UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

ARMONI MASUD JOHNSON, Plaintiff, v. SUPERINTENDENT MCGINLEY, et al., Defendants.	CIVIL ACTION NO. 4:18-CV-01714 (BRANN, J.) (MEHALCHICK, M.J.)

REPORT AND RECOMMENDATION

This is a civil rights action initiated upon the filing of the complaint by *pro se* Plaintiff Armoni Masud Johnson ("Johnson") on August 29, 2018. (Doc. 1). In the amendment to his amended complaint, filed on November 15, 2021, Johnson asserts claims under 42 U.S.C. § 1983 for deprivation of legal mail and access to the courts, and conspiracy and retaliation against Defendant Lieutenant Peters ("Peters"). (Doc. 85). Before the Court are multiple motions filed by Johnson, including a "fraud claim" motion (Doc. 80), a Rule 60(b) motion, a motion for summary judgment (Doc. 91), and a motion to compel justice. (Doc. 93). For the reasons stated herein, it is respectfully recommended that the motions be **DENIED**.

I. BACKGROUND AND PROCEDURAL HISTORY

Johnson filed the original complaint in this matter on August 29, 2018, in which he named Defendants Superintendent McGinley, Deputy Luscavage, and Major Mirachi. (Doc. 1). On March 15, 2019, the Court found that the complaint and supplemental documents failed to state claims upon which relief may be granted, and Johnson was granted leave to amend the complaint. (Doc. 28; Doc. 29). On April 8, 2020, Johnson filed the amended complaint. (Doc. 32; Doc. 34). On October 6, 2020, the Defendants filed a motion for a more

definite statement, which the Court denied on October 23, 2020. (Doc. 43; Doc. 50). On November 6, 2020, the Defendants filed a motion to dismiss. (Doc. 53). Johnson filed a motion for default judgment against the Defendants on May 19, 2021, and filed a motion to strike the Defendants' brief in support of their motion to dismiss, along with several other motions. (Doc. 61; Doc. 64; Doc. 66, Doc. 69; Doc. 71; Doc. 73; Doc. 76; Doc. 77).

On June 15, 2021, the undersigned filed a report and recommendation, finding that default judgment was not appropriate and that the Defendants' motion to dismiss and brief in support were effective because the Defendants timely filed their brief in support with the Court and, even if the Defendants had failed to reply, Johnson would not be entitled to default judgment under federal law (Doc. 68, at 2); *see* 42 U.S.C. § 1997e(g)(1). On June 23, 2021, Johnson filed a motion for extension of time to file objections to the recommendation, which the Court granted. (Doc. 69; Doc. 70). On July 9, 2021, Johnson filed an "omnibus motion" for extension of time and appointment of counsel in all his legal actions pending in the Middle District. (Doc. 72). On July 27, 2021, Johnson filed objections to the undersigned's recommendation. (Doc. 73).

On September 18, 2021, the Court denied Johnson's "omnibus motion," finding that Johnson has displayed an apparent ability to pursue his claims and file numerous documents in this and other matters. (Doc. 78). On the same day, the undersigned filed a second report and recommendation, recommending that the Defendants' motion to dismiss be granted in part and denied in part. (Doc. 79). The undersigned recommended that the Court dismiss, with prejudice, all of Johnson's claims against Defendants SCI-Coal Township and Peters, Johnson's access to courts claim, and Johnson's claim of conspiracy. (Doc. 79, at 6, 9, 12, 14). The undersigned also recommended that the motion to dismiss be denied as to Johnson's

claims of retaliation against Defendants Burn, McGinley, Brokenshire, Hughes, and Adams. (Doc. 79, at 12). Lastly, the undersigned recommended that the Court grant Johnson leave to file a supplement to his amended complaint so as to clarify any adverse action by Defendant Peters in retaliation for Johnson's grievances and to re-allege his claim of conspiracy. (Doc. 79, at 14).

