IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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| ROBERT GRODEN, | § | |
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| Plaintiff, | § | |
| | § | |
| v. | § | Civil Action No. 3:10-CV-1280-N |
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| FRANK GORKA, | § | |
| | § | |
| Defendant. | § | |

**ORDER**

This Order addresses Plaintiff Robert Groden's motion for a new trial [163] ("Groden's Mot."). Because Groden fails to meet the requirements of Federal Rule of Civil Procedure 59(e), the Court denies the motion.

## I. PROCEDURAL HISTORY OF THE DISPUTE

Plaintiff Groden is a historical enthusiast primarily interested in the assassination of President John F. Kennedy. Pursuant to this interest, Groden often distributes materials concerning the assassination in the Dealey Plaza area of Dallas, a frequent tourist attraction for those interested in the Kennedy assassination. After he was arrested in connection with his activity in Dealey Plaza, he sued both the City of Dallas (the "City") and certain police officers, including Sergeant Frank Gorka, alleging violation of various constitutional rights. Following a series of amendments to his complaint, the City of Dallas filed a Rule 12(b)(6) motion to dismiss Groden's fifth amended complaint [96]. On May 23, 2013, this Court granted the motion, finding that Groden had failed to adequately plead his Section 1983 and

Section 1985 conspiracy claims against the City. Specifically, as to the Section 1983 claim, the Court held that Groden had failed to plead the identity of the City's policymaker, the existence of a facially unconstitutional City policy, and that any City policy was the actual cause and "moving force" behind the allegedly unconstitutional police conduct. Order Granting City's Mot. Dismiss 7 [102] (the "Dismissal Order"). As to Groden's Section 1983 and Section 1985 conspiracy claims, the Court held that in addition to the above deficiencies, Groden also failed to plead facts supporting an actual agreement, and any race or class-based animus. *Id.* at 8–9. Finding Groden "had ample opportunity to state his best case against the City," the Court denied Groden leave to replead the dismissed claims. *Id.* at 10.

Following the Dismissal Order, Groden's claims against Sergeant Gorka proceeded to trial. The jury ultimately returned a verdict in favor of Sergeant Gorka [150], and on September 30, 2014, the Court denied Groden's motion for reconsideration and entered a final judgment in favor of Sergeant Gorka [159 & 160]. Groden filed this motion on October 27, 2014, requesting the Court vacate the Dismissal Order and order a new trial against both the City and Gorka. Groden bases his motion on new evidence allegedly discovered in the course of trial and a subsequent deposition of former Assistant Police Chief Vincent Golbeck.

## II. THE LEGAL STANDARD

As an initial matter, the Court must determine what standard to apply to Groden's motion. Aside from a passing reference to Federal Rule of Civil Procedure 54(b), Groden does not identify any standards governing the Court's review of his motion. Rule 54(b)

governs the entry of judgment as to less than all the claims or parties involved in a lawsuit. *See* FED. R. CIV. P. 54(b). The Rule provides that an order adjudicating fewer than all of the claims at issue in the suit "may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." *Id.* By its very terms, Rule 54(b) ceased to apply upon this Court's issuance of a final judgment on September 30, 2014. *See Estate of Henson v. Wichita Cnty.*, 988 F. Supp. 2d 726, 729 (N.D. Tex. 2013) ("Rule 54(b) provides that an order that adjudicates fewer than all the claims among the parties 'may be revised at any time' *before the entry of a final judgment*." (emphasis added) (citations omitted)). Thus, the Court declines to apply the standards associated with Rule 54(b).

