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

LAWRENCE BIRKS,)	No. C 01-2691 SBA (PR)
)	
Petitioner,)	<u>ORDER DENYING</u>
v.)	<u>MOTION FOR</u>
)	<u>RECONSIDERATION</u>
A.A. LAMARQUE, Warden,)	
)	(Docket no. 37)
Respondent.)	
_____)	

Plaintiff Lawrence Birks, a state prisoner, filed a pro se civil rights action on July 16, 2001, when he was incarcerated at Salinas Valley State Prison.

In an Order dated September 26, 2002, the Court determined that Plaintiff stated one cognizable claim for relief and dismissed all the other claims with leave to amend within thirty days. Plaintiff was informed that if he failed to file an amended complaint, the claims would be dismissed. The Court stayed service of the cognizable claim pending amendment.

In an Order dated May 27, 2004, the Court reviewed its September 26, 2002 Order and dismissed as unexhausted the claim previously found to be cognizable. With respect to the claims dismissed with leave to amend, the Court noted that Plaintiff never filed an amended complaint. Because Plaintiff failed to amend his complaint and no cognizable claims remained, the Court dismissed the complaint without prejudice and without further leave to amend.

Thereafter, on June 17, 2004, Plaintiff filed a notice of appeal. On January 13, 2006, the Ninth Circuit affirmed this Court's dismissal of the complaint, and the mandate issued on February 7, 2006.

More than three years later, on June 29, 2009, Plaintiff filed the present motion for reconsideration (docket no. 37). However, this Court lacks jurisdiction to decide the motion.

Once the notice of appeal is filed, the district court loses jurisdiction over the matters being appealed. Natural Res. Def. Council, Inc. v. Southwest Marine Inc., 242 F.3d 1163, 1166 (9th Cir. 2001); United Nat'l Ins. Co. v. R&D Latex Corp., 242 F.3d 1102, 1109 (9th Cir. 2001). A notice

1 of appeal does not divest the district court of jurisdiction if at the time it was filed there was then a
2 pending motion for reconsideration, however. Id. Under Federal Rule of Appellate Procedure
3 4(a)(4)(B)(i), such a notice of appeal does not become effective, and the district court does not lose
4 jurisdiction, until the district court rules on all motions for reconsideration filed no later than ten
5 days after judgment is entered. Miller v. Marriott Int'l., Inc., 300 F.3d 1061, 1063-64 (9th Cir.
6 2002). Where, as here, Plaintiff's motion for reconsideration was filed long after the notice of
7 appeal and even after the Ninth Circuit issued the mandate, the Court DENIES the motion (docket
8 no. 37).

9 The Court notes that the caption of the present motion for reconsideration also includes
10 Plaintiff's pending action before the United States District Court in the Eastern District of
11 California, Birks v. Santos, Case No. CIV S-07-1473 LKK DAD P.¹ Plaintiff crossed out
12 "Eastern" at the top of the motion where it states "In the United State [sic] District Court for the
13 Eastern District of California" and replaced it with "Northern." He also indicated the case number
14 for the instant case, Case no. C 01-2691 SBA (PR); therefore, the motion was also filed in this
15 Court. It seems that Plaintiff had initially attempted to related his case in the Eastern District with
16 another case he filed in this district, Birks v. Santos, Case No. C 07-5647 SBA (PR). However,
17 Magistrate Judge Dale R. Drozd from the Eastern District denied Plaintiff's request to relate the
18 cases. This Court notes that Case. No. C 07-5647 SBA (PR) was identical to his earlier-filed
19 action in the Eastern District, thus, it was dismissed as duplicative and frivolous on September 30,
20 2008. Thereafter, Plaintiff filed a notice of appeal in Case. No. C 07-5647 SBA (PR). On
21 February 24, 2009, the Ninth Circuit issued an order and mandate stating, "Because the appeal is
22 so insubstantial as to not warrant further review, it shall not be permitted to proceed."
23 Accordingly, even if Plaintiff had filed the present motion for reconsideration in Case. No. C
24 07-5647 SBA (PR), this Court would lack jurisdiction to decide the motion and it would be denied
25 for the same reasons stated in this Order.


26 _____
27 ¹ In the motion, Plaintiff incorrectly listed the Eastern District case number as "CIV S-04-
28 1473 LKK DAD P"; however, this Court has confirmed that the correct case number is "CIV S-07-
1473 LKK DAD P."

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This Order terminates Docket no. 37

IT IS SO ORDERED.

DATED:3/25/10


SAUNDRA BROWN ARMSTRONG
United States District Judge

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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

BIRKS,
Plaintiff,

Case Number: CV01-02691 SBA

CERTIFICATE OF SERVICE

v.

LAMARQUE et al,
Defendant.
_____ /

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on March 31, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Lawrence L.B. Birks
California State Prison - Lancaster Los Angeles County
J61976
P.O. Box 149
Lancaster, CA 93539

Dated: March 31, 2010

Richard W. Wieking, Clerk
By: LISA R CLARK, Deputy Clerk