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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

MARCUS R. ABBE, et al.,

Plaintiffs,

vs.

CITY OF SAN DIEGO,

Defendant.

CASE NO. 05cv1629 DMS (RBB)
06cv0538 DMS (RBB)

**ORDER DENYING PLAINTIFFS'
MOTION FOR RELIEF UNDER
FEDERAL RULE OF CIVIL
PROCEDURE 60(b)**

Pending before the Court is Plaintiffs' motion under Federal Rule of Civil Procedure 60(b)(5) and (6) for relief from order taxing costs. Defendant has filed an opposition and the moving Plaintiffs replied. For the reasons which follow, the motion is denied.

This wages and hours action was filed collectively by more than 1,409 San Diego police officers. After the City prevailed on the merits, it sought a cost award. On September 11, 2009, the Clerk granted in part the City's request for costs, and on December 16, 2009, this Court denied Plaintiffs' motion to retax costs. The final cost award was \$208,402.71. Although this is a collective action, Plaintiffs did not seek to determine whether the award was several, as opposed to joint and several, and the relevant orders are silent on this point.

If the award is several, each of the 1,409 Plaintiffs is individually responsible only for his or her own share, or \$147.91. If the award is joint and several, than any one Plaintiff can be held

1 responsible for the entire award. Plaintiffs concede that when, as here, the cost award is silent on the
2 issue, the award is presumed to be joint and several. (Mot. at 5.) They seek relief from the December
3 16, 2009 order, so that each of them would be responsible only for \$147.91.¹

4 Plaintiffs appealed the merits of their case. During the pendency of the appeal, the Ninth
5 Circuit issued *Bamonte v. City of Mesa*, 598 F.3d 1217 (9th Cir. 2010), which adversely affected
6 Plaintiffs' appeal. Shortly thereafter, between April 20 and July 29, 2010, almost all (1,266 out of
7 1,409) Plaintiffs settled and dismissed their appeals. The stipulations of dismissal provided in
8 pertinent part that

9 each party [is] to bear its own costs and attorney's fees. This stipulation is without
10 prejudice to the City's right to collect and/or pursue costs and attorney's fees as to
plaintiffs/appellants not party to this stipulation.

11 (Pls' Exs. 5-10 (stipulations); Def.'s Ex. 7 (drafted by Mr. Conger).) On April 28, 2010, shortly after
12 the first stipulation of dismissal was submitted to the Court of Appeals, Gregory G. Petersen,
13 Plaintiffs' counsel at trial and initially on appeal, filed an opposition to the stipulations of dismissal.
14 (Def.'s Req. for Jud. Notice Ex. 1.) One of the facts noted in the opposition was the urging of
15 Plaintiffs' present counsel that they should dismiss their appeals to avoid having to pay "thousands
16 of dollars in costs." (*Id.* at 14.) Nevertheless, the stipulated dismissals were subsequently entered.
17 The remaining appeals proceeded without success before the Court of Appeals. On January 9, 2012,
18 the United States Supreme Court denied review.

19 On April 10, 2013, the City started to collect the \$208,402.71 cost award from the 143
20 Plaintiffs who did not settle on appeal. The City took the position that the award was joint and
21 several, but offered to settle each remaining Plaintiff's cost obligation on a pro-rata basis by accepting
22 a payment of \$1,457.36 (the entire cost award divided by 143) to avoid other expenses and
23 consequences associated with collection. (Pls' Exs. 11-13.) The offer was open for 60 days. (*Id.*)
24 With their counsel's assistance, most of the 143 Plaintiffs accepted the City's offer and made payments
25 as agreed. (Mot. at 3; Def.'s Exs. 4 & 5.) On May 17, 2013, when submitting payment on behalf of

26 ¹ The four moving Plaintiffs seek this relief not only on their own behalf but also on
27 behalf of all other Plaintiffs who were subject to the City's effort to collect on the cost award.
28 Because this is not a class action, and the counsel represents only the four moving Plaintiffs, the
request on behalf of other Plaintiffs is improper.

