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Superior Court of California
County of San Bernardino
351 N. Arrowhead Avenue, Dept. S-2
San Bernardino, California 92415-0240

FILED-Central District
SUPERIOR COURT
SAN BERNARDINO COUNTY

DEC 22 2005

David A. Anderson
Deputy

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO, SAN BERNARDINO DISTRICT

THOMAS SLEMMER

Plaintiff,

vs.

FONTANA UNION WATER COMPANY,
et al,

Defendants.

) Case No.: SCV 086856

MOTION FOR RECONSIDERATION OF
ORDER GRANTING SUMMARY
JUDGMENT TO KAISER VENTURES

Ruling and Order on submitted Motion:

Background:

On September 23, 2005, this court heard Kaiser Venture's motion for summary judgment and took the matter under submission. On September 27, 2005, the court issued its order ruling granting summary judgment in favor of Kaiser Ventures. On October 6, 2005, Kaiser Ventures served Plaintiff with a copy of the court's order, by fax and mail.

1 On October 21, 2005, Plaintiff filed a motion for reconsideration under CCP §
2 1008, and served the motion by mail. On October 25, 2005, the court entered judgment
3 on the order. Given that the motion for reconsideration was pending at the time, Plaintiff
4 asks the court to vacate the entry of judgment as inadvertent, and entertain the motion
5 for reconsideration. Alternatively, if the court does not vacate the judgment, Plaintiff
6 moves for a new trial under CCP § 657 and 659.
7

8 As support for reconsidering the granting of summary judgment in favor of Kaiser
9 Venture, Plaintiffs contend that additional evidence obtained after that hearing shows
10 that Kaiser Ventures participated in a key Fontana Union meeting with Western Water in
11 June 1999 and Kaiser's general counsel Terry Cook lied about his participation in that
12 meeting to conceal Kaisers involvement in, and ability to influence Fontana Union's
13 decisions.
14

15 Plaintiffs argue the evidence *previously submitted* in opposition to Kaiser motion
16 for summary judgment was sufficient to establish that Kaiser *can* be liable for aiding and
17 abetting a breach of fiduciary duty, which occurs when one knows the other's conduct
18 constitutes a breach of duty and gives substantial assistance or encouragement to the
19 other to so act."¹
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23 Discussion:

24 *Procedural matters:*
25

26
27 ¹ In reply, plaintiffs suggest this is NEW law, decided after the instant motion for summary judgment
28 hearing, (*Frame v. Price Waterhouse Coopers* (Nov. 28, 2005) 2005 Cal.App. LEXIS 1836, copy attached
to the reply.) But as plaintiffs themselves previously noted in their moving papers, "California law is clear,
even if a party does not itself owe a fiduciary duty, it may still be liable for inducing or aiding and abetting
a breach of fiduciary duty by other parties." (Mtn, 10:10-12) *City of Atascadero v. Merrill Lynch* (1998) 68
Cal.App.4th 445, 462.

1 First, Defendant Kaiser contends the court is without jurisdiction to reconsider
2 because judgment was been entered in Kaiser's favor on Oct. 25th, and/or because the
3 motion was not timely filed within 10 days following service of the court's order granting
4 summary judgment, as required by § 1008.
5

6 Timeliness of the motion:

7 Plaintiff filed the motion for reconsideration on October 21st, 15 days after the
8 mailing of the order. CCP §1008(a) requires a motion for reconsideration to be made
9 within 10 days after service upon the party of written notice of entry on an order. The
10 10-day time limit runs from the service of notice of entry. Mailing the notice of ruling
11 triggers the 10-day time limit statute, rather than the entry itself. Weil & Brown,
12 *California Practice Guide: Civil Procedure Before Trial* § 9:325.
13

14 There is some doubt regarding whether the 5-day extension for mailing provided
15 in CCP § 1013 applies to the 10-day time limit set forth in § 1008.
16

17 Weil & Brown at § 9:326.1, p. 9(l)-105 indicates,

18 Presumably, the 10-day deadline for seeking reconsideration is extended
19 under CCP § 1013 for service by mail, fax or overnight delivery (see ¶
20 9:87.1ff.). (E.g., if notice of the court's order is served by mail, the losing
21 party would have 15 days within which to file and serve a motion to
22 reconsider.)
23

24 However, the matter is in doubt because CCP § 1005(b) provides that
25 "Section 1013, which extends the time within which ... an act may be done
26 does not apply to a notice of motion governed by this section." [CCP §
27 1005(b) (emphasis added)] (A motion for reconsideration would appear to be
28

1 such a motion; see CCP § 1005(a)(13). But there is no known authority in
2 point.]

