Okongwu v. Cnty. of Erie

Decided Oct 7, 2022

21-1025 (Lead) 21-2601 (Con)

10-07-2022

Emeka Dominic Okongwu, Plaintiff-Appellant, v. County of Erie, Defendant-Appellee, Chris Collins, and his successors, in their official capacities as Erie County Executive, Timothy B. Howard, individually and as official of the Erie County Sheriff's Office, Richard T. Donovan, and his successors, in their official capacities as Erie County Undersheriff, Robert Koch, and his successors, in their official capacity as Superintendent, Administrative Services Division, Jail Management Division Erie County, Barbara Leary, individually and as official of Erie County Holding Center, John Does 1-10, individually and in their official capacities as investigators, employees, and staff of the Erie County District Attorney's Office, the names of which are currently unknown, John Does 11-20, Individually and in their official capacities as officers, investigators, employees and staff of the Erie County Sheriff's Office, the names of which are currently unknown, District Attorney Kevin M. Dillon, and his successors, in their official capacities as Erie County District Attorney, Carol Bridge, individually and as official of the Erie County District Attorney's Office, Michael J. Cooper, individually and as official of the Erie County District Attorney's Office, City of Buffalo Police Department, City of Buffalo, Marcia Scott, individually and in her official capacity as Officer, Buffalo Police Department, John Graham, individually and in his official capacity as Officer, Buffalo Police Department, Robert Victory, individually and in his official capacity as Officer, Buffalo Police Department, Frank A. Sedita, III, individually and as official of Erie County District Attorney's Office, John Does 21-30, individually and in their official capacities as officers, investigators, employees and staff of the Erie County Holding Center, the names of which are currently unknown, John Does 31-40, individually and in their official capacities as officers, investigators, employees, and staff of the City of Buffalo Police Department, the names of which are currently unknown, John Does 41-50, individually and in their official capacities as officers, investigators, employees, and staff of the NYS Department of Corrections and Community Supervision, the names of which are currently unknown, John Does 51-60, individually and in their official capacities as officers, investigators, employees, and staff of the New York State Office of Children and Family Services, the names of which are currently unknown, John Does 61-70, individually and in their official capacities as officers, directors, trustees, consultants, contractors, partners, affiliates, vendors, employees, and staff of the Children's Hospital of Buffalo of Kaleida Health, the names of which are currently unknown, John Does 71-80, individually and in their official capacities as officers, directors, trustees, consultants, contractors, partners, affiliates, vendors, employees, and staff of the Jacobs School of Medicine and Biomedical Sciences, State University of New York at Buffalo, John Does 81-90, individually and in their official capacities as officers, directors, trustees, consultants, contractors, partners, affiliates, vendors, employees, and staff of the Child and Adolescent Treatment Services of

Buffalo, the names of which are unknown, Ollie McNair, individually and as official of Erie County Department of Social Services, New York State Department of Corrections and Community Supervision, New York State Office of Children and Family Services, Children's Hospital of Buffalo of Kaleida Health, Jacobs School of Medicine and Biomedical Sciences, State University of New York at Buffalo, Child and Adolescent Treatment Services of Buffalo, Erie County Sheriff's Office, Erie County Department of Social Services, State of New York, Erie County District Attorney's Office, Jen Henry, individually and as official of Child and Adolescent Treatment Services of Buffalo, Dr. Stephen Lazoritz, individually and as an official of Children Hospital of Buffalo of Kaleida Health, Michael Flahrety, individually and as official of the Erie County District Attorney's Office,

FOR PLAINTIFF-APPELLANT: Emeka Dominic Okongwu, pro se, Buffalo, NY. FOR DEFENDANT-APPELLEE: James Peter Blenk, Esq., Lippes Mathias LLP, Buffalo, NY.

UNPUBLISHED OPINION

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 7th day of October, two thousand twenty-two. *1

Appeal from a judgment and order of the United States District Court for the Western District of New York (Skretny, J.).

FOR PLAINTIFF-APPELLANT: Emeka Dominic Okongwu, pro se, Buffalo, NY.

FOR DEFENDANT-APPELLEE: James Peter Blenk, Esq., Lippes Mathias LLP, Buffalo, NY.

PRESENT: DENNIS JACOBS, DENNY CHIN, BETH ROBINSON, Circuit Judges.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, *2 ADJUDGED, AND DECREED that the judgment and order of the district court is **AFFIRMED**.

In New York state court, Emeka Dominic Okongwu was convicted of sexually abusing his twin daughters. After his conviction was vacated, he sued, among others, the County of Erie ("the County") under 42 U.S.C. § 1983, asserting that law enforcement officers had coerced and coached his daughters to falsely testify against him. The district court granted summary judgment to the County and denied Okongwu's post-judgment motions for relief under Federal Rules of Civil Procedure 59(e) and 60(b). We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We review a grant of summary judgment without deference to the district court, "resolv[ing] all ambiguities and draw[ing] all inferences against the moving party."[2] *Garcia v. Hartford Police Dep't*, 706 F.3d 120, 126-27 (2d Cir. 2013). "Summary judgment is proper only when, construing the evidence in the light most favorable to the non-movant, 'there is no genuine dispute as to any material fact and the movant is entitled to

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judgment as a matter of law.'" *Doninger v. Niehoff*, 642 F.3d 334, 344 (2d Cir. 2011) (quoting Fed.R.Civ.P. 56(a)). However, *3 a party cannot defeat summary judgment with "conclusory allegations or unsubstantiated speculation." *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 428 (2d Cir. 2001).

[2] Unless otherwise noted, in quoting caselaw this Order omits all alterations, citations, footnotes, and internal quotation marks.

I. Summary Judgment

Under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978), "local governments may be held liable in § 1983 actions" if a plaintiff can show the denial of a constitutional right that was "caused by an official municipal policy or custom." *Frost v. New York City Police Dep't*, 980 F.3d 231, 257 (2d Cir. 2020). An official municipal policy or custom includes (1) "the decisions of a government's lawmakers"; (2) "the acts of its policymaking officials"; and (3) "practices so persistent and widespread as to practically have the force of law." *Lucente v. Cnty. of Suffolk*, 980 F.3d 284, 297 (2d Cir. 2020).

The district court correctly determined that there was no genuine dispute of material fact as to the County's liability for malicious prosecution. First, there was no evidence of a policy of witness coercion or coaching based on the "decisions of [the County's] lawmakers." *Id.* Second, Okongwu did not proffer any evidence that an act by a policymaking official led to a constitutional violation. Okongwu's evidence consisted only of his daughters' affidavits accusing *4 "prosecutors," "law enforcement officials," and "law enforcement authorities" of coercion, and his testimony that "all the sheriffs" in the County were responsible for coaching his daughters' testimony. By relying on those sweeping but vague claims, Okongwu did not identify any "decision by a municipal policymaker" that could "fairly be said to represent official policy." *Roe v. City of Waterbury*, 542 F.3d 31, 37 (2d Cir. 2008). While Okongwu is correct that the question of whether sheriff's deputies were policymakers is a matter of law, *see Jeffes v. Barnes*, 208 F.3d 49, 57 (2d Cir. 2000), he failed to identify a "single action" by a specific official with final policymaking authority that led to the alleged constitutional violation. *Hu v. City of New York*, 927 F.3d 81, 105 (2d Cir. 2019).

