UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LUIS FELIPE MORENO-GODOY,

Plaintiff,

-v-

GALLET DREYER & BERKEY, LLP, ROGER L. STAVIS, ESQ., and STEVEN R. KARTAGENER, ESQ.,

Defendants.

14 Civ. 7082 (PAE)

OPINION & ORDER

PAUL A. ENGELMAYER, District Judge:

On June 29, 2017, the Court issued a decision granting in part, and denying in part, the parties' cross-motions for summary judgment. Dkt. 131 ("Decision"). On July 13, 2017, plaintiff Luis Felipe Moreno-Godoy filed a motion for reconsideration. Dkt. 132 ("Moreno-Godoy Mem."). On July 21, 2017, defendant Gallet Dreyer & Berkey, LLP ("GDB") filed a cross-motion for reconsideration, Dkt. 134, along with a memorandum of law supporting its motion and opposing Moreno-Godoy's, Dkt. 135. The same day, defendant Steven R. Kartagener filed a cross-motion for reconsideration, Dkt. 136, along with a memorandum of law supporting his motion and opposing Moreno-Godoy's, Dkt. 137. On July 22, 2017, Moreno-Godoy filed a brief in further support of his motion and in opposition to defendants', Dkt. 138. For the following reasons, the Court denies all three motions.

## I. Legal Standards

The standard governing motions for reconsideration "is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked." *Analytical Surveys, Inc. v. Tonga Partners, L.P.*, 684 F.3d 36, 52 (2d Cir. 2012) (citation omitted); *see also* S.D.N.Y. Local Rule 6.3 (requiring the movant to "set[ ] forth

concisely the matters or controlling decisions which counsel believes the court has overlooked"). Such a motion "is neither an occasion for repeating old arguments previously rejected nor an opportunity for making new arguments that could have been previously advanced." *Associated Press v. U.S. Dep't of Def.*, 395 F. Supp. 2d 17, 19 (S.D.N.Y. 2005); *see also Goonan v. Fed. Reserve Bank of N.Y.*, No. 12 Civ. 3859 (JPO), 2013 WL 1386933, at *2 (S.D.N.Y. Apr. 5, 2013) ("Simply put, courts do not tolerate such efforts to obtain a second bite at the apple."). Rather, reconsideration is appropriate "only when the [moving party] identifies an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Tr.*, 729 F.3d 99, 104 (2d Cir. 2013) (citation omitted).

Litigants are generally barred from introducing new facts in a motion to reconsider. *See Polsby v. St. Martin's Press, Inc.*, No. 97 Civ. 690 (MBM), 2000 WL 98057, at *1 (S.D.N.Y. Jan. 18, 2000) (citation omitted). A party seeking reconsideration "is not supposed to treat the court's initial decision as the opening of a dialogue in which that party may then use such a motion to advance new theories or adduce new evidence in response to the court's rulings." *De Los Santos v. Fingerson*, No. 97 Civ. 3972 (MBM), 1998 WL 788781, at *1 (S.D.N.Y. Nov. 12, 1998). The purpose of Rule 6.3 is to "ensure the finality of decisions and to prevent the practice of a losing party examining a decision and then plugging the gaps of a lost motion with additional matters." *Naiman v. N.Y. Univ. Hosps. Ctr.*, No. 95 Civ. 6469 (RPP), 2005 WL 926904, at *1 (S.D.N.Y. Apr. 21, 2005) (quoting *Carolco Pictures, Inc. v. Sirota*, 700 F. Supp. 169, 170 (S.D.N.Y. 1988)).

## II. Discussion

The Court assumes familiarity with the case's facts and procedural history and describes only those facts necessary to resolve the pending motions.

### A. Moreno's "Fresh Set of Eyes" Theory of Damages

Moreno-Godoy moves for reconsideration of the denial of his motion for summary judgment. The Court held that Moreno-Godoy's claim to have been deprived of the $100,000 payment originally given to Kartagener and then appropriated by GDB after Kartagener proved unable to serve as counsel must be resolved by a jury, based on a factual dispute about whether that sum belonged to Moreno-Godoy. Moreno-Godoy argues that he is entitled to pursue – and prevail on – an alternative theory of injury, to wit, that, by retaining the $100,000, GDB deprived Moreno-Godoy of the "benefit of his bargain," namely, a "fresh set of eyes" for his criminal appeal. *See* Moreno-Godoy Mem. at 4–7. In other words, Moreno-Godoy argues, even if the $100,000 earmarked for Kartagener did not belong to Moreno-Godoy, he was nevertheless harmed by its misappropriation by GDB because it could have been used to hire a different appellate lawyer in Kartagener's stead. *Id.* at 4.