On October 12, 2021, Johnson filed the "fraud claim" motion and a brief in support. (Doc. 80; Doc. 81, at 1). On October 15, 2021, Johnson filed the "omnibus Rule 60(b) motion" and a brief in support. (Doc. 82; Doc. 83, at 1). On October 18, 2021, the District Court adopted the undersigned's recommendations, denying Johnson's motion for default judgment. (Doc. 61) and motion to strike Defendants' brief in support of hits motion to dismiss (Doc. 64). (Doc. 84, at 2). Additionally, the Court granted Defendants' motion to dismiss in accordance with the undersigned's recommendations. (Doc. 84, at 2). On November 15, 2021, Johnson filed the supplement to his amended complaint, asserting conspiracy and retaliation claims against Defendant Peters and requesting $100,000 as relief for pain and suffering. (Doc. 85). On November 30, 2021, Defendants filed an answer and affirmative defenses to the supplement. (Doc. 86).

On December 30, 2021, Johnson filed a motion for summary judgment.[1] (Doc. 91; Doc. 92). On January 10, 2021, Johnson filed an "omnibus submission motion to compel justice." (Doc. 93, at 3). Defendants have not responded to any of the pending motions. The

[1] In the motion for summary judgment, Johnson asserts that Defendants failed to respond to interrogatories in a timely manner and that such failure functions as an admission of misconduct in another action, *Johnson v. Koehler, et al.*, No. 3:14-CV-01490 (M.D. Pa. July 31, 2014). (Doc. 91; Doc. 92, at 1). As that action has nothing to do with Johnson's conspiracy and retaliation claims against Defendant Peters in this action, it is recommended that Johnson's motion for summary judgment be DISMISSED with prejudice. (Doc. 91).

above-mentioned motions are ripe for disposition. (Doc. 80; Doc. 81; Doc. 82; Doc. 83; Doc. 93).

II. "FRAUD CLAIM" MOTION

Johnson asserts that "Document 78 and 79 reflects that both orders [are] from September 18, 2021, but document #79 was purposely withheld from being sent out making it hard for [Johnson] to file a timely objection to document 79, but reflects a pattern of fraud being committed by clerks office in this matter in violation of 1st, 6th and 14th amendment."(Doc. 81, at 1-2). In addition, Johnson contends that the Court was required to rule on his objection to the undersigned's June 15, 2021, recommendations before ruling on the September 18, 2021, recommendation. (Doc. 81, at 2; Doc. 83, at 1).

Rule 9(b) of the Federal Rules of Civil Procedure controls and provides that: "(b) Fraud or Mistake; Conditions of Mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). In order to satisfy Rule 9(b), plaintiffs must plead with particularity "the 'circumstances' of the alleged fraud in order to place the defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior." *Lum v. Bank of Am.*, 361 F.3d 217, 223-24 (3d Cir. 2004). Accordingly, "[p]ursuant to Rule 9(b), a plaintiff averring a claim in fraud must specify 'the who, what, when, where, and how: the first paragraph of any newspaper story.'" *Advanta Corp. Sec. Litig.*, 180 F.3d 525, 534 (3d Cir. 1999) (quoting *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990)). "Although Rule 9(b) falls short of requiring every material detail of the fraud such as date, location, and time, plaintiffs must use 'alternative means of injecting precision and some

measure of substantiation into their allegations of fraud.'" *In re Rockefeller Ctr. Props. Secs. Litig.*, 311 F.3d 198, 216 (3d Cir. 2002) (quoting *In re Nice Sys., Ltd. Secs. Litig.*, 135 F. Supp. 2d 551, 577 (D.N.J. 2001)); *Animal Sci. Prod., Inc. v. China Nat. Metals & Minerals Import & Export Corp.*, 596 F. Supp. 2d 842, 878 (D.N.J. 2008).

Johnson contends that fraud is being committed upon the Court by the Clerk of Court because he did not receive the September 18, 2021, Order and recommendation until October 7, 2021, nineteen days after they were issued. (Doc. 81, at 1). Johnson avers that the Clerk of Court "purposefully withheld" the documents from being sent out, which prevented Johnson from filing a timely objection to the undersigned's recommendations. (Doc. 81, at 1). Additionally, Johnson asserts that the September 18, 2021, recommendation is a manifest error because the Court did not first rule on the June 15, 2021, recommendation. (Doc. 81, at 2; Doc. 83, at 1). For relief, Johnson requests that the Court rule on the June 15, 2021, recommendation before any further proceedings, conduct a de novo review of Johnson's "fraud claim" motion, and reject the September 18, 2021, recommendation. (Doc. 81, at 2; Doc. 83, at 1).

