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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 DOLORES EARLYWINE,
12 Plaintiff,
13 v.
14 USAA LIFE INSURANCE COMPANY,
15 Defendant.
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Case No.: 3:17-CV-328-CAB-NLS

**ORDER DENYING MOTION FOR
RELIEF FROM ORDER AND TO
AMEND COMPLAINT**

[Doc. No. 21]

18 On January 18, 2017, Plaintiff filed this lawsuit in San Diego County Superior Court
19 asserting six claims: (1) breach of contract; (2) breach of the covenant of good faith and
20 fair dealing; (3) negligent misrepresentation; (4) fraud; (5) rescission; and (6) unfair
21 business practices under California Business and Professions Code section 17200. [Doc.
22 No. 1 at 8-16.] Defendant USAA Life Insurance Company (“USAA”) timely removed the
23 complaint to this court and filed a motion to dismiss the negligent misrepresentation and
24 fraud claims. In response to the motion, Plaintiff filed a first amended complaint (“FAC”),
25 which asserted the same six claims. [Doc. No. 7.] USAA again moved to dismiss the
26 negligent misrepresentation and fraud claims, and the Court granted the motion, dismissing
27 the claims with prejudice. [Doc. No. 12.] Plaintiff now moves from relief pursuant to Rule
28 60(b)(1) from the order dismissing her fraud and negligent misrepresentation claims with

1 prejudice, and for leave to file a second amended complaint with additional allegations
2 related to those claims. The motion has been fully briefed, and the Court deems it suitable
3 for submission without oral argument. Because Rule 60(b)(1) is not intended to remedy
4 the sorts of “mistakes” by Plaintiff’s counsel from which Plaintiff seeks relief, Plaintiff’s
5 motion is denied.

6 **I. Background**

7 In its order dismissing the negligent misrepresentation and fraud claims from the
8 FAC, the Court summarized Plaintiff’s claims as follows:

9 Defendant USAA Life Insurance Company (“USAA”) issued a universal life
10 insurance policy (“ULP”) effective August 17, 1990 to Plaintiff’s now-
11 deceased husband, William J. Earlywine. Plaintiff Dolores Earlywine was the
12 designated beneficiary of the policy. In January 2016, USAA cancelled the
13 policy after the Earlywine’s had been unable to continue paying the
14 premiums. [Doc. No. 7 at ¶ 22.] William died on April 23, 2016. [*Id.*]

15 According to the FAC, “[a]t the time of sale, the ULP was represented to
16 Plaintiff and her husband as having even premiums through age 95. USAA
17 advised that the premiums would not go up through age 95. Plaintiff and her
18 husband relied upon that assurance.” [*Id.* at ¶ 10.] The FAC alleged that these
19 statements were false and that “the policy premiums skyrocketed” to the point
20 that the Earlywines were unable to pay them. [*Id.* at ¶ 22.] In addition,
21 “USAA provided a soft disclaimer about the potential for the policy to not
22 perform. However, the likelihood of performance failure was not disclosed,”
23 and “[a]s time went on, it became certain that the ULP would fail to perform
24 [*Id.* at ¶ 15.] Before USAA cancelled the ULP, “[e]ven though the policy
25 became a sinkhole with no possibility of performing up to the levels at which
26 it was marketed, USAA kept accepting premiums [sic] payments and did not
27 advise their insured that the policy was failing.” [*Id.* at ¶ 16.]

28 The FAC also alleges that “[i]n or around early 2001 the Earlywines contacted
USAA to ask about the feature which allowed them to miss some payments.
USAA’s representative responded that it was ‘no problem.’” [*Id.* at ¶ 17.]
This statement was allegedly false because “[t]he policy was already going to
require significantly larger extra premium payments to keep it in force through
the actuarially expected lifespan of Mr. Earlywine.” [*Id.*] Further, according
to the FAC, this statement was also false because it contradicted a “Cost of
Insurance” clause in the ULP itself. [*Id.* at ¶ 18.]

[Doc. No. 12 at 1-2.] The Court ultimately granted USAA’s motion to dismiss because

1 these allegations from FAC lacked the specificity required for fraud and negligent
2 misrepresentation claims.

3 Further, the Court denied leave to amend because in the FAC and in her opposition
4 to the motion to dismiss, Plaintiff stated that she did not have any additional specifics about
5 the alleged false statements. Specifically, the FAC stated that “the identity of the
6 individual(s) who make [sic] the representations about the product at the time of sale are
7 not known to Plaintiff” and that “USAA is expected to have records of the sales literature
8 used at the time of sale which is not in Plaintiff’s possession.” [Doc. No. 7 at ¶ 14.]
9 Plaintiff’s opposition to the motion to dismiss similarly stated that “[t]he missing
10 information” about USAA’s interactions with the Earlywines will be found in USAA’s
11 records.” [Doc. No. 10 at 3.] It also stated that “greater detail about the full content of the
12 [“no problem”] discussion should be in USAA’s records. That information is unknown to
13 Plaintiff” [*Id.* at 4.] Based on these arguments and allegations, the Court concluded
14 that “[b]ecause, by her own admission, Plaintiff lacks additional knowledge of any of the
15 specific details that are missing from the FAC and are required before her fraud and
16 negligent misrepresentation claims can proceed, allowing Plaintiff to amend her complaint
17 again would be futile.” [Doc. No. 12 at 7.]

