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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

GUSTAVO ESCAMILLA, and GREENWAY NUTRIENTS,

Plaintiffs,

v.

DEPARTMENT OF HOMELAND SECURITY; *et al.*,

Defendants.

No. CV 17-7748 ODW (MRWx)

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR RECONSIDERATION FOR FRAUD ON THE COURT PURSUANT TO FRCP 60(D)(3); DECLARATION OF KEVIN B. FINN

Hearing Date: November 15, 2021
Hearing Time: 1:30 p.m.
Location: 5D

Honorable Otis D. Wright

Defendants oppose Plaintiffs' Motion for Reconsideration as follows:

A. GENERAL OBJECTIONS UNDER LOCAL RULES 7-3 AND 11-6

Plaintiffs have failed to comply with Local Rules 7-3 and 11-6. Local Rule 7-3 requires that counsel contemplating the filing of any motion shall first contact opposing counsel to discuss thoroughly, preferably in person, the substance of the contemplated motion and any potential resolution. The conference shall take place at least seven days prior to the filing of the motion.

Plaintiff declares that he sent Assistant United States Attorney Grace Park an email to provide notice on September 21, 2021 and that "[s]he did not respond." Dkt. 21, p. 61, ¶ 2. However, Plaintiffs' counsel's own Exhibit B reflects that Ms. Park responded to him on September 21, informing that she was going on medical leave and she would forward the message within her office. On October 4 and October 5, 2021, Assistant United States Attorney Kevin Finn responded to Plaintiffs' counsel by email to comply with Rule 7-3, inviting him to provide dates and times to meet and confer. Mr. Finn is not aware of receiving a response, and Plaintiffs' counsel does not declare that he did respond over the two weeks from the first email until he filed the motion. In fact, rather than acknowledge the two emails, Plaintiffs' counsel's declaration states that no one "has phoned my office" to discuss the motion, and that he has not "heard back on the substantive positions on this motion."

Additionally, Local Rule 11-6 states that no memorandum of points and authorities shall exceed 25 pages in length, unless permitted by order of the judge. Plaintiffs' memorandum of points and authorities is approximately 70 pages and an order authorizing a 70-page brief does not appear on PACER.

As such, Plaintiffs have failed to comply with the spirit of Rule 7-3 and have violated Rule 11-6. Therefore, the Court should deny the motion.

B. PLAINTIFFS FAIL TO SATISFY RULE 60(d)(3)

1. Relevant Procedural History

On October 24, 2017, Plaintiffs Gustavo Escamilla and Greenway Nutrients ("Plaintiffs") filed their complaint motion alleging claims for violation of 42 U.S.C. §

1983, California Civil Code § 52.1, Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress and Declaratory and Injunctive Relief. Dkt. 1. On January 29, 2018, Defendants Department of Homeland Security and United States of America filed their Motion to Dismiss. Dkt. 9. On April 4, 2018, the Court issued an order granting Defendants' Motion and dismissed the action with prejudice. Dkt. 13. The Court held that claims for civil rights violations, due process and equal protection cannot be brought under section 1983 against DHS or the United States. *Id.* at 8-9. The Court also dismissed Plaintiffs' tort claims against DHS for lack of subject matter jurisdiction because a federal agency cannot be sued for a tort, and Plaintiffs' FTCA claim against the United States because Plaintiffs failed to exhaust their administrative remedies. *Id.* at 10-11. Furthermore, the Court held that the discretionary function exception would bar Plaintiffs' claims even if they had exhausted their administrative remedies. *Id.* at 11-13. Finally, the Court dismissed Plaintiffs' complaint for failure to state a claim. *See Id.* at 14-17.

Over three years later, on July 19, 2021, Plaintiffs filed a Motion to Disqualify the Hon. Otis D. Wright. Dkt. 15. The Court referred the matter to the Hon. Stephen V. Wilson, and the Court denied the motion on July 22, 2021. Dkts. 16 and 17.

On September 18, 2021, Plaintiffs filed a Motion to Set Aside Judgment, and on September 19, 2021, the Court struck the motion for failure to comply with Local Rule 7-3. Dkts. 18 and 19. On October 18, 2021, Plaintiffs refiled their Motion to Set Aside Judgment. Dkt. 21.