1 the moving Plaintiffs, their counsel expressly stated that the City's offer "was accepted." (Def.'s Ex.
2 5.) Separately, prior to and after acceptance and payment, he also indicated that Plaintiffs intended
3 to seek relief by way of the pending motion. (Pls.' Exs. 15 - 17.) The pending motion was filed on
4 August 21, 2013.

5 The City argues the motion should be denied as untimely because it should have been brought
6 under Rule 60(b)(1), which must be filed within a year after entry of the order from which relief is
7 sought. Fed. R. Civ. Proc. 60(c)(1); *see also Corn v. Guam Coral Co.*, 318 F.2d 622, 629 (9th Cir.
8 1963) (the time limit for Rule 60(b) motions begins to run with the entry of the order from which relief
9 is sought). Rule 60(b)(1) allows for relief for reasons of "mistake, inadvertence, surprise, or excusable
10 neglect." Plaintiffs do not deny that their predicament stems from their mistake, inadvertence or
11 neglect in failing to raise the issue of apportionment in their filings before the final cost award order
12 was issued or on appeal. (*See Reply at 3.*) Based on Rule 60(b)(1), the motion is untimely.

13 Moreover, Plaintiffs cannot circumvent the one-year statute of limitations by styling their
14 motion under Rule 60 (b)(5) or (6), because the six subsections of Rule 60(b) are "mutually
15 exclusive." *Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847, 863 & n.11 (1988). A motion
16 properly brought under subsection (b)(1), cannot also be brought under (b)(5) or (6). Accordingly,
17 Plaintiffs' motion is denied as untimely because it was not brought within one year as required for
18 motions under subsection (b)(1).

19 Alternatively, the City maintains the motion should be denied as untimely because it was not
20 brought within a "reasonable time" as required for Rule 60(b)(5) and (6) motions. *See Fed. R. Civ.*
21 *Proc. 60(c).* "What constitutes reasonable time depends on the facts of each case. The facts are
22 analyzed to determine whether the [opposing party] was prejudiced by the delay and whether [the
23 moving party] had a good reason for failing to take the action sooner." *United States v. Holtzman*, 762
24 F.2d 720, 725 (9th Cir. 1985) (citations omitted).

25 The pending motion was filed more than three and a half years after the cost award order.
26 Plaintiffs contend it is timely because it was brought within a reasonable time after the change in
27 circumstances, *i.e.*, commencement of the City's collection efforts. But the issue of Plaintiffs'
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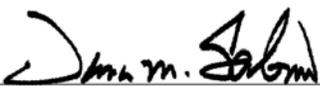
1 exposure to the cost award was raised long before the City commenced collection, yet they chose not
2 to take action. In April 2010, when their counsel advocated dismissing the appeals and drafted the
3 stipulations with the City's reservation of rights, the issue of costs was raised in the stipulations, yet
4 no effort was made to resolve the issue of the non-settling Plaintiffs' exposure to "thousands of dollars
5 in costs." Subsequently, the issue could have been addressed when the appeals were denied in January
6 2012. Finally, the issue was unambiguously brought to Plaintiffs' attention in April 2013 (more than
7 four months before the motion was filed), when the City commenced its collection efforts.
8 Nevertheless, instead of immediately filing their motion, Plaintiffs entered into a settlement agreement
9 with the City and paid the agreed amount. Accordingly, Plaintiffs had no good reason to delay filing
10 the subject motion for more than three and a half years after entry of the City's cost award.

11 On the other hand, the City is prejudiced by the delay. On appeal, it settled with 1,266
12 Plaintiffs with the understanding that it would be able to collect the entire cost award from the
13 remaining Plaintiffs. Had Plaintiffs raised the issue in a timely manner, the City would have had an
14 opportunity to settle on different terms or decline to settle altogether.

15 For the foregoing reasons, Plaintiffs' motion is denied as untimely.

16 **IT IS SO ORDERED.**

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18 DATED: October 29, 2013

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21 HON. DANA M. SABRAW
22 United States District Judge
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