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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

STEPHEN LOTHLORIEN,

Plaintiff,

v.

EASTRIDGE PERSONNEL OF LAS VEGAS
dba EASTRIDGE INFOTECH, UNITED
BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA, BRIAN
BORYSEWICH, BETH BORYSEWICH,
REGINA WILSON, ROE CORPORATIONS
I-X, and DOES I-X,

Defendants.

2:08-cv-1209-RCJ-LRL

ORDER

Currently before the Court are the following motions: (a) Motion for Reconsideration of Order re: Motion to Dismiss Third Amended Complaint and Motion to Dismiss Re-Entered Second Amended Complaint (#130); (b) Motion to Dismiss Third Amended Complaint (#131); (c) Motion to Strike (#132); (d) Motion to Dismiss Plaintiffs' Tenth and Eighteenth Causes of Action within the Third Amended Complaint (#134); (e) Motion for Summary Judgment (#160); and (f) Motion to Set Aside Default of Regina Wilson (#163).

The Court heard oral argument on the motions on December 3, 2010.

BACKGROUND

This case initially involved two separate-filing plaintiffs, Stephen Lothlorien and Richard Dinicola. After the filing of several of the pending motions, Dinicola voluntarily dismissed all of his claims against the remaining defendants—Eastridge Personnel of Las Vegas, Inc. dba Eastridge Infotech Technology ("Eastridge"), United Brotherhood of Carpenters and Joiners of America ("UBC"), Brian Borysewich, Beth Borysewich, and Regina Wilson. (See Notice of

1 Voluntary Dismissal (#155)). Lothlorien is the only plaintiff remaining.

2 Lothlorien entered into a Professional Services Agreement ("PSA") with West Coast
3 Consulting, LLC ("WCC") through his company Limerence Technology Partners, LLC
4 ("Vendor"). (See Mot. for Summary Judgment, Exh. B (#161-7) at 2). The PSA included the
5 following provisions:

6 WCC desires to have vendor furnish individual employees and/or independent
7 contractor/consultants of vendor who are qualified computer/data professionals
8 (each, a "consultant" to certain clients of WCC (each, a "client"), for the purpose
9 of performing professional computer consulting and programming services . . .
10 as described in a series of written Purchase Orders approved by WCC . . .

11 It is understood and agreed that Vendor is an independent contractor and all
12 Consultants are either employees of Vendor, or are independent
13 Contractors/Consultant of Vendor. Such consultants shall remain vendor's
14 employees, agents or sub contractors for all purposes and shall not for any
15 purpose be considered WCC's or client's employees, agents or sub contractors.

16 Nothing contained in this agreement shall be constructed to imply the existence
17 of a joint venture, joint employer, or principle and agent or employer/employee
18 relationship between vendor and/or any of it's [sic] personal [sic] on the one
19 hand and WCC or client on the other, and neither vendor, WCC nor client shall
20 have any right, power or authority to create any obligation, express or implied,
21 on behalf of the other.

22 This agreement constitutes the entire agreement between the parties with
23 regard to these subject matters and no other agreements, statements, promise
24 or practice between or relating to the subject matter shall be binding on the
25 parties. This agreement may be changed only by a written amendment signed
26 by both the parties.

27 (*Id.* at 3-4). The PSA included an Independent Contractor Agreement between WCC and
28 Limerence and named Lothlorien as the contractor on the project for one year starting July 17,
2006, and ending July 16, 2007. (*Id.* at 7). The clients in the contract were UBC/Eastridge.
(See Mot. for Summary Judgment, Exh. A (#161-2) at 26-28).

DISCUSSION

I. Defendants' Motion for Reconsideration (#130)

24 Defendants UBC, Brian Borysewich, Beth Borysewich, and Regina Wilson (collectively
25 "Defendants") have filed a motion for reconsideration of the order regarding the Motion to
26 Dismiss the (proposed) Third Amended Complaint (#78) and the Motion to Dismiss the
27 Re-Entered Second Amended Complaint (#104). Defendants make four arguments. First,
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1 Defendants assert that this Court erred, pursuant to the law of the case doctrine, because this
2 Court's March 31, 2010 Order (#126) permitting Lothlorien to pursue his federal claims against
3 UBC is inconsistent with the Court's July 21, 2009 Order (#49) dismissing Dinicola's identical
4 federal claims against UBC. Second, Defendants assert that they previously moved to dismiss
5 Lothlorien's 23rd cause of action for retaliation under NRS § 613.310, but notes that the Court
6 did not rule on this claim. Third, Defendants argue that this Court should reconsider its ruling
7 and dismiss the Plaintiffs' causes of action for fraud and defamation because Plaintiffs did not
8 allege these causes with the particularity required under Fed.R.Civ.P. 9. Fourth, Defendants
9 assert that the Court should "reconsider and dismiss the balance of Plaintiffs' remaining
10 claims" because Plaintiffs only make conclusory allegations.