On October 18, 2021, the District Court adopted the June 15, 2021, and September 18, 2021, recommendations. (Doc. 84). The Court noted that after seeking two extensions of time, Johnson successfully filed objections to the undersigned's June 15, 2021, recommendation that the motion for default judgment and motion to strike be denied, but Johnson failed to file timely objections to the September 18, 2021, recommendation regarding Defendants' motion to dismiss. (Doc. 84, at 1-2). Most importantly, the Court states "[r]egardless of whether timely objections are made, district courts may accept, reject, or modify – in whole or in part – the magistrate judge's finding or recommendations." (Doc. 84,

at 2) (citing 28 U.S.C. § 636(b)(1); Local Rule 72.31). Thus, after making an independent review of the record, the Court found no error in the undersigned's conclusion that Johnson's motion for default judgment should be denied and that Defendants' motion to dismiss should be granted in part and denied in part. (Doc. 84, at 2). The Court granted Johnson leave to file a supplement to the amended complaint "only with respect to his conspiracy claim and his retaliation claim against Defendant Peters." (Doc. 84, at 3).

Here, Johnson's motions fail to fully comport with the requirements of Rule 9(b). Fairly construed, Johnson's "fraud motion" conclusively states that the Clerk of Court "purposefully withheld" sending out copies of the Order and September 18, 2021, recommendation to prevent Johnson from filing timely objections. (Doc. 81, at 1). To support his allegations, Johnson asserts that the docket sheet printed on September 8, 2021, "reflects that [Johnson] did not receive Document 77 until 9-28-2021." (Doc. 81, at 1). However, Johnson does not proffer evidence to support a conclusion that the Clerk of Court "purposefully withheld" Johnson's legal documents. Johnson has pled no conduct whatsoever that gives rise to inference that the Clerk of Court intended to deceive Johnson or prevent him from filing timely objections. It is not evident from Johnson's allegations what he believes causes the Court's actions to rise to the level of fraud. *See Kearney v. JPC Equestrian, Inc.*, No. 3:11-CV-01419, 2012 WL 1020276, at *5 (M.D. Pa. Jan. 4, 2012) (plaintiff failed to plead facts that infer fraud). Moreover, "[r]egardless of whether timely objections were made," the District Court conducted its own review of the record and adopted the recommendations after finding no error in the undersigned's analysis or conclusions. (Doc. 84, at 2). Thus, because Johnson has failed to state with sufficient particularity the

circumstances constituting fraud as required under Rule 9(b), it is recommended that Johnson's "fraud claim" motion be DENIED. (Doc. 80).

III. "OMNIBUS RULE 60(B) MOTION"

In this motion, Johnson requests that the Court acknowledge a miscarriage of justice because the undersigned issued another recommendation before the Court ruled on a previous recommendation. (Doc. 82; Doc. 83, at 1). In addition, Johnson asserts that the Court committed "a manifest, obvious and observable error" because the Court did not rule on the June 15, 2021, recommendation, before the undersigned issued the September 18, 2021, recommendation. (Doc. 83, at 1). To bolster his argument, Johnson states that his other action, *Johnson v. Koehler, et al.*, No. 3:14-CV-01490 (M.D. Pa. July 31, 2014), was also dismissed after he did not have the opportunity to file objections to the recommendation because he never received the legal documents. (Doc. 83, at 2).

A motion filed pursuant to Federal Rule of Civil Procedure 60(b) "allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances including fraud, mistake, and newly discovered evidence." *Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005). Pursuant to Rule 60(b)(2), a "court may relieve a party or its legal representative from a final judgment, order, or proceeding" "for [ ] newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." Pursuant to Rule 60(b)(3), a "court may relieve a party or its legal representative from a final judgment, order, or proceeding" "for fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party." Finally, pursuant to the catch-all provision of Rule 60(b)(6), a "court may relieve a party or its legal representative from a final judgment, order, or proceeding," "for any other reason that

justifies relief." A court may grant a Rule 60(b) motion only in extraordinary circumstances, and in such a motion it is not appropriate to reargue issues that the court has already considered and decided. *See Moolenaar v. Gov't of Virgin Islands,* 822 F.2d 1342, 1346 (3d Cir. 1987); *Brambles USA Inc. v. Blocker*, 735 F. Supp. 1239, 1240 (D. Del. 1990).

