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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

KENNETH ALLEN SHARONOFF,
Plaintiff,
v.
MONTOYA, et al.,
Defendants.

No. 1:15-cv-00799-DAD-GSA (PC)
ORDER DENYING MOTION FOR RECONSIDERATION
(Doc. Nos. 45, 49, 51)

Plaintiff, Kenneth Allen Sharonoff, is a state prisoner proceeding *pro se* and *in forma pauperis* with this civil rights action filed pursuant to 42 U.S.C. § 1983.

On February 22, 2017, the assigned magistrate judge entered findings and recommendations, recommending that defendants’ motion for summary judgment be granted. (Doc. No. 45.) The parties were granted fourteen days in which to file objections. (*Id.*) After twenty-one days, no objections had been filed. Accordingly, on March 15, 2017, the court issued an order granting defendants’ motion for summary judgment. (Doc. No. 46.) On the same day, judgment was entered and the case was closed. (Doc. No. 47.)

On March 16, 2017, the court received objections by plaintiff to the findings and recommendations. (Doc. No. 48.) Plaintiff’s proof of service for his objections is dated March 2,

1 2017, which would render the objections timely under the mailbox rule.¹ Therefore, the court
2 will consider the objections and determine whether plaintiff's arguments therein would have
3 affected the court's decision to adopt the findings and recommendations.

4 On March 29, 2017, plaintiff filed a motion to vacate the order granting defendants'
5 motion for summary judgment. (Doc. No. 49.) On April 19, 2017, defendants filed an opposition
6 to the motion. (Doc. No. 50.) On April 26, 2017, plaintiff filed another motion to vacate the
7 order granting defendants' motion for summary judgment (Doc. No. 51), which is identical to his
8 previous filing (Doc. No. 49), save for plaintiff's citation in the latter filing to the decision in
9 *Miller v. Sumner*, 921 F. 2d 202 (9th Cir. 1990). (*Id.* at 8–9, Ex. A.) The court construes both of
10 plaintiff's motions to vacate the court's order as motions for reconsideration.

11 MOTION FOR RECONSIDERATION

12 Rule 60(b) of the Federal Rules of Civil Procedure provides in relevant part:

13 On motion and just terms, the court may relieve a party or its legal
14 representative from a final judgment, order, or proceeding for the
following reasons:

- 15 (1) mistake, inadvertence, surprise, or excusable neglect;
16 (2) newly discovered evidence that, with reasonable diligence,
17 could not have been discovered in time to move for a new trial
under Rule 59(b);

18 * * *

19 A motion under Rule 60(b)(1) or (2) must be made no more than a year after the entry of the
20 judgment. Fed. R. Civ. P. 60(c).

21 Generally speaking, a motion for reconsideration “should not be granted . . . unless the
22 district court is presented with newly discovered evidence, committed clear error, or if there is an
23 intervening change in the controlling law.” *389 Orange St. Partners v. Arnold*, 179 F. 3d 656,
24 665 (9th Cir. 1999) (citing *Sch. Dist. No. 1J v. ACandS, Inc.*, 5 F. 3d 1255, 1263 (9th Cir. 1993));
25 accord *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir.
26

27 ¹ Based on the mailbox rule of *Houston v. Lack*, 487 U.S. 266, 276 (1988), a pro se prisoner's
28 court filing is deemed filed at the time the prisoner delivers it to prison authorities for forwarding
to the court clerk. *Douglas v. Noelle*, 567 F.3d 1103, 1107 (9th Cir. 2009).

1 2009).² Reconsideration of a prior order is an extraordinary remedy “to be used sparingly in the
2 interests of finality and conservation of judicial resources.” *Kona Enters., Inc. v. Estate of*
3 *Bishop*, 229 F. 3d 877, 890 (9th Cir. 2000) (citation omitted); *see also Harvest v. Castro*, 531
4 F.3d 737, 749 (9th Cir. 2008) (addressing reconsideration under Rule 60(b)). In seeking
5 reconsideration under Rule 60, the moving party “must demonstrate both injury and
6 circumstances beyond his control.” *Harvest*, 531 F.3d at 749 (internal quotation marks and
7 citation omitted).

