

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

BYRON M. FAIRBANKS,
Plaintiff,

v.

KEN CLARK, Warden, and L. POLK,
Associate Warden,
Defendants.

Case No. 1:08-CV-186-BLW

ORDER

Pending before the Court is Plaintiff's Motion to Alter or Amend Order and Judgment. (Dkt. 21). On December 19, 2008, Defendants filed a Motion to Dismiss. (Dkt. 15.) Plaintiff did not file a response to the Motion in the eight-month period that the Motion was pending. On August 12, 2009, the Court entered an Order and Judgment dismissing this case for failure to prosecute.

Five months later, Plaintiff filed his Motion to Alter or Amend. He asserts that he was incarcerated on a parole violation on June 26, 2009, and was unable to use the law library or obtain the Court's address until December 29, 2009. However, Plaintiff fails to provide any explanation why he did not respond to the Motion to Dismiss between January 2009 (when the response was due) and June 2009.

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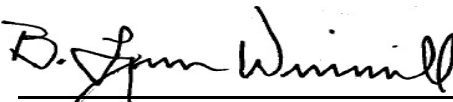
Construing the Motion under Rule 60(b) because it was filed more than five months after entry of Judgment, the Court shall deny Plaintiff's Motion to Alter or Amend Judgment for lack of an adequate factual basis and Plaintiff's failure to act diligently in the six-month period prior to his re-incarceration. Under Rule 60(b), a party is entitled to relief from judgment for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; or (6) any other reason justifying relief from the operation of the judgment. *See* Fed. R. Civ. P. 60(b). Relief under the "catch-all" provision of Rule 60(b)(6) should be granted only in extraordinary circumstances "as an equitable remedy to prevent manifest injustice," *U.S. v. State of Washington*, 98 F.3d 1159, 1163 (9th Cir. 1996) (internal citation and punctuation omitted). Here, Plaintiff has provided no facts showing that relief under any provision of Rule 60(b) is warranted.

ORDER

IT IS ORDERED that Plaintiff's Motion to Alter or Amend Judgment (Dkt. 21) is DENIED.



DATED: **August 10, 2010**


Honorable B. Lynn Winmill
Chief U. S. District Judge