

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

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5 ALEXANDER GRAHAM-SULT and DAVID
GRAHAM,

6 Plaintiffs,

7 v.

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9 NICHOLAS P. CLAINOS, RICHARD L.
GREENE, LINDA McCALL, GREENE
10 RADOVSKY MALONEY SHARE & HENNIGH
11 LLP, BILL GRAHAM ARCHIVES LLC,
d/b/a WOLFGANG'S VAULT, NORTON
12 LLC and WILLIAM E. SAGAN,

13 Defendants.
14 _____/

No. C 10-4877 CW

ORDER DENYING
PLAINTIFFS' MOTION
TO ALTER OR AMEND
THE JUDGMENT

(Docket No. 296)

United States District Court
For the Northern District of California

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16 On October 6, 2015, the Court granted Defendant Nicholas P.
17 Clainos's and Defendants Bill Graham Archives LLC, Norton LLC and
18 William E. Sagan's (collectively, BGA Defendants) motions for
19 summary judgment. The order resolved all of Plaintiffs Alexander
20 Graham-Sult and David Graham's claims in Defendants' favor and
21 judgment entered. Plaintiffs have now filed a motion to alter or
22 amend the judgment pursuant to Federal Rule of Civil Procedure
23 59(e). Defendant Clainos and BGA Defendants have filed
24 oppositions to the motion and Plaintiffs have filed a reply.
25 Having considered the parties' papers and the record in this case,
26 the Court DENIES Plaintiffs' motion.
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LEGAL STANDARD

Federal Rule of Civil Procedure 59(e) provides that a party may file a motion to alter or amend a judgment within twenty-eight days after entry of judgment. "Since specific grounds for a motion to amend or alter are not listed in the rule, the district court enjoys considerable discretion in granting or denying the motion." McDowell v. Calderon, 197 F.3d 1253, 1255 n.1 (9th Cir. 1999) (en banc) (per curiam) (internal quotation marks omitted). However, amending a judgment after its entry remains "an extraordinary remedy which should be used sparingly." Id. (internal quotation marks omitted). Absent "highly unusual circumstances," a motion for reconsideration should not be granted "unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." Kona Enterprises, Inc. v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000) (internal quotation marks and citations omitted).

DISCUSSION

Plaintiffs argue that they are entitled to reconsideration based on newly discovered evidence, an intervening change in law, and factual errors in the Court's order on summary judgment.

I. Newly Discovered Evidence

The purported newly discovered evidence consists primarily of deposition testimony from Randy Tuten and David Singer, artists who created artwork for posters used to market concerts for BGE. However, these witnesses provided declarations in support of Plaintiffs' opposition to Defendant Clainos's motion for summary

1 judgment. A motion for reconsideration may not be used to
2 introduce evidence that could have been, but was not, submitted in
3 support of briefing on a motion for summary judgment. See School
4 Dist. No. 1J Multnomah County v. ACandS, Inc., 5 F.3d 1255, 1263
5 (9th Cir. 1993). Plaintiffs do not explain why the information in
6 the testimony could not have been included in the declarations
7 filed in support of their opposition to Defendant Clainos's motion
8 for summary judgment.

9 Moreover, the testimony does not provide a basis for
10 revisiting the Court's judgment. Neither deponent provided any
11 evidence that Bill Graham was acting in his personal capacity when
12 he hired artists to create poster artwork. Indeed, Mr. Tuten
13 testified that he was paid by checks issued by "Bill Graham
14 Presents."¹

15 II. Intervening Change in Law

16 Plaintiffs next argue that the Court should reconsider its
17 judgment in favor of Defendants based on a recent order by a court
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19 ¹ Plaintiffs also argue that certain poster copyrights were
20 registered by Jerry Pompili to "The Fillmore Corporation," a
21 company owned by Bill Graham. Plaintiffs argue that this
22 demonstrates that Mr. Pompili knew how to register posters to a
23 corporate entity if he intended the copyright to belong to that
24 entity rather than to Bill Graham personally. As an initial
25 matter, Plaintiffs do not explain why they did not present this
26 evidence in their briefing or supplemental briefing on summary
27 judgment. The Court also notes that Mr. Pompili was deposed prior
28 to the briefing on Defendant Clainos's motion for summary judgment
and the deposition excerpts presented to the Court do not discuss
the copyrights registered to "The Fillmore Corporation." The mere
fact that some copyrights were registered to a corporate entity
does not establish that the copyrights that were registered to
Bill Graham were owned by him individually, rather than as a
representative of one of his companies.

1 in the Central District of California in Marya v. Warner/Chappell
2 Music, Inc., 2015 WL 5568497 (C.D. Cal.). However, to seek
3 reconsideration, Plaintiffs must present "an intervening change in
4 the controlling law." Kona Enterprises, 229 F.3d at 890.
5 Plaintiffs concede that the district court order they cite is not
6 controlling law. Moreover, Plaintiffs rely on Marya for the
7 proposition that BGA Defendants must prove that Bill Graham
8 transferred the copyrights he personally owned to his company or
9 companies. However, this position relies on Plaintiffs'
10 assumption that the copyrights were first owned by Bill Graham
11 personally, rather than as a representative of his company or
12 companies. The Court has already rejected that assumption.

