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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MICHAEL NEIL JACOBSEN,
Plaintiff,
v.
PEOPLE OF THE STATE OF CALIFORNIA, et al.,
Defendants.

Case No. 1:14-cv-00108-JLT (PC)
ORDER ON PLAINTIFF’S MOTION FOR SANCTIONS DUE TO SPOILATION OF VIDEO EVIDENCE
(Doc. 95)

In this action, Plaintiff is proceeding on the Second Amended Complaint on claims of excessive force and deliberate indifference to his serious medical needs based on two incidents that occurred in the Fresno County Jail -- on December 25, 2013 and March 11, 2014. (Docs. 16, 17.) Pending before the Court is Plaintiff’s motion for sanctions against Defendants for spoliation of surveillance video which Plaintiff asserts exists. (Doc. 95.)

LEGAL STANDARDS

Spoliation of evidence is the “destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence, in pending or reasonably foreseeable litigation.” *Keamev v. Folev&Lardner. L.L.P.*, 590 F.3d 638, 649 (9th Cir. 2009) (quoting *Hernandez v. Garcetti*, 68 Cal.App.4th 675, 680 (1998)). The authority to impose sanctions for spoliation arises from a court’s inherent power to control the judicial process. *Medical*

1 *Laboratory Mgmt. Consultants v. American Broadcasting Companies, Inc.*, 306 F.3d 806, 824
2 (9th Cir. 2002). The exercise of a court’s inherent powers must be applied with “restraint and
3 discretion” and only to the degree necessary to redress the abuse. *Chambers v. NASCO, Inc.*, 501
4 U.S. 32, 45 (1991); *see also Schmid v. Milwaukee Electric Tool Corp.*, 13 F.3d 76, 79 (3rd Cir.
5 1994) (courts should choose “the least onerous sanction corresponding to the willfulness of the
6 destructive act and the prejudice suffered by the victim”).

7 A party seeking an adverse inference instruction (or other sanctions) based on the
8 spoliation of evidence must establish the following three elements: (1) that the party having
9 control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the
10 records were destroyed with a “culpable state of mind” and (3) that the evidence was “relevant”
11 to the party’s claim or defense such that a reasonable trier of fact could find that it would support
12 that claim or defense. *Zubulake v. USB Warburg LLC (“Zubulake IV”)*, 220 F.R.D. 212, 220
13 (S.D.N.Y. 2003) (citing *Residential Funding Corp. v. DeGeorge Fin’l Corp.*, 306 F.3d 99, 108
14 (2d Cir. 2002)); *see also Apple Inc. v. Samsung Electronics Co., Ltd. (“Apple II”)*, 888 F.Supp.2d
15 976, 989-90 (N.D.Cal. 2012); *Surowiec v. Capital Title Agency, Inc.*, 790 F.Supp.2d 997, 1005
16 (D.Ariz. 2011); *Lewis v. Ryan*, 261 F.R.D. 513, 521 (S.D.Cal. 2009); *Rev 973 LLC v. Mouren-*
17 *Laurens*, 2009 WL 273205 at *3 (C.D.Cal. 2009); *cf. Victor Stanley v. Creative Pipe, Inc.*, 269
18 F.R.D. 497, 520-21 & App’x (D.Md. 2010) (analyzing standards for spoliation sanctions by
19 circuit). “After considering these factors, a court must then consider all available sanctions and
20 determine the appropriate one.” *Apple Inc. v. Samsung Electronics Co., Ltd. (“Apple I”)*, 881
21 F.Supp.2d 1132, 1138 (N.D.Cal. 2012). The party seeking spoliation sanctions has the burden of
22 establishing the elements of a spoliation claim. *Centrifugal Force, Inc. v. Softnet*
23 *Communication, Inc.*, 783 F.Supp.2d 736, 740 (S.D.N.Y.2011).

24 ANALYSIS

25 Before the elements of a spoliation claim can be evaluated, it is fundamental that the party
26 seeking sanctions establish that the evidence in question actually currently exists in an altered
27 form, or previously existed. This is an essential prerequisite to any spoliation claim and is where
28 Plaintiff’s motion is wanting.

1 In his motion, Plaintiff asserts that he “went to court on the new criminal charges and
2 twice the judge ordered the Plaintiff be provided a copy of the video,” but that “no video was ever
3 provided to the Plaintiff and the District Attorney dropped all charges.” (Doc. 95, p. 3.) This
4 does not establish that any surveillance video of the incidents exists or has ever existed. Rather,
5 this contention suggests that no such video has ever existed since -- if it did exist, it would have
6 been produced in the criminal proceeding against Plaintiff. The Court takes judicial notice of the
7 docket entries in *The State of California v. Michael Neil Jacobsen*, Fresno Superior Court Case
8 No. F14902385. Fed.R. Evid. 201, 28 U.S.C.A.; *Harris v. County of Orange*, 682 F.3d 1126,
9 1131-32 (2012). Charges were filed against Plaintiff in that case on March 13, 2014 for battery
10 upon a custodial officer and resisting public of peace officer. On March 19, 2014, the parties
11 stipulated to discovery pursuant to California Penal Code § 1054. On March 28, 2014, Plaintiff
12 requested the items of discovery that were described in the March 19, 2014 hearing and the Court
13 found discovery was not provided to Plaintiff, and ordered it be provided to him by May 2, 2014.
14 On May 2, 2014, Plaintiff was released on all counts and the case was dismissed.

