Frank Dufour v. Robert Allen et al Doc. 302

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL **'O'**

Case No.	2:14-cv-05616-CAS(SSx)	Date	July 12, 2017
Title	FRANK DUFOUR v. ROBERT ALLEN, ET AL.		

Present: The Honorable	CHRISTINA A. SNYDER	
Catherine Jeang	Not Present	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	
Not Present	Not Present	

Proceedings: (IN CHAMBERS) - PLAINTIFF FRANK DUFOUR'S MOTION TO SET ASIDE JUDGMENT (Dkt. 263, filed December 22, 2016)

The Court finds this motion appropriate for decision without oral argument. See Fed. R. Civ. P. 78; CD. Cal. L.R. 7-15. Accordingly, the hearing date of July 24, 2017 is vacated, and the matter is hereby taken under submission.

I. INTRODUCTION & BACKGROUND

This lawsuit commenced on February 8, 2012, when plaintiff Frank DuFour filed a complaint in Los Angeles County Superior Court. DuFour filed the operative Fourth Amended Complaint ("FAC") on December 27, 2013, also in Superior Court. See Dkt. No. 1-2. The FAC names as defendants Robert Allen, Enlightened Wealth Institute International, L.C., Enlightened Wealth Institute, L.C., Prosper Inc., Green Planet Services, Opteum Financial Services, Midland Mortgage Company, Aurora Loan Services, Sherson Lehman, Millennium Home Loans, Charlie Payne, and Giddens & Giddens, as well as other Doe defendants. Id. ¶¶ 2–26. On February 28, 2014, the Federal Deposit Insurance Corporation ("FDIC") was appointed as receiver of defendant Millennium Bank, N.A., a failed bank.[1] See Dkt. 1. On July 19, 2014, the FDIC removed this action to federal court based on federal question jurisdiction. Id. The case was transferred to the undersigned on July 25, 2014. Dkt. 10. A number of defendants have been dismissed pursuant to prior orders of this Court.

[1] The FAC named "Millennium Home Loans, an unknown business entity," as a defendant, but did not name Millennium Bank. See generally FAC. However, on May 21, 2014, plaintiff filed in the Superior Court an application to amend the FAC based on an "incorrect name." Dkt. 7-3. This application represented that plaintiff had discovered the true name of "Millennium Home Loans" to be "Millennium Home Loans a/k/a Millennium Bank, N.A." Id.

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In brief, plaintiff alleges in the FAC that defendants schemed to induce plaintiff to enroll in a fraudulent real estate investment course offered by Allen and Prosper to buy fraudulently marketed properties, from which defendants profited through undisclosed relationships with management and financing companies. Plaintiff alleges that Allen is the co-founder of entities which offer real estate investment instruction. Plaintiff contends that Allen, through multiple incarnations of the same business model, deceptively promoted risky and illegal investment techniques, and fraudulently induced him to pay thousands of dollars to enroll in a real estate investment course. According to plaintiff, Prosper is a corporation affiliated with Allen and other defendants, and after plaintiff was referred to Prosper by Allen, Prosper employees provided plaintiff with training materials and coaching and eventually connected plaintiff with other players in the alleged scheme. Plaintiff asserts that Freedom employees fraudulently induced plaintiff to make a series of real estate investments in Mississippi. Plaintiff also alleges that Allen and other defendants breached an implied contractual duty of good faith and fair dealing by failing to disclose that Freedom and other defendants "were all doing business together" with Prosper, which was "associated with, affiliated and involved in a joint venture business arrangement with . . . Allen."[2]

On December 23, 2013, just prior to the filing of the FAC, Prosper filed a cross-complaint for breach of contract against plaintiff. Dkt. No. 153 Ex. 1 ("Cross-Complaint"). Prosper alleged in this Cross-Complaint that plaintiff breached an Enrollment Agreement he purportedly entered into with Prosper by failing to fulfill his obligations as an enrollee in the course and refusing to mediate or arbitrate this dispute. Id. ¶ 10. Plaintiff filed a demurrer to the Cross-Complaint in the Superior Court, which was overruled. Plaintiff subsequently filed a so-called "Cross-Cross-Complaint," ("CCC") which this Court dismissed on September 15, 2014, on the ground that it impermissibly duplicated claims already raised in the FAC. Dkt. 46. Plaintiff appealed the order dismissing the CCC to the Court of Appeals for the Ninth Circuit. On March 19, 2015, the Court granted Prosper's motion for voluntary dismissal without prejudice of its Cross-Complaint. Dkt. 160.

