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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

ALFRED BROWN,

Plaintiff,

v.

DAVID KYLE, et al.,

Defendants.

CASE NO. 1:04-cv-06539-AWI-SMS PC

ORDER DENYING MOTION  
FOR RECONSIDERATION

(Doc. 42)

Plaintiff Alfred Brown is a state prisoner proceeding pro se and in forma pauperis in this civil rights action pursuant to 42 U.S.C. § 1983. On August 21, 2009, Plaintiff filed a motion seeking leave to file a second amended complaint to request a court trial rather than a jury trial. The Court denied Plaintiff’s motion on November 16, 2009, and December 9, 2009, Plaintiff filed a motion seeking reconsideration. Defendants Kyle and Domingo did not file a response.

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). The moving party “must demonstrate both injury and circumstances beyond his control . . . .” Id. (internal quotation marks and citation omitted). Further, Local Rule 230(j) requires, in relevant part, that Plaintiff show “what 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,” and “why the facts or circumstances were not shown at the time of the prior motion.”

1 Plaintiff sought leave to amend to request a court trial rather than a jury trial, and his motion  
2 was denied, without prejudice, as futile in light of the fact that once a jury trial is demanded, trial  
3 must be by jury unless the parties stipulate to a nonjury trial. In his motion for reconsideration,  
4 Plaintiff argues that at the time he filed his motion, neither defendant had made an appearance and  
5 he was therefore entitled to amend once as a matter of right.

6 Although Defendant Domingo filed an answer prior to the issuance of the Court's order,  
7 Plaintiff is correct that at the time he filed his motion, no defendant had appeared. However, the  
8 Court properly denied Plaintiff's motion on the ground of futility. See Montz v. Pilgrim Films &  
9 Television, Inc., No. 08-56954, 2010 WL 2197421, at \*5 (9th Cir. Jun. 3, 2010) (citing Albrecht v.  
10 Lund, 845 F.2d 193, 195 (9th Cir. 1988)) (a district court may cut off a party's right to amend as a  
11 matter of course if amendment would be futile).

12 Plaintiff's amended complaint does not contain a demand for trial by jury. (Doc. 17.) The  
13 right to a trial by jury must be preserved by making a demand, and unless a demand is properly filed  
14 and served, the right to a trial by jury is waived. Fed. R. Civ. P. 38(b),(d). Because Plaintiff waived  
15 his right to a jury trial, Plaintiff's desire to specify he wants a court trial serves no purpose. Further,  
16 and dispositive of the matter, once a jury trial has been properly demanded by any party, all parties  
17 must consent to its withdrawal and stipulate to a court trial. Fed. R. Civ. P. 38(d), 39(a)(1).  
18 Defendants Kyle and Domingo filed a timely demand for trial by jury, and as a result, this case must  
19 be tried by a jury unless all parties stipulate to a court trial. (Docs. 37, 46.) Allowing Plaintiff to file  
20 a second amended complaint stating that he wants a court trial would be futile.

21 Accordingly, Plaintiff's motion for reconsideration, filed December 9, 2009, is HEREBY  
22 DENIED.

23  
24 IT IS SO ORDERED.

25 **Dated: June 10, 2010**

**/s/ Sandra M. Snyder**  
UNITED STATES MAGISTRATE JUDGE