15 Plaintiff appears to point to the events in that criminal case against him to suggest that a
16 video existed which exonerated him in that action and would have proved his claims here.
17 However, no such definitive conclusion can be made since the docket entries in that action do not
18 show that a video was produced and played, let alone what any such video may have depicted;
19 nor is there a docket entry finding Plaintiff not guilty of the charges against him. The fact that no
20 video was produced in the criminal proceedings, despite the judge twice ordering it, may more
21 likely, but not definitively be construed to imply that no surveillance video exists or has ever
22 existed of the incidents in question here.

23 Plaintiff also asserts that the “sheriff detective (arresting officer) and the jail Sergeant who
24 heard the write up both told Plaintiff that there was a video and that it would be preserved due to
25 the criminal charges” which were filed against him from the incidents. (Doc. 95, p. 4.) However,
26 Plaintiff did not attach declarations from the detective or the sergeant to his motion to establish
27 that such video exists and his motion is not signed under penalty of perjury.

28 Furthermore, the discovery issues which have arisen in this action over the video all

1 support the conclusion that no such surveillance video has ever existed. (*See* Docs. 67, 104, 108.)
2 In their opposition, Defendants Barajas and Diaz present a declaration from Officer Juan M.
3 Gonzalez, who oversees the security cameras in the jail, and is familiar with the security camera
4 set up in the main jail which definitively states: “No video was recorded of the alleged incidents
5 on December 25, 2013 and March 11, 2014. Thus, video of the alleged incidents never existed.”
6 (Doc. 103, pp. 5-6.) In his reply, Plaintiff asserts that Officer Gonzalez’s declaration contradicts
7 a response that Defendants provided to his discovery request, but the discovery response Plaintiff
8 points to states that there was no security camera pointed to capture images of the incidents on the
9 dates at issue in this action. (Doc. 106, pp. 12-13.) That discovery response does not bolster
10 Plaintiff’s argument; rather it is consistent with Officer Gonzalez’s declaration -- the fact that no
11 security camera was set up that could capture the incidents at issue in this action logically leads to
12 the conclusion that video of the alleged incidents never existed.

13 Finally, in his reply Plaintiff submits his own declaration containing several statements of
14 FCJ employees as well as a declaration from Plaintiff’s cellmate that indicates he overheard
15 Plaintiff’s conversations with the FCJ employees and agrees that Plaintiff has truthfully
16 represented those statements. A statement made outside of court, which is offered for the truth of
17 the matter asserted in the statement is hearsay. Fed. R. Evid. 801. Hearsay is not admissible,
18 Fed.R.Evid. 802, unless it meets an exception, Fed. R. Evid. 803. Plaintiff offers the statements
19 of the FCJ employees in his declaration for the truth of the matter asserted in each statement --
20 that a surveillance camera has been pointed at the legal research room for the 4+ years Officer M.
21 Rocha has worked at FCJ; that the camera has probably been there since before Officer M. Bejar
22 was born; that there has been a camera there for many, many years (Officers J. Valenzuela & J.
23 DeLaCruz); that a camera has been there for the 4 or 5 years Corporal D. Nichols has been
24 employed at FCJ; and that though a new system is being installed, that the old system was tied to
25 a company in Texas that recorded all of the video from all of the cameras within FCJ which held
26 the video for two years before recording over it (Corporal V. Soun). (Doc. 106, pp. 6-9.)
27 Plaintiff seeks to use each of these statements for the truth of the matter asserted therein, bolstered
28 by the declaration of his cellmate that those statements in Plaintiff’s declaration are true.

1 However, none of the statements by FCJ employees recited in Plaintiff's declaration are
2 considered since none of the exceptions to the rule against hearsay apply.

3 Plaintiff does not provide any admissible evidence for the Court to find that surveillance
4 video was taken of the two incidents upon which he is proceeding in this action. Further, even if
5 Plaintiff provided admissible evidence, he fails to make any showing that Defendants Barajas,
6 Diaz, or Nurse Monica Choe had control over any asserted surveillance video, an obligation to
7 preserve it at the time it was destroyed, and that any destruction thereof was done with a
8 "culpable state of mind." *Zubulake IV*.

9 This is not to say that Plaintiff is unable to present admissible evidence on the existence
10 and spoliation of the surveillance video which he seeks. He has simply not done so here and has
11 not overcome the Defendants' evidence that no such video has ever existed. It is noted that, as of
12 the last notice of change of address which Plaintiff filed, he is out of custody. Thus, Plaintiff is
13 not prohibited from filing further motions on this issue if he is able to obtain admissible evidence
14 from a third party. However, Defendants need not respond to any further motions Plaintiff files
15 regarding surveillance videos on the incidents at issue in this action unless and until ordered to do
16 so by the Court.

17 **ORDER**

18 Accordingly, Plaintiff's motion for sanctions for spoliation of evidence, filed on
19 December 21, 2016 (Doc. 95), is **DENIED**.

20
21 IT IS SO ORDERED.

22 Dated: June 20, 2017

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE