

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

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

ROBERT DEWAYNE BOSLEY, JR.,
Plaintiff,
v.
M. VELASCO, et al.,
Defendants.

Case No. 1:14-cv-00049-MJS (PC)

**ORDER DENYING PLAINTIFF'S ORAL
MOTION FOR RELIEF FROM
JUDGMENT**

Plaintiff is a former state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. This matter is before the Court pursuant to the consent of the parties.

Following the dismissal of this action on November 30, 2016, Plaintiff moves the Court pursuant to Federal Rule of Civil Procedure 60(b) for relief from judgment. For the reasons set forth here, Plaintiff's motion will be denied, and no relief from judgment will be provided.

I. Procedural Background

Plaintiff initiated this action on January 14, 2014, and, before dismissal, was proceeding on a Second Amended Complaint charging Defendant Marti Velasco with excessive force in violation of the Fourteenth Amendment.

1 Defendant filed on Answer on April 30, 2015, and a Discovery and Scheduling
2 Order issued on May 12, 2015.

3 Following the denial of Defendant's motion for summary judgment, a Second
4 Scheduling Order ("SSO") issued setting a trial confirmation hearing for December 1,
5 2016, and a jury trial for January 18, 2017. (ECF No. 25.) The Court also imposed an
6 October 14, 2016, deadline for motions for the attendance of witnesses and for
7 Plaintiff's pretrial statement.

8 The SSO was subsequently modified twice. On September 30, 2016, the trial
9 confirmation hearing was moved to November 17, 2016, at 1:30 p.m. (ECF No. 80.)
10 Then, on November 8, 2016, Plaintiff was granted an extension of time to file his pretrial
11 statement on or before November 16, 2016. (ECF No. 89.) Both of these orders were
12 served on Plaintiff's address of record and are deemed to have been fully effective. See
13 E.D. Cal. Local Rule 182(f).

14 Following receipt of Plaintiff's November 14, 2016, Notice of Change of Address,
15 the order granting him an extension of time to file his pretrial statement was re-served
16 on his new address. Notwithstanding his receipt of the original SSO and the two orders
17 modifying it, Plaintiff filed untimely motions for the attendance of witnesses¹ (ECF Nos.
18 85-87), he did not file a pretrial statement, and he did not appear either in person or
19 telephonically at the November 17, 2016, trial confirmation hearing.

20 In light of the foregoing, on November 18, 2016, Plaintiff was ordered to show
21 cause in writing on or before November 28, 2016, why this action should not be
22 dismissed pursuant to Federal Rules of Civil Procedure 41(b) and 16(f). (ECF No. 95.)
23 Plaintiff was also directed to appear at a hearing on the Order to Show Cause ("OSC")
24 set for December 5, 2016. He was specifically informed that his failure to comply with
25 either of these two directives would result in the dismissal of this action. This order was
26

27 ¹ These motions were ultimately denied for other reasons, including Plaintiff's failure to comply with the
28 procedures for obtaining the attendance of incarcerated witnesses and for his failure to identify certain witnesses
in response to Defendant's discovery request or at any time thereafter pursuant to his obligations under Federal
Rule of Civil Procedure 26(e).

1 served on Plaintiff's new address of record and thus also deemed to have been fully
2 effective.

3 When Plaintiff did not submit a response to the OSC by November 28, 2016, this
4 action was dismissed with prejudice two days later. (ECF No. 98.)

5 Plaintiff did ultimately file a response to the OSC, though on December 1, 2016,
6 four days after the OSC deadline. (ECF No. 99.) Therein, Plaintiff claimed that he
7 attempted to call into the November 17, 2016, trial confirmation hearing but was
8 unsuccessful, and that he has been homeless since his release from incarceration,
9 which has caused him significant hardship in prosecuting this action.

10 As a result of this tardy filing, the undersigned held a hearing on December 5,
11 2016, to discuss the status of this case. During this hearing, Plaintiff made an oral
12 motion for relief from judgment based on the reasons included in his late response to
13 the OSC. Defendant opposes the motion.

14 **II. Legal Standards**

15 Once the Court has issued an order or entered judgment, reconsideration may
16 be sought by filing a motion for relief from judgment under Federal Rule of Civil
17 Procedure 60(b). Reconsideration may be based on (1) mistake, inadvertence, surprise,
18 or excusable neglect; (2) newly discovered evidence; (3) fraud, misrepresentation, or
19 misconduct by an opposing party; (4) the judgment being void; (5) the judgment having
20 been satisfied; or (6) any other reason justifying relief. Fed. R. Civ. P. 60(b).

