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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

KEITH WAYNE SEKERKE,

Plaintiff,

v.

SHERIFF DEPUTY GONZALEZ, et al.,

Defendants.

Case No.: 15-CV-573-JLS (WVG)

**ORDER ADOPTING REPORT AND
RECOMMENDATION RE
MOTIONS FOR SUMMARY
JUDGMENT**

(ECF Nos. 90, 101, 110)

Presently before the Court is Defendant Jose Gonzalez’s Motion for Summary Judgment, (ECF No. 90), and Plaintiff’s Cross-Motion for Summary Judgment, (ECF No. 101). Magistrate Judge William V. Gallo’s has issued a Report and Recommendation advising the Court grant Defendant’s Motion and deny Plaintiff’s Motion as untimely, (“R&R,” ECF No. 111). No Party filed objections to the R&R.

PROCEDURAL BACKGROUND

Judge Gallo’s Report and Recommendation contains a complete and accurate recitation of the relevant portions of the factual backgrounds as presented by both Parties. (See R&R. 2–3.) This Order incorporates by reference the background as set forth therein.

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1 **LEGAL STANDARD**

2 Federal Rule of Civil Procedure 72(b) and 28 U.S.C. § 636(b)(1) set forth a district
3 court’s duties in connection with a magistrate judge’s R&R. The district court must “make
4 a de novo determination of those portions of the report or specified proposed findings or
5 recommendations to which objection is made,” and “may accept, reject, or modify, in
6 whole or in part, the findings or recommendations made by the magistrate judge.” 28
7 U.S.C. § 636(b)(1); *see also United States v. Raddatz*, 447 U.S. 667, 673–76 (1980); *United*
8 *States v. Remsing*, 874 F.2d 614, 617 (9th Cir. 1989). However, in the absence of timely
9 objection, the Court “need only satisfy itself that there is no clear error on the face of the
10 record in order to accept the recommendation.” Fed. R. Civ. P. 72 advisory committee’s
11 note (citing *Campbell v. U.S. Dist. Court*, 501 F.2d 196, 206 (9th Cir. 1974)).

12 **ANALYSIS**

13 No party filed timely objections to the R&R. (*See* R&R 11 (any party may file
14 objections on or before February 28, 2018).) The Court therefore review the R&R for clear
15 error.

16 **I. Evidentiary Objection**

17 Defendant submitted an expert report in connection with its Motion. Plaintiff objects
18 to the Court considering the expert report because the report is not sworn under penalty of
19 perjury. Judge Gallo sustained the objection and did not consider the report. This Court
20 agrees and will not consider the report. Plaintiff’s objection is **SUSTAINED**.

21 **II. Defendant’s Motion for Summary Judgment**

22 Defendant moves for summary judgment on the grounds of qualified immunity.
23 Judge Gallo found that Plaintiff has “failed to show any genuine issue of material fact
24 which would allow a trier of fact to conclude that Defendant used excessive force in
25 violation of his rights under the Eighth Amendment.” (R&R 10.) Judge Gallo found
26 Plaintiff’s allegations do not support a statutory or constitutional violation, and Defendant
27 is therefore shielded by qualified immunity. (*Id.*) Plaintiff did not file objections to the
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1 R&R. The Court finds no clear error in the R&R and **ADOPTS** the R&R. Thus,
2 Defendant's Motion for Summary Judgment is **GRANTED**.

3 **III. Plaintiff's Motion for Summary Judgment**

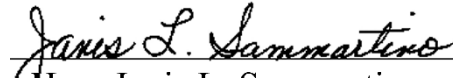
4 As detailed in the scheduling order dated January 13, 2017, all dispositive motions
5 were due on August 14, 2017. (*See* ECF No. 62 ¶ 8.) Plaintiff filed his Motion on
6 September 7, 2017. Judge Gallo therefore recommends denying Plaintiff's Motion as
7 untimely. (R&R 11.) Plaintiff did not file objections to the R&R. A court may deny as
8 untimely a motion filed after the scheduling order deadline when no modification request
9 has been made. *U.S. Dominator, Inc. v. Factory Ship Robert E. Resoff*, 768 F.2d 1099,
10 1104 (9th Cir. 1985). The Court finds no clear error in Judge Gallo's recommendation.
11 The Court therefore **DENIES** Plaintiff's Motion as untimely.

12 **CONCLUSION**

13 The Court **ADOPTS** Judge Gallo's R&R, **GRANTS** Defendant's Motion for
14 Summary Judgment, and **DENIES** Plaintiff's Motion for Summary Judgment. As to the
15 remainder of the case, Plaintiff named various Doe Defendants in his Complaint but has
16 not served them. (*See* ECF Nos. 6–8 (summons returned unexecuted as to John and Jane
17 Doe).) Because Plaintiff has failed to serve the Defendants within the time requirements
18 of Federal Rule of Civil Procedure 4(m), the Doe Defendants are **DISMISSED**
19 **WITHOUT PREJUDICE**. The Clerk **SHALL** close the file.

20 **IT IS SO ORDERED.**

21 Dated: March 5, 2018

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23 Hon. Janis L. Sammartino
24 United States District Judge
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