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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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JACOB WINDING,

Plaintiff,

v.

NO. 2:09-cv-3526 FCD KJN

MEMORANDUM AND ORDER

ALLSTATE INSURANCE COMPANY,
and DOES 1-25, inclusive,

Defendants.

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This matter is before the court on defendant Allstate Insurance Company's ("Allstate" or "defendant") objection to the court's Pretrial Scheduling Order. Specifically, defendant objects to the court's provision that trial will be by jury because plaintiff Jacob Winding's ("Winding" or "plaintiff") demand for a jury trial was untimely.

On December 21, 2009, defendant removed this case from the Superior Court of the State of California, in and for the County of San Joaquin on the basis of diversity jurisdiction. Both

1 plaintiff's complaint and defendant's answer had been filed in
2 state court. At the time of removal, plaintiff was representing
3 himself in propria persona. On February 26, 2010, the court
4 entered an order substituting attorney and acknowledging that
5 plaintiff was represented by counsel. On March 26, 2010,
6 plaintiff filed a demand for jury trial. On April 6, 2010, the
7 parties filed a joint status report, indicating that plaintiff
8 intended to make a request for trial by jury. Accordingly, on
9 April 7, 2010, the court issued its pretrial scheduling order,
10 providing that trial would be by jury. Subsequently, defendant
11 filed its objection, and the court requested supplemental
12 briefing from both parties.

13 Rule 81(c)(3)(B) of the Federal Rules of Civil Procedure
14 provides that, after an action is removed from state court and if
15 all necessary pleadings have been served at the time of removal,
16 "a party entitled to a jury trial under Rule 38 must be given one
17 if the party serves a demand *within 14 days* after: (i) it filed a
18 notice of removal; or (ii) it is served with a notice of removal
19 filed by another party." (emphasis added). Further, Rule 38
20 provides that "[a] party waives a jury trial unless its demand is
21 properly served and filed."

22 However, pursuant to Rule 39, "the court may, on motion,
23 order a jury trial on any issue for which a jury might have been
24 demanded." The court's discretion under Rule 39 is "narrow" and
25 "does not permit a court to grant relief when the failure to make
26 a timely demand results from an oversight or inadvertence." Pac.
27 Fisheries Corp. v. HIH Cas. & Gen. Ins., Ltd., 239 F.3d 1000,
28 1002 (9th Cir. 2001) (quoting Lewis v. Time Inc., 710 F.2d 549,

1 556-57 (9th Cir. 1983)); see Mardesich v. Marciel, 538 F.2d 848,
2 849 (9th Cir. 1976). Moreover, an untimely demand is not excused
3 if it resulted from a good faith mistake of law. Id. (citing
4 Beckham, 691 F.2d at 905)).

5 In this case, plaintiff filed a demand for jury trial over
6 three months after the case was removed to federal court.
7 Furthermore, the demand was filed a month after plaintiff was
8 represented by counsel. As such, the demand was untimely under
9 Rule 81(c)(3)(B).

10 Plaintiff erroneously argues that Rule 81(c)(3)(A), which
11 provides that a jury trial demand is not required where state law
12 does not require an express demand, applies because the local
13 rules of San Joaquin Superior Court do not require a plaintiff to
14 include a request for jury trial *in a complaint*. However,
15 California Code of Civil Procedure § 631 requires an express jury
16 demand. See Mondor v. U.S. Dist. Court for Cent. Dist. of Cal.,
17 910 F.2d 585, 586 (9th Cir. 1990). As such, the provision of
18 Rule 81(c)(3)(A) relied upon by plaintiff is inapplicable. See
19 Beckham v. Safeco Ins. Co. of Am., 691 F.2d 898, 905 (9th Cir.
20 1982) (holding that failure to file jury demand was not excused
21 where the plaintiff's counsel erroneously believed that no demand
22 was required under Rule 81(c)); see also The Rutter Group,
23 Federal Civil Procedure Before Trial, at 2D-198.10.

24 Plaintiff presents no reason, beyond his erroneous belief
25 that Rule 81(c)(3)(a) applies to the action, to support the
26 untimely jury demand. Further, plaintiff cites no authority to
27 support the court's exercise of discretion to allow an untimely
28

1 demand under the facts before it.¹ Accordingly, defendant's
2 objection to the pretrial scheduling order is SUSTAINED. Trial
3 in this matter will be by the court.

4 IT IS SO ORDERED.

5 DATED: May 12, 2010



FRANK C. DAMRELL, JR.
UNITED STATES DISTRICT JUDGE

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25 ¹ Indeed, plaintiff's argument that the court should
26 extend the deadline by exercise of another procedural rule has
27 been strongly discouraged by the Ninth Circuit. See Russ v.
28 Standard Ins. Co., 120 F.3d 988, 989-90 (9th Cir. 1997) (holding
that the district court could not employ another procedural rule
to circumvent the prohibition on granting untimely jury demands
due to inadvertence).