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5 **UNITED STATES DISTRICT COURT**
6 **EASTERN DISTRICT OF CALIFORNIA**
7

8 **VICTOR M. SIENZE,**

9 **Plaintiff**

10 **v.**

11 **SHERIFF'S DEPUTY MATTHEW J.**
12 **KUTZ and SHERIFF'S SERGEANT**
13 **DANIEL N. KERBER,**

14 **Defendants**

CASE NO. 1:17-CV-0736 AWI SAB

**ORDER RE: MOTIONS FOR
RECONSIDERATION AND TO ADD
WITNESSES**

(Docs. 68, 74, 75, and 85)

15 **I. Background**

16 Plaintiff Victor Sienze lives in Madera, CA. On May 24, 2016, Sienze called for an
17 ambulance to have his grandson, Victor Sienze III, transported to a hospital. Emergency Medical
18 Technicians Anthony Prieto and Sabrina Munoz arrived. Having difficulty with the transport, the
19 EMTs called the Madera County Sheriff's Office for assistance. Defendant Officer Matthew Kutz
20 was among the several police officers to arrive at the scene. Sienze objected to the manner in
21 which Officer Kutz was handling his Grandson and pushed Officer Kutz. The police officers
22 tackled and handcuffed Sienze. Defendant Officer Dan Kerber arrived on the scene. Sienze was
23 arrested for obstructing a police officer in the course of their duty. Sienze was uncooperative.
24 The police officers physically subdued him, picked him up, and put him in the back of a patrol car.
25 In the process, Officers Kutz and Kerber forced Sienze face first onto the ground and Officer Kutz
26 struck Sienze's head with the car door.

27 Sienze filed suit against the Madera County Sheriff's Office, Officers Kutz, Kerber, Ian
28 Roth, Jason Clark, and Michael Thomas for violating his civil rights under 42. U.S.C. § 1983.

1 Doc. 1. The operative complaint is the First Amended Complaint, which dropped the claims
2 against the Madera County Sheriff's Office. Doc. 5. Sienze is pro se and in forma pauperis. In
3 reviewing the First Amended Complaint, Magistrate Judge Stanley Boone recommended
4 dismissing Officers Roth, Clark, and Thomas from the case as well as limiting claims against
5 Officers Kutz and Kerber to excessive force. Doc. 6. The Findings and Recommendations were
6 adopted in full. Doc. 7.

7 Defendants filed a motion for summary judgment. Doc. 27. The form of Sienze's
8 opposition was not proper so he was granted leave to make additional filings in opposition to
9 the summary judgment motion. Doc. 44. Sienze complied with the request and also filed a motion
10 for leave to file a Second Amended Complaint. Doc. 53. Defendants' summary judgment motion
11 was granted in part and denied in part while Sienze's motion for leave to file a new complaint was
12 denied. Doc. 66. This case is limited to claims against Officers Kerber and Kutz regarding claims
13 of excessive force in tackling him on a patio and placing him in a patrol car. The pretrial
14 conference was held on January 23, 2019.

15 Sienze has filed two requests for reconsideration. Docs. 68 and 74. Additionally, he has
16 filed a request to amend the pretrial order to add witnesses and exhibits. Doc. 75. Defendants
17 oppose these motions. Docs. 72 and 84.

18 19 **II. Reconsideration**

20 Sienze seeks reconsideration of Doc. 66, the order granting Defendants' motion for
21 summary adjudication in part and denying Sienze's motion for leave to amend his complaint.
22 Docs. 68 and 74.

