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

SUSAN JETTE and BARBARA ANN JETTE,)
individuals,)
)
Plaintiffs,)
)
v.)
)
ORANGE COUNTRY FINANCIAL, INC., a)
corporation; MORTGAGEIT, INC. a)
corporation; INDYMAC FEDERAL BANK,)
FSB; TIEMPO ESCROW II, a)
corporation; JERRY INDES, an)
individual; MR. MINGUS, an)
individual,)
)
Defendants.)
_____)

2:08-cv-01767-GEB-KJN
ORDER DENYING SUSAN JETTE'S
MOTION FOR RECONSIDERATION AND
GRANTING MORTGAGEIT'S MOTION
TO DISMISS*

On May 21, 2010, Plaintiff Susan Jette ("Susan") filed a motion for reconsideration under Local Rule 230(j), requesting this Court reconsider its order filed on May 7, 2010, which denied her motion to substitute brought under Federal Rule of Civil Procedure 25(a)(1) ("Rule 25(a)(1)"). (Docket No. 173.) Susan moved to be substituted in place of her mother, Plaintiff Barbara Ann Jette ("Barbara"), who passed away on September 25, 2009 during the pendency

* This matter is deemed to be suitable for decision without oral argument. E.D. Cal. R. 230(g).

1 of this action. Susan's substitution motion, however, was denied
2 because she did not provide evidence demonstrating that she was a
3 proper party for substitution under Rule 25(a)(1).

4 Susan's pending motion requests reconsideration of that
5 denial because she has located her mother's testamentary documents,
6 which purportedly show she is a proper party for substitution under
7 Rule 25(a)(1). Defendant MortgageIT, Inc. ("MortgageIT") opposes
8 Susan's reconsideration motion, arguing Susan "has failed to establish
9 that [the] testamentary documents are 'new evidence' for the purposes
10 of reconsideration" and that Susan did not exercise reasonable
11 diligence in attempting to locate her mother's testamentary documents
12 prior to filing her substitution motion.¹ (Opp'n to Mot. for
13 Reconsideration 1:8-10, 16-28.) MortgageIT also separately moves to
14 dismiss Barbara's claims under Rule 25(a)(1). (Docket No. 174.) For
15 the reasons stated below, Susan's motion for reconsideration is DENIED
16 and MortgageIT's dismissal motion is GRANTED.

17 **I. BACKGROUND**

18 Plaintiffs Barbara Ann Jette and Susan Jette initiated this
19 lawsuit on April 3, 2008. Barbara, however, passed away on September
20 25, 2009. MortgageIT filed a statement noting Barbara's death on
21 February 24, 2010. Subsequently, Susan filed a motion under Rule
22 25(a)(1) on April 1, 2010, in which she stated she was the executor of
23 her mother Barbara's estate and sought to be substituted in Barbara's
24 place to continue litigating Barbara's claims.

25
26 ¹ Defendants Jeremy Indes, Orange County Financial and Jason
27 George Menges, who is allegedly erroneously sued as "Mr. Mingus," seek
28 to join in MortgageIT's opposition to Susan Jette's motion for
reconsideration. (Docket Nos. 177, 178.) Since this joinder is
unopposed, these Defendants' requests to join in MortgageIT's opposition
are granted.

1 Susan filed a declaration in support of her substitution
2 motion, in which she declared that "[o]n June 11, 2008, [her] home was
3 destroyed by a fire [and] [t]he fire destroyed all testamentary
4 documents executed by [her] mother including her will and power of
5 attorney." (Susan Jette Decl. Mar. 26, 2010 ¶ 6.) Susan further
6 declared "[i]t was [her] mother's intention to appoint [her] as the
7 executor and representative of her estate for all her property [and
8 she has] . . . acted as the executor and representative of [her]
9 mother's estate for all her property." (Id. ¶ 7.)

10 Susan's substitution motion was denied in an order filed on
11 May 7, 2010, because Susan's "averments . . . d[id] not demonstrate
12 that, under California law, she [was] either the 'successor in
13 interest' or 'legal representative' for her mother and a proper party
14 for substitution." (Docket No. 172 3:5-8.)

