

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

AUG 21 2018

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MICHAEL LOUIS BEATTIE,

Plaintiff-Appellant,

v.

L. ROMERO, Correctional Officer; et al.,

Defendants-Appellees.

No. 17-55833

D.C. No. 3:14-cv-01448-H-JMA

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Marilyn L. Huff, District Judge, Presiding

Submitted August 15, 2018**

Before: FARRIS, BYBEE, and N.R. SMITH, Circuit Judges.

California state prisoner Michael Louis Beattie appeals pro se from the district court's post-judgment order denying his motion to vacate summary judgment in his 42 U.S.C. § 1983 action. We have jurisdiction under 28 U.S.C. § 1291. We review for an abuse of discretion. *Latshaw v. Trainer Wortham &*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Co., 452 F.3d 1097, 1100 (9th Cir. 2006). We affirm.

The district court did not abuse its discretion in denying Beattie's Fed. R. Civ. P. 60(b) motion because Beattie failed to demonstrate any grounds warranting such relief. *See id.* at 1100-03 (discussing grounds for relief under Rule 60(b), and explaining that Rule 60(b)(6) relief is granted "only where extraordinary circumstances" are present (citations and quotation marks omitted)). Contrary to Beattie's contention, *Andres v. Marshall*, 867 F.3d 1076 (9th Cir. 2017) (*per curiam*), is factually distinguishable from his case.

We do not consider Beattie's contentions concerning the merits of the underlying case because "[a]n appeal from a denial of a Rule 60(b) motion brings up only the denial of the motion for review, not the merits of the underlying judgment." *Molloy v. Wilson*, 878 F.2d 313, 315 (9th Cir. 1989).

All pending motions are denied.

AFFIRMED.

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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 MICHAEL LOUIS BEATTIE,
12 Plaintiff,
13 v.
14 L. ROMERO; et al.,
15 Defendants.

Case No.: 3:14-cv-01448-H-JMA

ORDER DENYING RULE 60(b)(6)
MOTION

[Doc. No. 29]

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17 On June 13, 2014, Plaintiff Michael Louis Beattie (“Plaintiff”) filed a civil rights
18 action, pursuant to 42 U.S.C. § 1983, against correctional officers L. Romero, I. Marquez,
19 and I. Ugalde (“Defendants”) alleging excessive use of force. (Doc. No. 1.) On October
20 14, 2014, Defendants filed a pre-answer motion for summary judgment, arguing Plaintiff
21 failed to exhaust his administrative remedies prior to filing suit, as required by the Prison
22 Litigation Reform Act (“PLRA”), 42 U.S.C. § 1997e(a). (Doc. No. 10.) On December 8,
23 2014, the Court granted Defendants’ motion for summary judgment. (Doc. No. 16.) On
24 the record before it, the Court found that Plaintiff had not exhausted his administrative
25 remedies. (*Id.* at 6.) Plaintiff timely appealed the Court’s decision. (Doc. No. 18.)

26 On April 20, 2016, the Court of Appeals for the Ninth Circuit affirmed this Court’s
27 decision granting summary judgment to Defendants because Plaintiff failed to exhaust his
28 administrative remedies. *Beattie v. J. Romero et al.*, No. 15-55034 slip op. at 2 (9th Cir.

1 April 20, 2016). On October 4, 2016, the Ninth Circuit denied Plaintiff's motion to
 2 rehear the matter en banc. (Doc. No. 23.) On October 24, 2016, the Ninth Circuit issued
 3 its mandate, affirming the grant of summary judgment to Defendants. (Doc. No. 27.)

4 On May 8, 2017, Plaintiff filed a motion, pursuant to Federal Rule of Civil
 5 Procedure 60(b), to amend the Court's judgment granting summary judgment to
 6 Defendants. (Doc. No. 29.) Plaintiff argues a recent Ninth Circuit case, Andres v.
 7 Marshall, No. 15-56057 (9th Cir. April 21, 2017), shows the Court erred by granting
 8 summary judgment to Defendants. Thus, Plaintiff argues the Court should vacate its
 9 prior judgment.

10 ANALYSIS

11 Federal Rule of Civil Procedure 60(b) lists when a party may seek relief from a
 12 final judgment. Fed. R. Civ. P. 60(b)(1-6). The first three bases for relief are unavailable
 13 to Plaintiff because more than a year has passed since the grant of summary judgment.
 14 Fed. R. Civ. P. 60(c)(1). Similarly, relief is unavailable under (b)(4) and (b)(5) as
 15 Plaintiff has not presented any arguments regarding why the judgment is void, satisfied,
 16 or inequitable. Fed. R. Civ. P. 60(b)(4), (5). Thus, Plaintiff's only possible avenue of
 17 relief is pursuant to Rule 60(b)(6).

18 Federal Rule of Civil Procedure 60(b)(6) allows a district court to provide relief
 19 from final judgment for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6).
 20 However, "[j]udgments are not often set aside under Rule 60(b)(6). Rather the Rule is
 21 used sparingly as an equitable remedy to prevent manifest injustice." Latshaw v. Trainer
 22 Wortham & Co., Inc., 452 F.3d 1097, 1103 (9th Cir. 2006). Courts must be wary of
 23 using Rule 60(b)(6) "to circumvent the strong public interest in timeliness and finality."
 24 Flores v. Arizona, 516 F.3d 1140, 1163 (9th Cir. 2008) (rev'd on other grounds). To
 25 justify relief under Rule 60(b)(6) a party must show "extraordinary circumstances."
 26 Gonzalez v. Crosby, 545 U.S. 524, 536 (2005); Washington v. Ryan, 833 F.3d 1087,
 27 1099 (9th Cir. 2016). A district court's decision to deny a motion for reconsideration is
 28

1 reviewed for abuse of discretion. Phelps v. Alameida, 569 F.3d 1120, 1131 (9th Cir.
2 2009).

