IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

CHRISTOPHER KING, J.D. d/b/a KINGCAST/MORTGAGE MOVIES,	:	C.A. No: K15C-03-028 RBY
Plaintiff,	:	
v.	:	
BETTY LOU McKENNA, HOLLY MALONE and JOHN W. PARADEE, ESQ.	:	
Defendants.	:	

Submitted: August 18, 2015
Decided: August 24, 2015

Upon Consideration of Plaintiff's Motion to Alter or Amend Judgment
DENIED

Upon Consideration of Plaintiff's Motion for Relief from Judgment
DENIED

Upon Consideration of Defendants' Motion for Judgment on the Pleadings
GRANTED

ORDER

Christopher King, *Pro se.*

Joseph S. Shannon, Esquire, Marshall Dennehey Warner Coleman & Goggin, Wilmington, Delaware for Defendants Betty Lou McKenna and Holly Malone.

John A. Elzufon, Esquire, and Peter C. McGivney, Esquire, Elzufon Austin Tarlov & Mondell, P.A., Wilmington, Delaware for Defendant John W. Paradee, Esq.

Young, J.

King v. McKenna, et. al.
C.A. No.: K15C-03-028
August 24, 2015

SUMMARY

Christopher King ("Plaintiff") was denied the ability to film inside the Kent County Recorder of Deeds ("Recorder of Deeds") office by the allegedly coordinated, joint action of Betty Lou McKenna, the incumbent Kent County Recorder of Deeds ("Defendant McKenna"), Holly Malone ("Defendant Malone"), and John W. Paradee, Esq. ("Defendant Paradee," and together with Defendant McKenna and Defendant Malone "Defendants"). By his original Complaint, Plaintiff claimed Defendants' conduct violated the First Amendment, as well as constituted tortious activity. Defendants moved for judgment on the pleadings as to the First Amendment and tort claims. On June 29, 2015, the Court granted their motion. Plaintiff moves to alter or amend this decision, pursuant to Rule 59(d), and for relief from judgment under Rule 60(b).

The Court granted Plaintiff's motion to amend his Complaint, in which Plaintiff added a second constitutional claim alleging a violation of equal protection. Plaintiff's Complaint also added *four* other claims, including claims sounding in conspiracy, violation of the Delaware Freedom of Information Act, and violation of the common law. Defendants, again, move for judgment on the pleadings.

For the reasons that follow, the Court **DENIES** Plaintiff's motion to amend the Court's prior decision, **DENIES** Plaintiff's motion for relief from judgment, and **GRANTS** Defendants' motion for judgment on the pleadings as to Plaintiff's Amended Complaint. Those decisions resolve with finality all matters raised by Plaintiff in this Court, save for Plaintiff's Motion for this Court to recuse itself. Because of the following, that Motion is *moot*, or at least premature.

FACTS AND PROCEDURES

Plaintiff came to the Recorder of Deeds Office seeking to conduct a video recorded interview with Defendant McKenna, or one of her employees, concerning allegedly defamatory statements made against La Mar Gunn, a former candidate for the Recorder of Deeds position. In addition, Plaintiff asserted that he wanted to videotape the interior of the office, and to obtain B-roll footage of Mr. Gunn using the county fiche machines. Plaintiff avers he was also investigating fraudulent documents, allegedly held by the office.

Defendant Malone is said to have prevented Plaintiff from videotaping inside the Recorder of Deeds office. Plaintiff alleges that Malone made two phone calls upon meeting Plaintiff, one to Defendant McKenna, and one to Defendant Paradee. Following these discussions, Malone is alleged to have informed Plaintiff that administrative policy did not permit the videotaping of the office. Plaintiff asserts he was told to leave under threat of arrest. Plaintiff insists no such policy was in existence.[1] At a later date in time, Plaintiff alleges, he was permitted to shoot video in the New Castle County Recorder of Deeds office.

As a result of his thwarted video reporting efforts, Plaintiff brought suit against Defendants. Plaintiff's original Complaint alleged First Amendment violations, as well as claims sounding in tort. Following minimal discovery, both parties filed dispositive motions, the Plaintiff filing a summary judgment motion,

[1] Plaintiff attached as Appendix B to his amended complaint, a letter from Kent County Row Office Attorney Mary Sherlock, Esq., indicating that there is no policy prohibiting video recording.

and Defendants filing a motion for judgment on the pleadings. Plaintiff, then, moved to stay disposition of these motions, pending the completion of discovery. Plaintiff also filed a Rule 11 sanctions motion against Defendants, for their purported failure to respond to a discovery request adequately. A motion to compel was also filed by Plaintiff, which was stayed by Commissioner Freud, pending the Court's resolution of the dispositve motions. Finally, Plaintiff also filed a motion to reconsider Commissioner Freud's decision to prevent Plaintiff from videotaping courtroom proceedings.

By opinion dated June 29, 2015, this Court granted Defendants' motion for judgment on the pleadings, and denied Plaintiff's summary judgment motion, effectively disposing of the claims in Plaintiff's original Complaint. Around the time the Court was reviewing the dispositve motions, Plaintiff moved for amendment of his Complaint, seeking to add a second constitutional claim alleging an equal protection violation. The Court granted Plaintiff's request in this June 29, 2015 opinion, however, the Court made clear that the claims in the original Complaint would be disposed of. This opinion also denied Plaintiff's motion to reconsider the Commissioner's prohibition of videotaping court hearings. By separate Order, the Court denied Plaintiff's motion to stay consideration of the dispositive motions, as well as denied Plaintiff's motion for Rule 11 sanctions.

