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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

RICHARD CHUDACOFF, MD,)
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Plaintiff,)
)
v.)
)
UNIVERSITY MEDICAL CENTER OF)
SOUTHERN NEVADA, et al.,)
)
Defendants.)

2:09-cv-1679-RCJ-RJJ

ORDER

Currently before the Court is Plaintiff Richard M. Chudacoff, M.D.'s ("Plaintiff") Motion for Reconsideration (#77) of this Court's September 28, 2010, order (#75). The Court heard oral argument on May 6, 2011.

BACKGROUND

After Defendants¹ allegedly limited his medical privileges and issued a negative report to a national data bank, Plaintiff sued multiple defendants alleging violations of his due process rights accompanied by several state-law claims. In September 2010, this Court issued an order granting Dr. J. Dylan Curry's Motion to Dismiss (#29), Curry's Renewed Motion to Dismiss (#55), and Defendants' Motion for Summary Judgment (#53). (See Order (#75)).

¹ The defendants in this case are the University Medical Center of Southern Nevada ("UMC"), Steve Sisolak, Tom Collins, Larry Brown, Lawrence Weekly, Chris Giunchigliani, Susan Brager, Rory Reid (collectively "Board of Trustees"), Kathleen Silver (UMC CEO), John Ellerton, M.D., Frederick J. Lippman, M.D., Jim Christensen, M.D., Charles Bloom, M.D., Marietta Nelson, M.D., J. Dylan Curry, M.D., Kshama Daphtary, M.D., John Onyema, M.D., Beverly Neyland, M.D., Albert Capanna, M.D., Victor Grigoriev, M.D., Laura Bilodeau, M.D., Michael Casey, M.D., and Steven Becker, M.D (collectively the "Medical Staff"). All defendants except Dr. Curry are collectively referred to as "Defendants."

In this case, Defendants and Dr. Curry have filed separate oppositions (#80, 81). However, each have filed joinders to each others' responses (#82, 83).

1 Plaintiff now files a Motion for Reconsideration (#77) of that order.

2 In this Court's September 28, 2010, order, the Court found the following. The doctrine
3 of claim preclusion barred Plaintiff's due process claims against CEO Silver, UMC, the Board
4 of Trustees, and the Medical Staff. (*Id.* at 11). The doctrine of issue preclusion barred
5 Plaintiff's due process claims against the Medical Executive Committee and the Doctor
6 Defendants. (*Id.*). This Court dismissed Plaintiff's state-law claims without prejudice. (*Id.*).

7 This Court found the following with respect to preclusion. Federal common law
8 governed the preclusive effect of federal-court judgments. (*Id.*). For judgment in diversity
9 cases, federal law incorporated the rules of preclusion applied by the State in which the
10 rendering court sat. (*Id.*). However, it was not clear whether federal or state preclusion law
11 applied to a federal court's judgment on state-law claims through its exercise of supplemental
12 jurisdiction. (*Id.* at 11-12). This Court concluded that "for purposes of this matter, any
13 differences between federal and Nevada preclusion doctrine [was] immaterial." (*Id.* at 12).

14 With respect to claim preclusion, this Court found that "a claim that arose after the filing
15 of a complaint in a prior proceeding will not be barred by claim preclusion based on the prior
16 proceeding." (*Id.* at 13). This Court specifically cited to the holdings in *Lawlor v. Nat'l Screen*
17 *Serv. Corp.*, 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955) and *Carstarphen v. Milsner*,
18 594 F.Supp.2d 1201 (D. Nev. 2009). (*Id.*). This Court also recognized that claim preclusion
19 could bar claims based on later events in some cases including cases "where the plaintiff must
20 allege that 'all of the predicate acts, *taken together, constitute a single course of conduct,*'
21 such as in RICO cases" and cited to *Monterey Plaza Hotel Ltd. P'ship v. Local 483 of Hotel*
22 *Emp. & Rest. Emp. Union, AFL-CIO*, 215 F.3d 923 (9th Cir. 2000). (*Id.*).

23 In finding that claim preclusion barred Plaintiff's due process claims against CEO Silver,
24 UMC, the Board of Trustees, and the Medical Staff, this Court stated:

25 Though Plaintiff alleges claims based on actions that occurred after he filed his
26 prior complaint, all the underlying actions occurred before the close of the case
27 before Judge Reed in November of 2009. Furthermore, almost all the
28 underlying events occurred before Plaintiff's last amendment of his complaint.
Plaintiff could have supplemented his claims with these new matters. In
addition, Plaintiff essentially complains of the process afforded him by
Defendants. This is a case were the wrongful conduct alleged consists of a

1 series of procedural acts. See *Carstarphen*, 594 F. Supp. 2d at 1210.
2 Defendants CEO Silver, the Board of Trustees, UMC, and the Medical Staff
3 were defendants in the prior action. Judge Reed issued a final judgment on the
4 merits in their favor.

5 (*Id.* at 14).

6 Plaintiff now files a motion for reconsideration of the Court's order with respect to claim
7 preclusion. (See generally Mot. for Recons. (#77)).

