

OCT 06 2010

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JERRY DORAN,

Plaintiff - Appellant,

v.

7-ELEVEN, INC. DBA 7-Eleven;
SOUTHLAND CORP.,

Defendants - Appellees.

Nos. 09-55119

09-55279

D.C. No. 8:04-cv-01125-JVS-AN

MEMORANDUM*

Appeals from the United States District Court
for the Central District of California
James V. Selna, District Judge, Presiding

Submitted September 13, 2010**

Before: SILVERMAN, CALLAHAN, and N.R. SMITH, Circuit Judges.

Jerry Doran appeals from the district court's orders awarding costs to defendant 7-Eleven, Inc. and denying reconsideration in his action alleging claims under the Americans with Disabilities Act ("ADA") and state law. We have

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes these appeals are suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

jurisdiction under 28 U.S.C. § 1291. We review for an abuse of discretion. *Brown v. Lucky Stores, Inc.*, 246 F.3d 1182, 1187 (9th Cir. 2001) (costs); *Sch. Dist. No. 1J, Multnomah County, Or. v. ACandS, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993) (reconsideration). We reverse and remand.

The district court dismissed Doran's ADA claim and concluded that defendant was not entitled to costs because the claim was not frivolous, unreasonable, or without foundation. *See Brown*, 246 F.3d at 1190. The district court then denied Doran's request to plead diversity jurisdiction, dismissed Doran's state law claims without prejudice to refiling them in federal or state court, and awarded costs to defendant on these state law claims. The state law claims are now pending in district court. The district court abused its discretion when it awarded costs to defendant on the state law claims, because defendant was not a prevailing party on these claims. *See Fed. R. Civ. P. 54(d)(1); cf. Miles v. California*, 320 F.3d 986, 989 (9th Cir. 2003) (defendant was prevailing party where dismissal eliminated claim from further proceedings in federal court and thus materially altered the legal relationship of the parties).

Doran's unopposed request for judicial notice is granted.

REVERSED and REMANDED.