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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LARRY GIRALDES, JR.,
Plaintiff,

NO. CIV. S-01-2110 LKK/EFB

v.

O R D E R

T. PREBULA, et al.,
Defendants.

_____ /

This case concerns a prisoner's § 1983 action alleging that correctional staff purposefully withheld medical care for several chronic conditions. Defendants move for reconsideration of a 2004 order of this court, which adopted the magistrate judge's finding that the prisoner had exhausted his administrative remedies. For the reasons set forth below, this court denies defendants' motion for reconsideration as waived.

I. BACKGROUND

Plaintiff Larry Giraldes, Jr. ("plaintiff" or "Giraldes") filed and appealed at least three medically-related grievances with

1 the Inmates Appeals Branch ("IAB") of the California Department of
2 Corrections and Rehabilitation ("CDCR"). The earliest Director
3 Level Decision denying a grievance was February 27, 2002. Decl. of
4 N. Grannis in Supp. of Defs.' Mot. to Dismiss FAC, Doc. No. 17, at
5 2. The other two denials were issued on March 22, 2002 and April
6 22, 2002. Id.

7 On November 16, 2001, Giraldes filed a civil complaint in this
8 court alleging that defendants were deliberately indifferent to his
9 serious medical needs when they transferred him to HDSP. On July
10 17, 2002, the Magistrate Judge granted plaintiff's request to
11 proceed in forma pauperis. (Doc. No. 6). Thus, plaintiff received
12 final denials of his grievances after he filed his complaint, but
13 before he was granted in forma pauperis status.

14 On August 12, 2002, defendants filed a motion to dismiss,
15 arguing that plaintiff failed to exhaust the grievance process
16 prior to filing his suit. Defs.' Mem. Of P. & A. in Supp. of Mot.
17 to Dismiss at 1, 4-7 (Doc. No. 16). On January 2, 2004, the
18 Magistrate Judge issued findings and recommendations that
19 defendants' motion should be denied because plaintiff's action was
20 brought, for purposes of exhaustion under the Prison Litigation
21 Reform Act, on July 17, 2002, when the court authorized him to
22 proceed in forma pauperis, and not on November 16, 2001, when he
23 filed his original complaint. (Doc. No. 22). The Magistrate Judge
24 reasoned that even though plaintiff filed his lawsuit before the
25 Director's Level denials on his grievances were issued, Giraldes'
26 authorization to proceed in forma pauperis was issued after

1 plaintiff's health-related grievances with the CDCR had been denied
2 at Director's Level. Id. at 3-4. Defendants did not object to the
3 findings and recommendations, which were adopted in full by this
4 court on March 26, 2004 (Doc. No. 23).

5 On April 28, 2005, defendants filed a motion for summary
6 judgment on the grounds that defendants did not act with deliberate
7 indifference to plaintiff's rights and were entitled to qualified
8 immunity. (Doc. No. 62). They did not argue that plaintiff had
9 failed to exhaust his administrative remedies. On January 24, 2006,
10 the Magistrate Judge recommended that defendant's motion for
11 summary judgment be granted (Doc. No. 98). On March 24, 2006, this
12 court declined to adopt the findings and recommendations because,
13 "From what the court c[ould] tell, disputed facts exist warranting
14 closer scrutiny of the parties' evidence and the motions pending
15 before the court." (Doc. No. 102). This court, thus, remanded the
16 case to the Magistrate Judge to conduct further proceedings
17 consistent with the order. Id. The court did not issue a final
18 ruling on defendants' motion for summary judgment. Nonetheless, on
19 April 10, 2006, defendants appealed the order contending that this
20 court found that they were not entitled to qualified immunity.
21 (Doc. No. 103). On May 6, 2008, the Ninth Circuit dismissed the
22 appeal "[b]ecause the district court's order contemplated further
23 action on the summary judgment, [and was thus] not a final
24 appealable order." (Doc. No. 118). (Doc. No. 118).

25 While this case was on appeal, the Ninth Circuit decided Vaden
26 v. Summerhill, 449 F.3d 1047 (9th Cir. 2006). In Vaden, the Ninth

1 Circuit held that a prisoner action is "brought" to the court under
2 the Prison Litigation Reform Act, 42 U.S.C. §1997e(a), when the
3 complaint is tendered to the district clerk, not when the prisoner
4 is allowed to proceed in forma pauperis. Id. at 1050.