21 Relief under Rule 60 "is to be used sparingly as an equitable remedy to prevent
22 manifest injustice and is to be utilized only where extraordinary circumstances ..." exist.
23 Harvest v. Castro, 531 F.3d 737, 749 (9th Cir. 2008) (internal quotations marks and
24 citation omitted) (addressing reconsideration under Rules 60(b)(1)-(5)).

25 **III. Discussion**

26 Plaintiff in essence asks the Court to set aside its judgment dismissing this action
27 with prejudice pursuant to Rule 60(b)(1). This rule provides that a court may relieve a
28

1 party or its legal representative from a final judgment for “mistake, inadvertence,
2 surprise, or excusable neglect[.]” Fed. R. Civ. P. 60(b)(1).

3 In Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership,
4 the Supreme Court interpreted “neglect” to encompass “faultless omissions to act and,
5 more commonly, omissions caused by carelessness.” 507 U.S. 380, 388 (1993). In
6 assessing whether a set-aside is justified by a party's excusable neglect, courts apply a
7 four-part test: “(1) the danger of prejudice to the opposing party; (2) the length of delay
8 and its potential impact on the proceedings; (3) the reason for the delay; and (4)
9 whether the movant acted in good faith.” Id. at 395.

10 **A. Prejudice to Defendant**

11 To be prejudicial, “[t]he standard is whether [Defendant’s] ability to pursue [their
12 defenses] will be hindered.” Falk v. Allen, 739 F.2d 461, 463 (9th Cir. 1984). The Court
13 should consider whether “the delay [has] result[ed] in tangible harm such as loss of
14 evidence, increased difficulties of discovery, or greater opportunity for fraud or
15 collusion[.]” TGI Grp. Life Ins. Plan v. Knoebber, 244 F.3d 691, 701 (9th Cir. 2001)
16 (quoting Thompson v. Am. Home Assur. Co., 95 F.3d 429, 433-34 (6th Cir. 1996)),
17 overruled on other grounds by Egelhoff v. Egelhoff ex rel. Breiner, 532 U.S. 141 (2001).
18 This factor weighs in favor of setting aside the judgment since, although Defendant
19 would have to proceed to trial, the loss of a “quick victory” is not prejudice. See TGI Grp.
20 Life Ins. Plan, 244 F.3d at 701 (“delaying resolution of the case” is not prejudice).

21 **B. The Length of the Delay**

22 Pioneer next asks whether Plaintiff’s neglect caused significant delay or
23 otherwise had a deleterious influence on the proceedings. 507 U.S. at 395. As noted
24 supra, Plaintiff’s inability to follow the Court’s rules and file timely documents has
25 caused considerable delay and frustration on the part of both Defendant and the Court.
26 Due to his Plaintiff’s general failure to prosecute this action diligently, including through
27 his failure to comply with his discovery obligations, his tardy filing of witness motions,
28

1 his failure to file a pretrial statement, and his late response to the OSC, trial-related
2 proceedings and preparation have been hindered significantly. For example, Plaintiff's
3 failure to follow procedural requirements and meet certain deadlines has resulted in the
4 expenditure of time, effort and expense on Defendant's part in opposing untimely and
5 procedurally-deficient motions and the Court's part in denying those motions.

6 Additionally, the Pretrial Order, which issued on November 18, 2016, included
7 absolutely no input from Plaintiff either in paper format or through his presence at the
8 trial confirmation hearing. This lawsuit has become a one-sided effort carried almost
9 entirely by Defendant.

10 **C. The Reason for the Delay**

11 The third Pioneer factor requires an assessment of the reasons given for neglect.
12 In Pioneer, the Supreme Court interpreted Congress's intent as to permit courts "to
13 accept late filings caused by inadvertence, mistake, or carelessness, as well as by
14 intervening circumstances beyond the party's control." Id. at 388. As such, delays in
15 filing resulting from "negligence and carelessness," not "deviousness or willfulness,"
16 may be considered excusable neglect. Bateman v U.S. Postal Srvc, 231 F.3d 1220,
17 1225 (9th Cir. 2000)

18 This action was dismissed for a number of reasons, including Plaintiff's failure to
19 file timely witness motions, failure to file a pretrial statement, failure to appear at the
20 November 16, 2016, trial confirmation hearing, and failure to timely respond to the OSC.
21 In seeking relief from judgment, Plaintiff claims that he attempted to call into the trial
22 confirmation hearing and that his homelessness has affected his ability to comply with
23 certain orders of the Court. At the December 5, 2016, hearing, Plaintiff also claimed that
24 he did mail a pretrial statement both to the Court and defense counsel before the
25 October 14, 2016, deadline, and attributed any failure for its delivery to institutional
26 problems at the prison.