Third, Okongwu did not provide any evidence suggesting a "persistent and widespread practice" of witness coercion. *Lucente*, 980 F.3d at 297. The evidence he proffered consisted of various summaries in the National Registry of Exonerations of instances of police or prosecutorial misconduct by Erie County officials. Only one instance relates to threatening, coercing, or coaching witnesses. There is therefore no showing of conduct "so manifest as to imply the constructive acquiescence of senior policy-making officials." *Id.* at 297-98.

Finally, the County was entitled to summary judgment on Okongwu's *5 failure-to-train theory of liability, which required "a pattern of similar constitutional violations by untrained employees" showing that the County had been on notice. *Connick v. Thompson*, 563 U.S. 51, 62 (2011). The summaries that Okongwu provided simply do not provide a sufficient basis for a jury to find a pattern of witness coercion leading to malicious prosecution. *See also Outlaw v. City of Hartford*, 884 F.3d 351, 379 (2d Cir. 2018) (affirming grant of summary judgment to municipality where plaintiff relied, in part, on prior litigation about a different type of alleged misconduct). Okongwu also failed to identify any specific deficiency in the training curriculum for the sheriff deputies. On this evidence, a reasonable jury could not find that the County's failure to train its employees caused the witness coercion leading to his alleged malicious prosecution. *See Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 129 (2d Cir. 2004) (affirming summary judgment where plaintiffs "neglected to offer any evidence . . . as to the purported inadequacies" in a training program and

"the causal relationship between those inadequacies and the alleged constitutional violations").

II. Post-judgment Motions

We review the denial of the post-judgment motions for abuse of discretion. *6 *Metzler Inv. Gmbh v. Chipotle Mexican Grill, Inc.*, 970 F.3d 133, 146-47 (2d Cir. 2020). Okongwu asserted in his post-judgment motions that he had new evidence supporting his previously dismissed claims and sought to file a third amended complaint. Okongwu needed to show, among other things, that "the newly discovered evidence was of facts that existed" during the action, that he had been "justifiably ignorant" of the new facts, "despite due diligence," and that the evidence was admissible. *Id.* at 146-47 (addressing relief under Rule 59(e) and 60(b)).

Okongwu did not identify any new evidence. The proposed complaint contains new factual allegations but did not explain what new evidence the facts were based on. He therefore failed to show that the (unidentified) evidence was admissible. Nor did he establish that he had been justifiably ignorant of the new facts, contending instead that they came from documents he had previously sent to a friend. *See State St. Bank &Tr. Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 178 (2d Cir. 2004) (ruling party failed to demonstrate it was "justifiably ignorant" of evidence contained in its own files). And he did not show that he acted with diligence, as he did not explain *when* his friend had come forward with the documents. He thus failed to meet the burden for relief. *7

Finally, because Okongwu did not establish a basis for vacating the judgment, the district court properly denied leave to amend. *See Metzler Inv. Gmbh*, 970 F.3d at 142 ("It would be contradictory to entertain a motion to amend the complaint without a valid basis to vacate the previously entered judgment.").

We have considered all of Okongwu's arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment and order of the district court. *8

APPENDIX B

APPEALS COURT DENIAL OF REHEARING OR REHEARING EN BANC

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 28th day of November, two thousand twenty-two.

Emeka Dominic Okongwu,

Plaintiff-Appellant,

v.

County of Erie,

Defendant-Appellee,

Chris Collins, and his successors, in their official capacities as Erie County Executive, et al.,

Defendants.

ORDER

Docket Nos: 21-1025 (L)
21-2601 (Con)

Appellant, Emeka Dominic Okongwu, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

APPENDIX C

DISTRICT COURT'S ORDER DENYING MOTION FOR RECONSIDERATION

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

EMEKA DOMINIC OKONGWU,

Plaintiff,

v.

COUNTY OF ERIE,

Defendant.

DECISION AND ORDER

14-CV-832S

I. INTRODUCTION

Presently before this Court is Plaintiff Emeka Okongwu's motion asking this Court to reconsider its March 23, 2021 decision granting summary judgment to Erie County. By implication, Okongwu also asks this Court to revisit its decisions of September 7, 2016, and June 22, 2017, in which it dismissed most of Plaintiff's civil rights claims against various law enforcement, social service, and medical defendants. Okongwu alleges that he recently obtained new evidence that allows him to "fully present his case." (Docket No. 74-2 at p. 2.) He therefore also moves for leave to file a third amended complaint incorporating this new evidence. For the following reasons, all of Okongwu's motions will be denied.

II. BACKGROUND

This case stems from Okongwu's long imprisonment due to what he claims are his false arrest and malicious prosecution for sex crimes against his two daughters. (Docket No. 66-11 at p. 2; Certificate of Discharge, Docket No. 66-12 at p. 2.)

A. Allegations

The following is taken from Okongwu's proposed Third Amended Complaint, except where noted. (See Docket No. 74-3.) In 1984, Okongwu and his "traditional Nigerian wife," Doris Agbala, had twin daughters. (Id., ¶ 14.) After suffering medical problems, Agbala returned to Nigeria, leaving Okongwu in charge of raising his daughters. (Id., ¶ 16-17.) Okongwu relied on babysitters to help take care of his daughters. (Id., ¶ 18.) One babysitter alleged that Okongwu sexually abused his toddler-age twins. (Id., ¶ 20.) In 1988, Okongwu was exonerated of these allegations after a trial in Erie County Family Court. (Id., ¶ 21.) Okongwu's daughters were then placed in foster care. (Id., ¶ 22.)

The girls' foster mother, Ollie McNair, subsequently reported to the police "that once she came into the children's room and observed them playing on top of each other, and that when questioned what they were doing, they allegedly said that it was a simulation of what Daddy did to them when they visited him." (Id., ¶¶ 25-26.) Okongwu alleges that a criminal action was initiated solely based on these allegations. (Id., ¶ 26.) He was ultimately indicted on multiple criminal counts. (Id., ¶ 27.) Okongwu alleges that Erie County Sheriff Timothy Howard failed to properly investigate the claims against him. (Id., ¶ 42.) He further alleges that the district attorney, Frank Sedita, and others in his office, dictated to Buffalo police officers and Erie County deputy sheriffs what kind of evidence to collect. (Id., ¶¶ 46-47.) Okongwu also alleges that Sheriff's deputies, police officers, and assistant district attorneys all coached and coerced his daughters to testify falsely against him, threatening them with deportation to Nigeria if they did not cooperate. (Id., ¶¶ 47-50.) He alleges that all of these practices were part of policies of the District

Attorney's office and Buffalo Police Department. (Id., ¶¶ 67-69.)

