

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JUN 2 2017

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

GUILLERMO VERA,

Plaintiff-Appellant,

v.

CONNIE GIPSON, Warden,

Defendant-Appellee.

No. 16-16420

D.C. No. 1:13-cv-00870-AWI-MJS

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Anthony W. Ishii, District Judge, Presiding

Submitted May 24, 2017**

Before: THOMAS, Chief Judge, and SILVERMAN, and RAWLINSON,
Circuit Judges.

Guillermo Vera, a California state prisoner, appeals pro se from the district court's order denying his motion for relief from judgment following the dismissal of his 42 U.S.C. § 1983 action alleging an Eighth Amendment violation. We have jurisdiction under 28 U.S.C. § 1291. We review for an abuse of discretion, *Casey*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

v. Albertson's Inc., 362 F.3d 1254, 1257 (9th Cir. 2004), and we affirm.

The district court did not abuse its discretion by denying Vera's motion because Vera did not identify any grounds for relief from the judgment. *See* Fed. R. Civ. P. 60(b); *United Nat. Ins. Co. v. Spectrum Worldwide, Inc.*, 555 F.3d 772, 780 (9th Cir. 2009) (setting forth grounds for relief).

We do not consider matters not specifically and distinctly raised and argued in the opening brief, or arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.

UNITED STATES COURT OF APPEALS

FILED

FOR THE NINTH CIRCUIT

JAN 3 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

GUILLERMO VERA,

Plaintiff-Appellant,

v.

CONNIE GIPSON, Warden,

Defendant-Appellee.

No. 16-16420

D.C. No. 1:13-cv-00870-AWI-MJS
Eastern District of California,
Fresno

ORDER

Before: THOMAS, Chief Judge, and SILVERMAN and RAWLINSON,
Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no
judge has requested a vote on whether to rehear the matter en banc. *See Fed. R.*
App. P. 35.

Vera's petition for panel rehearing and petition for rehearing en banc
(Docket Entry Nos. 35 and 36) are denied.

No further filings will be entertained in this closed case.

7. 275

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GUILLERMO VERA ,

Plaintiff,

v.

CONNIE GIPSON,

Defendant.

CASE NO. 1:13-cv-00870-AWI-MJS (PC)

**ORDER DENYING MOTION TO AMEND
THE FINDINGS**

(ECF No. 41)

I. PROCEDURAL HISTORY

Plaintiff is a state prisoner proceeding pro se and in forma pauperis in this civil rights action brought pursuant to 28 U.S.C. § 1983. Plaintiff initiated this action by filing a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Court directed the habeas proceeding be converted to a 42 U.S.C. § 1983 civil rights action. (ECF No. 14.)

Plaintiff's first amended complaint was dismissed for failure to state a claim, but he was given leave to amend. (ECF No. 17.) On June 24, 2014, the Court screened Plaintiff's second amended complaint and again dismissed for failure to state a claim. (ECF No. 29.) Plaintiff was afforded thirty days in which to file an amended pleading. (*Id.*) Plaintiff requested a sixty day extension of time (ECF No. 31) and, on July 28, 2014, the Court granted Plaintiff a thirty day extension of time to file his amended pleading.

(ECF No. 32.) The thirty day deadline passed without Plaintiff filing an amended pleading or seeking an extension of time to do so.

On September 11, 2014, the Court ordered Plaintiff to show cause why the action should not be dismissed. (ECF No. 33.) Plaintiff filed no response.

On October 27, 2014, the Magistrate Judge assigned to the action issued findings and a recommendation to dismiss the action for failure to obey a court order and failure to prosecute. (ECF No. 34.) Plaintiff filed no objections. The undersigned adopted the findings and recommendation on November 20, 2014 (ECF No. 35), judgment was entered thereon (ECF NO. 36), and the action was closed.

On December 8, 2014 Plaintiff filed a "Motion to Amend the Findings" (ECF No. 37) and lodged a proposed amended complaint (ECF No. 38). The Court construed these submissions as a motion for reconsideration and denied the motion. (ECF No. 39.)

Presently before the Court is Plaintiff's March 24, 2016 "Motion to Amend the Findings." (ECF No. 41.) The Court will again construe the motion as a motion for reconsideration.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 60(b)(6) allows the Court to relieve a party from an order for any reason that justifies relief. Rule 60(b)(6) "is to be used sparingly as an equitable remedy to prevent manifest injustice and is to be utilized only where extraordinary circumstances" exist. Harvest v. Castro, 531 F.3d 737, 749 (9th Cir. 2008) (internal quotations marks and citation omitted).

