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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JOHN BAKER,
Plaintiff,
v.
COTTRELL, INC.,
Defendant.

No. 1:16-cv-00840-DAD-SAB

ORDER DENYING DEFENDANT’S
APPLICATION FOR RECONSIDERATION
(Doc. No. 71)

This matter is before the court on defendant’s motion for reconsideration. (Doc. No. 71.)
For the reasons that follow, defendant’s motion will be denied.

The factual background of this case has been addressed in prior orders of this court and need not be repeated here. On December 29, 2017, the court issued an order granting in part and denying in part defendant’s motion for summary judgment. (Doc. No. 69.) On January 19, 2018, defendant filed the instant motion, seeking reconsideration of the December 29, 2017 order under Rule 60(b) of the Federal Rules of Civil Procedure. (Doc. No. 71.) In the alternative, defendant requests leave of court to file a second motion for summary judgment. (*Id.*)

Federal Civil Procedure Rule 60(b)(1) provides that “[o]n motion and upon such terms as are just, the court may relieve a party. . . from a final judgment, order, or proceeding” for “mistake, inadvertence, surprise, or excusable neglect.” “The law in this circuit is that errors of

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1 law are cognizable under Rule 60(b).” *Liberty Mut. Ins. Co. v. EEOC*, 691 F.2d 438, 441 (9th
2 Cir. 1982).

3 Relief under Rule 60 “is to be used sparingly as an equitable remedy to prevent manifest
4 injustice and is to be utilized only where extraordinary circumstances” exist. *Harvest v. Castro*,
5 531 F.3d 737, 749 (9th Cir. 2008) (internal quotations marks and citation omitted) (addressing
6 reconsideration under Rule 60(b)(1)–(5)). The moving party “must demonstrate both injury and
7 circumstances beyond his control.” *Id.* (internal quotation marks and citation omitted). Further,
8 Local Rule 230(j) requires, in relevant part, that in moving for reconsideration of an order
9 denying or granting a prior motion, a party must show “what new or different facts or
10 circumstances are claimed to exist which did not exist or were not shown” previously, “what
11 other grounds exist for the motion,” and “why the facts or circumstances were not shown” at the
12 time the substance of the order which is objected to was considered.

13 In the instant motion, defendant moves for reconsideration on the ground of “mistake” and
14 raises a new argument why the granting of summary judgment in its favor is appropriate.
15 Defendant now asserts that there is no genuine dispute of material fact regarding whether the
16 ladder was new when plaintiff purchased it because plaintiff alleged as much in his complaint.
17 (*See* Doc. No. 1 (“Compl.”) at ¶ 12 (“Plaintiff is informed and believes and thereon alleges that
18 . . . the ladder was not new as had been represented to Plaintiff by Defendants at the time of
19 delivery”); Doc. No. 71 at 3.) The court construes this as an argument that the allegations of
20 plaintiff’s complaint constitutes a binding judicial admission that the ladder in question was not
21 new.

22 “A district court has discretion to decline to consider an issue raised for the first time in a
23 motion for reconsideration.” *Novato Fire Prot. Dist. v. United States*, 181 F.3d 1135, 1142 n.6
24 (9th Cir. 1999); *see also Reliance Ins. Co. v. Doctors Co.*, 299 F. Supp. 2d 1131, 1154 (D. Haw.
25 2003) (“In failing to raise this argument at summary judgment, [defendant] waived its right to
26 assert the argument following the Court’s ruling on the summary judgment motions, in the instant
27 motion for reconsideration”), *aff’d*, 132 Fed. App’x 730 (9th Cir. 2005). The court has reviewed
28 defendant’s Memorandum in Support of its Motion for Summary Judgment and finds that

1 nowhere did defendant raise the argument that the allegation in plaintiff's complaint constituted a
2 judicial admission of any sort. (See Doc. No. 48.) Moreover, defendant has offered no
3 explanation as to why this argument was not raised in the first instance. See L.R. 230(j). The
4 court declines to exercise its discretion to consider this new argument. Therefore, defendant's
5 application for reconsideration will be denied.

6 In the alternative, defendant requests leave of court to file a second motion for summary
7 judgment. "[D]istrict courts have discretion to entertain successive motions for summary
8 judgment." *Hoffman v. Tonnemacher*, 593 F.3d 908, 911 (9th Cir. 2010); *Culley v. Lincare Inc.*,
9 No. 2:15-cv-00081-MCE-CMK, 2017 WL 1477045, at *1 (E.D. Cal. Apr. 25, 2017). In moving
10 for summary judgment, defendant intentionally opted not to rely on the testimony of its expert.
11 However, defendant now concedes in the instant motion that "[i]n retrospect, Cottrell should have
12 included such evidence from its expert." (Doc. No. 71 at 7.) This case has been pending before
13 the court since June of 2016. Pursuant to the scheduling order, the last day for filing dispositive
14 law and motion was September 25, 2017. (Doc. Nos. 15 & 24.) Law and motion has now closed
15 in this action. The court is not persuaded that defendant's change of heart regarding its litigation
16 strategy constitutes good cause to re-open law and motion for purposes of allowing defendant to
17 file a second motion for summary judgment. Accordingly, the court declines defendant's
18 alternative request.

19 For these reasons,

- 20 1. Defendant's motion for reconsideration (Doc. No. 71) is denied; and
- 21 2. Within twenty-one days of service of this order, the parties are directed to email
22 Renee Gaumnitz at rgaumnitz@caed.uscourts.gov to schedule pre-trial conference
23 and trial dates.

24 IT IS SO ORDERED.

25 Dated: February 12, 2018

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UNITED STATES DISTRICT JUDGE