15 Susan moved for reconsideration of this May 7, 2010 order on
16 May 21, 2010, based on her declaration that she "accidentally"
17 discovered her mother's last will and testament and power of attorney
18 on May 6, 2010. (Susan Jette Decl. May 20, 2010 ¶¶ 6, 12-13.) Susan
19 explains in the declaration attached to her reconsideration motion
20 that prior to filing her substitution motion, she "had believed that
21 [her mother's] original [last will and testament] . . . were destroyed
22 by [a] fire" on property where she lived with her mother; however,
23 Susan also declares she decided to look through all [her] mother's
24 belongings to confirm [her] suspicion that no copies existed." (Id. ¶¶
25 8, 9). Susan declares she "searched through all the banker boxes,
26 file cabinets and file folders [and] did not find the original or
27 copies [of her mother's testamentary documents,] and informed [her]
28

1 2003) (quoting Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.,
2 Inc., 833 F.2d 208, 211 (9th Cir. 1987)); see also Frederick S. Wyle
3 Prof'l Corp. v. Texaco, Inc., 764 F.2d 604, 609 (9th Cir. 1985)
4 (stating that a party moving under Rule 60(b)(2) "is obliged to show
5 that [the] evidence was newly discovered or unknown to it until after
6 the hearing, but also that it could not with reasonable diligence have
7 discovered and produced such evidence at the hearing"). However,
8 "[e]vidence is not newly discovered . . . if it was in the moving
9 party's possession at the time of [the initial substitution motion] or
10 could have been discovered with reasonable diligence." Wallis v. J.R.
11 Simplot Co., 26 F.3d 885, 892 n.6 (9th Cir. 1994) (citing Coastal
12 Transfer, 833 F.2d at 211).

13 Federal Rule of Civil Procedure 60(b)(6) ("Rule 60(b)(6)")
14 also allows for reconsideration of a final order for "any other reason
15 justifying relief" However, decisions "are not often set
16 aside under Rule 60(b)(6). Rather, the Rule is used sparingly as an
17 equitable remedy to prevent manifest injustice and is to be utilized
18 only where extraordinary circumstances prevented a party from taking
19 timely action to prevent or correct an erroneous [decision]." Latshaw
20 v. Trainer Wortham & Co., Inc., 452 F.3d 1097, 1033 (9th Cir. 2006).
21 Therefore, "a party who moves for relief [under Rule 60(b)(6)] must
22 demonstrate both injury and circumstances beyond [her] control that
23 prevented [her] from proceeding with the action in proper fashion."
24 Id. (quotations and citations omitted).

25 Further, Local Rule 230(j) requires that a party moving for
26 reconsideration provide an affidavit or brief "setting forth . . .
27 what new or different facts or circumstances are claimed to exist
28 which did not exist or were not shown upon such prior motion, or what

1 other grounds exist for the motion," and "why the facts or
2 circumstances were not shown at the time of the prior motion." E.D.
3 Cal. R. 230(j). Local Rule 230(j), however, does not provide an
4 independent basis for seeking reconsideration; rather, it merely
5 prescribes the information that must be provided when a party moves
6 for reconsideration.

7 **III. SUSAN JETTE'S RECONSIDERATION MOTION**

8 Susan argues her substitution motion should be reconsidered
9 because she "made her best attempt to find [her mother's testamentary]
10 documents prior to the original motion." (Reply in Supp. of Mot. for
11 Reconsideration 2:22.) MortgageIT counters that the testamentary
12 documents are not "newly discovered" evidence since they were in
13 Susan's possession at the time she filed her initial motion; Susan has
14 not shown she could not have located these documents through
15 reasonable diligence prior to filing her initial substitution motion;
16 nor has she shown that the testamentary documents would change the
17 outcome of her substitution motion. (Opp'n to Mot. for
18 Reconsideration 1:16-28.)

19 Susan has not shown that her mother's testamentary documents
20 are "newly discovered" evidence under Rule 60(b)(2) since these
21 documents were on her property at the time she filed her initial
22 substitution motion. See Cachil Dehe Band of Wintun Indians v.
23 California, 649 F. Supp. 2d 1063, 1070 (E.D. Cal. 2009) (stating that
24 "[f]or the purposes of a motion for reconsideration, evidence is not
25 'new' if it was in the moving party's possession"). Susan discovered
26 the documents in a storage shed on the property she shared with her
27 mother. "[T]he failure to file documents in an original motion . . .
28 does not turn the late filed documents into 'newly discovered'

1 evidence.” Shalit v. Coppe, 182 F.3d 1124, 1132 (9th Cir. 1999)
2 (quotations and citations omitted).

3 Nor has Susan demonstrated that she exercised reasonable
4 diligence in attempting to locate her mother’s testamentary documents
5 prior to filing her substitution motion. Susan did not previously
6 explain what attempts she made to locate her mother’s testamentary
7 documents; rather, when she moved for substitution, she merely
8 declared that a “fire destroyed all [of the] testamentary documents.”
9 (Susan Jette Decl. Mar. 26, 2010 ¶ 6.) Susan declares in the
10 declaration attached to her reconsideration motion, that prior to
11 filing her substitution motion, she “searched through all the banker
12 boxes, file cabinets and file folders [and] did not find” her mother’s
13 testamentary documents. (Susan Jette Decl. May 20, 2010 ¶ 10.) Susan
14 also declares that “[o]nce [she] started sifting through [her]
15 mother’s belongings [she] never really stopped and continued to go
16 through everything that had survived the fire.” (Id. ¶ 11). Susan
17 further declares that after her substitution motion had been submitted
18 to the Court, she “accidentally happened upon” her mother’s
19 testamentary documents in the shed outside of her home. (Id. ¶ 13.)

