otherwise defend an action after being properly served with a summons and complaint, a
20 default judgment may be entered pursuant to Rule 55(a) of the Federal Rules of Civil
21 Procedure.

22 “The district court [also] possesses the power to impose default as a sanction for . . .
23 discovery conduct.” Dreith v. Nu Image, Inc., 648 F.3d 779, 786 (9th Cir. 2011.) “Under
24 Federal Rule of Civil Procedure 37(b), a district court may impose sanctions, including default,
25 for failing to comply with a court order [regarding discovery].” Id. “Rule 37(b) reads in
26 relevant part as follows:

27 If a party . . . fails to obey an order to provide or permit
28 discovery, including an order under Rule 26(f), 35, or 37(a), the
court where the action is pending may issue further just orders.

1 They may include . . . dismissing the action or proceeding in
2 whole or in part; [and] rendering a default judgment against the
disobedient party.

3 Fed. R. Civ. P. 37(b)(2)(A)(v)-(vi).” Id. “If a party ... fails to obey an order to provide or
4 permit discovery,” the court may impose sanctions, including “striking pleadings in whole or in
5 part.” Hester v. Vision Airlines, Inc., 687 F.3d 1162, 1169 (9th Cir. 2012) (quoting Fed. R.
6 Civ. P. 37(b)(2)(A)(iii); citing see also, e.g., Dreith, 648 F.3d at 786.) “Where [a discovery]
7 sanction results in default, the sanctioned party's violations must be due to the willfulness, bad
8 faith, or fault of the party.” Hester, 687 F.3d at 1169 (quoting Jorgensen v. Cassidy, 320 F.3d
9 906, 912 (9th Cir. 2003) (internal quotation marks omitted)). A court's finding that conduct is
10 willful or in bad faith is reviewed under the “clearly erroneous” standard. Id.

11 Once default has been entered against a defendant, the court may, “[f]or good cause
12 shown . . . set aside an entry of default. . . .” Fed. R. Civ. P. 55(c). “The court’s discretion is
13 especially broad where ... it is entry of default that is being set aside.” O’Connor v. State of
14 Nevada, 27 F.3d 357, 364 (9th Cir. 1994) (quoting Mendoza v. Wight Vineyard Mgmt., 783
15 F.2d 941, 945 (9th Cir. 1986)); see also Brady v. United States, 211 F.3d 499, 504 (9th Cir.
16 2000). Default is generally disfavored. In re Hammer, 940 F.2d 524, 525 (9th Cir. 1991);
17 Westchester Fire Ins. Co. v. Mendez, 585 F.3d 1183, 1189 (9th Cir. 2009).

18 Discussion

19 Plaintiff seeks reconsideration of the court’s order denying his request for entry of
20 default against defendant C/O C. Lockard for failure to participate in discovery. Plaintiff
21 argues that the court overlooked his evidence that defendant Lockard willfully failed to
22 participate in discovery by refusing to discuss his substantive responses to Plaintiff’s
23 interrogatories with defense counsel, despite defense counsel’s many efforts to communicate
24 with defendant Lockard, and by failing to provide verification for his discovery responses.
25 Plaintiff asserts that he presented evidence that defendant Lockard’s counsel has had a
26 continuing difficulty communicating with defendant Lockard, had not had a meaningful
27 discussion with defendant Lockard regarding substantive responses to Plaintiff’s
28 interrogatories, and had made many attempts to communicate with defendant Lockard by

1 email, overnight mail, and phone messages, without response from defendant Lockard.
2 Plaintiff also argues that he is prejudiced by defendant Lockard's failure to provide verification
3 for his responses, because the unverified responses are inadmissible as evidence, and Plaintiff
4 cannot use them for purposes of summary judgment and trial.

5 Plaintiff's arguments have merit. While the court maintains that Plaintiff's evidence is
6 not sufficient to prove that defendant Lockard willfully failed to participate in discovery, the
7 court record shows that defendant Lockard did not file any response to Plaintiff's request for
8 entry of default or provide evidence that he did not willfully refuse to participate in discovery.
9 On December 19, 2014, defendant Lockard's attorney (defense counsel) filed a declaration
10 indicating that she has been unable to secure defendant Lockard's cooperation in preparing
11 responses to Plaintiff's interrogatories to defendant Lockard. Defense counsel declared:

12 "Defendant Lockard is no longer employed by the California
13 Department of Corrections and Rehabilitation and resides in a
14 different city than counsel. I have had a continuing difficulty
15 communicating with Lockard and have yet to have a meaningful
16 discussion with him regarding his substantive responses to
17 Plaintiff's interrogatories. I have made many attempts to have the
18 required discussion with Lockard, including emailing him,
19 sending documents to him via overnight mail, and leaving
20 multiple phone messages. Despite my efforts, Lockard has not
21 phoned me to discuss his responses. Consequently, on December
22 16, 2014, I sent Lockard a letter by overnight mail reminding him
23 of his obligation to communicate with me and that if I do not hear
24 from him immediately he will need to seek new counsel."

19 (ECF No. 98 ¶5.) Defense counsel indicated at the close of defendant Lockard's responses to
20 Plaintiff's interrogatories that defendant Lockard's "verification [was expected] to follow," but
21 Plaintiff asserts that defendant Lockard has not provided any verification, and there is no
22 evidence that defendant Lockard signed a verification. (Doc. 116 at 41.) Based on this
23 evidence, defendant Lockard shall be required to show cause, within thirty days, why default
24 should not be entered against him for his failure to participate in discovery. Defense counsel
25 shall be directed to serve a copy of this order on defendant Lockard and file a proof of service
26 with the court.

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1 **III. CONCLUSION AND ORDER TO SHOW CAUSE**

2 Based on the foregoing, IT IS HEREBY ORDERED that:

- 3 1. Plaintiff's motion for reconsideration, filed on July 1, 2015, is GRANTED;
- 4 2. Within thirty days from the date of service of this order, defendant Lockard is
5 required to file a response in writing, showing cause why default should not be
6 entered against him for his failure to participate in discovery, pursuant to
7 Plaintiff's request for entry of default of April 9, 2015;
- 8 3. Counsel for defendant Lockard is directed to serve this order on defendant
9 Lockard **no later than July 27, 2015**, and file a proof of service with the court
10 **no later than August 3, 2015**;
- 11 4. Failure to comply with this Order to Show Cause will result in the striking of
12 defendant Lockard's Answer, an entry of default and default judgment against
13 him, and the imposition of any other sanctions outlined in Rule 37(b)(2) of the
14 Federal Rules of Civil Procedure.

15 IT IS SO ORDERED.

16 Dated: July 19, 2015

17 /s/ Gary S. Austin
18 UNITED STATES MAGISTRATE JUDGE