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**United States District Court
Central District of California**

VENICE BAKING COMPANY,
Plaintiff,
v.
SOPHAST SALES AND MARKETING
LLC; and DOES 1–10, inclusive,
Defendants.

Case No. 2:16-cv-6136-ODW(KS)

**ORDER DENYING PLAINTIFF’S
MOTION FOR
RECONSIDERATION [16]**

I. INTRODUCTION

Plaintiff Venice Baking Company files the pending motion for reconsideration and relief from the Court’s September 19, 2016, order granting Defendant Sophast Sales and Marketing LLC’s motion to dismiss with prejudice. (ECF Nos. 11, 16.) For the following reasons, the Court **DENIES** Plaintiff’s motion.¹

II. FACTUAL BACKGROUND

On May 4, 2016, Plaintiff filed this action in the Superior Court of Los Angeles,

¹ After considering the papers filed in support of and in opposition to Plaintiff’s motion, the Court deems the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78(b); C.D. Cal. L.R. 7-15.

1 seeking declaratory relief. (Compl., Not. of Removal, Ex. A, ECF No. 1.) Plaintiff's
2 claims arose out of a contractual dispute between the two parties. (*Id.*) Defendant
3 removed the action to this Court on August 16, 2016. (*Id.*) Defendant then filed a
4 motion to dismiss for lack of personal jurisdiction on August 30, 2016, which was set
5 for hearing on October 3, 2016. (ECF No. 9.) Plaintiff's opposition to the motion
6 was due on September 12, 2016, twenty-one days before the hearing. No opposition
7 was ever filed. On September 19, 2016, the Court granted Defendant's motion to
8 dismiss as unopposed. (ECF No. 11.) Later that day, Plaintiff filed an ex-parte
9 application seeking a continuance to file opposition. (ECF No. 12.) On September
10 21, 2016, the Court denied the ex-parte application as procedurally improper because
11 a final order had been issued. (ECF No. 17.) On the same day, Plaintiff filed the
12 pending motion for reconsideration and relief.² (Mot., ECF No. 16.)

13 In the pending motion, Plaintiff's counsel explains that the parties were
14 engaged in settlement negotiations prior to the September 12, 2016, deadline for filing
15 opposition. (Wiseman Decl. ¶¶10-16, ECF No. 16.) Plaintiff's counsel believed that
16 these negotiations would soon lead to a settlement. (*Id.*) He also believed that filing
17 opposition would serve as a potential irritant in these settlement negotiations, making
18 it less likely that his client would be able to obtain a settlement. (*Id.* ¶14)
19 Accordingly, Plaintiff's counsel did not file opposition. (*Id.*) Nonetheless, a
20 settlement failed to materialize and the deadline passed. (*Id.*, Ex. G at 1.) Three days
21 after the deadline to file opposition, Plaintiff's counsel asked Defendant's permission
22 to reschedule the October 3, 2016 hearing to a date two weeks later. (*Id.* ¶17)
23 Defendant declined Plaintiff's request. (*Id.*)

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28 ² Defendant filed opposition to the pending motion on October 3, 2016. (Opp'n, ECF No. 20.)
Plaintiff filed a reply on October 10, 2016. (Reply, ECF No. 21.)

1 **III. LEGAL STANDARD**

2 A party may file a motion for reconsideration pursuant to Federal Rule of Civil
3 Procedure 59(e) within twenty-eight days of the order that it seeks to amend.
4 However, Rule 59(e) is an “extraordinary remedy to be used sparingly” and is rarely
5 granted “absent highly unusual circumstances.” *Kona Enters., Inc. v. Estate of*
6 *Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (internal quotation marks omitted); *Marlyn*
7 *Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir.
8 2009).

9 Local Rule 7-18 dictates that there are only three grounds on which such a
10 motion may be granted:

11
12 (1) a material difference in fact or law from that presented to the Court
13 before such decision that in the exercise of reasonable diligence could not
14 have been known to the party moving for reconsideration at the time of
15 such decision, or (2) the emergence of new material facts or a change of
16 law occurring after the time of such decision, or (3) a manifest showing
17 of a failure to consider material facts presented to the Court before such
18 decision.

