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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

STEVE KASSAB,

Plaintiff,

vs.

SAN DIEGO POLICE
DEPARTMENT, a municipal
corporation, et al.,

Defendant.

CASE NO. 07cv1071 GPC
(WMC)

**ORDER DISMISSING
PLAINTIFF'S MOTION FOR
RECONSIDERATION**

[DKT. NO. 182]

Pending before the Court is Plaintiff's motion to reconsider the Court Order issued on January 11, 2013 granting Defendant's motion to dismiss parties and limit the issues to be tried. ECF No. 182. For the reasons set out below, the Court **DENIES** Plaintiff's motion.

BACKGROUND

Plaintiff's amended complaint asserts several §1983 claims against Defendants, including false arrest and false imprisonment, assault and intimidation, and excessive force and battery. ECF No. 49. Plaintiff also alleged state law civil rights violations and intentional infliction of emotional distress. *Id.* On September 9, 2009, the Court granted Defendants' motion for summary judgment as to all of Plaintiff's federal claims and declined to exercise supplemental jurisdiction over

1 Plaintiff's state law claims. Dkt. No. 123. Mr. Kassab appealed the Court's ruling
2 to the Ninth Circuit. Upon review, the Ninth Circuit affirmed in part, reversed in
3 part, and remanded. Kassab v. San Diego Police Department, 453 F. App'x 747, 748
4 (9th Cir. 2011). The Ninth Circuit held that the district court properly granted
5 summary judgment on Mr. Kassab's §1983 claims "concerning the searches of his
6 store, his arrest, and his prosecution because these claims are *Heck*-barred." Id. at
7 *748. See also Heck v. Humphrey, 512 U.S. 477, 486-87 (1994). The Ninth Circuit
8 also upheld summary judgment on the excessive force claim "alleging that
9 defendant Nunez slammed a car door on his knee because Kassab failed to create a
10 genuine dispute of material fact as to whether Nunez acted intentionally." Id. The
11 Ninth Circuit further upheld the excessive force claim against the "City of San
12 Diego defendants because there was no underlying constitutional violation as to the
13 car door incident, and Kassab failed to create a triable dispute as to whether the
14 exposure to excessive heat was the product of a city custom or practice or a failure
15 to train." Id. The Ninth Circuit reversed summary judgment on only one issue -
16 Kassab's excessive force claim that "he was detained in a police car for more than
17 four hours, with the windows rolled up, no air conditioning, and an interior
18 temperature of 115 degrees." Id. The Court of Appeals held that a genuine issue of
19 material fact existed as to whether the police used excessive force in leaving Kassab
20 in the hot police car. Id. Accordingly, the Ninth Circuit reversed summary
21 judgment on the claim "as to the individual officers" and remanded for further
22 proceedings. Id.

23 On January 11, 2013, the Court granted Defendant's motion to dismiss parties
24 and limit the issues to be tried. ECF No. 181. In that order, the Court dismissed all
25 but two Defendants, San Diego Police Officers Skinner and Hernandez, pursuant to
26 the Ninth Circuit ruling which affirmed in part, reversed in part, and remanded the
27 case back to the district court. Kassab, 453 F. App'x 747. The Court further held
28 that the only issue to be presented at trial would be the one excessive force count

1 that was reversed and remanded pursuant to the aforementioned Ninth Circuit
2 ruling. Id.

3 Plaintiff asks this Court to set aside its ruling based on two arguments. First,
4 Plaintiff asserts that the Court improperly dismissed Officer Millet because she was
5 the arresting officer and therefore should remain a Defendant. ECF No. 182 at 2.
6 Second, Plaintiff contends that the City of San Diego should also remain a
7 Defendant. Id. In opposition, Defendants point out that Plaintiff fails to
8 acknowledge the Ninth Circuit opinion affirming the District Court’s granting of
9 summary judgment as to all issues except one excessive force claim. ECF No. 183 at
10 2. Defendants further contend that the admissible evidence in the matter shows that
11 only Officers Skinner and Hernandez were involved in the arrest of the Plaintiff,
12 and that any allegations that Officer Millet was involved in the arrest are mere
13 conjecture or inadmissible evidence. Id. at 3. Defendants also assert that the City of
14 San Diego should not be a named Defendant in the matter because the claims
15 against the City are *Heck*-barred and the District Court’s findings dismissing those
16 claims were affirmed by the Ninth Circuit.