Okongwu was convicted in New York state court of rape in the first degree, sodomy in the first degree, incest, sexual abuse in the first degree, endangering the welfare of a child, and harassment. (People v. Okongwu, 71 A.D.3d 1393 (App. Div. 4th Dep't.), Docket No. 66-11 at p. 2.) He was sentenced to 35-107 years. (Docket No. 74-3, ¶ 28.) On March 19, 2010, the New York Appellate Division, Fourth Department, vacated his conviction and sentence. (Id., ¶ 33.) In documents submitted opposing Erie County's motion for summary judgment, Okongwu clarified that his conviction was overturned on the basis of ineffective assistance of counsel. (Erie County Statement of Material Facts, Docket No. 66-2 at p. 2; Okongwu Statement of Undisputed Facts, Docket No. 69-1 at p. 2.) The Fourth Department found that due to Okongwu's counsel's failure to proffer favorable evidence or call an expert—combined with the inconsistent testimony of his young daughters—there was "reasonable evidence that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (People v. Okongwu, 71 A.D.3d 1393, Docket No. 66-11.)

After Okongwu's conviction was overturned, Erie County Assistant District Attorney Michael Cooper kept him in jail for an additional 2 years while attempting to convince Okongwu's daughters to testify against him again. (Docket No. 74-3, ¶ 49.) On November 22, 2021, while he was being held in the Erie County Holding Center ("ECHC"), Okongwu was assaulted by a fellow prisoner. (Id., ¶¶ 30-31.) When Okongwu was released, ECHC did not return his paperwork, including legal documents and personal mementos. (Id., ¶ 85.)

B. Procedural History

Okongwu initiated this action pro se in federal court on October 8, 2014, asserting multiple constitutional claims against multiple defendants. (Docket No. 1.) After being granted leave to proceed in forma pauperis, he filed an Amended Complaint on October 15, 2015. (Docket No. 6.) In his Amended Compliant, Okongwu claimed that he was subjected to false arrest and malicious prosecution when Erie County District Attorneys, Buffalo police officers, and Erie County Sheriff's deputies coached and coerced his daughters to testify falsely against him, including by threatening them with deportation to Nigeria if they did not cooperate. He claimed that Erie County, the Erie County Sheriff's Department, Erie County Sheriff Timothy Howard, the Buffalo Police Department, and the City of Buffalo all had a policy or custom of failing to train their employees not to coerce witnesses to testify falsely, and were therefore liable as well. He alleged that Sheriff Howard and Barbara Leary, an official at ECHC, failed to protect him from being assaulted by a fellow inmate at ECHC. He also asserted that Leary was responsible for the loss of his paperwork at ECHC, including important legal documents and family mementos. He brought additional claims against various medical and social service personnel who are not the subjects of the instant motion.

On September 7, 2016, this Court screened Okongwu's amended complaint pursuant to 28 U.S.C. § 1915 (e)(2)(B) and dismissed many of his claims. (Docket No. 12.) It dismissed claims alleging a civil conspiracy by his daughters' foster parent and various medical professionals, finding that Okongwu had not adequately pled their personal involvement but granting him leave to amend to plead such facts. (Docket No. 12 at p. 5.) It dismissed Okongwu's claims against the Erie County Sheriff's Department, Erie County District Attorney's Office, and Erie County Department of Social Services,

finding that named Defendant Erie County was the proper party for any of Okongwu's claims against the other entities. (Docket No. 12 at p. 7.) This Court dismissed Okongwu's claims against the City of Buffalo Police Department, finding that the City of Buffalo was the proper defendant for claims against the police department. This Court then dismissed with leave to replead Okongwu's claims against Erie County and the City of Buffalo, finding that Okongwu had not adequately pled their municipal liability. This Court dismissed with prejudice Okongwu's claims against New York and the New York Department of Corrections and Community Services, finding them barred by the Eleventh Amendment. (Id. at p. 9.) It permitted him to replead his claims against Barbara Leary, an official at ECHC, and numerous John Doe employees of Erie County Jail and NY DOCCS. (Id.)

This Court dismissed Plaintiff's HIPAA claim because HIPAA does not provide a private right of action. It allowed him to replead his Civil Racketeering claims. (Id. at p. 10-11.) It found that there was no foster parent liability so it dismissed Ollie McNair. This Court dismissed Okongwu's claims against individual prosecutors Dillion, Bridge, Cooper, and John Does 1-10 as barred by prosecutorial immunity unless he could allege that they acted outside their prosecutorial roles. (Id. at p. 11.)

Okongwu filed a Second Amended Complaint ("SAC") on October 14, 2016. (Docket No. 13.) As is relevant to the instant motion, his SAC named as defendants Erie County, the City of Buffalo, District Attorney Frank Sedita, ADA Carol Bridge, ADA Michael Cooper, Sheriff Timothy Howard, and Barbara Leary, an official of the Erie County Holding Center. His SAC also lists other defendants who were later dismissed and against whom he does not seek to reinstate claims through the instant motions: foster

parent Ollie McNair, Jen Heary, an official of Child and Adolescent Treatment Services of Buffalo, Dr. Stephen Lazoritz, a doctor at Children's Hospital of Buffalo, and Michael Flaherty, an assistant District Attorney. (Docket No. 13.) Okongwu's SAC also failed to name some of the original defendants in his Amended Complaint, so they were removed. Significantly for the instant motion, this included City of Buffalo Police Officer Marcia Scott. (See Second Amended Complaint, Docket No. 13.)

On June 22, 2017, this Court screened Plaintiff's SAC pursuant to 28 U.S.C. § 1915 (e)(2)(B). (Docket No. 15.) In its decision and order, this Court dismissed all but one of the remaining claims and defendants. It dismissed Okongwu's due process claims, claims of false arrest and false imprisonment, claims of malicious prosecution, claims of conspiracy and RICO violations, and failure to intervene and protect against all Defendants except the County of Erie.

Importantly for Plaintiff's instant motion, this Court found that, even as amended, Okongwu had not stated a claim against the three named members of the district attorney's office, Angelo Sedita, Michael Cooper, and Carol Bridge. This Court found that they enjoyed prosecutorial immunity from suit for malicious prosecution for any conduct in preparing witnesses for trial. (Docket No. 15 at p. 7-9.)

This Court further found that, from the face of the SAC, it was clear that probable cause to arrest Okongwu existed. This, in addition to Okongwu's failure to allege any facts indicating Sheriff Howard's actual malice, doomed his false arrest and malicious prosecution claims against Howard. (Id. at p. 11.) This Court did allow Okongwu's failure-to-train claim to proceed against Erie County for its alleged failure to train Erie County Sheriff's deputies not to coach witnesses to testify falsely.