That theory fails for multiple independent reasons. First, this theory is belatedly pursued: In sustaining Moreno-Godoy's *pro se* complaint, the Court sustained only his theory of monetary injury, to wit, that it was his $100,000 that was misappropriated by existing counsel. That claim, for the reasons stated in the Decision, must be resolved at trial, given the disputed issues of fact. The Court did not, however, sustain the claim that Moreno-Godoy was separately cognizably injured by the loss of additional "eyes" to view his case. Second, even assuming that this claim of non-monetary injury had been preserved, Moreno-Godoy did not adduce any evidence on summary judgment that he requested or had available any alternative (and security-cleared) lawyer whom he sought to serve in lieu of the non-cleared Kartagener. Third, and most fundamentally, Moreno-Godoy's conviction was affirmed on appeal by the United States Court of Appeals for the Second Circuit. He does not here—and cannot here—claim any infirmity in

that result. Assuming that the $100,000 did not belong to Moreno-Godoy, the harm to him from the unavailability of another "set of eyes" would be measured by the outcome of his criminal appeal. The claim is not available here to Moreno-Godoy that the addition of other "eyes" to view the trial record that resulted in his affirmed conviction would have done him any good.

There is, therefore, no basis for reconsideration of the decision denying summary judgment to Moreno-Godoy.

**B. Raghdaa Habbal's Affidavit**

All parties move for reconsideration of the Decision insofar as it addressed the affidavit of witness Raghdaa Habbal, who attested therein that Moreno-Godoy had reimbursed her for the $100,000 that she paid made to Kartagener.

Moreno-Godoy argues that the Court was required to credit Habbal's affidavit as true, and therefore was required to enter summary judgment in his favor. Moreno-Godoy argues that the Court erred in not crediting her, citing *Rogoz v. City of Hartford*, 796 F.3d 236, 245 (2d Cir. 2015), for the proposition that in considering a motion for summary judgment, "the court may not make credibility determinations." That argument is frivolous. In resolving a motion for summary judgment, the Court is to "resolve all ambiguities and draw all permissible factual inferences *in favor of the party against whom summary judgment is sought*," *Johnson v. Killian*, 680 F.3d 234, 236 (2d Cir. 2012) (citing *Terry v. Ashcroft*, 336 F.3d 128, 137 (2d Cir. 2003) (emphasis added), not in favor of the moving party. The Court therefore was required to credit Habbal's declaration to the extent that defendants moved for summary judgment on the ground that there was insufficient evidence of Moreno-Godoy's ownership of the $100,000. On *Moreno-Godoy*'s motion for summary judgment, however, the Court was not obliged to treat Habbal's declaration as true, any more than the jury will be required to credit her if she appears at trial and similarly testifies. And the record supplies obvious circumstantial reasons why a trier

of fact might not credit her claim of reimbursement by Moreno-Godoy. The Court therefore denies Moreno-Godoy's motion for reconsideration of the denial to him of summary judgment.

For their parts, GDB and Kartagener argue that the Court was required to disregard Habbal's affidavit, because it does not bear the seal of a licensed notary public from the United States and does not recite that Habbal's statements were made under penalty of perjury. The Court denies that motion for two independent reasons.

First, it is untimely. Defendants filed their motion for reconsideration after the 14-day period for so moving had lapsed. *See* S.D.N.Y. Local Rule 6.3. "Failure to timely submit a motion for reconsideration is sufficient grounds for denying it." *R.B. ex rel. A.B. v. Dep't of Educ. of City of N.Y.*, No. 10 CIV. 6684 (RJS), 2012 WL 2588888, at *2 (S.D.N.Y. July 2, 2012). Second, although the Court has the discretion to disregard an affidavit for lack of these formalities, *see, e.g.*, *Hughes v. Lebron*, No. 14 Civ. 9479 (PAE), 2016 WL 5107030, at *8 (S.D.N.Y. Sept. 19, 2016), under the circumstances of this case, the Court elects not to do so. It appears undisputed that Habbal was the person who paid Kartagener the $100,000. As such, there is a foundation for her to speak to the issue the affidavit addresses (whether Moreno repaid her the $100,000). Moreover, her affidavit was witnessed, executed before, stamped, and verified by a Spanish advocate, in apparent compliance with the required formalities of the European Union. And inasmuch as Habbal is a foreign national (from Lebanon) resident in a third country (Spain) submitting a declaration on behalf of a previously *pro se* plaintiff assisted by court-appointed pro bono counsel in a case seeking recovery of $100,000, there are respectable reasons to excuse compliance with these ordinarily required formalities. However, Moreno-Godoy's counsel is admonished that this is not an invitation for future non-compliance with Court rules. Before proceeding to trial, the Court will require a commitment from counsel

for Moreno-Godoy that Habbal—as a necessary witness to support Moreno-Godoy's claim—will be present to give live sworn testimony.

The Court therefore denies GDB's and Kartagener's motions for reconsideration

**CONCLUSION**

For the foregoing reasons, all three motions for reconsideration is denied. The Clerk of Court is respectfully directed to close the motions pending at docket numbers 132, 134, and 136.

The case will now proceed to trial. The parties are directed, by Friday, August 24, 2017, to submit a joint pretrial order, in compliance in the Court's individual rules. Any motions *in limine* are due along with the joint pretrial order. Any oppositions to those motions are due Friday, August 31, 2017. Upon receipt of these materials, the Court will schedule a pretrial conference and set a prompt trial date.

SO ORDERED.

Paul A. Engelmayer

PAUL A. ENGELMAYER
United States District Judge

Dated: July 28, 2017
New York, New York