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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL AARON WITKIN,  
Plaintiff,

v.

MARIANA LOTERSZTAIN, et al.,  
Defendants.

No. 2:15-cv-0638 MCE KJN P

ORDER

Plaintiff, a state prisoner proceeding pro se, has filed this civil rights action seeking relief under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On December 22, 2016, the undersigned recommended that plaintiff’s motion to amend be denied. On February 16, 2017, plaintiff filed a motion for reconsideration of the findings and recommendations, addressed to the undersigned, pursuant to Local Rule 230(j)(3). Defendants filed a timely opposition to plaintiff’s request for reconsideration.<sup>1</sup>

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<sup>1</sup> On March 10, 2017, defendants filed a motion for extension of time to oppose the motion for reconsideration, along with their proposed opposition. Defendants argued that their opposition was filed one day late, and asked the court to grant a one day extension of time *nunc pro tunc*. Under Local Rule 230(l), oppositions to motions brought by prisoners are due 21 days after the motion is served. Here, plaintiff’s motion for reconsideration was served by the U.S. mail on February 14, 2017; therefore, the opposition was due March 7, 2017. However, because plaintiff mailed the motion, defendants receive an additional three days for mailing. Fed. R. Civ. P. 6(d).

1 (j) **Applications for Reconsideration.** Whenever any motion has  
2 been granted or denied in whole or in part, and a subsequent motion  
3 for reconsideration is made upon the same or any alleged different  
4 set of facts, counsel shall present to the Judge or Magistrate Judge  
5 to whom such subsequent motion is made an affidavit or brief, as  
6 appropriate, setting forth the material facts and circumstances  
7 surrounding each motion for which reconsideration is sought,  
8 including:

9 (1) when and to what Judge or Magistrate Judge the prior motion  
10 was made;

11 (2) what ruling, decision, or order was made thereon;

12 (3) what new or different facts or circumstances are claimed to exist  
13 which did not exist or were not shown upon such prior motion, or  
14 what other grounds exist for the motion; and

15 (4) why the facts or circumstances were not shown at the time of  
16 the prior motion.

17 Local Rule 230(j).

18 Plaintiff argues that in light of the court's order denying, without prejudice, defendants'  
19 motion for summary judgment, any prejudice defendants would suffer as a result of plaintiff  
20 amending his complaint, for the first time, is resolved, and asks the court to recommend that his  
21 motion to amend be granted. Plaintiff contends that the court's observation that the motion for  
22 summary judgment may need to be revised in light of Dr. Barnett's deposition is "consistent with  
23 plaintiff's argument" that defendants' motion was "frivolous and unjustified." (ECF No. 55 at 2.)  
24 Plaintiff argues that the dismissal of the summary judgment motion "has completely cured any  
25 prejudice the defendants would suffer as a result of plaintiff amending his complaint." (Id.)

26 Plaintiff contends that by contrast, he is "suffering ongoing prejudice" because his original  
27 complaint was written while he was in "significant physical pain, angry and frustrated," and "was  
28 not properly researched and full of pleading errors." (ECF No. 55 at 2.)

Defendants oppose on the grounds that the motion is premature because the findings and  
recommendations have not yet been addressed by the district court. In any event, defendants

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Thus, their opposition was due on March 10, 2017. Because their opposition was filed on March  
10, it was timely-filed, and the motion for extension of time is unnecessary, and is denied as  
moot.

1 argue that the court did not err in denying plaintiff's motion to amend. (ECF No. 58 at 4-9.)

2 The undersigned finds that plaintiff fails to identify new or different facts or  
3 circumstances that address the merits of plaintiff's motion to amend that did not exist when the  
4 undersigned issued the findings and recommendations. Rather, he relies on the February 6, 2017  
5 order denying the motion for summary judgment. However, such order was without prejudice to  
6 defendants re-filing or re-noticing their motion within 14 days from Dr. Barnett's deposition, and  
7 made no ruling on the merits of the motion. Contrary to plaintiff's belief, the order did not find  
8 the motion was "frivolous and unjustified." (ECF No. 53.) Indeed, the order stated that "[i]t is  
9 unclear whether defendants will need to revise their pending motion for summary judgment in  
10 light of Dr. Barnett's deposition," and noted "the deposition may impact plaintiff's opposition."  
11 (ECF No. 53 at 1-2.) The undersigned does not view the denial of the motion for summary  
12 judgment to have any impact on the motion to amend.


13 Finally, the undersigned disagrees that the denial of the summary judgment "completely  
14 cured any prejudice" defendants would suffer as a result of allowing plaintiff to amend. Plaintiff  
15 fails to explain how this order would ameliorate the undue delay and prejudice defendants would  
16 sustain if plaintiff amended the complaint at this stage of the proceedings.

17 Accordingly, the undersigned declines to reconsider the findings and recommendations,  
18 which are pending before the district court.

19 IT IS HEREBY ORDERED that:

- 20 1. Defendants' motion for extension of time (ECF No. 59) is denied as moot; and
- 21 2. Plaintiff's motion for reconsideration by the undersigned (ECF No. 55) is denied.

22 Dated: March 17, 2017

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25 KENDALL J. NEWMAN  
26 UNITED STATES MAGISTRATE JUDGE

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