8 LEGAL STANDARD

9 A motion to reconsider must set forth "some valid reason why the court should
10 reconsider its prior decision" and set "forth facts or law of a strongly convincing nature to
11 persuade the court to reverse its prior decision." *Frasure v. United States*, 256 F.Supp.2d
12 1180, 1183 (D. Nev. 2003). Reconsideration is appropriate if this Court "(1) is presented with
13 newly discovered evidence, (2) committed clear error or the initial decision was manifestly
14 unjust, or (3) if there is an intervening change in controlling law." *Sch. Dist. No. 1J v. Acands,*
15 *Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). "A motion for reconsideration is not an avenue to
16 re-litigate the same issues and arguments upon which the court already has ruled." *Brown v.*
17 *Kinross Gold, U.S.A.*, 378 F.Supp.2d 1280, 1288 (D. Nev. 2005).

18 DISCUSSION

19 Plaintiff seeks reconsideration of this Court's September 28, 2010, order. (Mot. for
20 Recons. (#77) at 3). Plaintiff alleges three errors: (1) the Court applied case law based upon
21 Nevada and California common law instead of federal common law; (2) the Court failed to
22 apply the rules set forth in *Carstarphen v. Millsner*, 594 F.Supp.2d 1201 (D. Nev. 2009); and
23 (3) the Court erred by adopting rules from federal racketeering and California case law and
24 applying them to 42 U.S.C. § 1983 claims in Nevada. (*Id.*). First, Plaintiff argues that the
25 Court should have applied the claim preclusion analysis from *Lawlor v. Nat'l Screen Serv.*
26 *Corp.*, 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955) instead of *Carstarphen* (applying
27 Nevada law) and *Monterey Plaza Hotel Ltd. P'ship v. Local 483 of Hotel Emp. & Rest. Emp.*
28 *Union, AFL-CIO*, 215 F.3d 923 (9th Cir. 2000) (applying California law). (*Id.* at 5). Second,
Plaintiff argues that the Court misapplied the majority rule in *Carstarphen* because the Court

1 ignored the timing of the acts relative to the complaint. (*Id.* at 8). Plaintiff asserts that the
2 majority rule in *Carstarphen* focuses on the date of the last pleading, January 2009, and not
3 the California standard of re-pleading before judgment, November 2009. (*Id.* at 8-9). Third,
4 Plaintiff contends that this Court erred in applying the *Monterey Plaza* exception that held that,
5 in racketeering cases, all of the predicate acts taken together constitute a single course of
6 conduct. (*Id.* at 9). In contrast, Plaintiff argues that in a § 1983 claim alleging due process
7 violations, violations of an individual's due process rights are not a continuing tort. (*Id.*). If the
8 Court grants his motion for reconsideration, Plaintiff also seeks reconsideration of the Court's
9 ruling regarding his state law claims. (*Id.* at 10).

10 In response, Defendants argue that Plaintiff only challenges this Court's interpretation
11 of applicable law and, therefore, has not alleged a proper basis for a motion for
12 reconsideration. (Defs.' Opp'n to Mot. for Recons. (#80) at 12). Defendants argue that
13 *Carstarphen* and *Monterey Plaza* were both federal court decisions and that their reliance on
14 state law does not preclude this Court from relying on them. (*Id.*). Defendants assert that,
15 even if the Court had applied the holding from *Lawlor*, claim preclusion would still apply. (*Id.*
16 at 12-13). Defendants contend that this Court did not apply the *Carstarphen* holding but
17 instead relied on the exceptions enumerated in that case. (*Id.* at 13). Defendants assert that,
18 although this Court cited *Monterey Plaza* to illustrate an exception, the Court did not apply
19 *Monterey Plaza* to the facts of this case. (*Id.* at 14).

20 In response, Curry argues that, although this Court cited to *Carstarphen* and *Monterey*
21 *Plaza*, the Court did not focus on those cases in reaching its conclusion. (Curry Opp'n to Mot.
22 for Recons. (#81) at 4). Curry argues that the Court did apply and cited to federal preclusion
23 law where appropriate, including *Lawlor*. (*Id.*). Curry asserts that, based on the cases that this
24 Court cited to, state and federal preclusion law do have similarities that this Court relied on.
25 (*Id.*). Curry contends that the bulk of the events that underlie *Chudacoff II*, specifically the
26 Second Fair Hearing in March 2009, occurred before Judge Reed's April 2009 order. (*Id.* at
27 5).

28 Plaintiff replies that Defendants rely on the portion of *Lawlor* that the Second Circuit

1 held was dicta. (Reply to Mot. for Recons. (#84) at 4-5).

2 As an initial matter, Plaintiff's motion is unclear as to whether he thinks that the Court
3 clearly erred because it should have applied federal common law for claim preclusion
4 throughout its analysis or whether the Court, when it did apply Nevada law for claim
5 preclusion, applied it incorrectly. (See Mot. for Recons. (#77) at 3-4, 7). Regardless, under
6 either argument, the Court did not clearly err in its application of the law.