18 II. Discussion

19 Plaintiff moves for relief from the Court’s order denying leave to amend pursuant to
20 Federal Rule of Civil Procedure 60(b)(1), which states that “[o]n motion and just terms,
21 the court may relieve a party or its legal representative from a final judgment, order, or
22 proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable
23 neglect.” Plaintiff moves for relief on account of a purported mistake by her counsel.
24 Specifically, Plaintiff’s counsel states that due to illness, Plaintiff was unable to assist him
25 with the drafting of the FAC and opposition brief, and that the allegations and arguments
26 therein concerning Plaintiff not having the information needed to plead her fraud and
27 negligent misrepresentation claims with specificity were erroneous.

28 Counsel’s admission of his purported “mistakes” raise a host of issues with respect

1 to the propriety of the filing of the FAC and his continued prosecution of Plaintiff's claims
2 while Plaintiff was incapacitated without advising the Court, but they do not entitle
3 Plaintiff to relief from the Court's order dismissing the fraud and negligent
4 misrepresentation claims without leave to amend. The Ninth Circuit has held that "[f]or
5 purposes of subsection (b)(1), parties should be bound by and accountable for the deliberate
6 actions of themselves and their chosen counsel. This includes not only an innocent, albeit
7 careless or negligent, attorney mistake, but also intentional attorney misconduct. Such
8 mistakes are more appropriately addressed through malpractice claims." *Latshaw v.*
9 *Trainer Wortham & Co.*, 452 F.3d 1097, 1101 (9th Cir. 2006).¹

10 Here, the FAC explicitly alleged that Plaintiff did not have specific information
11 related to the alleged fraud or negligent misrepresentations. Now, Plaintiff wants to file an
12 amended complaint that would directly contradict this unequivocal assertion in that it
13 would include additional information about the alleged misrepresentations that Plaintiff
14 stated was unknown to her. Plaintiff, however, is bound by the allegations in the FAC. *Cf.*
15 *Airs Aromatics, LLC v. Opinion Victoria's Secret Stores Brand Mgmt., Inc.*, 744 F.3d 595,
16 600 (9th Cir. 2014) ("A party cannot amend pleadings to 'directly contradic[t] an earlier
17 assertion made in the same proceeding.'") (quoting *Russell v. Rolfs*, 893 F.2d 1033, 1037
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19 ¹ In its opposition, USAA cites to *Washington v. Ryan*, 833 F.3d 1087, 1098 (9th Cir. 2016), for the
20 proposition that the four part test set forth in *Pioneer Investment Services Co. v. Brunswick Associates*
21 *Ltd. Partnership*, 507 U.S. 380 (1993), applies to Plaintiff's motion for relief from judgment. That four
22 part test considers: "(1) the danger of prejudice to the non-moving party; (2) the length of the filing delay
23 and its potential impact on the proceedings; (3) the reason for the filing delay; and (4) whether the moving
24 party acted in good faith." *Washington*, 833 F.3d at 1098 (citing *Pioneer*, 507 U.S. at 395). Although the
25 Ninth Circuit stated that "[a] district court must fully consider these factors in every case," a careful
26 reading of both *Washington* and *Pioneer*, and even the plain language of the test itself, indicates that this
27 test applies in the context of a claim of excusable neglect or mistake arising out of a failure to satisfy a
28 filing deadline. *See Pioneer*, 507 U.S. at 384-85 (concerning failure to timely file proofs of claim in
bankruptcy proceeding); *Washington*, 833 F.3d at 1089 (concerning untimely appeal of denial of petition
for writ of habeas corpus). Indeed, parts two and three to the test specifically require consideration of "the
filing delay." Because no "filing delay" is at issue here, this test does not apply. *Cf. Allmerica Fin. Life*
Ins. & Annuity Co. v. Llewellyn, 139 F.3d 664, 666-67 (9th Cir. 1997) (making no mention of the four-
part test in *Pioneer* while affirming denial of motion for relief from judgment because "counsel's failure
to plead an affirmative defense of waiver in the First Amended Answer does not provide a basis for
equitable relief under Rule 60(b)(1)").

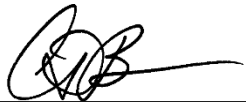
1 (9th Cir. 1990)). That her attorney contends he included these allegations in the FAC and
2 other filings by mistake, even if it was done in good faith, is not a basis to set aside the
3 Court’s order dismissing her fraud and negligent misrepresentation claims with prejudice.
4 *See Casey v. Albertson’s Inc.*, 362 F.3d 1254, 1260 (9th Cir. 2004) (“As a general rule,
5 parties are bound by the actions of their lawyers, and alleged attorney malpractice does not
6 usually provide a basis to set aside a judgment pursuant to Rule 60(b)(1).”); *see also*
7 *Allmerica Fin. Life Ins. & Annuity Co. v. Llewellyn*, 139 F.3d 664, 666 (9th Cir. 1997)
8 (“[A]ttorney error is insufficient grounds for relief under both Rule 60(b)(1) and (6)”);
9 *Kagan v. Caterpillar Tractor Co.*, 795 F.2d 601, 607 (7th Cir. 1986) (“Neither ignorance
10 nor carelessness on the part of the litigant or his attorney provide grounds for relief under
11 Rule 60(b)(1).”).

12 **III. Disposition**

13 In light of the foregoing, it is hereby **ORDERED** that Plaintiff’s motion for relief
14 from the Court’s order dismissing her fraud and negligent misrepresentation claims with
15 prejudice is **DENIED**.

16 It is **SO ORDERED**.

17 Dated: October 11, 2017

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20 Hon. Cathy Ann Bencivengo
21 United States District Judge
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