11 A motion to reconsider must set forth "some valid reason why the court should
12 reconsider its prior decision" and set "forth facts or law of a strongly convincing nature to
13 persuade the court to reverse its prior decision." *Frasure v. United States*, 256 F.Supp.2d
14 1180, 1183 (D. Nev. 2003). Reconsideration is appropriate if this Court "(1) is presented with
15 newly discovered evidence, (2) committed clear error or the initial decision was manifestly
16 unjust, or (3) if there is an intervening change in controlling law." *Sch. Dist. No. 1J v. Acands,*
17 *Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). "A motion for reconsideration is not an avenue to
18 re-litigate the same issues and arguments upon which the court already has ruled." *Brown v.*
19 *Kinross Gold, U.S.A.*, 378 F.Supp.2d 1280, 1288 (D. Nev. 2005).

20 Here, the Defendants have not presented the Court with any newly discovered evidence
21 or an intervening change in controlling law. The Court finds that the Defendants have not set
22 forth any strongly convincing facts or law that it committed clear error in its initial decision. The
23 law of the case doctrine applies only to identical cases and, although Lothlorien and Dinicola's
24 cases are similar, they are not identical. See *United States v. Real Prop. Located at Incline*
25 *Vill.*, 976 F.Supp. 1327, 1353 (D.Nev. 1997) (explaining that law of the case doctrine "generally
26 precludes a court from reconsidering an issue that has already been decided in the identical
27 case, either by the same court or a superior court"). Additionally, the Court finds that
28 Defendants other arguments are an attempt to re-litigate the same issues and arguments upon

1 which this Court already has ruled. Accordingly, the Court denies the Motion for
2 Reconsideration (#130).

3 **II. Defendants' Motion to Dismiss (#131) and Motion to Strike (#132)**

4 Defendants file a motion to dismiss the following claims in the Third Amended
5 Complaint (#129): (a) all of Dinicola's remaining state law claims; (b) Lothlorien's 16th cause
6 of action under NRS § 613.310; (c) Dinicola's 18th cause of action; and (d) all references to
7 claims under specified Nevada Revised Statutes pursuant to this Court's March 31, 2010
8 order.¹ Defendants move to strike Dinicola's 18th cause of action and to strike all references
9 to specified NRS provisions.

10 The Court denies the motion to dismiss and the motion to strike as moot with respect
11 to Dinicola's claims because Dinicola voluntarily dismissed all of his claims. The Court also
12 denies the motion to dismiss Lothlorien's 16th cause of action under the Third Amended
13 Complaint as moot because Lothlorien voluntarily dismisses this claim in a forthcoming motion.
14 (See Pl.'s Opp to Mot. for Summary Judgment (#174) at 1). Additionally, in light of this Court's
15 previous order (#126), the Court grants the motion to dismiss references to claims arising
16 under NRS §§ 613.030 and 608.100 *et seq* in the Third Amended Complaint. (See Third
17 Amended Complaint (#129) at 2). This Court also grants Defendants' motion to strike claims
18 and allegations referencing these statutes.

19 **III. Eastridge's Motion to Dismiss Plaintiffs' Tenth & Eighteenth Causes of Action**
20 **within the Third Amended Complaint (#134)**

21 Defendant Eastridge moves to dismiss Lothlorien's 10th cause of action for age
22 discrimination and Dinicola's 18th cause of action.

23 The Court denies this motion as moot because Lothlorien voluntarily dismissed his 10th
24 cause of action for age discrimination in a forthcoming motion, (see Pl.'s Opp. to Mot.
25

26 ¹ In the previous order, this Court dismissed Plaintiffs' claims under NRS §§ 613.020,
27 613.030, 613.210, 608.040, and 608.100 because the statutes did not provide for private
28 causes of action. (See Order (#126) at 11).

1 for Summary Judgment (#174) at 1), and Dinicola voluntarily dismissed all of his claims.

2 **IV. Defendants' Motion for Summary Judgment (#160)²**

3 All of the defendants move for summary judgment against Lothlorien's remaining
4 claims.³ In support of their motion, Defendants attached a copy of the PSA and excerpts of
5 Lothlorien's deposition. (See Mot. for Summary Judgment, Exhs. A-B (#161)). Defendants
6 argue that the PSA demonstrates that no employment relationship existed between them and
7 Plaintiff.