23 "A motion for reconsideration should not be granted, absent highly unusual circumstances,
24 unless the district court is presented with newly discovered evidence, committed clear error, or if
25 there is an intervening change in the controlling law." Marlyn Nutraceuticals, Inc. v. Mucos
26 Pharma GmbH & Co., 571 F.3d 873, 880 (9th Cir. 2009), citations and quotations omitted. Local
27 Rule 230(j) also requires Plaintiff seeking reconsideration of an order to show "what new or
28 different facts or circumstances are claimed to exist which did not exist or were not shown upon

1 such prior motion, or what other grounds exist for the motion and...why the facts or circumstances
2 were not shown at the time of the prior motion.” Eastern District of California Local Rule 230(j).
3 Reconsideration is an “extraordinary remedy,” to be used “sparingly as an equitable remedy to
4 prevent manifest injustice.” Wood v. Ryan, 759 F.3d 1117, 1121 (9th Cir. 2014), quoting Kona
5 Enters., Inc. v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000). “A party seeking
6 reconsideration must show more than a disagreement with the Court’s decision, and recapitulation
7 of the cases and arguments considered by the court before rendering its original decision fails to
8 carry the moving party’s burden.” United States v. Westlands Water Dist., 134 F. Supp. 2d 1111,
9 1131 (E.D. Cal. 2001), citations and quotations omitted.

10 Much of Sienze’s motion is a recapitulation of his version of the facts. It is evident that he
11 disagrees with the ruling but that by itself is insufficient for grant of reconsideration. The court
12 has already ruled that Defendants are entitled to partial summary adjudication based on the facts as
13 established by the evidence presented, taking all reasonable inferences in Plaintiff’s favor.
14 Nothing in Sienze’s multiple filings changes basic conclusion.

15 Sienze does make a few specific arguments. Regarding the partial grant of the summary
16 judgment motion, Sienze argues that the use of Benita Waltz’s and Stephen Waltz’s declarations
17 in deciding the earlier motion for summary judgment was improper. He states that “this hearsay
18 declaration was presented to this court as true facts and evidence to find summary judgment
19 against plaintiff. This action triggers the ‘confrontation clause of the sixth amendment’ plaintiff
20 was not allowed the opportunity of cross-examination of this witness. Doc. 74, 5:16-18 and 6:9-
21 14. First, the hearsay requirements of the Federal Rules of Evidence do not fully apply to
22 summary judgment motions. “[A]t summary judgment a district court may consider hearsay
23 evidence submitted in an inadmissible form, so long as the underlying evidence could be provided
24 in an admissible form at trial, such as by live testimony.” JL Bev. Co., LLC v. Jim Beam Brands
25 Co., 828 F.3d 1098, 1110 (9th Cir. 2016). “To survive summary judgment, a party does not
26 necessarily have to produce evidence in a form that would be admissible at trial, as long as the
27 party satisfies the requirements of Federal Rules of Civil Procedure 56.” Block v. City of L.A.,
28 253 F.3d 410, 418-19 (9th Cir. 2001). Part of that rule states that “An affidavit or declaration used

1 to support or oppose a motion must be made on personal knowledge, set out facts that would be
2 admissible in evidence, and show that the affiant or declarant is competent to testify on the matters
3 stated.” Fed. R. Evid. 56(c)(4). The declarations provided satisfied these conditions. Second, this
4 is a civil case. “The Confrontation Clause, which originates from the Sixth Amendment, applies
5 only to criminal matters.” Kesey, Ltd. Liab. Co. v. Francis, 2009 U.S. Dist. LEXIS 28078, *42 (D.
6 Or. Apr. 3, 2009), citing Austin v. United States, 509 U.S. 602, 608 n.4 (1993), United States v.
7 Alisal Water Corp., 431 F.3d 643, 658 (9th Cir. 2005), and U.S. Steel, LLC v. Tieceo, Inc., 261
8 F.3d 1275, 1287 n.13 (11th Cir. 2001). Defendants have informed Sienze that Benita and Stephen
9 Waltz will not be called at trial. This appears to be because the events they personally witnessed
10 only pertain to claims which were adjudicated in the summary judgment; that is, they were able to
11 see the events on the lawn but not the patio. As that part of the case is resolved, their testimony
12 would likely not be relevant.