5 After the Ninth Circuit dismissed defendants' appeal,
6 defendants did not file any papers in connection with this case
7 until January 2010, when the Magistrate Judge¹ ordered a response
8 to plaintiff's motion for a preliminary injunction (Doc. No. 131).
9 In their opposition to this motion, defendants did not argue that
10 plaintiff was unlikely to succeed on the merits of his claims
11 because they were not exhausted prior to his filing suit.

12 On June 24, 2010, the Magistrate Judge issued findings and
13 recommendations on defendants' remanded 2005 motion for summary
14 judgment (Doc. No. 136). The Magistrate Judge recommended
15 defendants' motion for summary judgment be denied because of the
16 presence of triable issues of fact. On July 8, 2010, defendants
17 filed objections to the findings and recommendations on the grounds
18 that there were no facts in the record from which a reasonable jury
19 could determine that they were deliberately indifferent to
20 plaintiff's serious medical needs. (Doc. No. 137). Defendants did
21 not, however, raise plaintiff's failure to exhaust his
22 administrative remedies prior to bringing this action. On August
23 31, 2010, this court adopted the Magistrate Judge's recommendation
24 that defendants' motion for summary judgment be denied in its

25 ¹ After the appeal to the Ninth Circuit was denied, this case
26 was re-assigned to a different magistrate judge.

1 entirety. (Doc. No. 142).

2 Nine months after the Magistrate Judge issued his findings and
3 recommendations on their summary judgment motion, on March 16,
4 2011, defendants filed their pretrial statement requesting that the
5 Magistrate Judge dismiss this action as unexhausted under Ninth
6 Circuit's holding in Vaden (Doc. No. 153). On May 22, 2011, the
7 Magistrate Judge issued a pretrial order recommending denial of
8 this request because the deadline for filing dispositive motions
9 passed on May 2, 2005, nearly six years ago. (Doc. No. 159, See
10 Doc. No. 50). Also, the Magistrate Judge recommended denial of this
11 request because defendants waited three years to raise this issue
12 after the case was remanded from the Ninth Circuit in 2008. Id.

13 Defendants move for reconsideration of this court's order
14 denying their motion to dismiss for failure to exhaust on the
15 grounds that intervening authority re-defined when a prisoner has
16 "brought" his action for purposes of exhaustion under the Prison
17 Litigation Reform Act (PLRA). Plaintiff opposes reconsideration
18 raising several meritless arguments. Nonetheless, defendants are
19 on fair notice of the meritorious argument discussed the Magistrate
20 Judge's pretrial order that the affirmative defense was waived due
21 to their failure to diligently raise it.

22 **II. STANDARD FOR A MOTION FOR RECONSIDERATION**

23 Pursuant to L.R. 230, a party seeking reconsideration of a
24 district court's order must brief the "new or different facts or
25 circumstances . . . which did not exist or were not shown upon such
26 prior motion, or what other grounds exist for the motion. Generally

1 speaking, before reconsideration may be granted there must be a
2 change in the controlling law or facts, the need to correct a clear
3 error, or the need to prevent manifest injustice. United States v.
4 Alexander, 106 F.3d 874, 876 (9th Cir. 1997).

5 **III. ANALYSIS**


6 As the Magistrate Judge noted in the pretrial order, the
7 failure to exhaust administrative remedies is not jurisdictional.
8 Pretrial Order (Doc. No. 159) (citing Wyatt v. Terhune, 315 F.3d
9 1108, 1117 n.9 (9th Cir. 2003)). Rather, it is a waivable
10 affirmative defense. Here, defendants failed to seek dismissal of
11 this case following remand from the Ninth Circuit in 2008, failed
12 to raise any concerns about exhaustion when objecting to the
13 Magistrate Judge's findings and recommendations in January and in
14 July 2010, and only now, at the eve of trial, did they raise these
15 concerns in their pretrial statement. Defendants have failed to
16 present any explanation for this delay. Thus, the court finds that
17 the affirmative defense of failure to exhaust administrative
18 remedies is waived.

19 **V. CONCLUSION**

20 For the foregoing reasons, IT IS HEREBY ORDERED that
21 defendants' motion for reconsideration (Doc. No. 164) is DENIED.
22 The court FURTHER ORDERS that a trial confirmation hearing shall
23 be held on August 29, 2011 at 11:15 a.m., at which time the court
24 shall set trial.

25 IT IS SO ORDERED.

26 DATED: July 28, 2011.


LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT

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