A "movant seeking relief under Rule 60(b)(6) [must] show 'extraordinary circumstances' justifying the reopening of a final judgment." *Gonzalez*, 545 U.S. at 535. "It is available where the party seeking relief demonstrates that 'extreme' and 'unexpected' hardship will result absent such relief." *Jackson v. Danberg*, 656 F.3d 157, 165-66 (3d Cir. 2011) (citing *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932)). The movant bears a heavy burden of proof that extraordinary circumstances are present. *Bohus v. Beloff*, 950 F.2d 919, 930 (3d Cir.1991). A Rule 60(b) motion may not be used as a "second bite at the apple." *See Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1231 (3d Cir. 1995). It "is not to be used as a means to reargue matters already argued and disposed of or as an attempt to relitigate a point of disagreement between the Court and the litigant." *Jones v. Shannon*, No. 3:05-CV-2255, 2013 WL 6021956, at *7 (M.D. Pa. Nov. 13, 2013) (citation omitted).

Johnson's allegation that the Clerk of Court's failure to send out legal documents raises the "fundamental constitutional right of access to the courts" that is embodied in the First and Fourteenth Amendments. *Lewis v. Casey*, 518 U.S. 343, 346 (1996) (quoting *Bounds v. Smith*, 430 U.S. 817, 828 (1977)). Where a prisoner asserts that the defendants' actions have inhibited his opportunity to present a past legal claim, he must show (1) he suffered an actual injury—that is, that he lost a chance to pursue a "nonfrivolous" or "arguable" underlying claim because of the alleged interference; and (2) he has no other "remedy that may be awarded as recompense" for the lost claim other than in the present denial-of-access suit. *Christopher v.*

Harbury, 536 U.S. 403, 415 (2002); *see also Monroe v. Beard*, 536 F.3d 198, 205 (3d Cir. 2008). However, if "an inmate does not allege an actual injury to his ability to litigate a claim, his constitutional right of access to the courts has not been violated." *Caldwell v. Beard*, 305 F. App'x. 1, 3 (3d Cir. 2008) (not precedential). Thus, an access-to-courts claim differs from a general First Amendment claim of interference with prisoner mail in that a prisoner-plaintiff need not allege that the violation resulted from a "pattern and practice" or explicit policy, but must assert an actual injury. *See Williams v. Lackawanna Cty. Prison*, No. 1:13-CV-00849, 2015 WL 4729438, at *4 (M.D. Pa. Aug. 10, 2015). Actual injury occurs when the denial of court access "hinder[s] [the inmate's] efforts to pursue a legal claim." *Casey*, 518 U.S. at 351.

Here, the undersigned finds that Johnson did not lose his right to pursue his legal claim. Johnson claims that he did not receive the September 18, 2021, Order and recommendation until October 7, 2021, nineteen days after the Order and recommendation was issued. (Doc. 83, at 1). However, Johnson does not submit any evidence to indicate he did not timely receive the Order and recommendation. Even giving Johnson every benefit of the doubt, his "omnibus Rule 60(b) motion" fails to raise any new or persuasive argument, nor does it meet the requisite standard for a Rule 60(b) motion. The District Court conducted an independent review of the record and found no error in the undersigned's recommendation, adopting the recommendation in its entirety. (Doc. 84, at 2). Moreover, Johnson had the option to appeal the District Court's decision to the Third Circuit Court of Appeals. *See* 28 U.S.C. § 1291; *see also Jerry-El v. Wetzel*, No. 19-CV-3105, 2022 WL 72728, at *1 (3d Cir. Jan. 7, 2022). Thus, Johnson had the opportunity to bring his challenge to the report and recommendation through the appellate process.

Because Johnson did not lose his chance to pursue his claims, he cannot allege "extraordinary circumstances" deprived him of his opportunity to challenge the September 18, 2021, Order and recommendation that justify the reopening of a final judgment. *Gonzalez*, 545 U.S. at 535. Johnson was able to present his challenge to the merits of the September 18, 2021, recommendation to the District Court in this "omnibus Rule 60(b) motion," and had the opportunity to present his challenge to the Third Circuit on appeal. Extraordinary circumstances do not exist that justify reopening the District Court's adoption of the undersigned's recommendations; therefore it is recommended that Johnson's "omnibus Rule 60(b) motion" be DENIED. (Doc. 82).