8 In response, Lothlorien explicitly dismisses claims 9, 10, 13, 16, and 17. (Pl.'s Opp. to
9 Mot. for Summary Judgment (#174) at 1-2). Lothlorien's response only focuses on his 11th
10 cause of action, Title VII retaliation, and argues that he understood that he was "an employee
11 of Limerence or its client UBC/Eastridge." (*Id* at 3). At oral argument, Lothlorien stated that
12 he did not want to dismiss his 12th claim for fraud and misrepresentation under NRS
13 § 613.010.

14 In reviewing a motion for summary judgment, the court construes the evidence in the
15 light most favorable to the nonmoving party. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir.
16 1996). Pursuant to Fed.R.Civ.P. 56, a court will grant summary judgment "if the pleadings, the
17

18 ² Lothlorien filed two motions for an extension of time to file an opposition to the motion
19 for summary judgment (#166, 172). The Court grants both extensions.

20 ³ Pursuant to the Third Amended Complaint (#129), Lothlorien's remaining claims are:
21 (9) influencing, persuading, or engaging worker to change from one place to another by false
22 representations under NRS § 613.010; (10) age and race discrimination under Title VII and
23 the ADEA; (11) retaliation under Title VII against Eastridge and UBC; (12) fraud and
24 misrepresentation under NRS § 613.010; (13) negligent hiring, training, and supervision of
25 Regina Wilson; (14) breach of the covenant of good faith and fair dealing against Eastridge
26 and UBC; (15) breach of agreement against Eastridge and UBC; (16) race discrimination
27 under Title VII and NRS § 613.310; and (17) defamation. (See *generally* Third Amended
28 Complaint (#129); Mot. for Summary Judgment (#160-1) at 2-3).

1 discovery and disclosure materials on file, and any affidavits show that there is no genuine
2 issue as to any material fact and that the movant is entitled to judgment as a matter of law.”
3 Fed.R.Civ.P. 56(c)(2). Material facts are “facts that might affect the outcome of the suit under
4 the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510,
5 91 L.Ed.2d 202 (1986). A material fact is “genuine” if the evidence is such that a reasonable
6 jury could return a verdict for the nonmoving party. *Id.*

7 The moving party bears the initial burden of identifying the portions of the pleadings and
8 evidence that the party believes to demonstrate the absence of any genuine issue of material
9 fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265
10 (1986). Once the moving party has properly supported the motion, the burden shifts to the
11 nonmoving party to come forward with specific facts showing that a genuine issue for trial
12 exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348,
13 1356, 89 L.Ed.2d 538 (1986). “The mere existence of a scintilla of evidence in support of the
14 plaintiff’s position will be insufficient; there must be evidence on which the jury could
15 reasonably find for the plaintiff.” *Anderson*, 477 U.S. at 252, 106 S.Ct. at 2512. The
16 nonmoving party cannot defeat a motion for summary judgment “by relying solely on
17 conclusory allegations unsupported by factual data.” *Taylor v. List*, 880 F.2d 1040, 1045 (9th
18 Cir. 1989). The nonmoving party must “set out specific facts showing a genuine issue for trial.”
19 Fed.R.Civ.P. 56(e)(2). “Where the record taken as a whole could not lead a rational trier of
20 fact to find for the nonmoving party, there is no genuine issue for trial.” *Matsushita*, 475 U.S.
21 at 587, 106 S.Ct. at 1356.

22 With respect to the 14th and 15th causes of action, Plaintiff has offered no evidence
23 that he had an employment contract with UBC or Eastridge. The PSA established that
24 Lothlorien via Limerence had an employment contract with WCC. Plaintiff did not produce any
25 evidence to establish that he had an agreement with UBC or Eastridge in which they could
26 breach. Accordingly, the Court grants summary judgment for Defendants on the 14th and 15th
27 claims.

28 Under the 11th claim, Plaintiff asserts a claim for retaliation under Title VII. Under Title

1 VII, it is unlawful for "an employer to discriminate against any of his employees . . . because
2 he has opposed any practice made an unlawful employment practice by this subchapter, or
3 because he has made a charge, testified, assisted, or participated in any manner in an
4 investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). An
5 "employee" is an individual employed by an employer. 42 U.S.C. § 2000e(f). An independent
6 contractor is not an employee. *Adcock v. Chrysler Corp.*, 166 F.3d 1290, 1292 (9th Cir. 1999).
7 In determining whether an individual is an independent contractor or an employee for Title VII
8 purposes, the court should evaluate "the hiring party's right to control the manner and means
9 by which the product is accomplished." *Murray v. Principal Fin. Group, Inc.*, 613 F.3d 943, 945
10 (9th Cir. 2010).