The case was referred to the late Magistrate Judge Hugh B. Scott, and, after many extensions of time, the parties confirmed that discovery was complete on May 13, 2020. (Docket No. 65.) Erie County moved for summary judgment on August 2, 2020, and on March 23, 2021, this Court granted the motion, holding that Okongwu had not raised a genuine issue of material fact as to the existence of any county custom or policy of failing to train Sheriff's deputies in proper preparation of witnesses. (Docket No. 72.)

Okongwu now asks this Court to vacate its March 23, 2021 order and allow him to file a Third Amended Complaint. He asserts that new evidence in his possession warrants this relief. His proposed Third Amended Compliant contains claims not only against Erie County, but against defendants that this Court dismissed in earlier orders or whom he failed to include in later complaints: Sheriff Timothy B. Howard, Barbara Leary, Carol Bridge, Frank Sedita III, Michael Cooper, the Buffalo Police Department, the City of Buffalo, and Buffalo police detective Marcia Scott. (See Proposed Third Amended Complaint, Docket No. 74-2 at p. 1.)

III. DISCUSSION

Okongwu asserts that he has obtained new evidence that he had sent to a friend for safekeeping. He claims that this new evidence allows him to provide sufficient factual material to support his claims. He argues that, because he could not independently remember the details in this evidence, and because he could not access this information until his friend sent it to him—apparently sometime after the entry of this Court's March 23, 2021 order—he will suffer manifest injustice if this Court does not permit him to reinstate his claims.

A. Rule 59

1. Legal Standard

Federal Rule of Civil Procedure 59 (e) allows a party, within 28 days of the entry of judgment, to file a motion to amend or alter a judgment against it. To succeed on a motion for reconsideration under Rule 59 (e), the movant must demonstrate that the Court overlooked "controlling law or factual matters" that had been previously put before it. Papadopoulos v. US Gov't (FBI), No. 19-CV-4597 (LLS), 2019 WL 2498266, at *1 (S.D.N.Y. June 17, 2019). Relief can also be granted to correct a clear error or prevent manifest injustice. Int'l Ore & Fertilizer Corp. v. SGS Control Servs., Inc., 38 F.3d 1279, 1287 (2d Cir. 1994) (quoting Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd., 956 F.2d 1245, 1255 (2d Cir. 1992)).

The rule is not, however, a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a second bite at the apple. Sequa Corp. v. GBJ Corp., 156 F.3d 136, 144 (2d Cir. 1998). Nor is it "an opportunity for a party to 'plug[ ] the gaps of a lost motion with additional matters.'" Cruz v. Barnhart, No. 04 Civ. 9794 (DLC), 2006 WL 547681, at *1 (S.D.N.Y. Mar. 7, 2006) (quoting Carolco Pictures Inc. v. Sirota, 700 F. Supp. 169, 170 (S.D.N.Y. 1988)). "It is well established that the rules permitting motions for reconsideration must be narrowly construed and strictly applied so as to avoid repetitive arguments on issues that have been considered fully by the [c]ourt." In re Gen. Motors LLC Ignition Switch Litig., No. 14-MC-2543, 2017 WL 3443623, at *1 (S.D.N.Y. Aug. 9, 2017).

The decision to grant a Rule 59 (e) motion falls within the sound discretion of the court. New York v. Holiday Inns, Inc., No. 83-CV-564S, 1993 WL 30933, at *4 (W.D.N.Y.

1993). Relief under Rule 59 (e) "is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." Universal Trading & Inv. Co. v. Tymoshenko, No. 11 Civ. 7877 (PAC), 2013 WL 1500430, at *1 (S.D.N.Y. Apr. 10, 2013) (citing Parrish v. Sollecito, 253 F. Supp. 2d 713, 715 (S.D.N.Y. 2003)).

2. Okongwu's Rule 59 (e) motion fails

Okongwu filed the instant motion on March 30, 2021. (Docket No. 74.) It was therefore filed within 28 days of only one judgment of this Court, the decision and order granting summary judgment to Erie County on Okongwu's claim that it failed to adequately train Sheriff's deputies. (See Docket No. 72.) Insofar as Okongwu seeks relief under Rule 59 as to any older decisions and orders, his motion is denied as untimely.

Okongwu seeks amendment of this Court's March 23, 2021, judgment based on the existence of "new evidence" and the risk of "manifest injustice" if he cannot tell his full story by filing another amended complaint. But he does not specify the nature of his "new evidence." After a careful reading of his proposed Third Amended Complaint, which is based on this new evidence, this Court does not discern any new facts that would undermine this Court's finding, at the summary judgment stage, that Okongwu did not establish a genuine issue of material fact regarding a County policy or custom of failing to train Sheriff's deputies.[1] It contains nothing new regarding a County custom of failing to train Sheriff's deputies in preparing witnesses for trial.

[1] The new evidence this Court can discern includes the details of other alleged abuses by the City of Buffalo, specifics of how the prosecutors from the District Attorney's office collaborated with Buffalo police detective Marcia Scott and unnamed Sheriff's deputies, and some details about his assault in ECHC and Barbara Leary's alleged failure to protect him. There are other changes from the Second to the Third Amended Complaint, but these appear to be more attempts to re-plead his causes of action based on the Court's prior orders. For example, after repeatedly stating that district attorneys coached his daughters regarding their *testimony at trial*, Okongwu now alleges that they gave his daughters false statements to memorize during their *investigation of the case*. This appears to be a rewriting to avoid the doctrine of prosecutorial immunity, not the result of the discovery of new facts.

Instead of presenting new or overlooked evidence, Okongwu appears to be attempting to take a "second bite at the apple." Sequa, 156 F.3d at 144. This Court will therefore decline to grant his Rule 59 motion as to its March 23, 2021 decision.

B. Rule 60

1. Legal Standard

Rule 60 (b) provides that a court may relieve a party from a final judgment, order, or proceeding for the following reasons: "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud, misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief." Fed. R. Civ. P. 60 (b).

"A motion under Rule 60 (b) must be made within a reasonable time—and for reasons (1), (2), and (3), no more than a year after the entry of the judgment or order." Fed. R. Civ. P. 60 (c)(1).

Motions for relief under Rule 60 (b) are disfavored, and are reserved for exceptional cases. United States v. Int'l Bhd. of Teamsters, 247 F.3d 370, 391 (2d Cir.2001) ("A motion for relief from judgment is generally not favored and is properly granted only upon a showing of exceptional circumstances."); Nemaizer v. Baker, 793 F.2d 58, 61 (2d Cir.1986) ("Since 60 (b) allows extraordinary judicial relief, it is invoked only upon a showing of exceptional circumstances."). "The burden of proof is on the party seeking relief from judgment." Int'l Bhd. of Teamsters, 247 F.3d at 391. A party seeking

relief pursuant to Rule 60 (b) normally must: "(1) support its motion with 'highly convincing' evidence; (2) show good cause for its failure to act sooner; and (3) prove that granting the motion will not impose any undue hardship on the other parties." Canini v. United States DOJ Fed. Bureau of Prisons, No. 04 Civ. 9049, 2008 WL 818696 (S.D.N.Y. Mar. 26, 2008) (citing Kotlicky v. United States Fidelity & Guar. Co., 817 F.2d 6, 9 (2d Cir. 1987)).