"A motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 880 (9th Cir. 2009). "A motion for reconsideration may not be used to raise arguments or present evidence for the first time when they could reasonably have been raised in earlier litigation." Id.

Moreover, "recapitulation of the cases and arguments considered by the court before rendering its original decision fails to carry the moving party's burden." U.S. v. Westlands Water Dist., 134 F. Supp. 2d 1111, 1131 (9th Cir. 2001) (quoting Birmingham v. Sony Corp. of Am., Inc., 820 F. Supp. 834, 856-57 (D.N.J. 1992)). Similarly, Local Rule 230(j) requires that a party seeking reconsideration show that "new or different facts or circumstances are claimed to exist which did not exist or were not shown upon such prior motion, or what other grounds exist for the motion"

III. ANALYSIS

Plaintiff states only that, in retaliation for filing his complaint in this action, he was transferred from Kern Valley State Prison to High Desert State Prison. The Court notes that Plaintiff presently is housed at Salinas Valley State Prison.

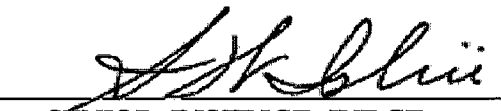
Plaintiff once again fails to explain his failure to obey the Court's order that he file an amended complaint (ECF Nos. 29 & 32), his failure to respond to the order to show cause (ECF No. 33), and his failure to object to the findings and recommendation that the action be dismissed (ECF No. 34). Accordingly, Plaintiff has not provided a basis for reconsideration.

IV. CONCLUSION AND ORDER

Based on the foregoing, Plaintiff's motion to amend the findings (ECF No. 41) is HEREBY DENIED and the case remains closed.

IT IS SO ORDERED.

Dated: June 21, 2016



SENIOR DISTRICT JUDGE

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

JUDGMENT IN A CIVIL CASE

GUILLERMO VERA,

CASE NO: 1:13-CV-00870-AWI-MJS

v.

CONNIE GIPSON,

XX — Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

**THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE
COURT'S ORDER FILED ON 11/20/14**

Marianne Matherly
Clerk of Court

ENTERED: November 20, 2014

by: /s/ S. Martin-Gill
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GUILLERMO VERA,
Plaintiff,

v.

CONNIE GIPSON, Warden,
Defendant(s).

Case No. 1:13-cv-00870-AWI-MJS (PC)

**ORDER ADOPTING FINDINGS AND
RECOMMENDATION DISMISSING
ACTION
(ECF NO. 34)**

**DISMISSAL COUNTS AS STRIKE
PURSUANT TO 28 U.S.C. § 1915(g)**

**CLERK TO TERMINATE ALL PENDING
MOTIONS AND CLOSE CASE**

Plaintiff initiated this action by filing pro se a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Court directed the habeas proceeding be converted to a 42 U.S.C. § 1983 civil rights action and that Plaintiff proceed in forma pauperis. On October 27, 2014, the magistrate judge issued findings and recommendation that the action be dismissed with prejudice, that dismissal count as a strike pursuant to 28 U.S.C. § 1915(g), and that the clerk of the court terminate any and all pending motions and close the case. (ECF No. 34, at 3:18-20.) Plaintiff did not object to the findings and recommendation and the time for doing so has expired.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), the court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendation to be supported by the record and by proper

1 analysis.

2 Accordingly, it is HEREBY ORDERED that:

- 3 1. The court adopts the findings and recommendation filed on October 27, 2014
4 (ECF No. 34), in full,
5 2. The action is DISMISSED with prejudice and dismissal shall count as a strike
6 pursuant to the "three strikes" provision set forth in 28 U.S.C. § 1915(g), and
7 3. The clerk of the court shall terminate all pending motions and close the case.

8 IT IS SO ORDERED.

9 Dated: November 20, 2014

10 
11 SENIOR DISTRICT JUDGE
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GUILLERMO VERA,
Plaintiff,

v.

CONNIE GIPSON, Warden,
Defendant(s).

Case No. 1:13-cv-00870-AWI-MJS (PC)

**FINDINGS AND RECOMMENDATION TO
DISMISS ACTION FOR FAILURE TO
OBEY A COURT ORDER AND FAILURE
TO PROSECUTE**

(ECF No. 33)

**FOURTEEN (14) DAY OBJECTION
DEADLINE**

I. PROCEDURAL HISTORY

Plaintiff initiated this action by filing pro se a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Court directed the habeas proceeding be converted to a 42 U.S.C. § 1983 civil rights action and that Plaintiff proceed in forma pauperis. A Second Amended Complaint was filed but dismissed by the Court because it failed to state a claim. Plaintiff was given leave to file a third amended complaint by not later than July 28, 2014. Plaintiff requested and was granted an extension of that deadline to September 2, 2014. The September 2nd deadline passed without Plaintiff either filing an amended pleading or seeking an extension of time to do so.

