

1 **E-Filed 3/24/2010**

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8 **IN THE UNITED STATES DISTRICT COURT**

9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

10 **SAN JOSE DIVISION**

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12 YONG TAN HUANG,

13 Plaintiff,

14 v.

15 TIM BELL, et al.,

16 Defendants.

Case Number C 09-5099 JF (PVT)

ORDER¹ DENYING PLAINTIFF'S
MOTION FOR RELIEF FROM
ORDER OF DISMISSAL

[re: document nos. 57, 70]

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19 On December 7, 2010, this Court issued an order denying Plaintiff's application to
20 proceed in forma pauperis and granting Plaintiff thirty days to pay the filing fee. The order
21 stated that if Plaintiff failed to pay the filing fee within thirty days, the Court would dismiss the
22 action without prejudice. Plaintiff, who is proceeding *pro se*, failed to pay the filing fee within
23 the time provided. On February 2, 2010, the Court dismissed the action without prejudice for
24 failure to pay the filing fee. The Court also terminated all pending motions, which included a
25 motion to dismiss filed by Defendants on December 7, 2009 and motions for summary judgment
26 filed by Plaintiff on January 22, 2010, January 28, 2010, and February 1, 2010.

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28 ¹ This disposition is not designated for publication and may not be cited.

1 On February 19, 2010, Plaintiff filed a motion for reconsideration of the dismissal order.
2 On March 23, 2010, Plaintiff filed an amended motion seeking relief from the dismissal order.
3 The Court concludes that these motions are appropriate for disposition without oral argument
4 pursuant to Civil Local Rule 7-1(b).

5 Plaintiff seeks relief under Federal Rule of Civil Procedure 60(b), which provides as
6 follows:

7 On motion and just terms, the court may relieve a party or its legal representative
8 from a final judgment, order, or proceeding for the following reasons:

9 (1) mistake, inadvertence, surprise, or excusable neglect;

10 (2) newly discovered evidence that, with reasonable diligence, could not have
11 been discovered in time to move for a new trial under Rule 59(b);

12 (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or
13 misconduct by an opposing party;

14 (4) the judgment is void;

15 (5) the judgment has been satisfied, released or discharged; it is based on an
16 earlier judgment that has been reversed or vacated; or applying it prospectively is
17 no longer equitable; or

18 (6) any other reason that justifies relief.

19 Fed. R. Civ. P. 60(b). It is unclear upon which provisions of the rule Plaintiff relies. He
20 complains that he received the order of dismissal on February 4, 2010, only one day before the
21 scheduled hearing date of February 5, 2010. The Court's dismissal order was entirely
22 independent of the motion to dismiss that had been set for February 5, 2010. The Court
23 dismissed Plaintiff's action not based upon any deficiency in his pleading, but *because he did not*
24 *pay the filing fee within the time provided by the Court.* Plaintiff indicates that he attempted to
25 pay the filing fee *after* dismissal of this action, but he offers no explanation for his failure to pay
26 the filing fee within the thirty-day window granted by the Court.

27 Plaintiff objects to the fact that the Court's dismissal order does not address the merits of
28 Plaintiff's claims. Again, the action was dismissed for failure to pay the filing fee – such
dismissal does not depend upon or require evaluation of the merits of Plaintiff's claims.

Plaintiff contends that the his action was “not dismissible” because it arose under the

1 United States Constitution. Plaintiff is mistaken. While the Court certainly has jurisdiction over
2 properly filed actions raising federal constitutional claims, such claims are subject to dismissal
3 when the plaintiff fails to pay the filing fee or otherwise fails to comply with the orders of the
4 court. *See Thomas v. Arn*, 474 U.S. 140, 147 (1985) (“Had petitioner failed to comply with a
5 scheduling order or pay a filing fee established by a court of appeals, that court could certainly
6 dismiss the appeal.”); *Link v. Wabash R. Co.*, 370 U.S. 626 (1962) (recognizing “inherent power”
7 of court to dismiss case for want of prosecution).

8 Plaintiff asserts that the Court acted improperly in failing to calendar his motion for
9 summary judgment for February 5, 2010. Plaintiff filed the subject motion for summary
10 judgment on January 22, 2010 and noticed it for hearing on February 5, 2010. The Court
11 declined to calendar the motion for the noticed hearing date on the ground that the motion was
12 filed less than thirty-five days prior to the hearing date as required by the Court’s Civil Local
13 Rules. *See Civ. L.R. 7-2(a)*. Plaintiff cites an outdated version of Federal Rule of Civil
14 Procedure 56 for the proposition that his motion for summary judgment was timely because it
15 was filed at least ten days prior to the hearing. Rule 56 no longer contains the provision relied
16 upon by Plaintiff. Moreover, the rule provides that its timing requirements apply “unless a
17 different time is set by local rule or the court orders otherwise.” Fed. R. Civ. P. 56(c). This
18 Court’s Civil Local Rules require that a motion be filed at least thirty-five days prior to the
19 hearing date. Moreover, this Court’s standing order requires that counsel and parties reserve a
20 hearing date with the Court’s administrative law clerk prior to noticing a motion. Plaintiff failed
21 to comply with either requirement. Thus the Court acted well within its authority when it
22 declined to calendar Plaintiff’s motion for summary judgment for the date of February 5, 2010.

23 The Court is mindful of Plaintiff’s *pro se* status and might be inclined to grant relief from
24 dismissal if Plaintiff had offered an explanation for his failure to pay the filing fee or had
25 demonstrated any likelihood of stating a cognizable claim against Defendants. As the record
26 stands, the Court declines to grant relief from its order of dismissal. The Court reminds Plaintiff
27 that the dismissal of this action is without prejudice to Plaintiff’s filing of a new action against
28 Defendants. If Plaintiff chooses to file a new action, the Court cautions Plaintiff that he must

1 comply with the *current* Federal Rules of Civil Procedure, this Court's Civil Local Rules, and
2 this Court's standing orders.

3 **ORDER**

4 Plaintiff's motion for relief from the order of dismissal is DENIED.

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11 DATED: 3/24/2010

12 
13 JEREMY FOGEL
14 United States District Judge

1 Copies of Order served on:

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