IV. "OMNIBUS MOTION TO COMPEL JUSTICE"

In his most recently filed motion, Johnson submits that he was found guilty without a trial and retaliated against "for attempting to exercise federally protected constitutional rights and the proof provided of institutional and systematic discrimination and modern day enslavement by the government." (Doc. 93, at 1). Johnson attaches multiple exhibits, which he avers provide proof that "parole board refuse to give any files being used against [Johnson]," and evidence of retaliation, cruel and unusual punishment, and due process violations. (Doc. 93, at 1; Doc. 94). In the motion, Johnson requests "fairness from Federal Court in pending actions, and request to be paroled and seek justice." (Doc. 93, at 1). Liberally construed to be a motion for reconsideration, the undersigned finds that this motion should be denied. (Doc. 93).

A "motion for reconsideration" is generally construed as a motion to alter or amend judgment under Federal Rule of Civil Procedure 59(e). *See Wiest v. Lynch*, 710 F.3d 121, 127 (3d Cir. 2013) (citations omitted). Such a motion must rely on at least one of the following

three grounds: "(1) an intervening change in controlling law; (2) the availability of new evidence; or (3) the need to correct clear error of law or prevent manifest injustice." *Wiest,* 710 F.3d at 128 (quoting *Lazaridis v. Wehmer*, 591 F.3d 666, 669 (3d Cir. 2010)); *see Max's Seafood Café v. Quinteros*, 176 F.3d 669, 677-78 (3d Cir. 1999); *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985). A court possesses the inherent power to reconsider its orders "when it is consonant with justice to do so." *United States v. Jerry*, 487 F.2d 600, 605 (3d Cir. 1973); *Alea N. Am. Ins. Co. v. Salem Masonry Co.*, 301 F. App'x 119, 121 (3d Cir. 2008). However, such relief is to be granted "sparingly." *Montanez v. York City*, No. 12-CV-1530, 2014 WL 3534567, at *7 (M.D. Pa. July 16, 2014) (quoting *Continental Casualty Co. v. Diversified Indus., Inc.*, 884 F. Supp. 937, 943 (E.D. Pa. 1995)).

A party may not invoke a motion for reconsideration as a means to relitigate matters already resolved by the court. *See Boretsky v. Governor of N.J.*, 433 F. App'x 73, 78 (3d Cir. 2011) (quoting *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 957 (11th Cir. 2007)). Further, a motion for reconsideration is not "an opportunity for a party to present previously available evidence or new arguments." *Federico v. Charterers Mut. Assurance Ass'n Ltd.*, 158 F. Supp. 2d 565, 577 (E.D. Pa. 2001); *see also Harsco Corp.*, 779 F.2d at 909.

In this case, Johnson bases the instant motion on arguments identical to or expanding on those previously raised and rejected by the Court, and does not substantiate a clear error of law in the District Court's prior decision to adopt the undersigned's recommendations. Accordingly, Johnson fails to satisfy the exacting standard of review applied to motions for reconsideration, and it is recommended that the "omnibus motion to compel justice" be DENIED. (Doc. 93).

V. RECOMMENDATION

Based on the foregoing reasons, it is respectfully recommended that Johnson's "fraud claim" motion (Doc. 80), "omnibus Rule 60(b) motion" (Doc. 82), motion for summary judgment (Doc. 91), and "omnibus motion to compel justice" (Doc. 93) be **DENIED**.

BY THE COURT:

Dated: March 3, 2022

s/ Karoline Mehalchick
KAROLINE MEHALCHICK
Chief United States Magistrate Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

ARMONI MASUD JOHNSON, Plaintiff, v. SUPERINTENDENT MCGINLEY, et al., Defendants.	CIVIL ACTION NO. 4:18-CV-01714 (BRANN, J.) (MEHALCHICK, M.J.)

NOTICE

NOTICE IS HEREBY GIVEN that the undersigned has entered the foregoing **Report and Recommendation** dated **March 3, 2022**. Any party may obtain a review of the Report and Recommendation pursuant to Rule 72.3, which provides:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636(b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Dated: March 3, 2022

s/ Karoline Mehalchick
KAROLINE MEHALCHICK
Chief United States Magistrate Judge