3
4 On November 23rd, Plaintiffs filed an amended notice to move for a new trial
5 under CCP § 657 and 659, if the court does not vacate the judgment.

6 Jurisdiction:

7
8 As Kaiser points out, after entry of judgment, the court loses jurisdiction to
9 entertain a motion for reconsideration, regardless of whether the § 1008 motion was
10 pending. *APRI Insurance Co. v. Sup. Ct.* (1999) 76 Cal.App.4th 176, 182.

11 But, as Plaintiffs indicate, recent case law provides that *after judgment*, the court
12 may treat the motion for reconsideration as a motion for a new trial. *Sole Energy*
13 *Company v. Petrominerals Corp.* (April 5, 2005, 4th Dist. Div. 3) 128 Cal.App.4th 187,
14 192-193.

15
16 Distinguishing the cases that Kaiser relies on here (*APRI Ins. Co.* and
17 *Passavnati*), *Sole Energy* explained,

18 After a trial court issues an order, whether interim or final, the losing party
19 may ask the court to reconsider its decision and enter a different order.
20 (Code Civ. Proc., § 1008, subd. (a).) A trial court may not rule on a motion for
21 reconsideration after entry of judgment. (*Aguilar v. Atlantic Richfield Co.*
22 (2001) 25 Cal.4th 826, 859 [107 Cal. Rptr. 2d 841, 24 P.3d 493].)

23
24 Here, the judgment was entered the same day Sole Energy Corporation's
25 motion for reconsideration was filed on September 19, 2001. The trial court,
26 however, deemed the motion for reconsideration to be a motion for a new
27 trial. Defendants raise several arguments that the court lacked the discretion
28 to do so. We reject each, as explained below.

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Defendants argue a motion for reconsideration may only be construed as a motion for a new trial if there is extremely good cause. In support of that argument, Defendants cite 20th Century Ins. Co. v. Superior Court (2001) 90 Cal.App.4th 1247, 1261 [109 Cal. Rptr. 2d 611]; Pollak v. State Personnel Bd. (2001) 88 Cal.App.4th 1394, 1408 [107 Cal. Rptr. 2d 39]; APRI Ins. Co. v. Superior Court (1999) 76 Cal.App.4th 176, 184 [90 Cal. Rptr. 2d 171]; and Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1610 [275 Cal. Rptr. 887]. Those cases consider whether an *appellate* court may construe a trial court motion as a different type of motion. They do not address the issue here: Whether the trial court may construe a motion for reconsideration as a motion for a new trial.

Indeed, a trial court is "free to consider the motion regardless of its label." (Passavanti v. Williams, supra, 225 Cal. App. 3d at p. 1609; see also Eddy v. Sharp (1988) 199 Cal. App. 3d 858, 863, & fn. 3 [245 Cal. Rptr. 211], citing Graham v. Hansen (1982) 128 Cal. App. 3d 965, 970 [180 Cal. Rptr. 604].) At oral argument, Defendants asserted this statement of law was essentially created by the court in Eddy v. Sharp, supra, 199 Cal. App. 3d 858, and was otherwise unsupported. We disagree.

The proposition that a trial court may construe a motion bearing one label as a different type of motion is one that has existed for many decades. "The nature of a motion is determined by the nature of the relief sought, not by the label attached to it. The law is not a mere game of words." (City & County of S. F. v. Muller (1960) 177 Cal. App. 2d 600, 603 [2 Cal. Rptr. 383].) Neither the Legislature, nor the California Supreme Court, nor any Court of Appeal has ever challenged that notion. To the contrary, several courts have tacitly

1 approved the treatment of a motion for reconsideration as a motion for a new
2 trial, and vice versa. (Malo v. Willis (1981) 126 Cal. App. 3d 543, 546, fn. 2
3 [178 Cal. Rptr. 774]; Board of Medical Examiners v. Terminal-Hudson
4 Electronics, Inc. (1977) 73 Cal. App. 3d 376, 384 [140 Cal. Rptr. 757];
5 Aronstein v. Aronstein (1959) 170 Cal. App. 2d 494, 496 [339 P.2d 191].)

6 The principle that a trial court may consider a motion regardless of the label
7 placed on it by a party is consistent with the court's inherent authority to
8 manage and control its docket. (Code Civ. Proc., §§ 128, subd. (a), 187.)
9 Sole Energy Company v. Petrominerals Corp. (April 5, 2005, 4th Dist. Div. 3)
10 128 Cal.App.4th 187, 192-193.