Okongwu bases his motion on the need to prevent manifest injustice, invoking this Court's broad equitable powers under Rule 60 (b)(6). This Court will also consider his arguments as invoking Rule 60 (b)(2) because he refers to the existence of new evidence.

A party may move for relief from a final judgment based upon "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under [Federal Rule of Civil Procedure] 59(b)." Fed. R. Civ. P. 60 (b)(2). As noted above, courts require "that the evidence in support of the motion to vacate a final judgment be highly convincing, that a party show good cause for the failure to act sooner, and that no undue hardship be imposed on other parties." Howard v. MTA Metro-N. Commuter R.R., 866 F. Supp. 2d 196, 213–14 (S.D.N.Y. 2011) (quoting Kotlicky, 817 F.2d at 9).

Rule 60 (b)(6) "is a 'grand reservoir of equitable power to do justice in a particular case[,]' ... [b]ut that reservoir is not bottomless." Stevens v. Miller, 676 F.3d 62, 67 (2d Cir. 2012) (quoting Matarese v. LeFevre, 801 F.2d 98, 106 (2d Cir.1986)). A party seeking to avail itself of the relief under Rule 60(b)(6) must "demonstrate that extraordinary circumstances warrant relief." Stevens, 676 F.3d at 67 (internal quotations and citations omitted); see also In re Terrorist Attacks on September 11, 2001, 741 F.3d 353, 356 (2d

Cir. 2013) (accord).

"Relief pursuant to Rule 60 (b)(6) is reserved for extraordinary circumstances outside the purview of Rule 60 (b)(1)-(5)." Canale v. Manco Power Sports, LLC, No. 06 CIV. 6131, 2010 WL 2771871, at *4 (S.D.N.Y. July 13, 2010); see also Int'l Bhd. of Teamsters, 247 F.3d at 391–92 ("[I]f the reasons offered for relief from judgment can be considered in one of the more specific clauses of Rule 60 (b), such reasons will not justify relief under Rule 60 (b)(6)"). Of particular concern is that parties may attempt to use Rule 60 (b)(6) to circumvent the one-year time limitation in other subsections of Rule 60 (b). Stevens, 676 F.3d at 67 (citing First Fidelity Bank, N.A. v. Gov't of Antigua & Barbuda–Permanent Mission, 877 F.2d 189, 196 (2d Cir.1989)).

2. Okongwu's Rule 60 (b) motion fails

a. Rule 60 (b)(2)

Any arguments arising under Rule 60 (b)(2) can apply only to this Court's March 23, 2021 order, because it is the only one that falls within one year of Okongwu's motion. See Rule 60 (c).

As discussed above, Okongwu provides absolutely no details about his "new evidence," so that this Court is unable to determine whether it is admissible, let alone "highly convincing." Having read Okongwu's proposed Third Amended Complaint, which he seeks leave to file based on the existence of new evidence, this Court does not find any new facts that are likely to lead to a different outcome.

Nor does Okongwu address the issue of due diligence. Defendant correctly notes that discovery on Okongwu's claim against Erie County proceeded from June 27, 2018, to May 13, 2020, when the parties confirmed that discovery was complete. (See Docket

Nos. 33, 65). At no time did Okongwu address the issue of a lack of evidence, nor seek to vacate this Court's earlier decisions and pursue discovery against the previously dismissed defendants. This Court does not find, therefore, that Okongwu has demonstrated diligence in attempting to locate information he needed for his case.

Finally, reopening this issue after Erie County has in good faith sought and been granted summary judgment would impose a hardship on Erie County, and even more so on the other parties who were dismissed in 2016 and 2017. Together, these factors weigh against granting Okongwu's motion under Rule 60 (b)(2).

b. Rule 60 (b)(6)

Okongwu claims that the "withholding of documents by defendants" is an extraordinary circumstance that warrants relief from this Court's judgment pursuant to Rule 60 (b)(6). As an initial matter, this Court notes that it is an unfortunate reality that the papers of incarcerated persons are frequently lost by the facilities in which they are housed. Federal courts frequently see claims, like Okongwu's, seeking damages under the Fourteenth Amendment for their losses. See, e.g., Berg v. New York, No. 21-CV-3293 (LTS), 2021 WL 2435450, at *1 (S.D.N.Y. June 14, 2021); Michael Jones v. D.O.C.C.S., et al., No. 20-CV-1682-LJV, 2021 WL 1910239, at *10 (W.D.N.Y. May 12, 2021); Mejia v. New York City Dep't of Corr., No. 96-CV-2306 JG, 1999 WL 138306, at *4 (E.D.N.Y. Mar. 5, 1999). These claims are regularly denied when state law provides an adequate post-deprivation remedy, based on the Supreme Court's holding on this issue. See Hudson v. Palmer, 468 U.S. 517, 533, 104 S. Ct. 3194, 3204, 82 L. Ed. 2d 393 (1984).

Thus, the fact that Okongwu's documents were lost is not an "extraordinary circumstance." Nor is the fact that he did not have access to them evidence of manifest

injustice. He does not state that the lost documents contained the "new evidence" that he now seeks to incorporate. Nor does he explain why he never contacted his friend before this Court's March 23, 2021 decision, or why he never pursued any other means of obtaining information.

In essence, Okongwu's 60 (b)(6) claim regarding the withholding of his documents is a (b)(2) claim regarding his need to present new evidence. But Rule 60 (b)(6) should not be used to make arguments that could be made under other subsections, or to circumvent the time limits for motions under other subsections. Stevens, 676 F.3d at 67.

Okongwu claims he only received the evidence, from "a friend that recently came forward with documents Plaintiff had been sending to him during his incarceration," between some point shortly before March 23, 2021, and the filing of the instant motion on March 30, 2021. (Docket No. 77 at p. 3; Docket No. 74-2 at p. 2.) It stretches credulity that there was no way for Okongwu to contact this person and request these documents at any point before the entry of this Court's order granting summary judgment to Erie County. At any rate, Okongwu offers no explanation for the timing of his receipt of the evidence. This fact, combined with Okongwu's failure to address his lack of information during discovery, demonstrates a lack of diligence.

Finally, this Court finds that reopening its decisions from 2016 and 2017 would present an undue hardship to all defendants. Erie County, which participated in discovery, vigorously pursued summary judgement, and now has the opportunity to oppose Okongwu's instant motion, would suffer hardship from having to relitigate this action. And the parties dismissed in the 2016 and 2017 orders would suffer considerable hardship were Okongwu's claims against them to be reinstated, particularly on the basis of such

scant new evidence as this Court can discern from the proposed TAC. Only Erie County was ever served in this action; this Court assumes that the parties Okongwu now seeks to add have no knowledge of this action. To permit Okongwu to file and serve a TAC now, particularly given the lack of extraordinary circumstances warranting this relief, would be contrary to the interests of justice.