3 Plaintiff argues that reconsideration is merited here in light of the Ninth Circuit's
4 subsequent decision in Andres, No. 15-56057, which relied on a recent Supreme Court
5 case, Ross v. Blake, 136 S.Ct. 1850 (2016). Plaintiff argues these decisions, published
6 after the Ninth Circuit affirmed this Court's decision granting summary judgment to
7 Defendants, justify relief under Rule 60. (Doc. No. 29 at 5.) Plaintiff is wrong because
8 the Ninth Circuit's decision in Andres is factually distinct and would not affect the
9 outcome in this case.

10 In Andres, a California state prisoner brought a federal § 1983 claim against a
11 correctional officer for excessive use of force. Andres, No. 15-56057, slip op. at 3. The
12 alleged excessive force occurred on January 23, 2013 and Andres filed an administrative
13 grievance two days later. Id. Andres never received a response to his grievance and filed
14 his federal suit on July 24, 2013, arguing his administrative remedies were effectively
15 unavailable. Id. at 4. While the federal suit was proceeding, a California state court held
16 an evidentiary hearing in a parallel state action and found that Andres had timely filed a
17 grievance and the prison administration failed to process it. Id. at 4, 6. The Ninth Circuit
18 treated the state court documents as part of the record on appeal and relied on those
19 factual findings to conclude that Andres had exhausted his available administrative
20 remedies. Id. at 6. As the Ninth Circuit explained it:

21 The state habeas court held an evidentiary hearing and found that defendants
22 improperly failed to process Andres' timely filed grievance. Under the
23 circumstances present here, Andres exhausted his available administrative
24 remedies prior to filing suit, thereby satisfying *Ross* and *McKinney*.

25 Id.

26 Here, unlike in Andres, Plaintiff never established that he took the necessary steps
27 to exhaust his administrative remedies or that Defendants' actions rendered those
28 remedies unavailable. In California prisons, administrative exhaustion requires

1 proceeding through three levels of review. Cal. Code Regs. Tit. 15, §§ 3084.2(a),
2 3084.7(a)-(d) (Jan 1, 2014). A final decision from the third level of review exhausts
3 administrative remedies under 42 U.S.C. § 1997e(a). See Lira v. Herrera, 427 F.3d 1164,
4 1166-67 (9th Cir. 2005). At summary judgment, the Court concluded that Plaintiff had
5 not exhausted his administrative remedies because he did not submit a third level appeal.
6 (Doc. No. 16 at 6.) Although Plaintiff alleges he submitted a third level appeal to the
7 Office of Appeals, the Court held that Plaintiff failed to meet his burden of establishing a
8 material question of fact existed. (Doc. No. 16 at 6). As the Court explained at the time:

9 On the record before the Court, Plaintiff has not exhausted his administrative
10 remedies. Defendants' evidence shows that Plaintiff did not obtain a
11 decision at the third level of review, as required to exhaust administrative
12 remedies. Furthermore, Defendants provide evidence that there is no record
13 of Plaintiff sending legal mail to the third level appeals office on or around
14 the date the he claims he used the legal mail process. Plaintiff's self-serving
15 allegations do not rebut this evidence. Furthermore, Plaintiff did not provide
16 the Court with any documents to support his assertion.

17 (Id.)

18 The fact that Plaintiff was unable to set forth facts supporting the conclusion that
19 he submitted a third level appeal distinguishes this case from Andres. There, the state
20 court established that Andres attempted to avail himself of his administrative remedies
21 but those remedies were rendered unavailable by defendants' actions. Here, there are no
22 facts to support a similar conclusion. Plaintiff did not show he submitted a third level
23 appeal, nor that it was rendered unavailable by Defendants' actions. As such, Andres is
24 inapposite and offers Plaintiff no relief.

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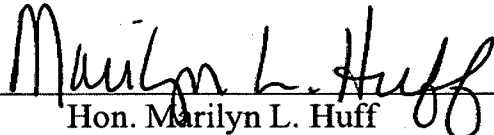
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CONCLUSION

Contrary to Plaintiff's assertions, Andres is distinguishable. There, a state court held an evidentiary hearing and found that the plaintiff had properly submitted a grievance and it was ignored by defendants. Here, in contrast, Defendants offered evidence showing Plaintiff never submitted a third level appeal and Plaintiff was unable to set forth facts sufficient to raise a material question. Thus, there was no basis for the Court to conclude Plaintiff exhausted his available administrative remedies. As the Ninth Circuit's decision in Andres does not change the outcome here, it is not an "extraordinary circumstance" and the Court denies Plaintiff's Rule 60(b) motion.

IT IS SO ORDERED.

DATED: May 19, 2017


Hon. Marilyn L. Huff
United States District Judge

**Additional material
from this filing is
available in the
Clerk's Office.**