[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-10212
Non-Argument Calendar

D.C. Docket No. 5:11-cv-00525-WTH-PRL

BEE'S AUTO, INC.,
a Florida corporation,
WAYNE E. WEATHERBEE,

Plaintiffs - Appellants,

versus

CITY OF CLERMONT,

Defendant - Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(September 3, 2015)

Before MARTIN, JILL PRYOR and ANDERSON, Circuit Judges.

PER CURIAM:

Bee's Auto, Inc. and Wayne E. Weatherbee[1] (collectively, "Bee's Auto") appeal the district court's denial of their motion for partial reconsideration and to alter the district court's judgment under Federal Rule of Civil Procedure 59(e). After careful consideration, we affirm.

I.

Bee's Auto brought this action under 42 U.S.C. § 1983 asserting that the City of Clermont, Florida had violated its constitutional rights by prohibiting it from operating an automobile repair shop and storage facility. Bee's Auto purchased a parcel of land in the City in February 2006 and planned to operate its automobile repair business there, but the City asserted that its zoning rules prohibited the operation of an automobile repair shop on the land that Bee's Auto owned.

Bee's Auto sued the City alleging that its enforcement of its zoning law violated Bee's Auto's procedural and substantive due process rights and constituted an inverse condemnation of property. Bee's Auto also brought a state law claim for equitable estoppel to stop the City from enforcing its zoning law.[2]

The City moved for summary judgment on these claims. In its brief, the City argued that pursuant to a 1991 amendment to the City's Comprehensive Plan

[1] Mr. Weatherbee is the owner and president of Bee's Auto, Inc.

[2] Bee's Auto also alleged that the City prohibited it from posting signs on the property complaining about the City's government, in violation of the First Amendment. The First Amendment claim is not before the Court on appeal.

Future Land Use Element (the "Plan") an automobile repair shop could not operate on the land owned by Bee's Auto and that this zoning requirement applied to Bee's Auto because it had acquired the land after 1991. Bee's Auto's response did not address the 1991 amendment in any way and presented no argument that the 1991 amendment was improperly enacted. The district court granted summary judgment to the City on the claims related to the zoning of the property because the Plan had prohibited the operation of automobile repair business on the property since 1991, and because Bee's Auto could have applied for a conditional use permit to operate an automobile repair business on its land but refused to do so.[3]

Shortly after the district court entered final judgment,[4] Bee's Auto filed a motion for partial reconsideration under Federal Rule of Civil Procedure 59(e). Bee's Auto asked the district court to reconsider the grant of summary judgment based on newly discovered evidence that showed, according to Bee's Auto, that the City had not properly enacted the 1991 amendment to its Plan. The new evidence consisted of a legal advertisement that the City placed in the *South Lake Press*, a local weekly newspaper. According to Bee's Auto, the notice shows that the City failed to hold two public hearings or to give notice more than 14 days before

[3] In 2007, the City amended the Plan via ordinance, specifically allowing an automotive repair service on the property provided that Bee's Auto applied for a conditional use permit.

[4] The district court denied summary judgment to the City on Bee's Auto's First Amendment claim, and the parties continued to litigate issues related to that claim. The district court entered final judgment in July 2014.

enacting the 1991 amendment, as required under Florida law and the City's code; thus, the 1991 amendment was never validly enacted. Bee's Auto obtained a copy of the City's advertisement by reviewing archived copies of the newspaper from a local library.

In its motion for reconsideration, Bee's Auto asserted that it had not previously discovered this evidence because the City had spoliated evidence by destroying files that could have contained copies of the advertisement. In October 2011, the City purged a large collection of old records, which included files described as "Advertisements: Legal" dating from December 28, 1916 through September 30, 2010. Bee's Auto assumes that a copy of the advertisement giving notice of the 1991 amendment was in the files that were destroyed. Bee's Auto learned about the destruction of the records because it obtained a copy of a "Records Disposition List" created by the City that catalogued the categories of records it was destroying. Bee's Auto has not explained how it obtained the Records Disposition List or why it did not raise a spoliation argument prior to the entry of final judgment.

More than a year before Bee's Auto filed this lawsuit, it sent a cease and desist letter to the City directing it not to destroy its files. Bee's Auto reminded the City that under Florida law it could destroy public records only pursuant to an established retention schedule established by the State. *See* Fla. Stat. § 257.36(6).

At the time it sent the letter, Bee's Auto had a separate lawsuit pending against the City in federal court and warned the City that if it destroyed documents that could be relevant Bee's Auto's claims in that case, it could be sanctioned.