Subsequently, Plaintiff applied for an interlocutory appeal certification of the Court's June 29, 2015 decision, concerning the First Amendment claims. The Court denied this application on July 30, 2015. On July 15, 2015, Plaintiff filed a

motion to alter or amendment judgment, regarding the Court's June 29th opinion, followed by his Amended Complaint, on July 17, 2015. In addition, Plaintiff filed a Rule 60(b) motion for relief from judgment, on July 27, 2015.Defendants move for judgment on the pleadings as to the Amended Complaint.

DISCUSSION

There are three motions requiring disposition: 1) Plaintiff's motion to alter or amend judgment; 2) Plaintiff's motion for Rule 60 relief from judgment; and 3) Defendants' motion for judgment on the pleadings concerning Plaintiff's Amended Complaint. The Court addresses each in turn.

I. Plaintiff's Motion to Alter or Amend Judgment

Before proceeding to the merits of Plaintiff's motion, the Court notes the controversy surrounding the timeliness of the motion's filing. Plaintiff titled his motion "Motion for Rule 59 Relief from Judgment." Plaintiff did not, however, specify under what subsection of Superior Court Civil Rule 59 he was moving. The significance of this is that each type of Rule 59 motion has a specific timeframe within which it must be filed. Additionally, these subsections carry different legal standards of analysis.

Assuming Plaintiff was moving under Rule 59(e), known as a motion for reargument, Defendants filed a motion to strike, arguing that Plaintiff was out of time. As per Rule 59(e), Plaintiff had 5 days from the issuance of the Court's opinion to file such a motion. Given certain other procedural rules, taking into account Plaintiff's filing by postal mail, as well as interceding holidays, this period was extended to 8 days. Plaintiff filed his motion 10 days after the issuance

of the opinion. Indeed, even if this Court wished to extend the time, it could not. Courts may not enlarge the period of time to file a motion for reargument.[2]

In response, Plaintiff asserts that his motion was pursuant to Rule 59(d): a motion to alter or amend judgment. Plaintiff had 10 days within which to file such a motion. Given the above referenced dates, Plaintiff managed to do so. His motion is, under that theory, timely. Giving Plaintiff the broadest possible leeway, the Court reviews Plaintiff's filing under the motion to alter or amend judgment standard.[3]

In Delaware, a motion to alter or amend judgment pursuant to Superior Court Civil Rule 59(d) will be granted if the movant shows: "(1) an intervening change in controlling law; (2) the availability of new evidence; or (3) the need to correct clear error of law or to prevent manifest injustice."[4] However, "the Court will deny the motion if it merely restates arguments already considered and rejected during the litigation."[5]

By his motion, Plaintiff seeks to amend this Court's disposition of his First

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[2] *State v. Kwalalon*, 2015 WL 4638911, at *2 (Del. Super. Ct. Aug. 3, 2015) ("because [Defendant's] reargument motion is untimely, the Court has no jurisdiction to consider it").

[3] The Court notes that Plaintiff did not provide the standard for his motion in his filing, and his legal analysis is not made pursuant to the requisite standard (or *any* recognizable standard, for that matter). In addition, Defendants' motion in opposition to Plaintiff's filing applies the Rule 59(e), motion for reargument standard.

[4] *Kostyshyn v. Comm'r of Town of Bellefonte*, 2007 WL 1241875, at *1 (Del. Super. Ct. Apr. 27, 2007).

[5] *Paron Capital Mgmt. v. Crombie*, 2012 WL 3206410, at *1 (Del. Ch. Aug. 2, 2012).

Amendment claims. In his original Complaint, Plaintiff alleged a violation of 42 U.S.C. § 1983 by each of the Defendants, as a result of his being denied access to videotape the interior of the Recorder of Deed's office. This Court, following the reasoning of the Third Circuit Court of Appeals,[6] found that the alleged right was one to gather government information. With limited exceptions[7] which the Court found lacking, there is no such recognized First Amendment right to government information.[8] Most importantly, the Third Circuit Court of Appeals and this Court do not find Plaintiff's attempted conduct to be expressive activity protected by the First Amendment.[9] Although other Courts, notably the Eleventh Circuit Court of Appeals, have analyzed the factual occurrence of video reporting in a public building to be an issue of First Amendment expression in a public forum,[10] the

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[6] *Whiteland Woods L.P. v. Township of West Whiteland,* 193 F.3d 177 (3d Cir. 1999).

[7] *See e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)(holding that public has First Amendment right of access to criminal trials); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1984) (holding that public has First Amendment right of access to trials involving minor victims of sexual offenses); *)Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (holding that public has First Amendment right of access to voir dire proceedings); *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147 (2004) (holding that public has First Amendment right of access to preliminary hearings).

[8] *Houchins v. KQED, Inc.*, 438 U.S. 1, 10 (1978).

[9] *Whiteland Woods,* 193 F.3d at 183 (in preventing the Plaintiff from videotaping the planning commission meeting, the Third Circuit reasoned that Defendants had not "interfered with [Plaintiff's] speech or other expressive activity").

[10] *See e.g., Smith v. City of Cumming,* 212 F.3d 1332 (11th Cir. 2000).

