

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAY 15 2023

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

ASMEROM GEBRESELASSIE,

Petitioner-Appellant,

v.

SCOTT FRAUENHEIM, Warden,

Respondent-Appellee.

No. 21-16843

D.C. No. 3:16-cv-06195-WHO
Northern District of California,
San Francisco

ORDER

Before: CANBY and SUNG, Circuit Judges.

Appellant's motion for an extension of time to file a motion for reconsideration (Docket Entry No. 18) is granted.

Appellant's combined motion for reconsideration and motion for reconsideration en banc (Docket Entry No. 20) is deemed timely filed.

The motion for reconsideration is denied and the motion for reconsideration en banc is denied on behalf of the court. *See* 9th Cir. R. 27-10; 9th Cir. Gen. Ord. 6.11.

No further filings will be entertained in this closed case.

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D.C. No. 3:16-cv-06195-WHO
Northern District of California,
San Francisco

ORDER

Before: BUMATAY and VANDYKE, Circuit Judges.

This appeal is from the denial of appellant's post-judgment motions. The request for a certificate of appealability (Docket Entry No. 15) is denied because appellant has not shown that (1) jurists of reason would find it debatable whether the district court abused its discretion in denying the motions and, (2) jurists of reason would find it debatable whether the underlying motions state a valid claim of the denial of a constitutional right. *United States v. Winkles*, 795 F.3d 1134, 1143 (9th Cir. 2015); *see also* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Lynch v. Blodgett*, 999 F.2d 401, 403 (9th Cir. 1993) (order).

All pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ASMEROM GEBRESELASSIE,

Petitioner,

v.

SCOTT FRAUENHEIM,

Respondent.

Case No. 16-cv-06195-WHO (PR)

**ORDER DENYING MOTION FOR
RECUSAL;**

**ORDER DENYING SECOND
MOTION FOR RELIEF FROM
JUDGMENT;**

**ORDER DENYING MOTION FOR
THE APPOINTMENT OF
COUNSEL;**

**ORDER DENYING MOTION FOR
ENTRY OF DEFAULT JUDGMENT**

Dkt. Nos. 55, 57, 58, 60, 63 and 64

INTRODUCTION

I denied petitioner Asmerom Gebreselassie's 28 U.S.C § 2254 habeas petition in October 2018. (Dkt. Nos. 33 and 34.) His motion for relief from the judgment also was denied. (Dkt. No. 48.) He appealed, but his appeal was terminated when the Ninth Circuit denied his request for a Certificate of Appealability. (Dkt. No. 51.) The Ninth Circuit also denied his motion for reconsideration and declared that "No further filings will be entertained in this closed case." (Dkt. No. 52.) The U.S. Supreme Court denied his petition for writ of certiorari. (Dkt. No. 54.)

Since then, Gebreselassie has filed motions for (i) my recusal; (ii) relief from the judgment; (iii) the appointment of counsel; and (iv) the entry of default judgment.

DISCUSSION

i. Motion for Recusal

Gebreselassie moves for my recusal on grounds that I failed to consider his traverse

1 in reaching my decision. (Dkt. No. 64 at 1-2.) He alleges that his traverse contained
2 evidence and arguments that would entitle him to relief. (*Id.*)

3 Motions to disqualify fall under two statutory provisions, 28 U.S.C. § 144 and
4 28 U.S.C. § 455. Section 144 provides for recusal where a party files a timely and
5 sufficient affidavit alleging both that the judge before whom the matter is pending has a
6 personal bias or prejudice either against the party or in favor of an adverse party and the
7 facts and reasons for such belief. *See* 28 U.S.C. § 144. Similarly, section 455 requires a
8 judge to disqualify himself “in any proceeding in which his impartiality might reasonably
9 be questioned,” 28 U.S.C. § 455(a), including where the judge “has a personal bias or
10 prejudice concerning a party,” *id.* § 455(b)(1).

11 A judge finding a section 144 motion timely and the affidavits legally sufficient
12 must proceed no further and another judge must be assigned to hear the matter. *United*
13 *States v. Sibla*, 624 F.2d 864, 867 (9th Cir. 1980). Where the affidavit is not legally
14 sufficient, however, the judge at whom the motion is directed may determine the matter.
15 *See id.* at 868 (holding judge challenged under section 144 properly heard and denied
16 motion where affidavit not legally sufficient).

17 The substantive test for personal bias or prejudice is identical under sections 144
18 and 455. *See Sibla*, 624 F.2d at 868. Under both statutes, recusal is appropriate where “a
19 reasonable person with knowledge of all the facts would conclude that the judge’s
20 impartiality might reasonably be questioned.” *Yagman v. Republic Ins.*, 987 F.2d 622, 626
21 (9th Cir. 1993) (citation omitted). Consequently, an affidavit filed under section 144 will
22 raise a question concerning recusal under sections 455(a) and (b)(1) as well. *Sibla*, 624
23 F.2d at 867.