13 III. Factual Errors

14 Finally, Plaintiffs argue that the Court made factual errors
15 regarding the poster copyrights at issue in this case.
16 Specifically, Plaintiffs argue that the Court erroneously adopted
17 Defendants' statement that 174 poster copyrights are at issue in
18 this case. Plaintiffs identify two potential errors in this
19 figure. First, the figure is based on Defendants' contention that
20 the only copyrights at issue in this case are those that were
21 identified in the 1995 assignment. Plaintiffs argue that their
22 claims concern every copyright registered in Bill Graham's name at
23 the time of his death. However, at the hearing on the motions for
24 summary judgment, Plaintiffs' only theory of damages with respect
25 to the poster copyright was based on the assignment. See Docket
26 No. 274, Transcript at 13:24-16:22; see also Transcript at 73:10-
27 15 (discussing the assignment in relation to claims against BGA
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1 Defendants based on copyrights). Accordingly, there was no error
2 in limiting Plaintiffs' claims to the copyrights identified in the
3 assignment.

4 Plaintiffs also assert that the copy of the assignment
5 attached to a declaration filed in support of Mr. Clainos's motion
6 for summary judgment was incomplete. See Docket No. 224, Sims
7 Declaration, Ex. 51. Plaintiffs state that the complete
8 assignment, which lists many more copyrights, was attached as an
9 exhibit to their complaint. However, Plaintiffs themselves cited
10 Mr. Clainos's version of the assignment. See Docket No. 232,
11 Plaintiffs' Opposition to BGA Defendants' MSJ at 11:9-10; Docket
12 No. 240, Plaintiffs' Opposition to Clainos's MSJ at 17:15-16.
13 Accordingly, the Court relied on that version. That Plaintiffs
14 attached a different version to their complaint in 2010 makes no
15 difference. It is the parties' responsibility to cite to the
16 materials in the record they wish the Court to consider. See
17 Forsberg v. Pac. N.W. Bell Tel. Co., 840 F.2d 1409, 1417-18 (9th
18 Cir. 1988) ("The district court is not required to comb the record
19 to find some reason to deny a motion for summary judgment.").

20 Even if the Court were to consider more copyrights than the
21 174 copyrights identified as disputed by Defendant Clainos, its
22 findings would still stand. Defendant Clainos presented
23 significant evidence to support a finding that the posters were
24 works-for-hire commissioned by Bill Graham as a representative of
25 his companies, not as an individual, and Plaintiffs failed to
26 present adequate evidence that the posters were commissioned by
27 Bill Graham as an individual to create a triable question of fact.
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1 Plaintiffs also attempt to raise arguments in their motion
2 for reconsideration that they could have but failed to raise in
3 their oppositions to the motions for summary judgment. For
4 example, Plaintiffs argue that some of the copyrights listed in
5 the attachment to the assignment were registered to Bill Graham
6 within five years of the creation of the artwork. Accordingly,
7 Plaintiffs argue that those copyrights presumptively belonged to
8 Bill Graham. However, the Court previously found that Defendants
9 presented sufficient evidence to rebut any presumption that the
10 facts stated in the copyrights were valid. See Docket No. 286 at
11 17.

12 Plaintiffs also argue for the first time that the assignment
13 was intended to affect all copyrights registered in Bill Graham's
14 name, not only those listed on the attachment to the assignment.
15 Although the assignment states that it transfers "any and all
16 copyrights, tradenames, trademarks and servicemarks claimed by or
17 registered in the name" of Bill Graham, Plaintiffs never raised
18 this argument in their briefs or at the hearing on the motions for
19 summary judgment. As noted above, the Court need not search the
20 record for evidence to support Plaintiffs' case. Nor need it
21 raise arguments that the parties fail to make. See, e.g., Guatay
22 Christian Fellowship v. County of San Diego, 670 F.3d 957, 987
23 (9th Cir. 2011) ("[J]udges are not like pigs, hunting for truffles
24 buried in briefs.") (internal quotation marks and citations
25 omitted). Moreover, Plaintiffs do not explain why the assignment
26 would include a list of some, but not all, of the relevant
27 copyrights if it was intended to affect all copyrights. Finally,
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1 as discussed above, even if the Court were to consider every
2 copyright registered in Bill Graham's name at the time of his
3 death, Plaintiffs have still failed to produce sufficient evidence
4 to support a finding that Bill Graham commissioned the copyrighted
5 artwork as an individual rather than as a representative of one or
6 more of his companies.

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8 CONCLUSION

9 For the reasons stated above, Plaintiffs' motion to alter or
10 amend the judgment is DENIED. Docket No. 296.

11 IT IS SO ORDERED.

12 Dated: January 27, 2016



13 CLAUDIA WILKEN
14 United States District Judge
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