Third Circuit and this Court do not follow this approach.[11] It was on this basis, that the Court granted Defendants' motion on the pleadings.[12]

Ignoring the Court's articulated, chosen path on this issue, Plaintiff reasserts a litany of extra-jurisdictional cases included in his prior filings that this Court already found inapplicable – either because they were not decided on a First Amendment basis, or because these cases do not fit into the Third Circuit Court of Appeal's First Amendment access to government information scheme that this Court adopted. Among these rehashed, *non-binding* cases are *Cirelli v. Town of Johnston Sch.Dist.*,[13] *Peloquin v. Arsenault*,[14] *Csorny v. Shoreham-Wading River Cent. Sch. Dist.*,[15] *Tarus v. Borough of Pine Hill*,[16] and *Iacobucci v. Boulter*.[17] The

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[11] Court's June 29, 2015 opinion, at p.10 ("the Third Circuit was not convinced that forum analysis is necessary to resolve such restrictions on the right of access") (internal quotations omitted) (citing *Whiteland Woods*, 193 F.3d at 182-183).

[12] The Court notes Plaintiff's rejection of this Third Circuit Court of Appeals precedent on the basis that it is "ancient." Does Plaintiff intend to, therefore, discredit all decisions over a certain age? If so, this Court counsels Plaintiff to consider *Marbury v. Madison*, 5 U.S. 137 (1803) a centuries' old case establishing judicial review by the United States Supreme Court, one upon which any appeal of a lower state court decision (such as the present one) to the highest court in our Nation is inextricably based, and indebted to.

[13] 897 F.Supp. 663 (D.R.I. 1995).

[14] 162 Misc. 2d 306 (N.Y. Sup. Ct. 1994).

[15] 305 A.D. 2d 83, 91 (N.Y. App. Div. 2003).

[16] 916 A.2d 1036 (N.J. 2007).

[17] 1997 WL 258494, at *1 (D. Mass. Mar. 26, 1997), *aff'd*, 193 F.3d 14 (1st Cir. 1999). As to *Iacobucci*, Plaintiff accuses the Court of being "intellectually disingenuous" in characterizing it as, primarily, a Fourth Amendment case. Although the First Amendment was implicated

positions raised by the motion to amend are no more than a disagreement with the Court's prior reading of this non-precedential case law."[T]he Court will deny the motion if it merely restates arguments already considered and rejected during the litigation."[18] If Plaintiff wishes to procure further interpretation of the issues at hand, our State's appellate procedure affords him that opportunity. However, at this juncture, these matters have been put to rest.

In addition to the above referenced cases, Plaintiff points to *Pomykacz v. Borough of West Wildwood*,[19] as authority this Court failed to consider. Although Plaintiff neglects the need to cite the motion to alter judgment standard, or to shape his motion according to this standard, the Court can only assume Plaintiff means to assert that this Court committed a "clear error of law," or that it was,

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(specifically with regard to the Massachusetts definition of "disorderly conduct"), the Court still sees *Iacobucci* as, first and foremost, a Fourth Amendment, "probable cause" case, inapplicable to Plaintiff's *information gathering* right at issue: "[i]n light of [plaintiff's] clearly-established *Fourth Amendment* right not to be unlawfully arrested, the settled law defining *disorderly conduct* so as to exclude First Amendment activities, and state law establishing a citizen's right to videotape public meetings, no objectively reasonable police officer confronted with plaintiff's version of facts could have believed that there was *probable cause* to arrest [plaintiff] for disorderly conduct." 1997 WL 258494 at *6 (emphasis added). Furthermore, "[b]y the commencement of the trial, this Court had narrowed the issues to be *decided* to the following: whether [officer] arrested [plaintiff] without *probable cause*, whether [officer] used excessive force in making that arrest, and whether [officer] committed tort of intentional infliction of emotional distress." *Id.*, at *1(emphasis added). In any event, to the extent Plaintiff disagrees, this is not proper grounds for a motion to alter judgment. He is merely disputing the Court's reading of *Iacobucci*. He already did this in his filings leading to this Court's contested opinion, and the Court rejected his view of that case. Moreover, as a case from the First Circuit, this Court is free to treat it as only persuasive authority. Delaware is not bound by First Circuit decisions.

[18] *Paron Capital*, 2012 WL 3206410 at *1.

[19] 438 F.Supp.2d 504 (D.N.J. 2006).

somehow, "manifest injustice" for the Court to not consider *Pomykacz*.[20] Thus, the Court will review that case.

In *Pomykacz,* the U.S. District Court for the District of New Jersey held that, where Plaintiff alleged she was arrested and charged with stalking certain government officials, as a result of, among other things, taking their photographs, she had sufficiently pleaded a First Amendment retaliation claim.[21] "To establish a claim for retaliation...[Plaintiff] must demonstrate that (1)*[he] engaged in protected activity*; (2) the government responded with retaliation; and (3) the protected activity itself was the cause of the retaliation."[22] Setting aside the fact that nowhere in his original Complaint does Plaintiff expressly assert a First Amendment retaliation claim, *Pomykacz* is, moreover, inapplicable as this Court specifically ruled that Plaintiff was *not* engaging in a protected First Amendment activity. On the contrary, this Court found that videotaping the interior of the Recorder of Deed's office is not expressive conduct. Therefore, the necessary *Pomykacz* predicate is missing in the case at bar. It was, therefore, neither a clear error of law, nor manifest injustice, for this Court not to have addressed the *Pomykacz* case in its previous Order.