2. Relief Under Rule 60(D)(3)

Federal Rule of Civil Procedure 60(d)(3) allows a court to set aside a judgment for fraud on the court. However, relief from judgment for fraud on the court is "available only to prevent a grave miscarriage of justice." *United States v. Beggerly*, 524 U.S. 38,

47 (1998).[1]

"[N]ot all fraud is fraud on the court… the relevant inquiry is not whether fraudulent conduct 'prejudiced the opposing party,' but whether it 'harmed the integrity of the judicial process'…. Fraud on the court must be an 'intentional, material misrepresentation'… [and] 'must involve an unconscionable plan or scheme which is designed to improperly influence the court in its decision." *See U.S. v. Sierra Pacific Industries, Inc.*, 862 F.3d 1157, 1167-1168 (2017), and the Ninth Circuit cases cited therein.

"In addition, the relevant misrepresentations must go 'to the central issue in the case,' (citation omitted), and must 'affect the outcome of the case'". *Id.* at 1168. "In other words, the newly discovered misrepresentations must 'significantly change the picture already drawn by previously available evidence.'" *Id*. Mere nondisclosure of evidence is typically not enough to constitute fraud on the court. *Id.* The Supreme Court and the Ninth Circuit have consistently applied this standard for fraud on the court even in cases involving government attorneys, rather than creating some different standard for these cases. *See Beggerly*, 524 U.S. at 47; *Sierra Pacific*, 862 F.3d at 1168.

Finally, relief for fraud on the court is available only where the fraud was not known at the time of settlement or entry of judgment. *See, e.g., Hazel-Atlas*, 322 U.S. at 244 (allowing relief for "after-discovered fraud"); *Haeger v. Goodyear Tire & Rubber Co.*, 813 F.3d 1233, 1243–45 (9th Cir. 2016) (analogizing to fraud on the court, where crucial information was concealed until after settlement and entry of judgment), overruled on other grounds, —— U.S. ——, 137 S.Ct. 1178 (2017); *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128, 1131 (9th Cir. 1995) (finding fraud on the court where crucial information was concealed and came to light after entry of judgment); *In re Levander*, 180 F.3d 1114, 1120 (9th Cir. 1999) (same). This limitation arises because

[1] The Supreme Court has noted that "[o]ut of deference to the deep-rooted policy in favor of the repose of judgments ..., courts of equity have been cautious in exercising [this] power." *See Hazel-Atlas Glass Co. v. Hartford-Empire Co*., 322 U.S. 238, 244 (1944).

issues that are before the court or could potentially be brought before the court during the original proceedings "could and should be exposed at trial." *Levander*, 180 F.3d at 1120 (explaining that there is no fraud on the court where "the plaintiff had the opportunity to challenge the alleged perjured testimony or non-disclosure because the issue was already before the court").

Allowing parties to raise issues that should have been resolved at trial amounts to a collateral attack and undermines "the deep rooted policy in favor of the repose of judgments." *Hazel-Atlas*, 322 U.S. at 244. Where the moving party "through due diligence could have discovered" the alleged perjury or non-disclosure, such fraud does "not disrupt the judicial process" and thus does not constitute fraud on the court. *Appling v. State Farm*, 340 F.3d 769, 780 (2003). Thus, a finding of fraud on the court is reserved for material, intentional misrepresentations that could not have been discovered earlier, even through due diligence. *Sierra Pacific*, 862 F.3d at 1169.

3. Plaintiffs Fail to Meet Their High Burden

Plaintiffs contend that Plaintiff Gustavo Escamilla discovered in March and July of 2021 that AUSAs "provided the Court with a phony narrative and filed multiple false and materially misleading declarations, pleadings and filings" in this 2017 civil rights suit. Dkt. 21, p. 9. However, as the Court's dismissal order reflects, none of Plaintiff's claims could be brought against Defendants as a matter of law. Section 1983 claims and FTCA claims cannot be brought against DHS, and the discretionary function exception and failure to exhaust preclude Plaintiffs' tort claims against the United States. Plaintiffs' motion fails to overcome these fatal deficiencies in their civil rights complaint. While Plaintiffs have also failed to establish a fraud on the court, assuming *arguendo* that once existed, it would not "affect the outcome of the case" and would not support the relief Plaintiffs seek.