The Court finds instead that Rule 59(e) provides the proper standard of review. Rule 59(e) has been used in the Fifth Circuit to evaluate motions to reconsider interlocutory orders. *See, e.g.*, *WesternGeco L.L.C. v. ION Geophysical Corp.*, 2012 WL 3150303, at *1 (S.D. Tex. 2012). Because Groden seeks to vacate the Court's Dismissal Order, which applied to a single Defendant, Rule 59(e) applies. Additionally, although Rule 59(e) motions may only be brought within 28 days from judgment, *see Montgomery v. Wells Fargo Bank, N.A.*, 2011 WL 1870279, at *1 (N.D. Tex. 2011), that clock begins to run upon entry of final judgment, not the issuance of the challenged interlocutory order, *see Bohack Corp. v. Iowa Beef Processors, Inc.*, 715 F.2d 703, 712 n.10 (2d Cir. 1983); *Warner v. Rossignol*, 513 F.2d

678, 684 n.3 (1st Cir. 1975). Accordingly, the Court applies the standards associated with Rule 59(e) to Groden's motion to vacate the Dismissal Order and for new trial.[1]

Rule 59(e) "favor[s] the denial of motions to alter or amend a judgment." *Southern Constructors Grp., Inc. v. Dynalectric Co.*, 2 F.3d 606, 611 (5th Cir. 1993). A Rule 59(e) "motion is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment." *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004). Instead, Rule 59(e) "serve[s] the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence." *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 473 (5th Cir. 1989) (internal quotations omitted). Although a district court has considerable discretion in determining whether to reopen a judgment, it must do so while striking a balance between (1) the need to bring litigation to an end; and (2) the need to render just decisions on the basis of all the facts. *Templet*, 367 F.3d at 479.

## III. THE COURT DENIES GRODEN'S MOTION

### *A. Groden's Newly Discovered Evidence Fails to Remedy the Deficiencies in His Fifth Amended Complaint*

Groden argues that new evidence discovered after the Court dismissed his claims against the City support his Section 1983 and Section 1985 claims and thus justifies vacating the Dismissal Order. The Court dismissed his Section 1983 claims (1) for failure to plead

[1]Groden's argument for a new trial against Gorka is based on alleged prejudice he suffered from having to proceed to trial against Gorka without his claims against the City. Accordingly, if there is no basis for vacating the Dismissal Order and reinstating his claims against the City, there is no basis for a new trial against Gorka.

the identity of the City's policymaker; (2) for failure to plead a facially unconstitutional City policy; and (3) for failure to plead that any City policy was the actual cause and "moving force" behind the alleged unconstitutional actions of the police or that the City's policymakers were deliberately indifferent to a known or obvious risk that a policy would result in constitutional deprivations. Dismissal Order 7. In addition, the Court found Groden's Section 1983 conspiracy claim failed because he failed to allege facts supporting the existence of a specific agreement, and that his Section 1985 conspiracy claim failed because he pled no racial or class-based animus. *Id.* at 8–9. Thus, to succeed, Groden must present newly discovered evidence that addresses each of these deficiencies.

Groden identifies five pieces of new evidence supporting his dismissed claims against the City: (1) deposition testimony of former Assistant Chief of Police Vincent Golbeck that allegedly shows Golbeck was the City's policymaker with regards to the "Dealey Plaza Initiative" (the "Initiative"),[2] Groden's Mot. 12–14; (2) trial testimony from City employees demonstrating an allegedly unconstitutional policy of wrongly verifying criminal complaints, *id.* at 11; (3) discovery documents establishing others in Dealey Plaza were arrested pursuant to a City policy, allegedly demonstrating the City maintained a facially unconstitutional policy, *id.* at 14–16; (4) trial testimony that shows specific City ordinances were the moving force behind Groden's arrest,[3] *id.* at 16–18; and (5) new evidence of the identities of the

[2]The Initiative is an alleged systemic crackdown on the vendors in Dealey Plaza that Groden asserts constitutes a policy or practice sufficient for imposition of municipal liability.

[3]In fact, the Court's Dismissal Order held the challenged city ordinances could not be the basis of a Section 1983 claim because Groden's pleadings asserted the ordinances did not

officers who were part of the alleged conspiracy, *id.* at 19. Groden fails to present any new evidence that convinces the Court the dismissal of the City was inappropriate.

