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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

RICHARD RANDALL HEFNER,
Plaintiff,
v.
ELAINE CHAO, Secretary of Labor, *et al.*,
Defendants.

Civil No. 08cv1586 L (BLM)
**ORDER DENYING PLAINTIFF’S
EX PARTE MOTION FOR
RECONSIDERATION [doc. #9] and
GRANTING EXTENSION OF TIME**

Plaintiff seeks reconsideration of the Court Discrepancy Order filed March 4, 2009 [doc. #11] that rejected plaintiff opposition to defendants’ motion to dismiss as being untimely.

As set forth in the Court’s Order of February 18, 2009 [doc. #10], defendants filed a motion to dismiss the first amended complaint on December 15, 2009. Under the Civil Local Rules, plaintiff’s response was due on February 17, 2009 but on the due date, plaintiff filed an ex parte motion for an extension of time in which to file his response in opposition to defendants’ motion to dismiss. In his ex parte motion, plaintiff stated that family medical issues necessitated his request for an extension of time to file his response in opposition. As the Court noted in its February 18, 2009 Order, “Plaintiff neither requests an extension for a specific number of days nor provides information concerning whether the family medical issues he cites have been resolved or whether an additional extension of time may be needed in order to file his opposition.” (Order at 1.) Noting plaintiff’s *pro se* status, the Court granted plaintiff’s request

1 for an extension of time: "Plaintiff's response in opposition to defendants' motion to dismiss
2 shall be filed on or before March 2, 2009." *Id.* at 2.

3 Plaintiff's current request for reconsideration is based on his alleged lack of receipt of the
4 Courts' February 18, 2009 Order and his misunderstanding of when his response was due.

5 Civil Local Rule 7.1(i) allows parties to file motions for reconsideration. Under that local
6 rule, a party may apply for reconsideration "[w]hensoever any motion or any application or
7 petition for any order or other relief has been made to any judge and has been refused in whole
8 or in part. . . ." Civ. L. R. 7.1(i)(1). A party must show "what new or different facts and
9 circumstances are claimed to exist which did not exist, or were not shown, upon such prior
10 application." *Id.* A timely-filed motion for reconsideration under a local rule is considered a
11 motion under Federal Rule of Civil Procedure 59(e). *Schroeder v. McDonald*, 55 F.3d 454, 459
12 (9th Cir. 1995).

13 Reconsideration under Rule 59(e) is appropriate "if the district court (1) is presented with
14 newly discovered evidence, (2) committed clear error or the initial decision was manifestly
15 unjust, or (3) if there is an intervening change in the controlling law." *School Dist. No. 1J,*
16 *Multnomah County, Oregon v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). A Rule 59(e)
17 motion "should not be granted[] absent highly unusual circumstances." *389 Orange St. Partners*
18 *v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999).

19 Plaintiff first contends that he was "told that the 'normal' extension of time is 14 days" by
20 court staff. (Reconsideration Mtn at 2.) Court staff is keenly aware that legal advice may not be
21 given to litigants and plaintiff's suggestion that he received such information is highly suspect.
22 Additionally, there is no and has never been a "normal" length of time connected with requests
23 for extensions of time. Plaintiff's suggestion otherwise is wholly without merit.

24 As noted above, plaintiff did not request an extension for a set number of days. (Order
25 filed February 18, 2009 at 1. [doc. #10]) As a result of the lack of specificity concerning how
26 much time plaintiff would need to file a response to defendants' motion, the Court's Order
27 clearly provided that "Plaintiff's response in opposition to defendants' motion to dismiss shall be
28 filed **on or before March 2, 2009.**" *Id.* at 2.

1 But plaintiff argues that he never received a copy of the Court's February 18, 2009 Order.
2 (Mtn at 2-3.) The official Court docket reflects that "[a]ll non-registered users [were] served via
3 U.S. Mail Service" with the Court's Order. The Court may infer receipt in the ordinary course
4 from the fact of mailing if the mail is directed to the proper address. *Nunley v. City of Los*
5 *Angeles*, 52 F.3d 792, 796 (9th Cir. 1995). Plaintiff's address on record is P.O. Box 80173, San
6 Diego, CA 92138. Although contending that he did not receive the mailed Order, the official
7 court record does not reflect that the mail was returned to the Court as undeliverable. The Court
8 also applies the common law mailbox rule that the mailing of a document creates a rebuttable
9 presumption that the document was received by the addressee in the usual time. *See Schikore v.*
10 *Bank of America Supplemental Ret. Plan*, 269 F.3d 956, 961 (9th Cir. 2001). Although this
11 presumption is weaker when delivery is made by regular mail as opposed to certified mail, a
12 sworn affidavit should ordinarily be presented to rebut the presumption of delivery. *See Salta v.*
13 *I.N.S.*, 314 F.3d 1076, 1079 (9th Cir. 2002). Here, plaintiff does nothing more than state he did
14 not receive the mailing. Interestingly, plaintiff has not contended that he failed to receive any
15 other document filed in this action. The Court finds plaintiff's statement that he did not receive
16 the Court's Order that provided the date for filing his opposition to defendants' motion not
17 credible.

18 Finally, plaintiff states that he was not aware that he needed to file a proof of service on
19 defendants with any document filed in this case even though he had "previously filed a case with
20 the Federal Court." (Mtn at 5.) Federal Rule of Civil Procedure 5(d)(1) provides that "[a]ny
21 paper after the complaint that is required to be served – together with a certificate of service –
22 must be filed within a reasonable time after service." Even though plaintiff is proceeding
23 without counsel, he must comply with the Federal Rules of Civil Procedure and the Civil Local
24 Rules. Nevertheless, the lack of certificate of service was only one of the problems with
25 plaintiff's response in opposition to defendants' motion to dismiss. Missing the Court imposed
26 deadline resulted in the document being rejected.

27 It is clear that plaintiff's response in opposition to defendants' motion was untimely albeit
28 by one day only. Plaintiff's arguments in support of his motion for reconsideration lack

1 credibility for the reasons discussed above. His motion for reconsideration fails to meet the
2 standard under Rule 59(e) in that plaintiff has not presented newly discovered evidence, or
3 demonstrated that the Court committed clear error or the initial decision was manifestly unjust,
4 or asserted that there has been an intervening change in the controlling law. Nevertheless, the
5 Court will allow plaintiff to file his response in opposition to defendants' motion to dismiss in
6 the interest of justice, *i.e.*, the Court prefers that decisions should be made after full briefing by
7 the parties and plaintiff is proceeding without counsel.


8 Based on the foregoing, **IT IS ORDERED:**

9 1. Plaintiff's motion for reconsideration is **DENIED**; however, plaintiff may file with
10 the Clerk of the Court and serve on opposing counsel his response in opposition to defendants'
11 motion to dismiss along with a certificate of service no later than April 22, 2009. **NO**
12 **FURTHER EXTENSIONS OF TIME WILL BE GRANTED.**

13 2. Defendants shall file a reply memorandum not later than April 29, 2009. The
14 matter will be deemed submitted without oral argument on April 30, 2009.

15 **IT IS SO ORDERED.**

16 DATED: April 14, 2009

17 
18 M. James Lorenz
United States District Court Judge

19 COPY TO:

20 HON. BARBARA L MAJOR
21 UNITED STATES MAGISTRATE JUDGE

22 ALL PARTIES/COUNSEL
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