C. Rule 15 (a) Motions to Amend

Okongwu asks this Court, if it grants his request for relief from its judgments, to grant him leave to amend his complaint and incorporate his new evidence.

Courts "should freely give leave" to amend a complaint "when justice so requires." Fed. R. Civ. P. 15 (a) (2). Where, however, a party does not seek leave to file an amended complaint until after judgment is entered, "Rule 15's liberality must be tempered by considerations of finality." Williams v. Citigroup Inc., 659 F.3d 208, 213 (2d Cir. 2011). As a procedural matter, "[a] party seeking to file an amended complaint postjudgment must first have the judgment vacated or set aside pursuant to [Rules] 59(e) or 60(b)." Id. at 212–13; see also Nat'l Petrochem. Co. of Iran v. M/T Stolt Sheaf, 930 F.2d 240, 245 (2d Cir.1991) ("Unless there is a valid basis to vacate the previously entered judgment, it would be contradictory to entertain a motion to amend the complaint.")).

As discussed above, this Court does not find a valid basis under either Rule 59 or 60 to vacate its previously entered judgments. It therefore denies Okongwu's motion to amend.

IV. CONCLUSION

Having carefully considered Okongwu's motion, this Court does not find a compelling reason to amend or vacate any of its previous judgments. Although Okongwu refers to the existence of "new evidence," it is apparent that he simply seeks to present his case under a new theory. Relief under Rule 59 is therefore not warranted. Nor does Okongwu demonstrate extraordinary circumstances warranting equitable relief under Rule 60 (b). Because it denies his motions for reconsideration, this Court will also deny his motion to amend his complaint. For all these reasons, this Court denies Okongwu's motion for reconsideration and motion for leave to amend his complaint. (Docket No. 74.)

V. ORDERS

IT HEREBY IS ORDERED, that Plaintiff's Motion for Reconsideration (Docket No. 74) is DENIED.

SO ORDERED.

Dated: October 1, 2021
Buffalo, New York

s/William M. Skretny
WILLIAM M. SKRETNY
United States District Judge

APPENDIX D

DISTRICT COURT'S ORDER GRANTING SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

EMEKA DOMINIC OKONGWU,
Plaintiff, v. COUNTY OF ERIE,
Defendant.
DECISION AND ORDER

14-CV-832S

I. INTRODUCTION In this action, Plaintiff Emeka Okongwu seeks damages from Erie County for violating his constitutional rights when Erie County sheriff's deputies coerced his daughters to testify falsely against him in a sexual assault prosecution that resulted in his extended incarceration. Before this Court is Defendant' s motion for summary judgment (Docket No. 66), which this Court will grant, for the following reasons.

II. BACKGROUND Unless otherwise noted, the following facts are undisputed for purposes of the motion for summary judgment. This Court takes the facts in the light most favorable to Okongwu, the non-moving party. See Mitchell v. City of New York, 841 F.3d 72, 75 (2d Cir. 2016) (at summary judgment, a court "views the evidentiary record in the light most favorable to ... the non-moving party").

On December 21, 1992, a grand jury indicted Okongwu for rape in the first degree, incest, sodomy in the first degree, sexual abuse in the first degree, endangering the welfare of a child, and harassment. (Docket No. 66-11 at p. 2; Certificate of Discharge, Docket No. 66-12 at p. 2.) Okongwu's daughters both testified at his trial that he had

abused them. (Affidavit of Chendo Okongwu, Docket No. 66-10 at p. 11.)

Okongwu's daughters assert in sworn affidavits that "law enforcement officials" and prosecutors told them to testify falsely against their father and threatened them with deportation to Africa if they did not memorize false facts provided to them about their father's sexual abuse. (Affidavit of Nnedi Okong wu, Docket No. 66-10 at pp. 5-7; Affidavit of Chendo Okongwu, Docket No. 66-10 at pp. 11-13.) Both daughters assert that unnamed "law enforcement authorities" paid them for their false testimony. (Id. at pp. 6, 12.)

Okongwu was sentenced to 35 to 107 years imprisonment as a result of this prosecution. (Docket No. 66-5 at p. 8.) He served approximately 16 years of his sentence. (Id.) On December 15, 2011, the New York Appellate Division, Fourth Department, vacated Okongwu's judgment of conviction on the basis of ineffective assistance of counsel. (Erie County Statement of Material Facts, Docket No. 66-2 at p. 2; Okongwu Statement of Undisputed Facts, Docket No. 69-1 at p. 2.) The Fourth Department based its holding on Okongwu's counsel's failure to proffer favorable evidence or call an expert and on the inconsistent testimony of his daughters. (People v. Okongwu, 71 A.D.3d 1393, at Docket No. 66-11.) The Fourth Department found "reasonable evidence that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Docket No. 66-11 at p. 4.) Okongwu brought this action on October 8, 2014,

asserting multiple constitutional claims against multiple defendants. (Docket No. 1.) Because Okongwu was proceeding in forma pauperis, this Court screened his Amended Complaint pursuant to 28 U.S.C. § 1915. (Docket No. 12.) This Court dismissed Okongwu's claims against the Erie County

District Attorney's Office, the Erie County Sheriff's Office, the Erie County Department of Social Services, and the City of Buffalo Police Department. (Docket No. 12.) In a further screening order, this Court dismissed all but one of the claims in the Second Amended Complaint. (Docket No. 15.) This Court read Okongwu's complaint "generously" as asserting that his alleged malicious prosecution "was a product of the failure o f Erie County to properly train and monitor its employees." (Id. at p. 16.) Implicit in this statement was this Court's finding that the County, not the Sheriff's Office, could be a proper defendant for this cause of action.

Okongwu's remaining claim is for malicious prosecution against Erie County. Okongwu asserts that " undersheriffs of the Sheriff's Department arrested him, procured his two daughters and coerced, coached and intim[id]ated them while paying them when the process of fabrication of evidence against Plaintiff went well." (Docket No. 69-1 at p. 4.) Erie County does not assert that this did not happen, but rather, argues that it does not employ Erie County sheriff's deputies and has no policy related to the training or conduct of sheriff's deputies.