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20 Like a motion for reconsideration, a motion for relief from judgment pursuant
21 to Federal Rule of Civil Procedure 60(b) is considered a form of “extraordinary relief”
22 reserved for “exceptional circumstances.” *See Engleson v. Burlington N. R. Co.*, 972
23 F.2d 1038, 1044 (9th Cir. 1992) (quoting *Ben Sager Chemicals Int'l, Inc. v. E. Targosz*
24 *& Co.*, 560 F.2d 805, 809 (7th Cir. 1977)). Motions made pursuant to Federal Rule of
25 Procedure 60(b)(1) allow a court to “relieve a party . . . from a final judgment, order,
26 or proceeding for . . . mistake, inadvertence, surprise, or excusable neglect.” Fed. R.
27 Civ. P. 60(b)(1). When a Rule 60(b)(1) motion is based on neglect, courts weigh four
28 factors to determine whether the neglect was excusable: “(1) the danger of prejudice

1 to the opposing party; (2) the length of the delay and its potential impact on the
2 proceedings; (3) the reason for the delay [or other error, including whether it was
3 within the reasonable control of the movant]; and (4) whether the movant acted in
4 good faith.” *See Lemoge v. United States*, 587 F.3d 1188, 1192 (9th Cir. 2009)
5 (quoting *Bateman v. U.S. Postal Serv.*, 231 F.3d 1220, 1223 (9th Cir. 2000)); *see also*
6 *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993).

7 A party may also seek relief pursuant to Rule 60(b)(6). This catchall provision
8 is used “sparingly” when necessary to prevent “manifest injustice.” *United States v.*
9 *Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993). To satisfy this
10 “lofty standard” the movant must prove that it suffered (1) an injury (2) and that
11 circumstances beyond its control prevented timely action to protect its interests. *Id.*;
12 *see also Reese v. Sprint Nextel Corp.*, No. 2:13-CV-03811-ODW, 2014 WL 3724055,
13 at *1 (C.D. Cal. July 24, 2014).

14 15 IV. DISCUSSION

16 A. Reconsideration

17 Plaintiff asks the Court to amend its final order dismissing this case *with*
18 prejudice to instead dismiss this case *without* prejudice. (Memorandum 14, ECF No.
19 16.) However, the Court finds that Plaintiff has not satisfied any of the three grounds
20 outlined in Local Rule 7-18 to warrant such an amendment. Plaintiff neither cites a
21 material fact or law that could not have been reasonably known at the time of the
22 order’s issuance nor a material new fact or change in law that occurred after the
23 order’s issuance.

24 Additionally, Plaintiff’s motion fails to describe material facts presented *before*
25 the order’s issuance that the Court failed to consider. Due to the unopposed nature of
26 Plaintiff’s motion to dismiss, few facts were necessary to rule in Defendant’s favor.
27 First, the Court found that Plaintiff filed a motion to dismiss on August 30, 2016
28 alleging that this Court lacked personal jurisdiction over it. (Order 2, ECF No. 11.)

1 Second, the Court found that a hearing was set for October 3, 2016 on the motion.
2 (*Id.*) Third, the Court found that opposition to the motion was due on September 12,
3 2016, twenty-one days before the hearing. (*Id.*) Finally, the Court found that no
4 opposition was filed by the deadline. (*Id.*) Based on these facts, all of which were
5 expressly included in the September 19, 2016 order, the Court granted Defendant’s
6 motion to dismiss for lack of opposition. (*Id.* at 3.) Having failed to satisfy any of the
7 requirements outlined in Local Rule 7-18, the Court denies Plaintiff’s request to
8 reconsider and amend the prior order.

