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

DEBORAH COONEY,

Plaintiff,

v.

THE STATE OF CALIFORNIA, *ET AL.*,

Defendants.

Case No. 13-cv-01373-BAS(KSC)

**ORDER DENYING PLAINTIFF'S
MOTION TO RECONSIDER THE
COURT'S ORDER TO DISMISS
DEFENDANTS WITHOUT
LEAVE TO AMEND**

(ECF No. 59)

On July 18, 2014, the Court issued an order granting Defendants' motions to dismiss (ECF Nos. 35, 36, 38) without leave to amend. (ECF No. 52.) On September 2, 2014, plaintiff Deborah Cooney ("Plaintiff") filed a motion for reconsideration under Rules 54(b), 59(e), and/or 60(b)(1)-(3) of the Federal Rules of Civil Procedure solely as to the Court's determination that Plaintiff should not be granted leave to file a Second Amended Complaint. (ECF No. 59.) Defendants City of San Diego, John Kerr, Bonny Hsu, Keith Phillips, County of San Diego, Ivan Baroya, and George W. Brewster, Jr. (collectively "Defendants") filed an opposition. (ECF No. 60.) For the following reasons, the Court **DENIES** Plaintiff's motion.

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1 **I. LEGAL STANDARD**

2 Rule 60(b) of the Federal Rules of Civil Procedure provides for extraordinary
3 relief and may be invoked only upon a showing of exceptional circumstances.
4 *Engleson v. Burlington N.R. Co.*, 972 F.2d 1038, 1044 (9th Cir.1994) (citing *Ben*
5 *Sager Chem. Int’l v. E. Targosz & Co.*, 560 F.2d 805, 809 (7th Cir. 1977)). Under
6 Rule 60(b), the court may grant reconsideration of a final judgment or an order based
7 on: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered
8 evidence which by due diligence could not have been discovered before the court’s
9 decision; (3) fraud by the adverse party; (4) the judgment is void; (5) the judgment
10 has been satisfied; or (6) any other reason justifying relief. Fed. R. Civ. P. 60(b). The
11 last prong is “used sparingly as an equitable remedy to prevent manifest injustice and
12 is to be utilized only where extraordinary circumstances prevented a party from taking
13 timely action to prevent or correct an erroneous judgment.” *Delay v. Gordon*, 475
14 F.3d 1039, 1044 (9th Cir. 2007) (citing *United States v. Alpine Land & Reservoir Co.*,
15 984 F.2d 1047, 1049 (9th Cir. 1993) (internal quotations marks omitted)). It “applies
16 only when the reason for granting relief is not covered by any of the other reasons.”
17 *Id.* “A party seeking to re-open a case under Rule 60(b)(6) must demonstrate both
18 injury and circumstances beyond his [or her] control that prevented him [or her] from
19 proceeding with the prosecution or defense of the action in a proper fashion.” *Id.*

20 District courts also have the authority to entertain motions for reconsideration
21 of interlocutory orders at any time before the entry of final judgment. *See Amarel v.*
22 *Connell*, 102 F.3d 1494, 1515 (9th Cir. 1996) (“[I]nterlocutory orders and rulings
23 made pre-trial by a district judge are subject to modification by the district judge at
24 any time prior to final judgment.”); Fed. R. Civ. P. 54(b); *Balla v. Idaho State Bd. of*
25 *Corr.*, 869 F.2d 461, 465 (9th Cir. 1989) (“Courts have inherent power to modify their
26 interlocutory orders before entering a final judgment. . . . In addition, [Rule 54(b) of]
27 the Federal Rules of Civil Procedure explicitly grants courts the authority to modify
28 their interlocutory orders.”). To determine the merits of a request to reconsider an

1 interlocutory order, the court applies the standard required under a Rule 59(e)
2 reconsideration motion. *See Hydranautics v. FilmTec Corp.*, 306 F. Supp. 2d 958,
3 968 (S.D. Cal. 2003) (Whelan, J.).