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[20] *See Gsell v. Unclaimed Freight*, 1995 WL 339026, at *1, n. 2 (Del. Super. Ct. May 3, 1995) (where [litigant] was *pro se*, "[t]he Court has attempted to characterize [*pro se* litigant's] position as recognizable legal argument").

[21] *Id.*, at 513.

[22] *Id.*, at 512(emphasis added); *see also Hill v. City of Scranton*, 411 F.3d 118, 125 (3d Cir. 2005)(same).

Plaintiff next seeks alteration of this Court's determination that Defendant Paradee is not a State Actor, and, therefore, cannot have violated Plaintiff's First Amendment right. In so doing, Plaintiff inappropriately repeats arguments decided by this Court previously. The Court found that, based upon the allegations in Plaintiff's original Complaint, Paradee's only connection to Delaware state government was his representation of Defendant McKenna, the Kent County Recorder of Deeds, in a prior civil suit. This is insufficient to establish him as a State Actor.[23] This ruling still stands. In any event, even if Defendant Paradee were a State Actor, such a finding would not change this Court's ruling. The June 29, 2015 opinion held that Plaintiff had no First Amendment Right to film in the Recorder of Deeds office. Therefore, no Constitutional rights were violated.

Plaintiff, yet again, seeks alteration/amendment of this Court's decision concerning Supreme Court Administrative Direction No. 155. However, in its June 29, 2015 opinion this Court *already* denied Plaintiff's *identical* motion for reargument, with regard to the Commissioner Freud's decision to reject Plaintiff's request to videotape court proceedings:

> The Court's position regarding Supreme Court Administrative Directive No. 155 *remains the same*. By this Directive, trial judges in their discretion retain the ability to permit electronic media coverage in certain proceedings. This Court chose not to allow the electronic media coverage at issue. The Court has neither misapprehended the law nor overlooked controlling precedent. Plaintiff is merely rehashing arguments already

[23] *See e.g., Wilkerson v. Sullivan*, 593 F.Supp.2d 689, 691 (D. Del. 2009) ("[n]or is a private attorney considered a state actor. To act under color of law a defendant must be clothed with the authority of state law")(internal quotations omitted).

decided by the Court.[24]

Persistence will get one only so far. Plaintiff's petulant behavior, now approaching disrespect, is in direct contravention of appellate procedure. The decision as to Directive No. 155 is final. Plaintiff is free to seek review from a higher court, but his continued pressing of this point, in *this* Court, is inappropriate.

The Court last addresses Plaintiff's assertion that the Court's June 29, 2015 opinion wrongfully employed the motion for judgment on the pleadings standard, as opposed to the summary judgment motion standard.[25] Alleging that his own filings referenced matters outside of the pleadings, Plaintiff contends the Court should have converted Defendants' motion for judgment on the pleadings to a motion for summary judgment. As Defendants accurately point out, the law requires the Court to make such a conversion, only in the event the *Court,* in its discretion, considers matters outside of the pleadings.[26] That Plaintiff by his many supplemental filings (made, notably, *without* leave of this Court), included into his disdainful efforts matters outside of the pleadings, is of no consequence. No

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[24] Court's Opinion, dated June 29, 2015 at p.24 (internal quotations omitted)(emphasis added).

[25] The Court notes that Plaintiff did not object as to the standard to be employed in consideration of Defendants' motion for judgment on the pleadings at the time of its filing. His present contention is, therefore, an afterthought.

[26] *Kahn v. Roberts*, 1994 WL 70118, at *2 (Del. Ch. Feb. 28, 1994)("[i]n considering a...Rule 12(c) motion for judgment on pleadings, only those matters referred to in the pleadings are to be considered by the Court, unless the motion is converted into a Rule 56 summary judgment motion").

additional amount of material, consisting mostly of self-aggrandizing video stills and the like, alter the fact that Plaintiff had no First Amendment right to film the interior of the Recorder of Deeds office.[27] That is what his original Complaint asserted, and it is on those facts that the Court made its decision.

Plaintiff's motion to alter judgment is **DENIED** in its entirety. The matters contained therein are decided finally, at least with respect to this Court. Plaintiff is to cease addressing these issues at this juncture. The appellate process is the sole potentially proper place for further discussion and consideration.

II. Plaintiff's Motion for Rule 60 Relief from Judgment

In his now *third* effort to overturn the Court's June 29, 2015 opinion,[28] Plaintiff moves for relief from judgment pursuant to Superior Court Civil Rule 60(b). In so doing, Plaintiff reasserts the saliency of *Iacobucci*,[29] and argues for the case dispositive nature of *Pomykacz*.[30] Additionally, Plaintiff has discovered two other cases, to which he had not previously cited, that he avers will change the

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[27] *See e.g., Dickerson v. Phillips*, 2012 WL 2236709, at *2 (Del. Super. Ct. Jun. 13, 2012) (court, *unlike* this Court, received request from Plaintiffs to convert motion for judgment on the pleadings to summary judgment motion, as Plaintiffs desired court to consider additional materials. Court concluded that request was "unavailing...as the [additional materials] supplied by Plaintiffs do not change the fact that the facts as pled in the Complaint are inadequate" to plead the proper claim in question).

[28] Plaintiff previously moved for an interlocutory appeal, and by his present filings, seeks amendment of judgment.

[29] The Court has, on several occasions, reasserted its view of this case.

