UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

REINALDO GARCIA, et al., Plaintiffs,	:	CIVIL ACTION NO. 3:15-cv-00597-AWT
V.	:	
WINTHROP FRY Defendant.	: :	MAY 25, 2016

DEFENDANT'S MEMORANDUM IN OPPOSITION TO MOTION FOR RECONSIDERATION

Pursuant to L.Civ.R. 7(a)(1), the Defendant hereby submits this memorandum of law in opposition to Plaintiff's Motion for Reconsideration dated May 24, 2016 (Doc. No. 40) ("Plaintiff's Motion"). For the reasons set forth below, the motion should be denied.

STANDARD OF REVIEW

As this Court has noted,

> The standard for granting a motion for reconsideration is strict. Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir.1995) (internal citations omitted). "A motion for reconsideration may not be used to plug gaps in an original argument or to argue in the alternative once a decision has been made." SPGGC, Inc. v. Blumenthal, 408 F.Supp.2d 87, 91 (D.Conn.2006) (internal citation and quotation marks omitted). "It is also not appropriate to use a motion to reconsider solely to re-litigate an issue already decided." Id. "A motion for reconsideration may not be used to advance new facts, issues or arguments not previously presented before the Court, nor may it be used as a vehicle for relitigating issues already decided by the Court." Davidson v. Scully, 172 F.Supp.2d 458, 461 (S.D.N.Y.2001). *See also* Nat'l Union Fire Ins. Co. of Pittsburgh v. Stroh Cos., Inc., 265 F.3d 97, 115 (2d Cir.2001) (noting that arguments raised for the first time on a motion for reconsideration may be rejected as untimely).

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Connecticut Commissioner of Labor v. Chubb Group of Insurance Companies, No. 3:11cv00997, 2013 WL 836633 *1 (D.Conn, March 6, 2013).

ARGUMENT

In his Memorandum in Support of Plaintiff's Motion to Reconsider (Doc. No. 40-1) (**"Mem. Reconsider"**), Plaintiff simply regurgitates the same arguments made in his Opposition to Motion for Judgment on the Pleadings (Doc. No. 26) (**"Plaintiff's Opposition"**). The crux of the Plaintiff's position – that the Defendant admitted that the fax sent to Plaintiff's employer was not an "attempted legal execution on plaintiff's wages", and that he knew he could not fax a wage garnishment outside his jurisdiction – are both addressed on the very first page of both Plaintiff's Opposition and the Mem. Reconsider. Further, the Court addressed this very argument, and found that it did not defeat the "state officer" exemption of the FDCPA:

> Even if, as Garcia alleges, Fry's transmission of fax to an out-of-state entity was not in accordance with Connecticut law, his actions were still performed in the course of his duties as a marshal, a fact that the plaintiff does not dispute.

Ruling on Motion for Judgment on the Pleadings (Doc. No. 36) (**"Ruling"**), p. 8.

Plaintiff attempts to justify reconsideration by arguing that the "Court overlooked controlling law" and that "the Court also overlooked the extensive factual developments (new evidence) reflected in plaintiff's contemporaneous motion for summary judgment."[1] Mem. Reconsider, p.3. Neither argument is accurate, or

[1] In support of his argument, Plaintiff cites to Virgin Atl. Airways, Ltd. V. Nat'l Mediation Bd., 956 F.2d 1245 (2d Cir., 1992) (quoting 18B C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure, § 4478 (2d Ed. 2007)): "The major grounds justifying reconsideration are 'an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'"

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persuasive. First, Plaintiff argues that the Court overlooked the case of Romea v. Heiberger & Assocs., 163 F.3d 111, 117 (2d. Cir., 1998), for the proposition that Marshal Fry is not a "process server" entitled to exemption under 15 U.S.C. § 1692a(6)(D). In Romea, defendant law firm sent plaintiff a "three-day notice" seeking payment of back rent under New York's summary process statute, N.Y. Real Prop. Acts. Law § 711. The Court determined that the three-day notice was not part of a legal proceeding, but rather a statutory prerequisite to commencement of a legal proceeding, and therefore not "legal process" under § 1692a(6)(D). Romea, 163 F.3d at 116. The Court also noted that "Congress intended to apply the exemption only to 'process servers,' and not to those who prepared the communication that was served on the consumer." Id., at 117. Thus Romea is clearly distinguishable from the instant case: Marshal Fry was state marshal acting as a "process server" and engaged in the service of legal process, i.e., a post-judgment wage execution issued by the Superior Court. Further, rather than overlooking Romea, the Court actually cites to it as authority. *See* Ruling, pp. 8-9.

Second, the "extensive factual developments" referred to by Plaintiff are not "new evidence" at all, but rather simply consist of excerpts from Defendant's Opposition to [Plaintiff's] Motion for Summary Judgment (Doc. No. 29) which restates the facts argued to and considered by the Court in deciding the motion for judgment on the pleadings, i.e., that the fax sent by Marshal Fry "was not meant to constitute service." Mem. Reconsider, pp. 3-4.

Simply stated, there is nothing the Plaintiff has raised in his motion for

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reconsideration that warrants the granting of same: no new law, no new facts, and no exposition of controlling law overlooked by the Court. For these reasons, the motion should be denied.

RESPECTFULLY SUBMITTED
THE DEFENDANT

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2016, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system, or by mail to those listed below who are unable to accept electronic filing, as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

_____
Joseph B. Burns

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