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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GEORGE SHELDON JERCICH,

Plaintiff,

v.

CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,
et al.,

Defendants.

No. 1:18-cv-00032-NONE-EPG (PC)
ORDER DENYING PLAINTIFF'S MOTION
FOR RECONSIDERATION

(Doc. No. 62)

Plaintiff, George Sheldon Jercich, is a former state prisoner proceeding *pro se* with this civil rights action filed pursuant to 42 U.S.C. § 1983. Before the court is plaintiff's motion for reconsideration. (Doc. No. 62.) For the reasons set forth below, the court will deny the motion.

BACKGROUND

Plaintiff commenced this action on January 5, 2018, with the filing of a complaint. (Doc. No. 1.) On March 2, 2018, plaintiff filed a motion for leave to file a First Amended Complaint along with a First Amended Complaint. (Doc. No. 19.) On March 5, 2018, plaintiff requested leave to file a Second Amended Complaint ("SAC"). (Doc. No. 20.) Plaintiff lodged his proposed SAC on March 6, 2018. (Doc. No. 21.) On March 8, 2018, the court granted plaintiff leave to file the SAC. (Doc. No. 22.)

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1 Two motions to dismiss the SAC were filed. (Doc. Nos. 33, 38.) On November 29, 2018,
2 the court granted plaintiff's motion to file a Third Amended Complaint ("TAC") (Doc. No. 43)
3 and denied the pending motions to dismiss as moot (Doc. No. 44). On January 4, 2019, plaintiff
4 filed his TAC. (Doc. No. 45.)

5 Two motions to dismiss the TAC were filed. (Doc. Nos. 46, 47.) On August 28, 2019,
6 the court granted the motions to dismiss, granted plaintiff leave to amend only his Eighth
7 Amendment medical care claim regarding the alleged failure to conduct a concussion
8 examination, and dismissed with prejudice all remaining claims. The court advised plaintiff that
9 no further opportunities to amend would be granted. (Doc. No. 54.)

10 On September 30, 2019, plaintiff filed a Fourth Amended Complaint ("FAC"). (Doc. No.
11 55.) The FAC alleges, in relevant part,¹ as follows:

12 Plaintiff was processed at North Kern State Prison ("NKSP") on June 26,
13 2014. (Doc. No. 55 at 6.) Plaintiff was placed in "Mainline" housing and within
14 hours, Plaintiff was jumped from behind and beaten over the head and in the face.
15 Plaintiff was knocked out. (*Id.* at 11.)

16 After Plaintiff was beaten in the dorm, prison personnel, including Defendant
17 Smith, took Plaintiff to "Medical," where Plaintiff was placed on a single elevated
18 hospital-type bed. While in the bed and after standing up from the bed, Plaintiff
19 repeatedly asked for some type of concussion inspection. The nurse and Defendant
20 Smith ignored Plaintiff's pleas while they continued to talk between themselves,
21 focusing on whether or not Plaintiff had been stabbed. Once it was determined that
22 Plaintiff was not stabbed, the nurse and Defendant Smith finished cleaning Plaintiff
23 up and told him to get off the bed. (Doc. No. 55 at 12.)

24 Defendant Smith then escorted Plaintiff outside. Smith unlocked "a phone-
25 booth sized, expanded metal cage-enclosure" and told the younger inmate who was
26 inside to get out. Smith then locked the younger inmate in a second
27 enclosure/holding cell, which had a seat, and placed Plaintiff in the first holding cell
28 that had no seat. (Doc. No. 55 at 12.) When Plaintiff looked out, his surroundings
appeared blurry. Plaintiff demanded a concussion inspection and informed
Defendant Smith that his vision was blurry. Defendant Smith refused Plaintiff's
attempts to get a concussion inspection and told Plaintiff that he was not
experiencing blurry vision but that it only appeared so because Plaintiff was looking
through "expanded metal." (*Id.* at 13.)

¹ The bulk of the FAC contains allegations against defendants who were previously dismissed from this action with prejudice and against new defendants not identified in plaintiff's previous pleadings. However, Plaintiff was granted leave to amend only his Eighth Amendment medical care claim regarding the alleged failure to conduct a concussion examination. All remaining claims were dismissed with prejudice. (Doc. No. 54). Accordingly, the court only recounts the allegations in the FAC regarding the Eighth Amendment medical care concussion claim.

1 Plaintiff remained standing in the holding cell for approximately thirty
2 minutes and then was taken to a new dorm. (Doc. No. 55 at 14.) Plaintiff was not
3 clear-headed for two to three days and he did not feel well for a couple of weeks.
4 (*Id.* at 15). Plaintiff claims that it was obvious that Defendant Smith failed to follow
up with anyone regarding the possibility of Plaintiff being concussed because no one
ever came to deal with Plaintiff's possible concussion. (*Id.* at 16.)

5 (Doc. No. 59.)

6 On October 16, 2019, Defendant Smith filed a motion to dismiss the FAC with prejudice
7 for failure to state facts sufficient to state a claim for relief. (Doc. No. 56.)