[30] *See supra* for discussion of this case.

course of this litigation: *Montgomery v. Killingsworth*,[31] and *Tisdale v. Gravitt*.[32]

The Court surmises that Plaintiff's motion is brought under Rule 60(b)(2) and (b)(6). Proper grounds for a motion pursuant to Rule 60(b)(2) require "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)."[33] Rule 60(b)(6) permits relief from judgment for "any other reason justifying relief from the operation of the judgment."[34] As regards the latter form of relief, the Delaware Supreme Court has stated that only under "extraordinary circumstances" will such a motion be granted.[35]

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[31] 2015 WL 289934, at * 1 (E.D.Pa. Jan. 22, 2015). With regard to *Montgomery*, the Court states simply that its holding is, in fact, contrary to Plaintiff's position that he had a First Amendment right to videotape inside the Recorder of Deed's office: "[there is] no clear rule regarding First Amendment rights to *obtain information by videotaping...*" *Montgomery*, 2015 WL 289934 at *15 (internal quotations omitted)(emphasis added)(citing *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262 (3d Cir. 2010)). As indicated, the *Montgomery* Court came to this determination, pursuant to the Third Circuit Court of Appeal's statement in *Kelly*. This is the *true* Third Circuit authority by which this Court is bound.

[32] 51 F.Supp.3d 1378 (N.D. Ga. 2014). Concerning *Tisdale*, the Court restates its position that it *explicitly* rejected the First Amendment public fora analysis employed by the 11th Circuit, and, evidently, the *Tisdale* Court, in its June 29th, 2015 decision. Instead, the Court found Plaintiff's attempted video recording to not be expressive activity, but rather information gathering. The Third Circuit Court of Appeals, following the lead of the U.S. Supreme Court, found such videotaping, information gathering conduct to not be protected by the First Amendment. Plaintiff's continued citation to public fora cases ignores this Court's articulated and chosen approach.

[33] Super. Ct. Civ. R. 60(b)(2).

[34] Super. Ct. Civ. R. 60(b)(6).

[35] *Jewell v. Div. of Social Servs.*, 401 A.2d 88, 90 (Del. 1979).

The discovery of six month-old, and year-old, *extra-jurisdictional* case law that, purportedly, supports Plaintiff's position, is a far cry from the intended purpose of Rule 60 relief, under either Rule 60(b)(2)[36] or Rule 60(b)(6).[37] The same can be said for the case law already considered and rejected by this Court.[38] Therefore, the Court **DENIES** Plaintiff's motion for relief from judgment.

III. Defendants' Motion for Judgment on the Pleadings

The Court begins by noting that Plaintiff went beyond the Court sanctioned amendment of his original Complaint. By his initial request to amend the original Complaint, Plaintiff indicated he would be adding a second constitutional claim:

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[36] As far as this Court understands, "evidence," as per Rule 60(b)(2), means something other than decisional law. In any event, the two cases cited by Plaintiff were already decided at the time he filed his original complaint, being easily accessible to him. Therefore, Plaintiff could have employed "due diligence" to discover them sooner.

[37] In *Jewell v. Div. of Social Servs.*, the Delaware Supreme Court considered the following cases in contemplating the meaning of "extraordinary circumstances": *Klapprott v. U.S.*, 335 U.S. 601 (1949) (court granted relief from judgment where the judgment consisted of a denaturalization of citizenship, and there were factual questions as to basis for the denaturalization); *Aro Corp v. Allied Witan Co.*, 65 F.R.D. 513 (N.D. Ohio 1975), *aff'd* 531 F.2d 1368 (6th Cir. 1976)("extraordinary circumstances" calling for relief from judgment found where court dismissed lawsuit based on party's entry into settlement agreement, and party subsequently acted in contravention of agreement"). 401 A.2d at 90. That this Court rejected Plaintiff's interpretation of case law, or that Plaintiff did not discover allegedly pertinent case law until after the decision, strike this Court as meager inconveniences compared to the true injustices the appellants in the cases considered by the Delaware Supreme Court faced. Most importantly, Plaintiff's purported plight is far from extraordinary, and is such that is faced by litigants time and time again: a court denying one's motion.

[38] *See e.g., Evans v. Lee*, 36 A.3d 349 (Del. 2012) (affirming denial of Rule 60 motion as "although titled as a motion for relief from judgment, [movant's] motion, in fact, was an attempt to reargue the merits of his complaint").

one sounding in a violation of equal protection. In addition to this equal protection claim, Plaintiff has included *four* other claims: a section 1985 conspiracy claim, a civil conspiracy claim, a claim alleging violation of common law, and a claim alleging violation of Delaware's Freedom of Information Act.[39] Such conduct is not only in contravention of a clear Court order, but further shows a complete lack of respect for the opposing parties and their counsel. Although motions to amend are to be liberally granted,[40] this does not absolve Plaintiff of his responsibility to request the *specific* amendments he seeks. Plaintiff is to keep this in mind going forward.

As to the five claims appearing in Plaintiff's Amended Complaint, Defendants, again, move for judgment on the pleadings on all counts. "A motion for judgment on the pleadings admits, for the purposes of the motion, the allegations of the opposing party's pleadings but contends that they are insufficient as a matter of law."[41] Where there is any question of material fact, such motions must not be granted, as such motions raise, inherently, only questions of law.[42] "It is the Plaintiff's burden to establish the existence of a

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[39] Plaintiff, additionally, reasserts his First Amendment claims. This Court by its June 29,2015 opinion granted Defendants' motion for judgment on the pleadings as to the First Amendment claims. These claims have already been disposed of and the Court will not consider them. Plaintiff's First Amendment claims are no longer in this suit.

