

FILED

MAR 11 2019

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY *aj* DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ROCHELLE NISHIMOTO
individually and as Successor in Interest
to JASON NISHIMOTO,
Plaintiffs,
v.
COUNTY OF SAN DIEGO; and
DOES 1-100, inclusive,
Defendants.

Case No.: 3:16-cv-1974-BEN-LL

**ORDER DENYING IN PART
PLAINTIFF'S MOTION:
(1) FOR RECONSIDERATION; and
(2) FOR LEAVE TO ADD THREE
CPMG OFFICIALS
[Doc. 119]**

Plaintiff Rochelle Nishimoto, individually and as Successor in Interest to Jason Nishimoto, moves the Court to (1) reconsider its previous order granting the parties' joint motion to dismiss Plaintiff's Section 1983 claims against Defendant CPMG, and (2) grant leave to amend Plaintiff's Complaint to add three individual CPMG defendants. [Doc. 119, parts 1 and 2.] For the following reasons, Plaintiff's motion is **DENIED**.¹

¹ This Order does not dispose of Plaintiff's motion in its entirety because Plaintiff's motion additionally moves the Court for leave to continue discovery, an issue within the province of the magistrate judge. [Doc. 119, part 3]. The Court referred part 3 of Plaintiff's motion to Magistrate Judge Linda Lopez. [Doc. 122.]

1 **A. Reconsideration Under Rule 60(b)(2)**

2 On October 11, 2018, Plaintiff and CPMG jointly filed for dismissal with prejudice
3 Counts 1 and 4 (the § 1983 claims) against CPMG. [Doc. 78.] The Court granted the joint
4 motion on November 16, 2018. [Doc. 100.] Plaintiff now moves the Court to “reconsider”
5 its Order under Federal Rule of Civil Procedure 60(b)(2) because of newly discovered
6 emails produced by the County of San Diego defendants on December 6, 2018. Under
7 Rule 60(b)(2), the moving party must show that the (1) evidence constitutes newly
8 discovered evidence; (2) the party exercised due diligence to discover this evidence; and
9 (3) the newly discovered evidence is of such magnitude that production of it earlier would
10 have been likely to change the outcome of the prior order. *See Coastal Transfer Co. v.*
11 *Toyota Motor Sales*, 833 F.2d 208, 211 (9th Cir. 1987).

12 Here, Plaintiff offers no authority showing that Rule 60(b)(2) may be used to set
13 aside an order granting a joint motion to voluntarily dismiss claims against a party.
14 Regardless, even assuming that Rule 60(b)(2) is the proper vehicle, Plaintiff fails to
15 establish the third factor—that the newly discovered evidence is of such magnitude that
16 production of it earlier would have been likely to change the prior order. In support of her
17 motion, Plaintiff contends that the newly discovered emails would “create material
18 disputes” that “would defeat any dispositive motion.” [Doc. 119-1.] However, Plaintiff is
19 not moving this Court to reconsider an Order on a dispositive motion. Rather, Plaintiff is
20 moving this Court to reconsider an Order granting Plaintiff’s joint motion to dismiss the §
21 1983 claims against CPMG, a result Plaintiff’s counsel concedes was based on her own
22 “strategic decision to simplify certain issues and to focus her Section 1983 efforts on the
23 county[.]” [Doc. 119-1 at p. 12.] Plaintiff further contends that she should not be held
24 to her strategic decision because the County “dragged its feet for seven months” in
25 producing emails she requested. [*Id.*] The docket does not reflect, however, that Plaintiff
26 ever attempted to rectify the County’s alleged delay by moving to compel production of
27 those emails. Moreover, Plaintiff offers no evidence that she could not have delayed her
28 “strategic decision” to dismiss the claims against CPMG until after the County’s long-

1 awaited email production. Thus, because the basis for Plaintiff's joint motion to dismiss
2 was her own strategic decision, a decision that could have been delayed until after the
3 County's email production, Plaintiff has not established the Court's Order would have been
4 different. Furthermore, because the Court's Order was not based on the facts of the case,
5 but rather on the parties' joint motion to dismiss, Plaintiff does not show how the newly
6 discovered emails would have been likely to change the Court's decision to grant the
7 parties' joint motion to dismiss. The motion to reconsider is **DENIED**.

8 **B. Leave to Add Three CPMG Individual Defendants**

9 Based on the newly discovered emails, Plaintiff additionally moves for leave to
10 amend her Complaint to name three new CPMG defendants, Drs. Mannis, Rao, and Badre.
11 Plaintiff argues that, to evaluate whether leave should be granted, the Court first applies
12 the good cause standard under Federal Rule of Civil Procedure 16(b), followed by the
13 "when justice so requires" standard of Rule 15(a). [Doc. 119-1, p. 13.] The Court need
14 not reach Rule 15(a)'s "when justice so requires" standard, however, because Plaintiff fails
15 to state good cause.

16 Plaintiff filed her Complaint on August 5, 2016, more than two and a half years ago.
17 Nonetheless, Plaintiff argues two grounds establish good cause for amending her
18 Complaint at this late stage: (1) the newly discovered emails evince a feud between CPMG
19 and the County of which she could not have been aware, and (2) the County may offer an
20 empty chair defense that CPMG and its high-ranking officials were the parties responsible
21 for the pattern of prior preventable suicides. As to the first ground, the Court is not
22 persuaded that Plaintiffs were "not aware of" the feud between CPMG and the County
23 "until after dismissal" of CPMG when Plaintiff discovered the emails. Indeed, the
24 existence of an ongoing feud between CPMG and the County is not new information to the
25 parties or to this Court. Moreover, before Plaintiff dismissed CPMG, CPMG's counsel
26 disclosed to Plaintiff's counsel the separate action between the County and CPMG's
27 Commercial General Liability Carrier relative to issues in this case and other cases
28

1 involving both parties. [Doc. 146-1 at ¶ 13.] Therefore, this ground does not state good
2 cause.

3 Plaintiff's second proffered ground also fails to state good cause. Plaintiff argues
4 that because the County may use an empty chair defense, "Plaintiff would have no
5 discovery to defend against this argument." [Doc. 119-1 at p. 14.] After filing her motion,
6 however, Plaintiff settled with the County and the County's individual defendants. *See*
7 [Doc. 142 (order granting parties' joint motion to dismiss all of Plaintiff's claims against
8 the County Defendants).] Because this theory is no longer a concern, it does not state good
9 cause. Accordingly, Plaintiff's motion for leave to amend her Complaint to add three new
10 defendants is **DENIED** for lack of good cause.

11 **IT IS SO ORDERED.**

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13 Date: March 11, 2019


14 HON. ROGER T. BENITEZ
15 United States District Judge
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