

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Philip A. Brimmer

Civil Action No. 13-cv-00206-PAB-KLM

DAVID B. HOECK,

Plaintiff,

v.

LANCE MIKLICH,
TED STENZEL,
DARRYL PROFFIT,
MARY TOOMEY,
LINDA WORTHEN,
SCOTT LANCASTER,
TOM JORDAN,
VALARIE CRAIG,
KEN TOPLISS,
J. STRICKLETT, and
MARY ANN ALDRICH,

Defendants.

ORDER

This matter is before the Court on the Motion for Opportunity to Respond to Magistrate Judge's Recommendation [Docket No. 38] filed by plaintiff David Hoeck. In light of plaintiff's pro se status, the Court construes his filings liberally. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (citing *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972)).

On November 7, 2013, United States Magistrate Judge Kristen L. Mix recommended [Docket No. 35] that the Court grant the Motion to Dismiss [Docket No. 28] filed by defendants Lance Miklich, Ted Stenzel, Darryl Proffit, Mary Toomey, Linda

Worthen, Scott Lancaster, Tom Jordan, Valarie Craig, Ken Topliss, J. Stricklett, and Mary Ann Aldrich. On December 5, 2013, having received no objections to the magistrate judge's recommendation (the "Recommendation") from either party, the Court reviewed it for clear error and, finding none, adopted it. Docket No. 36. Final judgment entered against plaintiff on December 9. Docket No. 37.

On December 11, 2013, Plaintiff filed the instant motion, asserting that he had not been served with a copy of the Recommendation and was thus deprived of the requisite fourteen days in which to file a response before the Court ordered the case dismissed. Docket No. 38; see FED. R. CIV. P. 72. Plaintiff states that he became aware of the Court's Order dismissing the case on December 6, 2013, when he received the Court's Order accepting the Recommendation. Docket No. 38. He requests that the Court vacate the Order accepting the Recommendation, send plaintiff a copy of the Recommendation, and permit him time to file objections. *Id.* The Court construes this as a motion to alter or amend judgment pursuant to Federal Rule of Civil Procedure 59.

"Rule 59(e) allows a party to direct the district court's attention to newly discovered material evidence or a manifest error of law or fact, and enables the court to correct its own errors and thus avoid unnecessary appellate procedures." *Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir. 1996). Such a motion is appropriate in the event of "(1) an intervening change in the controlling law, (2) new evidence previously unavailable, [or] (3) the need to correct clear error or prevent manifest injustice," and may be granted "where the court has misapprehended the facts, a party's position, or the controlling law." *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir.

2000). The decision to grant or deny a Rule 59 motion is committed to the Court's discretion. *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997).

Plaintiff requests that the Court amend its judgment because he was not served with the Recommendation before the entry of judgment. Docket No. 38. Taking into account the logistical challenges inherent in obtaining proof of when and whether the Recommendation reached plaintiff in prison, and plaintiff's diligence in prosecuting this case throughout the course of the litigation, the Court finds there is no reason not to credit plaintiff's assertion regarding the lack of service. Thus, sufficient grounds exist to grant plaintiff's motion to set aside the Court's judgment and permit him to file a response to the Recommendation. See *Servants of the Paraclete*, 204 F.3d at 1012.

III. CONCLUSION

For the foregoing reasons, it is

ORDERED that the Motion for Opportunity to Respond to Magistrate Judge's Recommendation [Docket No. 38] filed by plaintiff David Hoeck is GRANTED. It is further

ORDERED that the Order Accepting Magistrate Judge's Recommendation [Docket No. 36] and the Final Judgment [Docket No. 37] are VACATED and this case is reopened. Plaintiff shall file objections to the Recommendation on or before **Friday, December 27, 2013.**

DATED December 12, 2013.

BY THE COURT:

s/Philip A. Brimmer
PHILIP A. BRIMMER
United States District Judge