[40] Super. Ct. Civ. R. 15 (motion to amend "shall be freely given when justice so requires").

[41] *Dickerson*, 2012 WL 2236709 at *1.

[42] *Id.*

genuine issue of material fact."[43]

a. Plaintiff's Equal Protection Claim

The Court has already ruled, and reaffirmed by this opinion, that Defendant Paradee is not a State Actor. Therefore, the present assertion of a constitutional violation can be addressed only as to Defendants McKenna and Malone.[44]

Plaintiff's Amended Complaint asserts the following as to his Fourteenth Amendment Equal Protection claim:

> Plaintiff may exercise his *constitutional rights to run video and to take pictures* of a County Recorder's office just down the road in New Castle County. Not only is that a material Constitutional violation, there isn't even any rational basis for that sort of disparate treatment between the counties.[45]

Plaintiff's claim rests upon the allegation that he was denied the ability to film in the Kent County Recorder of Deeds Office, while he was permitted to do so in the New Castle County Recorder of Deeds Office. Stated succinctly, the "Equal Protection Clause of the Fourteenth Amendment commands that no State shall deny to any person within its jurisdiction the equal protection of the law, *which is essentially a direction that all persons similarly situated should be treated*

[43] *Id.*

[44] *Doe v. Cape Henlopen School Dist.*, 759 F.Supp.2d 522, 530 (D. Del. 2011)(constitutional violation requires some form of state action).

[45] Plaintiff's Amendment Complaint, at p. 13 (emphasis added).

alike."[46] The Court understands Plaintiff to allege that he is the similarly situated person in both Kent and New Castle County, who received divergent treatment.

Although framed as an equal protection claim, the Court need not analyze it as such. The Third Circuit Court of Appeals has recognized that, where "First Amendment and Equal Protection claims are functionally identical...it would be redundant to treat them separately."[47] The Third Circuit reasoned "it is generally unnecessary to analyze laws which burden the exercise of First Amendment rights...under the equal protection guarantee, because the substantive guarantees of the Amendment serve as the strongest protection against the limitation of these rights."[48] Therefore, "[i]f a law passes muster under the First Amendment it is also likely to be upheld under the Equal Protection clause."[49]

This Court, by its previous June 29, 2015 decision, found that Plaintiff had no First Amendment right to film inside the Recorder of Deeds office. Pursuant to Third Circuit precedent, having previously made such a determination, the Court need not consider the newly added equal protection claim separately. Rather, having found no violation of the First Amendment, there is also no violation of the equal protection clause of the Fourteenth Amendment. Indeed, Plaintiff's equal protection claim is directly tied to his previous First Amendment claim, given the

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[46] *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (emphasis added).

[47] *Hill*, 411 F.3d at 125-126.

[48] *Id.*, at 126 (internal quotations omitted).

[49] *Id.*

"right" he asserts by his Amended Complaint: "constitutional right to run video."[50] This is "functionally identical" to the underpinnings of his First Amendment claim, which was based upon the same denial of video recording access to the Recorder of Deeds office. Despite this Court having disposed of his First Amendment claim by its prior opinion, Plaintiff continues to assert that the right to videotape the interior of the Recorder of Deeds office is a First Amendment right.[51] As the denial of his ability to film "pass[ed] muster under the First Amendment," it, likewise, passes muster under the Fourteenth Amendment.[52] Defendants' motion for judgment on the pleadings as to the equal protection claim is **GRANTED**.

b. Plaintiff's Delaware Freedom of Information Act Claim

Plaintiff avers that his thwarted efforts to videotape the Recorder of Deeds office violated the Delaware Freedom of Information Act. Specifically, Plaintiff points to 29 *Del. C.* § 10004 and § 10006. Section 10006 provides for video conferencing of public meetings, and section 10004 provides that all public bodies be open to the public. Taken together, Plaintiff contends that these provisions

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[50] Plaintiff's Amendment Complaint, at p. 13; *see also* Plaintiff's Amended Complaint, at p. 11 (plaintiff alleges that being denied access to film the Recorder of Deed's office "chill[ed] or discourag[ed] his political and information activities as a journalist or citizen-activist.").

[51] *See e.g.*, *Id.*, at p. 10 ("Plaintiff has a right, protected by the First...Amendment to the United States Constitution, to participate in politics and to gather information about the working of government, and to use that information to express himself on issues of political and governmental concern").

[52] *Hill*, 411 F.3d at 126.

support his right to videotape the Recorder of Deeds office. Given his citation to these provisions, the Court understands Plaintiff to argue that the Recorder of Deeds is a public body, and, at the time of his attempted video reporting, was engaged in a public meeting. However, Plaintiff insists that "Plaintiff has ***already long since argued on deaf ears*** that this ***is not*** actually a Public Body/Public Meeting case..."[53] The Court notes the disjunction in asserting statutory authority that directly involves public bodies and public meetings, while simultaneously stating that the case does not concern these matters. In considering Plaintiff's Delaware Freedom of Information Act claim, therefore, the Court assumes Plaintiff intended to make a public body/public meeting argument. To proceed otherwise would be nonsensical. The Court would have to dismiss this claim of right, in order to maintain any semblance of logical thought.