8 On December 23, 2019, the assigned magistrate judge entered findings and
9 recommendations, recommending that Defendant Smith's motion to dismiss the FAC be granted,
10 and that the FAC be dismissed with prejudice, stating in relevant part:

11 The FAC's allegations do not demonstrate that Defendant Smith subjectively knew of and
12 disregarded an excessive risk to Plaintiff's health and safety. The conduct at issue
occurred immediately after Defendant Smith had taken Plaintiff to medical to be inspected
13 by a nurse, who had rejected Plaintiff's multiple requests for a concussion examination.
The FAC does not contain sufficient factual allegations to demonstrate the course of
14 treatment the nurse chose was medically unacceptable or that Defendant Smith relying on
or deferring to the nurse's opinion was not reasonable. *See Jackson*, 90 F.3d at 332
15 (holding that to establish a difference in opinion rising to the level of deliberate
indifference, a "plaintiff must show that the course of treatment the doctors chose was
16 medically unacceptable under the circumstances"); *Snow*, 681 F.3d at 986 ("[C]hoosing
to rely upon a medical opinion which a reasonable person would likely determine to be
17 inferior' . . . could . . . constitute[] deliberate indifference."). Accordingly, Defendant
Smith's motion to dismiss the FAC with prejudice should be granted.

18 (Doc. No. 59 at 7.)

19 Plaintiff was provided with an opportunity to file objections to the findings and
20 recommendations within twenty-one days. (*Id.*) Plaintiff failed to do so.

21 After a *de novo* review of the case, the court found the magistrate judge's findings and
22 recommendations to be supported by the record and by proper analysis. (Doc. No. 60.) The court
23 therefore adopted the findings and recommendations, granted Defendant Smith's motion to
24 dismiss, and dismissed the FAC and this action with prejudice. (Doc. No. 60.) On January 24,
25 2020, judgment was entered against plaintiff and the case was closed. (Doc. No. 61.) On
26 February 6, 2020, plaintiff filed the instant motion for reconsideration. (Doc. No. 62.)

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1 **DISCUSSION**

2 “A motion for reconsideration should not be granted, absent highly unusual
3 circumstances, unless the district court is presented with newly discovered evidence, committed
4 clear error, or if there is an intervening change in the controlling law,” and it “may not be used to
5 raise arguments or present evidence for the first time when they could reasonably have been
6 raised earlier in the litigation.” *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571
7 F.3d 873, 880 (9th Cir. 2009) (internal quotations marks and citations omitted) (emphasis in
8 original).

9 In his motion for reconsideration, plaintiff seeks additional time to conduct research and
10 submit objections to the findings and recommendations entered by the magistrate judge. (Doc.
11 No. 62.) Plaintiff indicates that prior to February 5, 2020, he was unable emotionally and
12 physically to open and read Defendant Smith’s reply in support of the motion to dismiss filed on
13 November 4, 2019; the magistrate judge’s findings and recommendations entered on December
14 23, 2019; and the order adopting the findings and recommendations entered on January 24, 2020.
15 (Doc. No. 62 at 3-4.) Plaintiff explains that he is 81 years old. (*Id.*) He also represents that he
16 has significant health issues, along with financial and personal difficulties, and is not trained in
17 the law. (*Id.* at 4-10.)

18 While the court is sympathetic to these issues raised by plaintiff, they do not demonstrate
19 newly discovered relevant evidence, nor do they demonstrate that the court committed clear error
20 or that there has been an intervening change in controlling law. *See Marlyn Nutraceuticals*, 571
21 F.3d at 880.

22 Particular to the allegations at issue in the FAC, plaintiff states in his declaration the
23 following:

24 CDC&R’s Sergeant Smith acted in a grossly-calloused manner toward me, after
25 the R&R at its North Kern State Prison placed me, then a 75 year old man with
26 health issues, on its “main line,” only to be attacked from behind and concussed
27 by an inmate I have never seen to this day, and that sergeant protected that
28 inmate’s identity from me, and refused to try to bring charges against him – and
then – refused to evaluate me for a concussion, notwithstanding my strong
demand at the time that we have it done; also, I am walking around without a

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number of teeth in my mouth, the first time in my life I have suffered such an indignity, because of the cowardly sergeant-involved-beating. . . .

(Doc. No. 62 at 5.)

Neither this information, nor any other information in plaintiff’s motion for reconsideration and supporting declaration present newly discovered evidence relevant to the pled Eighth Amendment claim, demonstrate that the court committed clear error, or cite to an intervening change in the controlling law.

Moreover, to the extent plaintiff seeks to have his motion and supporting declaration reviewed as an untimely objection to the findings and recommendations, the court has again carefully reviewed the entire file, including plaintiff’s motion and supporting declaration, and finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, plaintiff’s motion for reconsideration (Doc. No. 62) is DENIED.

IT IS SO ORDERED.

Dated: July 9, 2020


UNITED STATES DISTRICT JUDGE