11 In this case, Defendants have set forth evidence demonstrating that neither UBC nor
12 Eastridge were Lothlorien's employer and that neither directly hired him. The PSA
13 demonstrates that Lothlorien's direct employer was his own company, Limerence, and that
14 WCC entered into a service agreement with Limerence. UBC and Eastridge were WCC's
15 clients. Moreover, the clients, UBC/Eastridge, paid WCC, who in turn paid Limerence. (Mot.
16 for Summary Judgment, Exh. A (#161-1) at 33). Limerence then paid Lothlorien. (*Id.*). WCC
17 did not pay Lothlorien's taxes. (*Id.*).

18 Plaintiff fails to bring forth any evidence demonstrating that either UBC or Eastridge was
19 his employer. In response, Plaintiff only makes a conclusory statement that "he understood
20 his employment to be as an employee of Limerence or its client, UBC/Eastridge." (See Pl.'s
21 Opp to Mot. for Summary Judgment (#174) at 3). However, he fails to provide any evidence
22 to support his assertion. Accordingly, the Court grants Defendants' motion for summary
23 judgment on Plaintiff's 11th claim.

24 The only remaining claim is Plaintiff's 12th claim for fraud and misrepresentation under
25 NRS § 613.010. The Court finds that Defendants, who argue that there must be an employee-
26 employer relationship under the statute, have not meet their burden to demonstrate an
27 absence of any genuine issue of material fact. Nevada Revised Statute § 613.010(3) provides
28 a cause of action for recovery for all damages that a worker sustained "in consequence of the

1 false or deceptive representations, false advertising or false pretenses used to induce the
2 worker to change his or her place of employment, or place of abode . . . against any person
3 or persons, corporations, companies or associations directly or indirectly causing such
4 damages." Nev. Rev. Stat. § 613.010(3). Despite Defendants' assertions, NRS § 613.010
5 does not require there to be an actual employment relationship between the parties because
6 persons, agents, or companies may be liable for inducing the worker. See *id.* § 613.010(1).

7 However, after a review of the entire record, the Court declines to exercise
8 supplemental jurisdiction over this claim. See 28 U.S.C. § 1367(c)(3) (providing that the
9 district court may decline to exercise supplemental jurisdiction over a claim if the court has
10 dismissed all claims over which it has original jurisdiction). Accordingly, the Court dismisses
11 Plaintiff's 12th cause of action. No claims remain in this case.

12 **V. Motion to Set Aside Default of Regina Wilson (#163)**

13 Defendants move to set aside Regina Wilson's default on grounds that Plaintiffs failed
14 to serve her any of the amended complaints. Plaintiff filed no response. Accordingly, this
15 Court grants the motion to set aside default. See Local R. 7-2(d) (the failure of an opposing
16 party to file points and authorities in response to any motion shall constitute a consent to the
17 granting of the motion).

18 **CONCLUSION**

19 For the foregoing reasons, IT IS ORDERED that the Motion for Reconsideration (#130)
20 is DENIED.

21 IT IS FURTHER ORDERED that the Motion to Dismiss (#131) and the Motion to Strike
22 (#132) are GRANTED in part and DENIED as moot in part.

23 IT IS FURTHER ORDERED that the Motion to Dismiss Plaintiffs' Tenth and Eighteenth
24 Causes of Action (#134) is DENIED as moot.

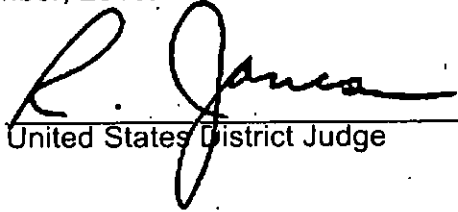
25 IT IS FURTHER ORDERED that Plaintiff's Motions to Extend Time to File an Opposition
26 (#166, 172) are GRANTED.

27 IT IS FURTHER ORDERED that the Motion for Summary Judgment (#160) is
28 GRANTED in part and DENIED in part.

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IT IS FURTHER ORDERED that the Motion to Set Aside Default of Regina Wilson (#163) is GRANTED.

DATED: This 27th day of December, 2010.


United States District Judge