Defendants respond that Sections 10004 and 10006 are not intended to encompass the position, or office for that matter, of the Recorder of Deeds. Defendants cite the statutory definitions of "meeting" and "public body" in support of their position, found at 29 *Del. C.* § 10002(g) and (h), respectively:

> (g) "Meeting" means the formal or informal gathering of a quorum of the members of any public body for the purpose of discussing or taking action on public business either in person or by video-conferencing.
>
> (h) "Public body" means...any regulatory, administrative, advisory, executive, appointive or legislative body of the State, or of any board, bureau, commission, department, agency, committee, ad hoc, committee,

[53] Plaintiff's Opposition to Defendants' Motion for Judgment on the Pleadings, at p.10 (emphasis in the original).

> special committee, temporary committee, advisory board and committee, subcommittee, legislative committee, association, group, panel, council or any other entity or body established by an act of the General Assembly of the State, or established by any body established by the General Assembly of the State, or appointed by any body or public official of the State...[54]

First and foremost, it is Defendants' assertion that the Recorder of Deeds is not a "public body" within the meaning of Section 10002(g). Instead, Defendants cite to 9 *Del. C*. § 9601, establishing the Recorder of Deeds as an *elected* official. Therefore, the call of Section 10004 that all meetings, defined as a gathering of a "public body" by Section 10002(g), be open to the public is inapplicable. Likewise, Section 10006, providing for video conferencing, expressly omits meetings of individuals who are "elected by the public," such as the Recorder of Deeds.[55]

Defendants' reading of the relevant provision of the Delaware Freedom of Information Act is on point and persuasive. The Court does not find that the Recorder of Deeds position is contemplated by Sections 10004 and 10006. Further, Plaintiff has made no effort to plead that a "meeting," as defined by Section 10002(g), was in session when he attempted to film inside the office. Defendants' motion with regard to Plaintiff's Freedom of Information Act claim is, therefore, **GRANTED**.

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[54] Defendant McKenna's and Defendant Malone's Motion for Judgment on the Pleadings, at ¶17.

[55] 29 *Del. C.* § 10006.

c. Plaintiff's Common Law Claim

Citing, yet again, to extra-jurisdictional case law, which this Court had rejected in its prior decision, Plaintiff alleges Defendants' refusal to permit him to film the Recorder of Deeds office was contrary to a right of public access to public meetings, recognized by the "common law."[56] However, the citation to New Jersey common law has little bearing on the state of affairs in Delaware. Indeed, this concept is so ingrained and well-understood in this present age that this Court had to reach across both space and time to a statement by the Iowa Supreme Court made in 1895, for elucidation of this matter:

> He who shall travel through the different states will soon discover that the whole of the common law has been nowhere introduced, – some states have rejected what others have adopted, – and there is, in short, a great and essential diversity in the subjects to which the common law is applied, as well as in the extent of its application. *The common law, therefore, of one state is not the common law of another*.[57]

Stated plainly, that New Jersey recognizes, and has recognized, a centuries' old common law right of public access, is of limited significance to a Delaware court. Plaintiff must, instead, point to some Delaware common law tradition that is analogous or on topic. The true failing of Plaintiff's argument is that he asserts a "*common law* violation of a right"[58] without any support.

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[56] *See e.g., Tarus v. Borough of Pine Hill*, 916 A.2d 1036 (N.J. 2007) (holding found that video reporter had right to access public event because of *New Jersey common law* permitting public access to public events)(emphasis added).

[57] *Gatton v. Chicago R.I. & P. R.R. Co.*, 63 N.W. 589, 592 (Iowa 1895)(emphasis added).

[58] Plaintiff's Amendment Complaint, at p.12 (emphasis added).

Plaintiff attempts to create support for this "common law right" by citation to a 2011 internal memo drafted by the Delaware Attorney General's Office, and submitted to the State Solicitor. Although on a motion for judgment on the pleadings, external documents are not to be considered,[59] there is an exception if such documents are incorporated into the Complaint, and are integral to the claim.[60] As Plaintiff directly cited to language from this memorandum, and, essentially, based his common law claim on this document (as well as the New Jersey jurisprudence), the Court finds it within the exception to consider that document. Therefore, the Court proceeds in its review of the Attorney General's memo.[61]

The memorandum from the Attorney General's Office to the State Solicitor poses the following question: "[d]o members of the public have a right under the Freedom of Information Act...or the First Amendment to record, by audio, video, or photography, public meetings of public bodies?" In answering this question, the Attorney General's Office looked to the Freedom of Information Act statute itself, as well as to Third Circuit and extra-jurisdictional jurisprudence. Importantly, there is no mention of *any* common law tradition in *Delaware* that would aid in

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[59] *Kahn,* 1994 WL 70118 at *2.

[60] *Vanderbilt Income & Growth Assoc., LLC v. Arvida/JMB Mangers, Inc.*, 691 A.2d 609, 613 (Del. 1996).Although this is case law relating to a motion to dismiss, Delaware courts have found that a motion for judgment on the pleadings is "almost identical" to a motion to dismiss. *Blanco v. AMVAC Chemical Corp.*, 2012 WL 3194412, at *6 (Del. Super. Ct. Aug. 8, 2012).

