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

CARLOS PERFINO AND JESS)
ZURANICH,)
)
Plaintiff,)
)
v.)
)
STEVE HARDY, DIRECTOR; ELIZABETH)
GAVIA, LORI AJAX,)
)
Defendants.)
_____)

2:09-cv-00833-GEB-KJM

ORDER DENYING PLAINTIFFS'
MOTION FOR RECONSIDERATION*

Plaintiffs move for reconsideration of the Court's July 2, 2010, "Order Granting Defendants' Motion for Summary Judgment on Plaintiff Perfino's Federal Claim & Dismissing Plaintiffs' Remaining State Claim under 28 U.S.C. § 1367(c)(3)" under Federal Rule of Civil Procedure ("Rule") 60(b). In essence, Plaintiffs argue they should be excused from failing to submit certain evidence in opposition to Defendants' summary judgment motion because they were not on notice of the "class of one" equal protection issue raised in the July 2, 2010, Order. For the reasons stated below, Plaintiffs' reconsideration motion is DENIED.

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

1 **I. BACKGROUND**

2 Defendants argued in their summary judgment motion that they
3 were entitled to prevail on Plaintiff Perfino ("Perfino")'s federal
4 equal protection claim and Plaintiffs' state interference with contract
5 claim. Summary judgment was granted on Perfino's equal protection claim
6 on July 2, 2010, on two grounds: 1) Perfino was not "ready and able to
7 apply for the [subject] liquor license[,] and 2) Perfino's "class of
8 one" allegations were unsupported by facts in the summary judgment
9 record. (Order Granting Defs.' Mot. for Summ. J. ("Order") 9:7-16,
10 10:10-12, ECF No. 64.) Plaintiffs' remaining state law interference
11 with contract claim was dismissed without prejudice under 28 U.S.C.
12 section 1367(c)(3). (Id. 12:12-16.)

13 **III. DISCUSSION**

14 Plaintiffs argue the Court should reconsider the July 2, 2010,
15 Order based upon their "mistake, inadvertence, surprise, or excusable
16 neglect" in not supplying available evidence to support Perfino's "class
17 of one" claim because the "issue/doctrine was not raised by the
18 defendants in their moving papers . . . nor . . . during the course of
19 litigation in this matter." (Pls.' Mem. of P.&A.'s in Supp. of Mot. for
20 Reconsideration ("Mot.") 7:10-12, 7:14-16, 7:26-27.) Plaintiffs also
21 argue in their reply brief that reconsideration is warranted "for any
22 other reason that justifies relief" under Rule 60(b)(6). (Pls.' Reply
23 Brief in Supp. of Mot. for Reconsideration ("Reply") 6:1-2.) However,
24 since the Rule 60(b)(6) argument was made for the first time in
25 Plaintiffs' reply, it is considered waived and need not be addressed.
26 See United States v. Anderson, 472 F.3d 662, 668 (9th Cir. 2006)
27 ("Issues raised for the first time in an appellant's reply brief are
28 generally deemed waived."); Zamani v. Carnes, 491 F.3d 990, 997 (9th

1 Cir. 2007) (“The district court need not consider arguments raised for
2 the first time in a reply brief.”)

3 Defendants oppose the motion, arguing “[n]one of the three
4 criteria [permitting reconsideration] exist in this case.” (Defs.’ Opp’n
5 to Mot. for Reconsideration (“Opp’n”) 2:2-3.) Defendants contend, inter
6 alia, they showed Perfino cannot prevail on his equal protection claim
7 since he was not “ready and able to apply for a liquor license,” and the
8 evidence Plaintiffs seek to present in opposition to Defendants’ summary
9 judgment motion is not “new evidence” required to justify
10 reconsideration since it was available at the time Plaintiffs opposed
11 Defendants’ summary judgment motion. (Opp’n 3:20-26, 4:13-16.)

12 “A district court may reconsider its grant of summary judgment
13 under either Federal Rule of Civil Procedure 59(e) (motion to alter or
14 amend a judgment) or Rule 60(b) (relief from judgment).” School Dist.
15 No. 1J, Multnomah County, Or. v. ACandS, Inc., 5 F.3d 1255, 1262 (9th
16 Cir. 1993). However, “[a]bsent ‘highly unusual circumstances,’
17 reconsideration of a final judgment is appropriate only where (1) the
18 court is presented with newly-discovered evidence, (2) the court
19 committed ‘clear error or the initial decision was manifestly unjust,’
20 or (3) there is an intervening change in the controlling law.” Calif.
21 Dump Truck Owners Ass’n v. Davis, 302 F.Supp.2d 1139, 1140 (E.D. Cal.
22 2002) (quoting ACandS, Inc., 5 F.3d at 1263).

23 Plaintiffs have not shown that reconsideration is appropriate.
24 The evidence Plaintiffs argue justifies reconsideration is not “newly-
25 discovered” evidence since it was available before Plaintiffs filed
26 their opposition to Defendants’ summary judgment motion. (Mot. 9:5-8,
27 9:14-16, 10:13-20.) See Frederick S. Wyle Prof. Corp. v. Texaco, Inc.,
28 764 F.2d 604, 609 (9th Cir. 1985) (stating evidence available to party

1 before it filed its opposition to a summary judgment motion was not
2 "newly discovered evidence" warranting reconsideration.)

3 Further, Plaintiffs have not shown that the Court committed
4 clear error in granting summary judgment. Plaintiffs' argument that the
5 "class of one" doctrine "had not been raised at all throughout the
6 litigation of this matter" is incorrect. (Mot. 5:6-9.) The March 29,
7 2010, Order Granting in Part and Denying in Part Defendants' Motion to
8 Dismiss Plaintiffs' First Amended Complaint expressly construed
9 Perfino's equal protection claim as a "class of one" claim. (Docket No.
10 53, 11:15-12:5.) Even assuming *arguendo*, that Plaintiffs did not have,
11 and should have been provided, notice of the "class of one" equal
12 protection issue, the evidentiary record makes it manifestly clear that
13 it was Ayala's decision to withdraw his liquor license application that
14 prevented Perfino from being able to apply for the liquor license at
15 issue, not the Defendants' alleged arbitrary treatment of Perfino.

16 Therefore, Plaintiffs' motion for reconsideration is denied.

17 Dated: August 24, 2010

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GARLAND E. BURRELL, JR.
United States District Judge