III. DISCUSSION Okongwu claims that Defendant violated his Fourth Amendment right to be free from malicious prosecution when it failed to train sheriff's deputies not to coerce his daughters to testify falsely against him. He seeks compensatory and punitive damages from the County on this basis. Defendants move for summary judgment on Okongwu's claim . A. Summary Judgment

Summary judgment is appropriate if "the movant shows that there is no genuine

dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (a). A fact is "material" if it "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc. , 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). An issue of material fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

In deciding a motion for summary judgment, the evidence and the inferences drawn from the evidence must be "viewed in the light most favorable to the party opposing the motion." Addickes v. S.H. Kress and Co., 398 U.S. 144, 158-59, 90 S. Ct.1598, 1609, 26 L. Ed. 2d 142 (1970). "Only when reasonable minds could not differ as to the import of evidence is summary judgment proper." Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir. 1991). Indeed, "[i]f, as to the issue on which summary judgment is sought, there is any evidence in the record from which a reasonable inference could be drawn in favor of the opposing party, summary judgment is improper." Sec. Ins. Co. of Hartford v. Old Dominion Freight Line, Inc., 391 F.3d 77, 82– 83 (2d Cir. 2004) (citations omitted). But a "mere scintilla of evidence" in favor of the nonmoving party will not defeat summary judgment. Anderson, 477 U.S. at 252. A nonmoving party must do more than cast a "metaphysical doubt" as to the material facts; it must "offer some hard evidence

showing that its version of the events is not wholly fanciful." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); Wright v. Goord, 554 F.3d 255, 266 (2d Cir. 2009) ("When a motion for summary judgment is properly supported by documents or other evidentiary materials, the party opposing summary judgment may not merely rest on the allegations or denials of his pleading....") ; D'Amico v. City of N.Y. , 132 F.3d 145, 149 (2d Cir. 1998). That is, there must be evidence

from which the jury could reasonably find for the non-moving party. See Anderson, 477 U.S. at 252.

In the end, the function of the court is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson, 477 U.S. at 249. "Assessments of credibility and choices between conflicting versions of the events are matters for the jury, not for the court on summary judgment." Rule v. Brine, Inc., 85 F.3d 1002, 1011 (2d Cir. 1996). B. Federal Constitutional Claim

Okongwu brings his claim pursuant to 42 U.S.C. § 1983. Civil liability is imposed under § 1983 only upon persons who, acting under color of state law, deprive an individual of rights, privileges, or immunities secured by the Constitution and laws. See 42 U.S.C. § 1983. On its own, § 1983 does not provide a source of substantive rights, but rather, a method for vindicating federal rights conferred elsewhere in federal statutes and the Constitution. See Graham v. Connor, 490 U.S. 386, 393-94,109 S. Ct. 1865, 1870, 104 L. Ed. 2d 443 (1989) (quoting Baker v. McCollan, 443 U.S. 137, 145 n.3, 99 S. Ct. 2689, 2695, 61 L. Ed. 2d 433 (1979)). Accordingly, as a threshold matter in reviewing claims brought pursuant to § 1983, it is necessary to precisely identify the constitutional violations alleged. See Baker, 443 U.S. at 140. Here, Okongwu's malicious prosecution claim is grounded in the Fourth Amendment. C. Municipal Liability

To prevail on a § 1983 claim against a municipal entity, a plaintiff must show: "(1) actions taken under color of law; (2) deprivation of a constitutional or statutory right; (3) causation; (4) damages; and (5) that an official policy of the municipality caused the

constitutional injury." Roe v. City of Waterbury , 542 F.3d 31, 36 (2d Cir. 2008). Thus, "a municipality can be held liable under Section 1983 if the deprivation of the plaintiff's rights under federal law is caused by a governmental custom, policy, or usage of the municipality." Jones v. Town of E. Haven, 691 F.3d 72, 80 (2d Cir. 2012). "T he Supreme Court has made clear that ' a municipality cannot be made liable' under § 1983 for acts of its employees ' by application of the doctrine of respondeat superior.'" Roe, 542 F.3d at 36 (citing Pembaur v. City of Cincinnati, 475 U.S. 469, 478, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986)).

"Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." Connick v. Thompson, 563 U.S. 51, 60 – 61, 131 S. Ct. 1350, 1359, 179 L. Ed. 2d 417 (2011) (citing Monell v. New York City Dept. of Social Servs., 436 U.S. 658, 692, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)). While the actions of subordinate employees do not, in and of themselves, constitute a "custom" or "practice," the single act of a municipal policymaker, i.e., a

person with the authority to set municipal policy, can constitute official policy, and thus, can give rise to municipal liability. See Pembaur, 475 U.S. at 480. Additionally, a municipal policymaker's failure to train can trigger municipal liability where such a failure " ' amounts to deliberate indifference to the rights' of those with whom municipal employees will come into contact." Walker v. City of New York, 974 F.2d 293, 297 (2d. Cir.1992) (quoting City of Canton v. Harris, 489 U.S. 378, 388, 109 S. Ct. 1197, 103 L.Ed.2d 412 (1989)). But the "mere assertion that a municipality has such a policy is insufficient to establish Monell liability," and a plaintiff "may not overcome summary judgment by relying merely on allegations or denials in its

own pleading." Manganiello v. City of New York, No. 07 Civ. 3644(HB), 2008 WL 2358922, at *9– 10, 2008 U.S. Dist. LEXIS 44765, at *29– 30 (S.D.N.Y. June 10, 2008). See also Southerland v. Garcia, 483 F. App'x. 606, 609 (2d Cir. 2012) ("summary judgment was proper on the remaining claims against the City. Plaintiffs have failed to allege, let alone present any evidence of, an official custom or policy such as is necessary to establishing liability under Monell...."); Jackson v. Cnty. of Nassau, No. 07– CV– 245 (JFB)(AKT), 2010 WL 1849262, at *11, 2010 U.S. Dist. LEXIS 44344, at *35– 36 (E.D.N.Y. May 6, 2010) (granting summary judgment in favor of county on plaintiff's Monell claim, because the "mere assertion that a municipality has s uch a policy is insufficient to establish Monell liability," and "in any case Plaintiff may not overcome summary judgment by relying merely on allegations or denials in its own pleading.") .

The County argues that Okongwu has not identified a policy under any of the above theories of liability.

First, the County argues that Okongwu has not offered any evidence of the existence of a policy or custom pursuant to which he was injured. This Court agrees. Okongwu submits printouts regarding ten local defendants who were later exonerated, but none of these cases constitutes evidence from which a reasonable jury could find a County policy of encouraging false witness testimony. (See Docket No. 69 at pp. 12-15.)

The case of Valentino Dixon involves, as Okongwu's briefing states it, an unnamed "official of the police" forcing a witness to falsely identify Dixon as a murderer. (Docket No. 69 at p. 12; see also Docket No. 69-3 at pp. 2-4.) Okongwu states that Dixon is currently suing Erie County, but does not specify under what theory of liability. And the mere filing of a lawsuit does not prove liability. Okongwu states that Warith Habib Abdal

"settled a lawsuit with Erie County," and that "Erie County was liable," (Docket No. 69 at p. 12), but the printout Okongwu attaches from the National Registry of Exonerations states that Abdal's estate ultimately settled with the City of Buffalo, undercutting Okongwu's assertion of Erie County's responsibility for any violation. (Docket No. 69- 3 at pp. 5-6.)