7 In its order, the Court recognized that federal common law governed whether a federal
8 court judgment had a preclusive effect on a subsequent federal-court case. (See Order (#75)
9 at 11). This Court also recognized that the law was unclear as to whether federal or state
10 preclusion law applied to a federal-court's judgment on state-law claims through its exercise
11 of supplemental jurisdiction. (*Id.* at 11-12). This Court found that any differences between
12 federal or Nevada preclusion law was immaterial to the outcome of this case. (*Id.* at 12).

13 Plaintiff's three arguments fail to demonstrate clear error. First, with respect to claim
14 preclusion, the Supreme Court has held that while a "[prior] *judgment* precludes recovery on
15 claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did
16 not even then exist and which could not possibly have been sued upon in the previous case."
17 *Lawlor*, 349 U.S. at 328, 75 S.Ct. at 868 (emphasis added). Even though the Second Circuit
18 may have held that this statement is dicta, the Ninth Circuit has quoted and cited this
19 statement as controlling law. See *Frank v. United Airlines, Inc.*, 216 F.3d 845, 851 (9th Cir.
20 2000); *Eichman v. Fotomat Corp.*, 759 F.2d 1434, 1438 (9th Cir. 1985) (recognizing that
21 California courts follow the Supreme Court's *Lawlor* decision).

22 As demonstrated by the order, this Court did apply *Lawlor's* federal common law rule
23 about claim preclusion to the case at hand. To illustrate, this Court cited to *Lawlor* and recited
24 the relevant portions of the opinion regarding prior judgments. (See Order (#75) at 13).
25 Additionally, this Court applied *Lawlor* to the case at hand when the Court found that "all of the
26 underlying actions occurred before the close of the case before Judge Reed in November of
27 2009." (See *id.* at 14). Therefore, this Court properly applied federal claim preclusion
28 common law to the case at hand.

1 Second, the *Carstarphen* Court found that, in Nevada, claim preclusion applies when:
2 “(1) the parties or their privies are the same, (2) the final judgment is valid, and (3) the
3 subsequent action is based on the same claims or any part of them that were or could have
4 been brought in the first case.” *Carstarphen*, 594 F.Supp.2d at 1208. In determining whether
5 a plaintiff was attempting to re-litigate the same claim, or any part of the same claim, that was
6 or could have been brought in the first case, the court predicted that the Nevada Supreme
7 Court would follow the majority rule. *Id.* at 1210. Pursuant to the majority rule, “claim
8 preclusion extends to claims in existence at the time of the *filing of the original complaint* in
9 the first lawsuit and any additional claims actually asserted by *supplemental pleading*.” *Id.*
10 (emphasis added). The court recognized that there were exceptions to the majority rule such
11 that events occurring *after* the filing of the first complaint would be barred by claim preclusion.
12 *Id.* One such exception included, “[c]ontexts where a second claim depends on the allegation
13 that a series of wrongful acts constituted a single scheme, rather than merely later actions of
14 the same type.” *Id.* In identifying this exception, the court cited *Monterey Plaza* and noted that
15 it was a federal RICO case. *Id.* at 1211.

16 As demonstrated by the order, the Court did cite to the majority rule identified in
17 *Carstarphen*. (See Order (#75) at 13). The Court applied this rule when it stated that “almost
18 all of the underlying events occurred before Plaintiff’s last amendment of his complaint.” (See
19 *id.* at 14). Additionally, with respect to the claims that fell outside the last amended complaint,
20 the Court found that those claims fell into an exception because they were more akin to “a
21 series of procedural acts” that constituted a single scheme. (See *id.*). Therefore, the Court
22 properly applied the majority rule.

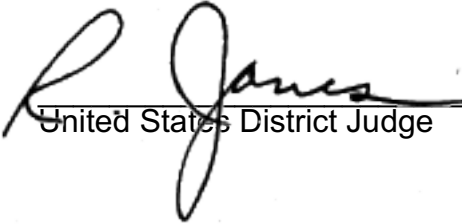
23 Third, although the exception identified in *Monterey Plaza* was in the context of a
24 federal racketeering claim, there is nothing in *Carstarphen* that states that the exception for
25 “[c]ontexts where a second claim depends on the allegation that a series of wrongful acts
26 constituted a single scheme, rather than merely later actions of the same type” only applies
27 to federal racketeering claims. See *Carstarphen*, 594 F.Supp.2d at 1210. Moreover, Judge
28 McQuaid has found in another case that a plaintiff’s due process allegations were “more akin

1 to a series of wrongful acts constituting a single scheme.” See *Paliotta v. Brooks*, No.
2 3:09-cv-0194-RCJ-RAM, 2011 WL 769981, at *8 (D. Nev. Feb. 3, 2011). Therefore, the Court
3 did not commit clear error. Accordingly, Plaintiff has failed to demonstrate that the Court
4 committed clear error in its order and the Court denies the motion for reconsideration.

5 **CONCLUSION**

6 For the foregoing reasons, IT IS ORDERED that Plaintiff’s Motion for Reconsideration
7 (#77) is DENIED.

8 DATED: This 11th day of May, 2011.

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11 United States District Judge
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