Plaintiffs' motion largely repeats their allegations which they claim support their section 1983 civil rights claims and details subsequent lawsuits unrelated to the dismissal of this civil rights case. *See* Motion (Dkt. 21), pp. 9-16, 19-27. Then Plaintiffs allege that

Escamilla filed a "formal civil rights complaint with DHS's Office of Civil Rights and Civil Liberties ("CRCL"), pursuant to the Federal Tort Claims Act ("FTCA"). *Id.*, p. 16. Plaintiffs allege that Escamilla sent the May 1, 2017 civil rights complaint to over 20 DHS and DOJ officials. *Id.*, p. 17. Finally, Plaintiffs allege that on May 2, 2017, the CRCL advised Escamilla that the department did not have jurisdiction over the civil rights complaint. *Id.*, p. 18.

With respect to the alleged "fraud" on the court warranting a reversal of the dismissal order based on lack of jurisdiction and failure to state a claim, Plaintiffs rely solely on minutiae regarding the underlying procedural history and Plaintiffs' interactions with prosecutors. However, Plaintiffs fail to understand that the alleged merits of their claims are not relevant to the fundamental issues of waiver of sovereign immunity and jurisdiction.

Plaintiffs first rely on allegedly false statements regarding a Magistrate's recommendation in a Colorado lawsuit as the evidence supporting their motion. *Id.*, p. 42-47. Plaintiffs then assert that this Court dismissed the subject suit "based on USAO-CDOC U.S. Attorneys presenting the Court with the aforementioned false and misleading narrative regarding a magistrate's October 27, 2015 recommendation, which was overruled by the judge in the case." *Id.*, p. 47. Plaintiffs also allege that U.S. Attorneys "misled the Court regarding Escamilla's discovery that Greenway's former attorney[s]… engaged in criminal" activities. *Id.*

As the Court is aware, the recitation of Plaintiffs' narrative of the underlying facts pursuant to Rule 12 standards, both in the Court's ruling and in Defendants' opposition, formed no basis of the Court's dismissal for lack of jurisdiction and failure to state a claim, other than affirming that Plaintiffs alleged section 1983 and tort claims in their complaint. The alleged fraud would not establish jurisdiction where it does not exist and would not change the outcome of the case.

Plaintiffs' motion then alleges misrepresentations in the 2021 pleadings filed three years after the dismissal of this suit. *Id.*, pp. 48-56. Plaintiff has not provided any

evidence supporting their claims of fraud, but those claims are irrelevant because the alleged fraud occurred years after the dismissal of this case and would not support a motion to set aside the judgment based on underlying fraud on the court. Again, the alleged fraud could not create jurisdiction or change the dismissal in 2018.

To the extent Plaintiffs attempt to claim that the alleged fraud in 2021 impacted the Court's decision to deny their disqualification motion, Plaintiffs have failed to clearly articulate this argument, have failed to meet their high burden of establishing a knowing, conscious fraud on the court, have failed to establish that the allegedly fraudulent statements are relevant to the issues related to disqualification, or that their disqualification motion had merit, the court's ruling was not proper and it would have changed in the absence of the alleged fraud.

4. Plaintiffs Have Failed to Establish Recent Discovery of the Alleged Fraud

While Plaintiffs contend that Escamilla just discovered the fraud in March and July of 2021, Plaintiffs have failed to cite any allegedly fraudulent statements made to the Court in 2017 or 2018 that Plaintiffs could not have addressed at the time of opposing the dismissal motion or the Court's dismissal order. Plaintiffs were aware of the Magistrate's recommendation, the former attorneys' alleged criminal activities and of their alleged civil rights claim. As such, Plaintiffs have failed to establish that they did not know of the alleged fraud at the time of the judgment, and could not have presented those arguments in opposition to the motion to dismiss. Plaintiffs have failed to establish that they learned of facts subsequent to the hearing of the dismissal motion that would have changed the outcome. Plaintiffs could have raised the facts alleged in the Rule 60 motion in their opposition filed in 2018.

Additionally, Plaintiffs have failed to establish that they were not aware at the time of their disqualification motion of the alleged facts that would dispute the alleged misrepresentations made to the Court in the government's opposition, and that they could not have raised those arguments at the time of the disqualification motion. As such, Plaintiffs have failed to meet their burden of establishing newly discovered

evidence to support their Rule 60 motion.

C. CONCLUSION

Plaintiffs have failed to meet their burden of establishing a fraud on the court, that a fraud impacted the dismissal of this action for lack of jurisdiction and failure to state a claim, that a fraud impacted the denial of their recusal motion, and that their motion for relief from the 2017 judgment is timely because they did not know of the alleged fraud at the time of the dismissal. As such, the Court should deny Plaintiffs' motion for relief under Rule 60(d)(3).

Dated: August 20, 2021

Respectfully submitted,

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