***1. Golbeck's Deposition Testimony Fails to Identify Golbeck as the City's Policymaker.*** **–** Groden argues Golbeck's deposition testimony, along with evidence introduced at trial, establishes that Golbeck was the City's final policymaker with respect to the Initiative, on which Groden bases his Section 1983 claims. Groden's argument is based on circumstantial inferences gleamed from connections between Golbeck and the Initiative, as well as Fifth Circuit authority suggesting that a policymaker need not have the last word on the challenged policy. *See* Groden's Mot. 13. Groden provides no specific reference to any portion of Golbeck's deposition confirming him as the policymaker, but rather makes a number of legal arguments that were wholly available to him at the motion to dismiss stage as to why an assistant police chief can be considered a policymaker. The Court finds nothing in Golbeck's deposition that establishes Golbeck was the final policymaker with respect to the Initiative. Accordingly, Groden fails to present new evidence establishing the identity of the City's policymaker.[4]

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apply to him. Dismissal Order 7. However, Groden continues to argue that although these ordinances do not apply to him, they may form the basis for a Section 1983 claim. To the extent Groden argues the City maintained a policy or practice of using nonapplicable statutes to violate his constitutional rights, claims based on these ordinances are more appropriately considered with his claims based on the Initiative.

[4]Even if Groden's newly discovered evidence did establish Golbeck was the relevant policymaker, it is unclear whether Groden has established diligence in uncovering the information prior to the Dismissal Order. *See Infusion Res., Inc. v. Minimed, Inc.*, 351 F.3d 688, 696–97 (5th Cir. 2003) (explaining that newly discovered evidence must not have been previously discoverable through proper dilligence). Although Groden notes that he sent

***2. Groden Fails to Identify a Newly Discovered Unconstitutional City Policy. –*** Groden asserts that trial testimony from two City employees establishes that the City maintains an unconstitutional policy of having its employees verify criminal complaints without personal knowledge of the facts supporting the complaint. Groden fails to establish that the anecdotal experiences of two City employees can support the existence of a policy or practice sufficient for municipal liability. Moreover, as with his claim based on the Initiative, Groden fails to identify a policymaker behind this alleged policy.

***3. Groden Fails to Present New Evidence Establishing that the Dealey Plaza Initiative is a Facially Unconstitutional Policy. –*** Groden primarily cites discovery evidence to establish that other vendors were ticketed and/or arrested in Dealey Plaza. This evidence is not specific or concrete enough to "support the existence of a 'persistent, widespread practice . . . so common and well settled as to constitute a custom that fairly represents municipal policy." Dismissal Order 6 (alteration in original) (quoting *Webster v. City of Houston*, 735 F.2d 838, 841 (5th Cir. 1984)). Groden thus fails to produce new evidence sufficient to overcome his initial failure to establish the Initiative was a facially unconstitutional policy.

***4. Groden's Argument that the Dealey Plaza Initiative Was the "Moving Force" Behind his Constitutional Deprivation Is Recycled. –*** This Court's Dismissal Order was based in part on Groden's attempt to base Section 1983 claims on two City ordinances that

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discovery requests that went unanswered, he cites no authority suggesting that would be sufficient to establish diligence in uncovering the identity of the City's policymaker at the pleading stage.

he admitted did not apply to his conduct. He argues now that his claim was actually based on the City's purposeful use of nonapplicable ordinances to violate his constitutional rights. These are arguments that have been made and rejected. *See* Groden's Resp. Mot. Dismiss 9–10 [99]; Dismissal Order 7–8. Accordingly, Rule 59(e) is an inappropriate vehicle for their reconsideration.

***5. Groden Fails to Demonstrate Sufficient New Evidence of Conspiracy.* –** Lastly, Groden argues that discovery documents reveal the identities of Dallas Police Officers involved in policing Dealey Plaza. This evidence does nothing to cure the deficiencies present in Groden's Fifth Amended Complaint – namely, the lack of any allegations supporting a specific agreement or any class-based or racial animus. Accordingly, Groden fails to present new evidence sufficient to overcome his initial failure to plead conspiracy claims.

## CONCLUSION

Groden's asserted newly discovered evidence fails to remedy the deficiencies in his claims against the City present in his Fifth Amended Complaint. Accordingly, the Court denies Groden's motion to vacate the Dismissal Order and grant a new trial against both the City and Defendant Gorka.

Signed January 13, 2015.

David C. Godbey
United States District Judge