13 Regarding the denial of leave to amend, Sienze asserts that “Judge Stanley Boone had no
14 prior knowledge as to all the facts now having been brought before this court. Judge Stanley
15 Boone was missing the facts that [Officers] Kerber [,] Kutz[,], Clark[,], Roth[, and] Thomas were
16 all present at plaintiff’s home and were with full knowledge that [plaintiff] was/is an elderly
17 disabled person and a disabled veteran and with such knowledge did willfully and maliciously
18 attack and assault said plaintiff.” Doc. 68, 5:18-23. Additionally, he states that in the audio
19 recording, the conversation between Officers Roth and Kerber shows a conspiracy to deprive
20 Sienze of his constitutional rights: “there was a conspiracy clearly shown to give ‘special
21 treatment’ to a grand par that was something of a site searcher.” Doc. 68, 7:8-9. Sienze asserts
22 that “I had to search in earnest greatly to try to get a legal transcript of the conversation between
23 two officers that I submitted to the court. I did my best to be diligent in getting the information I
24 needed transcribed...It took me approximately two months and one week to get the CDs
25 transcribed once that was done I had to have background noise cleaned up on CDs by a
26 professional so that one could more clearly hear and understand what was being said.” Doc. 68,
27 8:9-15. However, Sienze stated in his deposition on March 9, 2018 that he listened to the audio
28 recording when it was first sent to him and in fact complained that there were parts missing. Doc.

1 37, 119:13-17. There is no allegation that the relevant portion of the recording Sienze refers to
2 was withheld by Defendants. See Tesoro Ref. & Mktg. Co. LLC v. Pac. Gas & Elec. Co., 2015
3 U.S. Dist. LEXIS 130480, *45 (N.D. Cal. Sep. 28, 2015) (“Manifest injustice might exist if a party
4 withholds relevant information in bad faith during litigation”). While Sienze does detail the time
5 needed to clean up the recording, he does not state that he could not understand it in its original
6 form. Indeed, he was able to understand it well enough to note what parts were missing. The
7 earlier ruling on Sienze’s motion concluded that he was not diligent in bringing his motion. He
8 was aware of the need to amend his complaint by March 9, 2018 but did not request to do so until
9 September (or arguably July). Sienze has not presented new fact or law sufficient to warrant
10 reconsideration.

11 12 **III Amending the Pretrial Order**

13 Sienze seeks to add three people to the list of witnesses who may be called to testify at
14 trial: 1) his wife Kay Sienze to authenticate photographs, 2) Mike Badella to testify on Plaintiff’s
15 character, and 3) an unnamed expert witness to testify on Sienze’s medical records. Doc. 75.
16 Defendants oppose all three requests. Doc. 84. The pretrial order stated that people could be
17 added to the witness list upon a showing of “manifest injustice.” Doc. 72, 14:13-16. This mirrors
18 the requirements of Rule 16 which state “The court may modify the order issued after a final
19 pretrial conference only to prevent manifest injustice.” Fed. R. Civ. Proc. 16(e). The party seeking
20 to add witnesses has the burden of persuasion. See Galdamez v. Potter, 415 F.3d 1015, 1020 (9th
21 Cir. 2005). “Under the ‘manifest injustice’ test of Rule 16, the Ninth Circuit has listed four factors
22 for courts to consider: prejudice to the opposing party, that party’s ability to cure the prejudice, the
23 impact on the orderly and efficient conduct of the trial and any willfulness or bad faith on the part
24 of the party seeking the modification. The court also considers the moving party’s delay in seeking
25 amendment.” Copart, Inc. v. Sparta Consulting, Inc., 2018 U.S. Dist. LEXIS 49698, *4-5 (E.D.
26 Cal. Mar. 26, 2018), citations omitted.