11
12 The Court therefore entertains this motion as one for a new trial under § 657,
13 which is timely filed under § 659. The standard here is essentially the same as for
14 reconsideration—newly discovered evidence, material for the party making the
15 application, which he could not, with reasonable diligence, have discovered and
16 produced at the trial.' (CCP § 657(4).) ; see Baldwin v. Home Savings of America (1997)
17 59 Cal.App.4th 1192, 1198.

18
19 Kaiser argues that Plaintiffs have failed to offer new, pertinent evidence
20 discovered after they filed their opposition. Kaiser argues that Plaintiffs simply rehash
21 the arguments from their opposition to the motion for summary judgment. The Court
22 agrees, and so finds.

23
24 Plaintiffs fail to establish why the after-obtained discovery could not have been
25 obtained *before* the motion for summary judgment hearing. As reflected in the minute
26 order from that hearing the court denied the request for a continuance to complete the
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1 ongoing discovery for failure to meet the prerequisites. Plaintiff cannot be rewarded for
2 that failure here.

3 Moreover, even entertaining the "new" evidence does not justify a different result.
4 Plaintiffs claim that Kaiser's counsel Terry Cook's calendar shows a June 8, 1999
5 meeting with Western Water (Exh. C). Plaintiffs argue this is critical to show that Kaiser
6 participated in the Fontana Union meeting with Western Water to prevent Western
7 Water from taking its share of Fontana Union water and that Cook lied about his
8 involvement in that meeting to conceal it. Plaintiffs also submit the calendars of San
9 Gabriel's President Michael Whitehead and Cucamonga's General Manager Robert
10 DeLoach (Exhs. D and E are the same meeting.)
11

12 Whitehead testified that he could not recall whether Cook attended the June 8th
13 meeting (Exh. F, p. 845). Cook declares that he does not recall attending the meeting
14 in June 1999. Kaiser indicates that Western Water cannot be a Plaintiff class member
15 against Kaiser here because Western Water released all claims against Kaiser in March
16 2000 (Cook decl, Exh. F.)
17

18 Moreover, Kaiser indicates Cook's calendar is not "new" evidence, it was
19 produced on August 10, 2005, a month before Plaintiffs filed their opposition to Kaiser's
20 motion for summary judgment. (Beatty decl, ¶¶ 3-4.)
21

22 Additionally, as Kaiser points out, even if Cook attended the June 8th meeting,
23 there is no evidence he was exerting any control or influence over the business matters.
24 As previously indicated in the original motion, Kaiser had ceded its control by executing
25 an irrevocable proxy Cucamonga County Water District (CCWD), but Kaiser remained
26 financially interested in, and monitored the activities of Fontana Union, which affected
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1 its rights under its lease with CCWD. . Plaintiffs have not presented any *new* evidence
2 to show that Kaiser possessed or exercised any control over Fontana Union matters
3 affecting the minority shareholders, nor do they show that Kaiser aided and abetted the
4 other Defendants in breach a fiduciary duty owed to the Plaintiffs.
5

6 Motion for Sanctions under § 128.7.

7 Kaiser indicates that on December 7, 2005, it served a motion for sanctions
8 under CCP § 128.7 for fees incurred in opposing this frivolous motion for
9 reconsideration. Kaiser asks the court to shorten the 21-day *safe harbor* provision, and
10 if not, to continue the hearing date to give Plaintiffs the requisite 21 days to decide
11 whether to withdraw their motion to reconsider.
12

13 CCP § 128.7 permits the court to award monetary sanctions (and nonmonetary
14 directives) against an attorney or unrepresented party who presents a pleading or similar
15 paper to the court that is *without evidentiary and legal support* and is presented primarily to
16 harass or cause unnecessary delay or increase the cost of litigation.
17

18 While, the court finds that Plaintiffs have not presented *new* facts that could not
19 have been discovered and presented earlier (or that make a difference), the court
20 cannot say the motion has no legal support. Accordingly the court grants the order
21 shortening time, but denies the motion for sanctions.
22

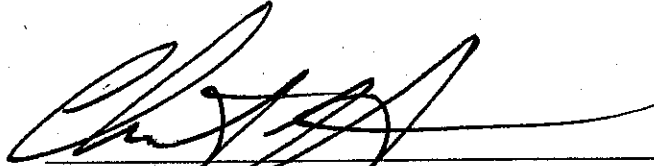
23 Orders:

- 24 1. Plaintiffs' motion for reconsideration is denied for lack of jurisdiction.
- 25 2. Plaintiffs' motion for new trial under CCP § 657 is denied as unsupported.
- 26 3. Grant order shortening time to hear Kaiser's motion for sanctions under CCP §
27 128.7, motion denied.
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The motion is denied.

Dated this 22 day of December, 2005.



CHRISTOPHER J. WARNER
Judge of the Superior Court