24 Gebreselasie’s motion to disqualify me is DENIED. His conclusory allegations
25 fail to provide any fact or reason on which a reasonable person would conclude that my
26 impartiality might reasonably be questioned, or that otherwise indicate any bias or
27 prejudice. Furthermore, as a general matter, merely ruling against Gebreselasie is not
28 sufficient to show prejudice or bias. *See Liteky v. United States*, 510 U.S. 540, 555 (1994)

(holding judicial rulings on basis of facts introduced or events occurring in course of judicial proceedings “almost never” provide grounds for recusal); *Sibla*, 624 F.2d at 868 (holding affidavit not legally sufficient unless it alleges facts demonstrating bias or prejudice that “stems from an extrajudicial source”). Bias or prejudice cannot be shown here merely because I denied the petition, which was a ruling in the course of judicial proceedings.

ii. Motion for Reconsideration

This is Gebreselassie’s second motion for relief from the judgment. (Dkt. No. 55.) Where, as here, the court’s ruling has resulted in a final judgment or order, a motion for reconsideration may be based either on Rule 59(e) or Rule 60(b) of the Federal Rules of Civil Procedure. “Under Rule 59(e), it is appropriate to alter or amend a judgment if ‘(1) the district court is presented with newly discovered evidence, (2) the district court committed clear error or made an initial decision that was manifestly unjust, or (3) there is an intervening change in controlling law.’” *United Nat. Ins. Co. v. Spectrum Worldwide, Inc.*, 555 F.3d 772, 779 (9th Cir. 2009) (quoting *Zimmerman v. City of Oakland*, 255 F.3d 734, 740 (9th Cir. 2001)).

Rule 60(b) provides for reconsideration where one or more of the following is shown: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence that by due diligence could not have been discovered before the court’s decision; (3) fraud by the adverse party; (4) voiding of the judgment; (5) satisfaction of the judgment; (6) any other reason justifying relief. *See* Fed. R. Civ. P. 60(b); *School Dist. 1J v. ACandS Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). Although couched in broad terms, subparagraph (6) requires a showing that the grounds justifying relief are extraordinary. *See Twentieth Century-FoxFilm Corp. v. Dunnahoo*, 637 F.2d 1338, 1341 (9th Cir. 1981).

Gebreselassie’s motion for reconsideration contains claims regarding the denial of trial counsel of his choice. These claims were raised in the petition, (Dkt. No. 1 at 92), in the traverse, (Dkt. No. 31-7 at 14-16; Dkt. No. 31-8 at 1-15; Dkt. No. 31-9 at 1-16), and in Gebreselassie’s first motion for relief from the judgment, (Dkt. No. 39 at 48-80); they were

1 addressed in the order denying the petition (Dkt. No. 33 at 18-20) and in the order denying
2 the first motion for relief from the judgment, (Dkt. No. 48 at 6-7).

3 The current motion contains no showing of newly discovered evidence or that I
4 committed clear error or made an initial decision that was manifestly unjust, or that there
5 was an intervening change in controlling law. *See* Fed. R. Civ. P. 59(e); *United Nat. Ins.*
6 *Co. v. Spectrum Worldwide, Inc.*, 555 F.3d 772, 779 (9th Cir. 2009) (quoting *Zimmerman*
7 *v. City of Oakland*, 255 F.3d 734, 740 (9th Cir. 2001)). Nor does the motion contain a
8 showing of newly discovered evidence nor set forth any mistake, inadvertence, surprise,
9 excusable neglect, fraud by the adverse party, or voiding of the judgment. Plaintiff offers
10 no other reason justifying relief. *See* Fed. R. Civ. P. 60(b); *School Dist. 1J v. ACandS Inc.*,
11 5 F.3d 1255, 1265 (9th Cir. 1993). Accordingly, the motion for relief from the judgment is
12 DENIED. (Dkt. Nos. 55 and 58.)

13 **iii. Motion for the Appointment of Counsel**

14 Because there are no grounds justifying relief from the judgment, Gebreselassie's
15 motion for the appointment of counsel is DENIED. (Dkt. Nos. 57 and 60.)

16 **iv. Motion for the Entry of Default Judgment**

17 Gebreselassie filed a motion for default judgment, which the Clerk denied. (Dkt.
18 Nos. 61 and 62.) He filed a second motion for default judgment. (Dkt. No. 63.) In it, he
19 contends default judgment should be entered because respondent failed to respond to his
20 motion for reconsideration in violation of Rule 12. (*Id.* at 1-2.) Rule 12 does not require
21 respondent to file a responsive pleading to a motion for reconsideration. Unlike a petition
22 or a complaint, a motion for reconsideration is not a pleading and therefore does not
23 require a responsive pleading. The motion is DENIED.

24 **CONCLUSION**

25 A certificate of appealability will not issue. Gebreselassie has not shown "that
26 jurists of reason would find it debatable whether the petition states a valid claim of the
27 denial of a constitutional right and that jurists of reason would find it debatable whether
28 the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473,

1 484 (2000).

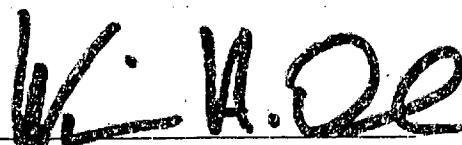
2 No further filings will be accepted in this closed case, other than a Notice of
3 Appeal from this Order. If Gebreselassie wishes to file a new and separate federal
4 habeas suit in this court, he is free to do so. What he may not do is file anything further in
5 the present suit, other than a Notice of Appeal from this Order.

6 Gebreselassie is informed that before he can file a second or successive petition in
7 this court, he must obtain an order from the Ninth Circuit Court of Appeals authorizing this
8 court to consider the petition. 28 U.S.C. § 2244(b)(3)(A).

9 The Clerk shall terminate all pending motions and shall not accept any further
10 filings of any kind in this suit, other than a Notice of Appeal from this Order. All other
11 filings, letters, notices, motions or requests (including applications to proceed *in forma*
12 *pauperis* on appeal and a motion to appoint counsel) must be filed in the Ninth Circuit
13 Court of Appeals, not in this court.

14 **IT IS SO ORDERED.**

15 Dated: October 13, 2021

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17 WILLIAM H. ORRICK
18 United States District Judge
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United States District Court
Northern District of California