27 28 **A. Kay Sienze**

1 Kay Sienze is being asked “to authenticate photographs taken by her and other testimony
2 that may seem appropriate.” Doc. 75, 1:16-18. Defendants point out that Plaintiff’s exhibits listed
3 in the Pretrial Order only lists “1. Copies of photographs taken by Sheriff Deputy Thomas of
4 Plaintiff Victor M. Sienze at Madera County Jail and given to Plaintiff by defense counsel Mark
5 Kitabayashi.” Doc. 72, 16:1-14. However, the court notes that photographs taken by Kay Sienze
6 were submitted as part of the opposition to summary judgment. Doc. 51. The court interprets this
7 as a request to add Kay Sienze to the witness list and to add photographs she has taken to the
8 exhibit list.

9 First, with regards to authentication, the photographs have been disclosed to Defendants in
10 the past. The extent of Sienze’s injuries is a central question in this case. Defendants themselves
11 had taken photographs of these injuries on the day of the incident. While the trial will start soon,
12 there does not appear to be any surprise and Defendants have time to examine the photographs
13 more carefully. Inclusion of these photographs would not impact the conduct of the trial. Sienze
14 is pro se. While he has been diligent in learning about and trying to follow legal rules, it is evident
15 from his comments at the last hearing that Sienze did not fully understand the need for
16 authenticating photographs. There does not appear to be any bad faith on his part for not seeking
17 to include Kay Sienze as a witness for this purpose before. Given this set of circumstances,
18 permitting modification is warranted. See Fresno Rock Taco, LLC v. Nat’l Sur. Corp., 2013 U.S.
19 Dist. LEXIS 101428, at *7 (E.D. Cal. July 18, 2013) (in a July 18, 2013 order concerning a July
20 31, 2013 trial, “As there remains time for Plaintiffs to review the documents that Ms. Richards
21 will authenticate, Plaintiffs have adequate time to cure any prejudice that will arise from
22 modifying the pretrial order to include Ms. Richards as a witness and include the public records
23 from the City of Fresno as potential trial exhibits”).

24 Second, Sienze seeks to allow Kay Sienze to provide “other testimony that may seem
25 appropriate.” Doc 75, 1:16-18. This request is broad and does not give Defendants any idea about
26 what the nature of that testimony might be. There is no indication that Kay Sienze was a
27 percipient witness to the events of May 26, 2016. Sienze has not demonstrated manifest injustice
28 for this purpose.

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B. Mike Badella

Sienze wishes to have Mike Badella “testify as to personal knowledge of plaintiff’s character[. He has] been a friend of plaintiff for more than 59 years.” Doc 75, 1:19-21. Defendants say that “Mike Badella does not appear to have been involved in the events of May 26, 2016 to any degree, and his name was never revealed in discovery or referenced in any court document.” Doc. 84, 5:9-11. Under the federal rules of evidence that apply in this case, “Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.” Fed. R. Evid. 404(a)(1). Mike Badella is not a witness to the incident in question. His testimony about Sienze’s overall character would not be relevant in this trial.

C. Medical Expert

Sienze also seeks “Addition of expert testimony as it seems court has informed plaintiff this will or may be necessary as to plaintiff’s medical records for damages.” Doc. 75, 1:26-27. Defendants point out that Sienze “completely failed to identify any expert witness(es) to testify in these proceedings, let alone the proper and timely disclosures required under the Federal Rules of Civil Procedure.” Doc. 84, 6:13-14. The scheduling order stated that “parties are directed to disclose all expert witnesses, in writing, on or before August 17, 2018 and to disclose all supplemental experts on or before September 17, 2018.” Doc. 19, 3:5-6. The pretrial order noted that “No expert witnesses have been named in this case.” Doc. 72, 19:6. It is simply too late to inquire about adding a medical expert.

IV. Order

Sienze’s motion for reconsideration is DENIED.

Sienze’s request to modify the pretrial order to add witnesses and exhibits is GRANTED in part and DENIED in part.

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IT IS SO ORDERED.

Dated: March 18, 2019



SENIOR DISTRICT JUDGE