17 18 **DISCUSSION**

19 A district court may reconsider an order under either Federal Rule of Civil
20 Procedure 59 (e) (motion to alter or amend a judgment) or Rule 60(b)(relief from
21 judgment). Under the local rules, a party that files a motion for reconsideration of
22 an order must set forth the material facts and circumstances surrounding the motion,
23 including any new or different facts and circumstances that are claimed to exist
24 which did not exist, or were not shown, upon such prior application. L. Civ. R. 7.1.i.
25 Motions for reconsideration offer an “extraordinary remedy, to be used sparingly in
26 the interests of finality and conservation of judicial resources.” Carroll v. Nakatani,
27 342 F.3d 934, 945 (9th Cir.2003). Reconsideration is appropriate if the district
28 court (1) is presented with newly discovered evidence, (2) committed clear error or

1 the initial decision was manifestly unjust, or (3) if there is an intervening change in
2 controlling law. Sch. Dist. No. 1J, Multnomah Cnty., Or. v. ACandS, Inc., 5 F.3d
3 1255, 1263 (9th Cir. 1993).

4 Plaintiff first argues that the Court wrongfully dismissed Officer Millet
5 because she assisted with his arrest. Plaintiff attaches to his declaration a statement
6 by Officer Hernandez that indicates he assisted Officer Millet in the execution of the
7 arrest warrant for Steven Kassab. ECF No. 182, Exhibit 2. The statement further
8 details a planning meeting between Officer Millet and Officers Hernandez and
9 Skinner prior to the operation taking place which lead to Plaintiff's arrest.

10 Defendants object to the submission of the statement as inadmissible evidence that
11 has never been brought forth before the Court. Defendants further contend that the
12 statement does not show that Officer Millet participated in the arrest of Mr. Kassab.
13 Defendants remind the Court that the Ninth Circuit's ruling affirmed the Courts
14 summary judgment on all counts with the exception of one excessive force claim by
15 Officers Hernandez and Skinner and, as such, Officer Millet was properly
16 dismissed.

17 The Court will not rely on evidence that could have been made available to
18 the Court prior to the order granting summary judgment, which the Ninth Circuit
19 affirmed on all but one count. Although Plaintiff brings this motion for
20 reconsideration of the order dismissing defendants and limiting the issues at trial, it
21 appears that Plaintiff is also attempting to re-litigate the previous order granting
22 summary judgment. For example, Plaintiff states that he has the right to show that
23 Officer Millet is personally liable under 42 U.S. C section 1983. ECF No. 182 at 6.
24 However, the allegations of a violation of 42 U.S.C. section 1983 were dismissed by
25 the Court and the Ninth Circuit affirmed that ruling. If the proffered evidence was
26 available before disposition of the motion for summary judgment, then as a matter
27 of law the movant is not entitled to reconsideration based upon that evidence. All
28 Hawaii Tours, Corp. v. Polynesian Cultural Ctr., 116 F.R.D. 645, 649 (D. Haw.

1 1987) rev'd, 855 F.2d 860 (9th Cir. 1988)(citing Trentacosta v. Frontier Pac.
2 Aircraft Industries, 813 F.2d 1553, 1557–58 n. 4 (9th Cir.1987); Frederick S. Wyle
3 P.C. v. Texaco, Inc., 764 F.2d 604, 609 (9th Cir.1985)). Here, Plaintiff failed to
4 demonstrate that the evidence could not have been obtained before the Court ruled
5 on defendant’s motion for summary judgment. The Court now refuses to consider
6 the evidence after the Ninth Circuit has ruled upon the appeal of the order granting
7 summary judgment. The Court further refuses to review new evidence upon
8 reconsideration of a completely separate order seeking to implement the Ninth
9 Circuit’s decision.

10 Plaintiff’s argument that the Court improperly dismissed the City of San
11 Diego also fails for similar reasons. Plaintiff again asserts 42 U.S.C. section 1983
12 claims against the City of San Diego, an issue that was dismissed by the Court and
13 affirmed by the Ninth Circuit. ECF NO. 182 at 7. The Ninth Circuit found that Mr.
14 Kassab “failed to create a triable dispute as to whether the exposure to excessive
15 heat was the product of a city custom or practice or a failure to train.” Kassab, 453
16 F. App’x 747. As the Ninth Circuit affirmed dismissal of this claim, and as Plaintiff
17 has not stated any other reason to support his argument, the Court refuses to
18 reconsider its decision dismissing the City of San Diego as a defendant.

19 Plaintiff has not brought forth any other assertions that the Court has
20 committed clear error, that the decision was manifestly unjust or that there was an
21 intervening change in controlling law. For these reasons, the Court stands by its
22 January 11, 2013 order dismissing all defendants except San Diego Police Officers
23 Hernandez and Skinner, and limiting the issue to be tried to the one excessive force
24 claim. ECF No. 181.

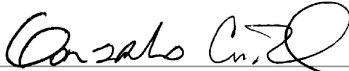
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CONCLUSION

IT IS HEREBY ORDERED that Plaintiff's motion for reconsideration is **DENIED.**

DATED: April 17, 2013


HON. GONZALO P. CURIEL
United States District Judge