The Court then ordered Plaintiff, by not later than September 29, 2014, to show cause why the action should not be dismissed. (ECF No. 33.) The September 29, 2014

1 deadline passed without Plaintiff responding further.

2 **II. DISCUSSION**

3 Local Rule 110 provides that “failure of counsel or of a party to comply with these
4 Rules or with any order of the Court may be grounds for imposition by the Court of any and
5 all sanctions . . . within the inherent power of the Court.” District courts have the inherent
6 power to control their dockets and “in the exercise of that power, they may impose
7 sanctions including, where appropriate . . . dismissal of a case.” *Thompson v. Housing*
8 *Auth.*, 782 F.2d 829, 831 (9th Cir. 1986). A court may dismiss an action, with prejudice,
9 based on a party’s failure to prosecute, failure to obey a court order, or failure to comply
10 with local rules. See, e.g., *Ghazali v. Moran*, 46 F.3d 52, 53-54 (9th Cir. 1995) (dismissal
11 for noncompliance with local rule); *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260-61 (9th Cir.
12 1992) (dismissal for failure to comply with an order requiring amendment of a complaint);
13 *Malone v. U.S. Postal Service*, 833 F.2d 128, 130 (9th Cir. 1987) (dismissal for failure to
14 comply with a court order); *Henderson v. Duncan*, 779 F.2d 1421, 1424 (9th Cir. 1986)
15 (dismissal for lack of prosecution and failure to comply with local rules).

16 In determining whether to dismiss an action for lack of prosecution, failure to obey a
17 court order, or failure to comply with local rules, the Court must consider several factors: (1)
18 the public’s interest in expeditious resolution of litigation; (2) the Court’s need to manage its
19 docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition
20 of cases on their merits; and (5) the availability of less drastic alternatives. *Thompson*, 782
21 F.2d at 831; *Henderson*, 779 F.2d at 1423-24; *Malone*, 833 F.2d at 130; *Ferdik*, 963 F.2d at
22 1260-61; *Ghazali*, 46 F.3d at 53.

23 In the instant case, the public’s interest in expeditiously resolving this litigation and
24 the Court’s interest in managing its docket weigh in favor of dismissal. The third factor, risk
25 of prejudice to defendants, also weighs in favor of dismissal, since a presumption of injury
26
27
28

1 arises from the occurrence of unreasonable delay in prosecuting this action. *Anderson v.*
2 *Air West*, 542 F.2d 522, 524 (9th Cir. 1976). The fourth factor -- public policy favoring
3 disposition of cases on their merits -- is outweighed here because Plaintiff has failed to
4 comply with the Court's order that he file an amended civil rights complaint.
5 Notwithstanding extension of time, Plaintiff has before the Court no cognizable claim for
6 relief against any named Defendant. Finally, as for the availability of lesser sanctions, at
7 this stage in the proceedings there is little available which would constitute a satisfactory
8 lesser sanction while preserving scarce Court resources. Plaintiff has not paid the filing fee
9 for this action and is likely unable to pay, making monetary sanctions of little use.
10

11 Plaintiff was previously advised that failure to respond to the Court's order by the
12 September 29, 2014 deadline would result in a recommendation the action be dismissed
13 with prejudice subject to the "three strikes" provision set forth in 28 U.S.C. § 1915(g). (See
14 ECF No. 33, 3:10-13.)
15

16 **III. LEGAL CONCLUSIONS AND RECOMMENDATION**

17 Plaintiff has not shown good cause in avoidance of dismissal and has not filed an
18 amended civil rights complaint as ordered. The undersigned recommends that the action
19 be dismissed with prejudice, that dismissal count as a strike pursuant to 28 U.S.C. §
20 1915(g), and that the Clerk of the Court terminate any and all pending motions and close
21 the case.
22

23 The Findings and Recommendation will be submitted to the United States District
24 Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within
25 fourteen (14) days after being served with the Findings and Recommendation, the parties
26 may file written objections with the Court. The document should be captioned "Objections
27 to Magistrate Judge's Findings and Recommendation." A party may respond to another
28 party's objections by filing a response within fourteen (14) days after being served with a

1 copy of that party's objections. The parties are advised that failure to file objections within
2 the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*,
3 951 F.2d 1153 (9th Cir. 1991).
4

5
6 IT IS SO ORDERED.

7 Dated: October 24, 2014

8 /s/ Michael J. Seng
9 UNITED STATES MAGISTRATE JUDGE
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**Additional material
from this filing is
available in the
Clerk's Office.**