The district court denied Bee's Auto's motion for reconsideration in a short order. This is Bee's Auto's appeal.

II.

We review the district court's denial of a Rule 59 motion to alter or amend a judgment for abuse of discretion. *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 957 (11th Cir. 2009). A court abuses its discretion only "if it makes a clear error of judgment or applies an incorrect legal standard." *Bradley v. King*, 556 F.3d 1225, 1229 (11th Cir. 2009). We readily conclude that the district court did not abuse its discretion here.

A district court may grant a Rule 59(e) motion to alter or amend a judgment only when there is "newly-discovered evidence or manifest errors of law or fact." *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1344 (11th Cir. 2010) (internal quotation marks omitted). In other words, a Rule 59(e) motion cannot be used "to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." *Michael Linet, Inc. v. Vill. of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005). Bee's Auto argues that the district court

abused its discretion when it denied the Rule 59(e) motion because there was newly discovered evidence.

When a party moves for reconsideration under Rule 59(e) based on newly discovered evidence, a district court "should not grant the motion absent some showing that the evidence was not available during the pendency of the motion." *Mays v. United States Postal Serv.*, 122 F.3d 43, 46 (11th Cir. 1997) (per curiam). If the evidence was available while the motion was pending, then the movant must show that "counsel made a diligent yet unsuccessful effort to discover the evidence." *Chery v. Bowman*, 901 F.2d 1053, 1057 n.6 (11th Cir. 1990).

III.

Bee's Auto's newly discovered evidence consists of an advertisement that the City placed in a weekly newspaper in 1991 and the Records Disposition List.[5] Bee's Auto has failed to show that this newly discovered evidence was unavailable during the pendency of the summary judgment motion. Bee's Auto located copies of the advertisement by searching archived editions of a local newspaper that were kept in the local library; there is no indication whatsoever that this advertisement was unavailable while the summary judgment motion was pending. The Records

[5] Bee's Auto also relies on a third piece of newly discovered evidence, which is an agenda for a City council meeting from February 1991. We note that Bee's Auto has offered no evidence or explanation about when or how it located this document. Because it has not argued that the document was not previously available or that it was diligent in locating the document, the agenda is not newly discovered evidence.

Disposition List, which was created in October 2011, also existed while the summary judgment motion was pending, and Bee's Auto has presented no argument that the document was unavailable to it.

Now, we must consider whether Bee's Auto's counsel acted with diligence to discover these documents. As to the advertisement, Bee's Auto argues that its counsel was diligent because he sent the City a document preservation letter in another case in which Bee's Auto sued the City and because the City should have produced a copy of the advertisement during discovery in this case. Essentially, the thrust of Bee's Auto's argument is that its counsel had no way of knowing that the City's document production was incomplete.

We cannot say that the district court abused its discretion given the record evidence regarding diligence. It is clear that Bee's Auto never searched for the advertisements that the City placed in connection with the 1991 amendment until after the district court entered final judgment. But the City argued in its motion for summary judgment—filed nearly two years before the district court entered final judgment—that an automobile repair shop could not be operated on the land Bee's Auto owned under a 1991 amendment to the Plan. Upon receiving the City's summary judgment brief, Bee's Auto knew (or should have known) that to survive summary judgment it needed to explain why the 1991 amendment to the Plan did not apply. At that point, Bee's Auto could have searched the City's legal

advertisements from 1991 to determine whether the City had complied with state law and city ordinances requiring it to provide public notice before changing zoning rules. The City's document production did not excuse Bee's Auto from searching publicly available documents, like old copies of old local newspapers kept at the local library. Instead Bee's Auto chose to ignore the City's arguments about the 1991 amendment at the summary judgment stage, waiting until after the district court entered final judgment to introduce evidence from publicly available documents about the amendment.

Bee's Auto tries to blame the City for destroying evidence, but it has not shown that it was diligent in raising the spoliation of evidence argument. Although Bee's Auto asserts that it first learned from the Records Disposition List that the City had destroyed evidence, it has presented no evidence identifying the steps it took to obtain the Records Disposition List prior to the entry of final judgment or showing when it obtained the Records Disposition List. Because Bee's Auto has failed to explain why it was unable to raise the spoliation argument prior to the entry of final judgment, we simply cannot say that its efforts to discover the evidence were diligent. Thus, the district court did not abuse its discretion when it denied the Rule 59(e) motion.

IV.

For the foregoing reasons, we affirm the district court's judgment.

AFFIRMED.