9 **B. Relief**

10 Plaintiff alleges eligibility for relief pursuant to Rule 60(b)(1) on the grounds of
11 excusable neglect and surprise. (Memorandum 2.) In applying the *Pioneer* four-
12 factor test to determine whether the neglect was excusable, the Court finds that there
13 is little likelihood of prejudice to Defendant, that the length of the delay was modest (a
14 matter of days), and that there is no evidence Plaintiff acted in bad faith. Thus, the
15 Court finds these three factors weigh in Plaintiff’s favor.

16 However, the Court finds that the third factor weighs heavily against Plaintiff.
17 With full knowledge of the deadline to file opposition and of the settlement
18 negotiations’ progress, Plaintiff’s counsel made the decision not to file opposition or a
19 motion for an extension of the opposition deadline. (Wiseman Decl. ¶¶10-14.) This
20 decision on the part of Plaintiff’s counsel was not only deliberate but also purposeful;
21 Plaintiff’s counsel believed that by not filing opposition it would increase the
22 likelihood of a settlement for his client. (Wiseman Decl. ¶14.) This was a risk
23 Plaintiff’s counsel took at his own peril; there is no evidence that the parties ever
24 finalized an agreement to extend the deadline for filing an opposition or to push back
25 the hearing date. Even if there was an agreement between the parties, such an
26 agreement was never formalized with the Court.

27 It is also worth noting that Plaintiff’s situation differs markedly from others
28 where courts have found excusable neglect. In one line of cases finding excusable

1 neglect, attorneys were prevented from timely filing by calendaring mistakes. *Pincay*
2 *v. Andrews*, 389 F.3d 853, 855 (9th Cir. 2004); *Pioneer Inv. Servs. Co.*, 507 U.S. at
3 399; *In re Hawaiian Airlines, Inc.*, No. CV. 08-00405 DAE-BMK, 2011 WL
4 1483923, at *8 (D. Haw. Apr. 18, 2011). In another line of cases finding excusable
5 neglect, attorneys were effectively prevented from timely filing by personal or family
6 emergencies. *See Lemoge v. United States*, 587 F.3d at 1197 (attorney suffered injury
7 during proceedings that required multiple surgeries, skin grafts, and extensive
8 therapy); *see also Bateman v. U.S. Postal Serv.*, 231 F.3d at 1222 (family emergency
9 requiring attorney's presence in Nigeria). The implication in these two lines of cases
10 is that, but for the calendaring mistake or emergency preventing it, these attorneys
11 would have timely filed. By contrast, Plaintiff's counsel was not prevented from
12 timely filing: he *chose not* to file opposition to avoid disrupting the settlement
13 process. Balancing the four *Pioneer* factors, the Court finds that the neglect of
14 Plaintiff's counsel was not excusable.

15 The Court also finds that Plaintiff is not entitled to relief on the basis of
16 surprise. Plaintiff's counsel insinuates that Defendant bated him into not timely filing
17 opposition by making it appear that settlement was imminent. (Wiseman Decl. ¶¶19-
18 21.) While the Court cannot entirely discount the possibility that such a scheme
19 existed, it is not in receipt of sufficient evidence to substantiate that claim. Having
20 ruled out both excusable neglect and surprise, the Court finds no basis on which to
21 grant Plaintiff Rule 60(b)(1) relief.

22 Finally, Plaintiff seeks relief pursuant to Rule 60(b)(6). However, as discussed
23 at length, Plaintiff's decision not to file timely opposition was within its control. *See*
24 *Alpine Land & Reservoir Co.*, 984 F.2d at 1049 (requiring circumstances to be outside
25 of movant's control for Rule 60(b)(6) relief). As a result, the Court finds that Plaintiff
26 is not entitled to Rule 60(b)(6) relief.

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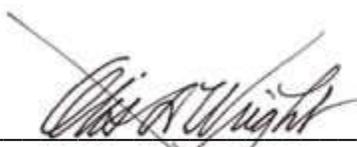
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V. CONCLUSION

As detailed above, Plaintiff has not met the requirements for reconsideration or relief. Therefore, the Court **DENIES** Plaintiff's motion.

IT IS SO ORDERED.

October 11, 2016



OTIS D. WRIGHT, II
UNITED STATES DISTRICT JUDGE