20 Susan’s averments, however, are insufficient to demonstrate
21 that she exercised reasonable diligence in attempting to locate her
22 mother’s testamentary documents prior to filing her substitution
23 motion. Susan has not adequately explained why she failed to engage
24 in a more thorough search prior to filing her substitution motion.
25 See Fredrick S. Wyle Prof’l Corp., 764 F.2d at 609 (stating that
26 movant obliged to show he or she “could not with reasonable diligence
27 have discovered and produced such evidence at the hearing”); see also
28 Graves v. Johnson Control World Servs., Inc., No. C-05-1772 SC, 2006

1 WL 1308056, at *1 (N.D. Cal. May 11, 2006) (stating that "the
2 proffering party must have acted with due diligence in attempting to
3 discover the evidence"). Since Barbara passed away on September 25,
4 2009, and Susan's substitution motion was filed on April 1, 2010, a
5 more sufficient explanation should have been provided as to why the
6 testamentary documents were not found earlier. Further, since Susan
7 declares that she "never really stopped" looking for her mother's
8 testamentary documents and continued to go through everything that had
9 survived the fire," it is unclear what she means when she declares she
10 "accidentally happened upon" them. Susan, therefore, has not shown
11 that she could not have discovered the testamentary documents with
12 reasonable diligence before she filed her Rule 25(a)(1) motion on
13 April 1, 2010.

14 Lastly, Susan has neither argued nor provided "extraordinary
15 circumstances" warranting relief under Rule 60(b)(6). Latshaw, 452
16 F.3d at 1103. This Rule is "used sparingly as an equitable remedy to
17 prevent manifest injustice and is to be utilized only where
18 extraordinary circumstances prevented a party from taking timely
19 action" Id. (quotations and citation omitted).

20 Since Susan has not satisfied her burden of demonstrating
21 that her reconsideration motion should be granted, it is denied.

22 **IV. MORTGAGEIT'S DISMISSAL MOTION**

23 MortgageIT argues the claims asserted by Barbara Ann Jette
24 should be dismissed since "no party has properly moved to substitute
25 . . . within the 90-day period provided by Rule 25(a)(1)"
26 (MortgageIT Mot. to Dismiss 3:20-22.) Susan responds that "[i]f the
27 court grants [her] motion for reconsideration, Defendant MortgageIT's
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1 motion to dismiss should be denied." (Opp'n to Mot. to Dismiss 1:26-27.)

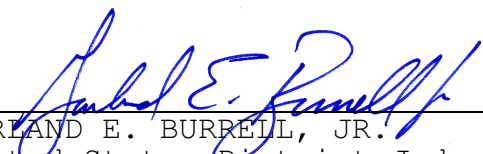
2 Rule 25(a)(1) allows "any party or . . . [a] decedent's
3 successor or representative" to move for substitution within 90 days
4 of service of a statement noting the death of a party. Fed. R. Civ.
5 P. 25(a)(1). "If [a substitution] motion is not made within 90 days
6 after service of a statement noting the death, the action by or
7 against the decedent must be dismissed." Id.

8 MortgageIT filed a statement noting Barbara's death on
9 February 24, 2010. Therefore, the ninety-day period elapsed on May
10 28, 2010. See Fed. R. Civ. P. 5(b)(2)(E) & 5(b)(3) (allowing for
11 service by filing on docket) & Fed. R. Civ. P. 6(d) (allowing for 3
12 additional days when served under Fed. R. Civ. P. 5(b)(2)(E)). Since
13 no party was properly substituted prior to the lapse of the ninety-day
14 period, the claims asserted by Barbara Ann Jette must be dismissed
15 under Rule 25(a)(1). Therefore, MortgageIT's motion to dismiss these
16 claims is granted.

17 **V. CONCLUSION**

18 For the reasons stated above, Susan Jette's motion for
19 reconsideration is DENIED and MortgageIT's motion to dismiss Barbara
20 Ann Jette's claims under Rule 25(a)(1) is GRANTED, and the claims
21 alleged by deceased Plaintiff Barbara Ann Jette are DISMISSED.

22 Dated: August 11, 2010

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25 _____
26 GARLAND E. BURRELL, JR.
27 United States District Judge
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