4 Rule 59(e) permits a party to file a motion to alter or amend a judgment “no
5 later than 28 days after the entry of the judgment.” Fed. R. Civ. P. 59(e). “Although
6 Rule 59(e) permits a district court to reconsider and amend a previous order, the rule
7 offers an extraordinary remedy, to be used sparingly in the interests of finality and
8 conservation of judicial resources.” *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d
9 877, 890 (9th Cir. 2000) (internal quotation marks and citation omitted).
10 “Reconsideration is appropriate if the district court (1) is presented with newly
11 discovered evidence, (2) committed clear error or the initial decision was manifestly
12 unjust, or (3) if there is an intervening change in controlling law.” *Sch. Dist. No. 1J,*
13 *Multnomah Cnty. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993); *see also Allstate*
14 *Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011); *Kona Enters., Inc.*, 229 F.3d
15 at 890. However, a Rule 59(e) motion for reconsideration may not be used to raise
16 arguments or present evidence for the first time when they could reasonably have been
17 raised earlier in the litigation. *Kona Enters., Inc.*, 229 F.3d at 890. It does not give
18 parties a “second bite at the apple.” *See Weeks v. Bayer*, 246 F.3d 1231, 1236-37 (9th
19 Cir. 2001). “[A]fter thoughts” or “shifting of ground” do not constitute an appropriate
20 basis for reconsideration. *Ausmus v. Lexington Ins. Co.*, No. 08-CV-2342-L, 2009
21 WL 2058549, at *2 (S.D. Cal. July 15, 2009) (Lorenz, J.).

22 **II. DISCUSSION**

23 Plaintiff requests reconsideration of the Court’s Order granting the motions to
24 dismiss filed by Defendants and MD Dominick Addario, without leave to amend. (*See*
25 *ECF No. 52.*) With respect to her motion, Plaintiff only seeks reconsideration of the
26 Court’s decision not to grant Plaintiff leave to amend her First Amended Complaint.
27 (*ECF No. 59* at 2, lines 4-5; *ECF No. 61* at 3, ¶ 6.) Plaintiff claims that “[a]lthough
28 the Court may not have imagined it, it is possible to amend the Complaint so as to

1 state a valid claim.” (*Id.* at 4, lines 14-15.) Plaintiff seeks to amend her First Amended
2 Complaint to pursue relief from the assessment of Defendants’ costs against her in the
3 state court action on the basis that “[s]uch an assessment is unconstitutional.” (*Id.* at
4 4, lines 18-21.) Plaintiff has not previously presented this claim before any court,
5 including this Court. (*See id.* at 6, lines 1-4.) To explain her failure to previously
6 raise the claim, Plaintiff asserts she was deprived of the assistance of counsel in the
7 state court action and, in representing herself, she “may have made mistakes or
8 excusable errors.” (*Id.* at 6.)

9 As final judgment has already been entered in this case, the Court will analyze
10 Plaintiff’s motion under Federal Rules of Civil Procedure 59(e) and 60(b). In applying
11 Rule 59(e), the Court finds Plaintiff has presented no newly discovered evidence or
12 intervening change in controlling law, and further does not argue the Court committed
13 clear error or was manifestly unjust in ruling on the motions to dismiss. Plaintiff
14 simply seeks to bring an entirely new claim, of which she was aware prior to bringing
15 suit, and chose not to raise in either her initial complaint or amended complaint. A
16 Rule 59(e) motion for reconsideration may not be used to raise arguments or present
17 evidence for the first time when they could reasonably have been raised earlier in the
18 litigation. *See Kona Enters., Inc.*, 229 F.3d at 890. “After thoughts” do not constitute
19 an appropriate basis for reconsideration. *See Ausmus*, 2009 WL 2058549, at *2.
20 Accordingly, Plaintiff’s motion under Rule 59(e) must be denied.

21 In applying Rule 60(b), the Court finds Plaintiff has made no showing of any
22 of the relevant factors, with the possible exception of “excusable neglect” on the basis
23 that Plaintiff is proceeding *pro se*. While a late filing by a *pro se* plaintiff may in the
24 rare circumstance be excused by negligence, *see Briones v. Riviera Hotel & Casino*,
25 116 F. 3d 379, 382 (1997), the Court finds Plaintiff’s failure to allege a claim, of which
26 she was aware, on two separate occasions, is not excusable neglect. Under Rule
27 60(b)(6), the Court may grant relief for “any other reason justifying relief;” however,
28 this option is to be “used sparingly as an equitable remedy to prevent manifest injustice


1 and is to be utilized only where extraordinary circumstances prevented a party from
2 taking timely action to prevent or correct an erroneous judgment.” *Delay*, 475 F.3d at
3 1044. The Court finds Plaintiff has not demonstrated manifest injustice will arise if
4 she is not permitted leave to file a Second Amended Complaint seeking relief from
5 the assessment of Defendants’ costs in her state court action, or that extraordinary
6 circumstances prevented her from taking timely action to protect her interests.
7 Therefore, Plaintiff’s motion under Rule 60(b) must also be denied.

8 **III. CONCLUSION & ORDER**

9 Because Plaintiff fails to demonstrate entitlement to reconsideration, the Court
10 **DENIES** her motion in its entirety. (ECF No. 59.)

11 **IT IS SO ORDERED.**

12
13 **DATED: June 29, 2015**

14 
15 **Hon. Cynthia Bashant**
16 **United States District Judge**