In May 2014, before this case was removed to federal court, the Superior Court granted summary judgment in favor of defendants Freedom Home Mortgage Corporation ("Freedom"), as well as defendants Allen, Prosper, Inc., Prosper Holdings, Inc.,

[2] These facts are drawn from the Court's prior orders dated September 15, 2014, dkt. 46, November 10, 2014, dkt. 75, and March 19, 2015, dkt. 160.

Education Success, Inc., R.A.H.A.D., Inc., and D.A.H.A.R., Inc. (collectively the "Prosper Defendants").

On November 21, 2014, this Court entered judgment in favor of Freedom and the Prosper Defendants on plaintiff's claims raised in the operative FAC. Dkt. 90. On December 19, 2014, plaintiff appealed to the Court of Appeals for the Ninth Circuit the entry of judgment in favor of Freedom and the Prosper Defendants. Dkt. 110.

On February 22, 2017, the Ninth Circuit affirmed this Court's (1) grant of summary judgment in favor of Freedom and the Prosper Defendants and (2) dismissal of plaintiff's cross-cross-claim. Dkt. 271.

On April 20, 2017, the Court granted the Prosper Defendants' motion for attorneys' fees on the basis of the indemnity provision of the Enrollment Agreement. Dkt. 288. The Court concluded that plaintiff was estopped from repudiating the existence of the Enrollment Agreement because he sought affirmative relief under that agreement in his CCC. Id. at 15. On June 16, 2017, the Court awarded the Prosper Defendants $404,330.97 in attorneys' fees and costs. Dkt. 295.

On June 19, 2017, plaintiff filed the instant motion to set aside the Court's November 21, 2014 judgment. Dkt. 296 ("Motion"). The Prosper Defendants filed their opposition on July 3, 2017, dkt. 297, and plaintiff filed his reply on July 10, 2017, dkt. 298 ("Reply").

Having carefully considered the parties' arguments, the Court finds and concludes as follows.

II. LEGAL STANDARDS

Pursuant to Federal Rule of Civil Procedure 60(b), "the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> (4) the judgment is void;

> (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). "A party seeking reconsideration must show more than a disagreement with the Court's decision, and recapitulation of the cases and arguments considered by the court before rendering its original decision fails to carry the moving party's burden." United States v. Westlands Water Dist., 134 F. Supp. 2d 1111, 1131 (E.D. Cal. 2001) (quotation marks omitted). A Rule 60(b) motion "must be made within a reasonable time" and "no more than a year after the entry of the judgment or order or the date of the proceeding" if the motion is based on (1) mistake inadvertence, surprise, or excusable neglect; (2) newly discovered evidence, or (3) fraud, misrepresentation, or misconduct by an opposing party. Fed. R. Civ. P. 60(c)(2).

Rule 60(b)(1) permits a court to correct its own inadvertence, mistakes of fact, Kingvision Pay–Per–View Ltd. v. Lake Alice Bar, 168 F.3d 347, 350 (9th Cir. 1999), or mistakes of law, Liberty Mut. Ins. Co. v. EEOC, 691 F.2d 438, 441 (9th Cir. 1982). However, a Rule 60(b)(1) reconsideration motion should not merely present arguments previously raised, or which could have been raised in the original briefs. See Backlund v. Barnhart, 778 F.2d 1386, 1388 (9th Cir. 1985) (motion properly denied where it "presented no arguments that had not already been raised in opposition to summary judgment."). Under Rule 60(b)(6), the so-called catch-all provision, the party seeking relief "must demonstrate both injury and circumstances beyond his control that prevented him from proceeding with the action in a proper fashion." Latshaw v. Trainer Wortham & Co., Inc., 452 F.3d 1097, 1103 (9th Cir. 2006). In addition, the Ninth Circuit confirmed that "[t]o receive relief under Rule 60(b)(6), a party must demonstrate extraordinary circumstances which prevented or rendered him unable to prosecute his case." Lal v. California, 610 F.3d 518, 524 (9th Cir. 2010). Rule 60(b)(6) must be "used sparingly as an equitable remedy to prevent manifest injustice and is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment." Id. (quotation marks omitted).