[61] Attached as Ex. 1 to Defendant McKenna's and Defendant Malone's Motion for Judgment on the Pleadings.

answering this question. Therefore, it is entirely implausible that this memorandum could form the basis for Plaintiff's common law violation claim. There exists no Delaware common law right regarding the denial of videotaping access alleged to have prevented.

The Attorney General's memorandum is, however, helpful as it sheds light upon the state of the law in Delaware concerning access to public meetings of public bodies. Citing to the aforementioned *Whiteland Woods* Third Circuit Court of Appeals case, upon which this Court's prior decision was based, the memorandum recognizes that "[t]he First Amendment does not create a right to *video* public meetings."[62]

These terms, "meeting" and "public body" stem from the Freedom of Information Act. This Court has already determined that the definition of these terms, as contemplated by the Freedom of Information Act, does not encompass the Recorder of Deeds. There is no indication that the Attorney General's memorandum would include Plaintiff's attempted video recording, within the type of activity that should be permitted.

Regardless of what the Attorney General's memorandum would think of Plaintiff's thwarted activities, nowhere in that document is there any mention of Delaware common law. Defendants' motion for judgment on the pleadings as to Plaintiff's common law violation claim is **GRANTED**.

[62] Ex. 1 to Defendant McKenna's and Defendant Malone's Motion for Judgment on the Pleadings (emphasis in the original).

d. Plaintiff's Civil Conspiracy Claim

In a single sentence, Plaintiff brings a civil conspiracy claim against Defendants, alleging as follows: "the intentional, knowing conduct of the Defendants in threatening an unlawful arrest, constitute[s] Civil Conspiracy." In Delaware, civil conspiracy requires the claimant to plead: "(1) a confederation of or combination of two or more persons; (2) an unlawful act done in furtherance of the conspiracy; and (3) actual damage."[63]

Even accepting all of the allegations in Plaintiff's Amended Complaint as true, the civil conspiracy claim fails for the reason that Plaintiff has not pleaded an "unlawful act" as required by the civil conspiracy standard. The Court has determined, by both its prior opinion and the current opinion, that there was no violation of Plaintiff's First Amendment or Fourteenth Amendment rights. Therefore, no law was broken, in furtherance of which the Defendants could have conspired. The sole sentence by which Plaintiff pleads this claim alleges an unlawful threat of arrest. To the extent Plaintiff means for this to be a Fourth Amendment challenge, he has failed so to specify. As far as the Court understands, the purported conspiracy concerns the First and Fourteenth Amendments. Hence, as it currently stands, Plaintiff's civil conspiracy claim is unsustainable based upon the elements pleaded in his Amended Complaint. Defendant's motion as to this claim is **GRANTED**.

[63] *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 149-150 (Del. 1987).

e. Plaintiff's 42 U.S.C. § 1985 Conspiracy Claim

Plaintiff alleges that Defendants conspired to deny him the ability to videotape the Recorder of Deeds office. Plaintiff further asserts that this coordinated action was done to "deprive Plaintiff of equal protection of the laws by chilling or discouraging his political and information activities as a journalist or citizen-activist."[64] Plaintiff seeks to remedy this purported violation by invoking 42 U.S.C. § 1985(3).

Section 1985(3) claims require: "(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is injured in his person or property or deprived of any right or privilege of a citizen of the United States."[65] Importantly, such claims are not "intended to provide a federal remedy for all tortious, conspiratorial interferences with the rights of others, or to be a general federal tort law."[66] Therefore, Section 1985(3) claims need "some racial, *or perhaps otherwise class-based*, invidiously discriminatory animus behind the conspirators' action in order to state a claim."[67]

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[64] Plaintiff's Amended Complaint, at p.11.

[65] *Farber v. City of Paterson*, 440 F.3d 131, 134 (3d Cir. 2006) (internal quotations omitted).

[66] *Id.*, 135 (quoting *Griffin v. Brekenridge*, 403 U.S. 88 (1971)).

[67] *Id.*, at 135 (internal quotations omitted)(emphasis in original); *see also Malachi v. Sosa*, 2011 WL 2178626, at *3 (Del. Super. May 25, 2011) ("[i]n his complaint, Plaintiff failed to

Given the limitation imposed upon Section 1985(3) claims, that the claimant must plead some sort of animus toward a specific class, Plaintiff's rendition of this action is wholly unsustainable. His Amended Complaint fails to allege any animus on behalf of Defendants toward him, as a result of his race or membership in a targeted class. This reason alone, calls for the granting of Defendants' motion for judgment on the pleadings as to this claim.

CONCLUSION[68]

For the foregoing reasons: 1) Plaintiff's motion to alter or amend judgment is **DENIED**; 2) Plaintiff's motion for relief from judgment is **DENIED**; and 3) Defendants' motion for judgment on the pleadings is **GRANTED**.

IT IS SO ORDERED.

/s/ Robert B. Young
J.

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allege the violation of 42 U.S.C. § 1985(3) was based on race so it is dismissed. To state a claim under 42 U.S.C. § 1985(3), Plaintiff must allege...[a] conspiracy...motivated by racial animus").

[68] Plaintiff continues to allege that his likeness was posted throughout the Kent County Courthouse. The Court repeats it previous position on this matter: "[s]imply as a matter of observation, the Court is unaware of any images of Plaintiff being displayed within the Courthouse. In any event, this is not the proper filing by which to raise [this] concern. Thus, the Court takes no action." Court's June 29th, 2015 opinion, at p.24-25.