8 DISCUSSION

9 The court has thoroughly reviewed plaintiff’s objections received by the court on March
10 16, 2017, plaintiff’s motion to vacate the order granting defendants summary judgment filed on
11 March 29, 2017, defendants’ opposition filed on April 19, 2017, and plaintiff’s reply filed on
12 April 26, 2017. (Doc. Nos. 48–51.)

13 In his objections to the findings and recommendations, plaintiff argues that he was not
14 required under 42 U.S.C. § 1997(e) to further pursue the inmate appeal he filed on May 8, 2015
15 prior to filing this lawsuit. Plaintiff also argues that his filing of his complaint in this action
16 before allowing the requisite thirty days for a response to his inmate appeal did not cause the
17 defendants to suffer undue prejudice or significantly change the outcome of his inmate appeal.
18 Plaintiff asserts that he waited nineteen days for a response to his inmate appeal, which gave
19 prison officials plenty of time to correct their mistakes before he filed suit.

20 In their opposition to plaintiff’s motion for reconsideration defendants acknowledge that
21 plaintiff’s objections to the findings and recommendations were filed timely under the mailbox
22 rule, but that consideration of those objections does not change the fact that plaintiff did not
23 exhaust his available administrative remedies prior to filing suit as required. Defendants argue
24 that plaintiff’s premature filing of his lawsuit undermines the purpose of the exhaustion

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26 ² The Local Rules of this court require, in relevant part, that in moving for reconsideration of an
27 order denying or granting a prior motion, a party must show “what new or different facts or
28 circumstances are claimed to exist which did not exist or were not shown” previously, “what
other grounds exist for the motion,” and “why the facts or circumstances were not shown” at the
time the substance of the order which is objected to was considered. Local Rule 230(j).

1 requirement, which requires compliance with the prison's procedural rules and deadlines.
2 Defendants contend that administrative remedies were still available to plaintiff at the time he
3 filed this lawsuit, and therefore, it cannot be disputed that plaintiff did not properly exhaust his
4 administrative remedies before he filed suit.

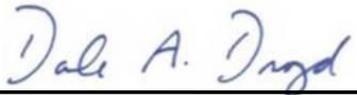
5 After consideration of plaintiff's objections and motion for reconsideration, the court's
6 decision with respect to defendants' motion for summary judgment in their favor remains
7 unchanged. Notably, in the findings and recommendations issued on February 22, 2017 (Doc.
8 No. 45) and later adopted by the undersigned on March 15, 2017 (Doc. No. 46), the magistrate
9 judge found that "[p]laintiff's failure to wait the full 30 days denied prison officials a fair
10 opportunity to correct their own errors and such failure is fatal to his lawsuit." (Doc. No. 45 at
11 13-14). The court does not find this conclusion to be the result of mistake, inexcusable neglect,
12 or clear error. Plaintiff has not set forth any new evidence which would cause the court to
13 consider reversing its prior decision. In short, the Prison Litigation Reform Act requires prisoners
14 to exhaust their available administrative remedies prior to filing suit, *Jones v. Bock*, 549 U.S. 199,
15 211 (2007); *McKinney v. Carey*, 311 F.3d 1198, 1199-1201 (9th Cir. 2002), and plaintiff failed to
16 do so here. Therefore, plaintiff's motion for reconsideration will be denied, and plaintiff's case
17 shall remain closed.

18 CONCLUSION

19 Based on the foregoing, consideration of plaintiff's arguments set forth in his objections
20 do not change the court's March 15, 2017 decision granting defendants' motion for summary
21 judgment due to plaintiff's failure to exhaust his administrative remedies prior to filing suit.
22 Plaintiff's motion for reconsideration (Doc. Nos 49 and 51) is denied.

23 IT IS SO ORDERED.

24 Dated: October 20, 2017

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26 _____
27 UNITED STATES DISTRICT JUDGE
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