Under Central District of California Civil Local Rule 7-18,

> A motion for reconsideration of the decision on any motion may be made only on the grounds of (a) a material difference in fact or law from that

> presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion.

See C.D. Cal. L.R. 7-18.

III. DISCUSSION

Plaintiff requests that the Court set aside its November 21, 2014 judgment on the basis of mistake, pursuant to Rule 60(b)(1), and any other reason that justifies relief, pursuant to Rule 60(b)(6). Motion at 3. Plaintiff appears to argue that this Court dismissed plaintiff's fraud and breach of implied covenant claims based on improper statutes of limitations. Id.

Because the Ninth Circuit affirmed that plaintiff's claims against defendants were barred by the applicable statutes of limitations, see dkt. 271, the Court finds that plaintiff's motion implicates the "the law of the case" doctrine. See Herrington v. Cty. of Sonoma, 12 F.3d 901, 904 (9th Cir. 1993) ("The law of the case doctrine states that the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case." (quotation marks omitted)). The Ninth Circuit's decision thus forecloses consideration of the question raised by plaintiff's motion.

Alternatively, plaintiff has failed to demonstrate that the Court should set aside its November 21, 2014 judgment.

To the extent plaintiff seeks to set aside a judgment pursuant to Rule 60(b)(1), plaintiff's motion is untimely because he filed it more than one year after theNovember 21, 2014 judgment. See Fed. R. Civ. P. 60(c)(2). Thus, the Court is "without jurisdiction to consider" plaintiff's Rule 60(b)(1) motion. Nevitt v. United States, 886 F.2d 1187, 1188 (9th Cir. 1989). While plaintiff filed his *appeal* of this Court's decision within one year, "the one-year limitation period is not tolled during an appeal." Id. Contrary to plaintiff's assertion, see Reply at 16–17, the one-year limitations period begins to run upon the Court's summary judgment. Burton v. Spokane Police Dep't, 517 F. App'x

554, 555 (9th Cir. 2013) ("The district court lacked jurisdiction to consider Burton's motion to vacate the judgment under Rule 60(b)(2) or (3) because the motion was filed more than one year after summary judgment was granted for defendants.").

Furthermore, plaintiff has failed to show that the Court committed any mistake in granting summary judgment. Plaintiff argues that the Court should have applied the four-year statute of limitations for contract actions—rather than the three-year limitations period for his fraud claim and the two-year limitations period for his claim for beach of the implied covenant—because the Court concluded that the Prosper Defendants were entitled to attorneys' fees based on the Enrollment Agreement's indemnity provision. Motion at 8–9. However, the Court's consideration of the Enrollment Agreement in determining whether attorneys' fees were authorized does not convert plaintiff's claims for fraud and breach of the covenant into claims on a written contract. Furthermore, plaintiff need not have sued "on the contract" in order to trigger the indemnity provision of the Enrollment Agreement. Rather, the indemnity provision provides:

> You understand and agree to defend, indemnify and hold Prosper, Inc., and its officers, directors, employees, independent contractors, instructors, coaches, and their related companies harmless from an against *all* damages, liabilities, costs, losses, expenses, *claims*, and/or judgments, including legal costs and reasonable attorney's fees and disbursements which any of them may occur or become obligated to pay arising out of or resulting from (I) the activities pursuant to this agreement (with the exception of willful misconduct on the part of Prosper, Inc.) and (II) the breach of the User of any of its representation, warranties, covenants, obligations, agreements (with the exception of the breach of/or a default under any other agreement, instrument, order, law or regulation applicable to us or by which it may be bound) and claims of injury or otherwise arising from the sales of any products or services pursuant to this enrollment agreement.

274-4, Ex. A at 3 (emphases added). Thus, the Enrollment Agreement provides for attorneys' fees for all claims arising out of activities undertaken pursuant to the agreement, not only for contract actions based on the agreement.

Finally, plaintiff has not demonstrated any additional basis—let alone extraordinary circumstances or manifest injustice—to set aside the Court's judgment pursuant to Rule 60(b)(6).

IV. CONCLUSION

In accordance with the foregoing, the Court **DENIES** plaintiff's motion for reconsideration.

IT IS SO ORDERED.

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