The case of Peter Dombrowski involves a police lineup and the gathering of fingerprints but it is not clear from Okongwu's submission what law enforcement agency was involved. (Docket No. 69-3 at p. 7.) In the case of Cory Epps, Okongwu states that "Erie County law enforceme nt" withheld evidence of mistaken identity, and that "Erie County was liable," but the document he submits states that Epps subsequently sued the City of Buffalo, not Erie County. (Docket No. 69-

3 at p. 9.) Although Okongwu asserts that "Erie County was li able" in the case of Nathanial Johnson, the exoneration printout does not point to any misconduct. (Docket No. 69-3 at pp. 10-11.) Okongwu asserts that "law enforcement in Erie County coerced a confession" from Josue Ortiz, and that "Erie County was liable," (Docket No. 69 at pp. 13-14), but the exoneration printout suggests that Ortiz testified falsely due to mental illness, and that he subsequently sued the City of Buffalo in federal court. (Docket No. 69-3 at p. 13.) Okongwu asserts that "authorities li ed to obtain the conviction" of Michael White, but the documentation he submits suggests that White was exonerated based on later, more sophisticated DNA testing of semen samples. (Docket No. 69 at p. 15.)

In his memorandum, Okongwu also mentions the cases of Anthony Capozzi, Jerome Thagard, and Lynn Dejac, but does not provide any supporting documentation. (See, e.g., Docket No. 69 at p. 14, "Anthony Capozi (sic). This wrongful conviction case

was caused by police misconduct. Erie County was liable."). In all instances, Okongwu asserts, "Erie County was liable." (Docket No. 69 at pp. 12- 15.)

Okongwu also mentions a 300-page report by the International Association for Police Chiefs "voicing concern about official misconduct of the officials of the county of Erie." (Docket No. 69 at p. 15.) But he does not submit any part of this report that supports this proposition, nor does he demonstrate that Erie County was aware of and disregarded this report, or that the misconduct allegedly detailed in this report relates to any injury he suffered.

None of Okongwu's assertions or documentation constitutes evidence from which a jury could find an Erie County custom of coercing or coaching of false testimony by sheriff's deputies, the conduct at issue in his case.

Regarding the second theory of Monell liability, Okongwu does not provide evidence of any acts by policymakers. He asserts that unnamed sheriff's deputies coached his daughters to testify falsely against him. In his deposition, when asked to identify the particular actors who did this, he stated " all the sheriffs in Erie county." (Okongwu Deposition, Docket No. 66-7 at p. 7.) His daughters' affidavits state that "law enforcement officials" coached and bribed them to testify falsely . (See, e.g., Affidavit of Nnedi Okongwu, Docket No. 66-10 at pp. 5-7.) Taken together, this is insufficient evidence from which a reasonable jury could conclude that the officers who "coached" his daughters were policymakers.

Third, he does not provide evidence of a custom or practice that was tolerated or gained the force of an official policy. The existence of 10 incidents where defendants were exonerated does not establish a custom that gained the force of an official policy, just as

it did not establish the existence of an official policy or custom. To establish liability under this theory, Okongwu would have to demonstrate both that constitutional violations occurred, and that the County was aware of them and failed to remedy them, thereby tolerating them. This argument fails, apart from the fact that the examples do not implicate coercion of false testimony by sheriff's deputies, because it is not clear that Erie County was aware of these actions such that it tolerated a custom.

It is well established that contemporaneous or subsequent instances of constitutional violations cannot be used to demonstrate a municipality's awareness of an issue and consequent duty to remedy it. O'Neal v. City of New York, 196 F. Supp. 3d 421, 435 (S.D.N.Y. 2016), aff'd sub nom. O'Neal v. Morales, 679 F. App'x 16 (2d Cir. 2017) (citing Connick, 563 U.S. at 63 n. 7 ("[C]ontemporaneous or subsequent conduct cannot establish a pattern of violations that would provide 'notice to the cit[y] and the opportunity to conform to constitutional dictates ...') (quoting City of Canton, 489 U.S. at 395)).

Okongwu's daughters assert that they were coached by law enforcement officials "in advance of [their] father's trial in November 1993." (Docket No. 66- 10 at pp. 3, 5.) Of the examples Okongwu submits, only three predate his 1993 prosecution. Dombrowski went on trial in 1985—but the issue was withholding of evidence. (Docket No. 69-3 at p. 7.) Although Valentino Dixon was convicted in 1995, the conduct appears to have been by Buffalo police. (Id. at p. 3.) Later DNA evidence, not County actions, appear to have exonerated Abdal. (Id. at pp. 14-15.)

In short, Okongwu has failed to submit admissible evidence for the proposition that the County or sheriff's department tolerated a practice of sheriff's deputies coercing or

coaching witnesses to falsely testify, and his argument on this theory of municipal liability fails.

Turning to the final theory of municipal liability, Okongwu does not provide evidence from which a jury could determine that the County failed to train sheriff's deputies in proper and constitutional methods of preparing witnesses. The Second Circuit and Supreme Court have established that to succeed on a failure-to-train claim a plaintiff must " establish not only that the officials' purported failure to train occurred under circumstances that could constitute deliberate indifference, but also that plaintiffs identify a specific deficiency in the city's training program and establish that that deficiency is 'closely related to the ultimate injury,' such that it 'actually caused' the constitutional deprivation." Amnesty Am. v. Town of W. Hartford, 361 F.3d 113, 129– 30 (2d Cir. 2004) (quoting City of Canton, 489 U.S. at 391). In other words, a plaintiff must establish that "the officer's shortcomings ... resulted from ... a faulty training program" rather than from the negligent administration of a sound program or other unrelated circumstances. Id.

Okongwu has proffered no evidence of the County's training programs or advanced any theory as to how a training deficiency caused the unnamed sheriff's deputies to coach and coerce his daughters to testify falsely. Plaintiffs' failure-to-train theory is based solely on his daughters' sworn statement that unnamed "law enforcement officials" brib ed, coerced, and coached them to lie about their father's actions. But this is not sufficient to establish that these actions stemmed from improper training (whether negligent or deliberately indifferent) and not from the independent decisions of individual officers.

At the summary judgment stage, Okongwu cannot rest on the allegations of his

complaint. Nothing he submits would suffice to persuade a reasonable jury that failure of training caused his injuries. See Southerland, 483 F. App' x. at 609 (holding summary judgment proper where plaintiffs " failed to allege, let alone present any evidence of, an official custom or

policy such as is necessary to establishing liability under Monell...."); Jackson, 2010 WL 1849262, at *11 (granting summary judgment in favor of county on plaintiff's Monell claim, because the "mere assertion that a municipality has such a policy is insufficient to establish Monell liability," and "in any case Plaintiff may not overcome summary judgment by relying merely on allegations or denials in its own pleading") .

Under these circumstances, a reasonable jury could not find the County liable under Monell for any constitutional violation Okongwu may have suffered. D. Because there is no evidence of a policy, the County's legal relationship to

the Sheriff's Office is not a relevant inquiry. The County's main argument in moving for summary judgment is that the County does not employ, direct, or make policies governing the sheriff's deputies, so that it cannot be held liable for any constitutional violations on their part. But regardless of who ultimately controls the actions of the sheriff's deputies , Okongwu has failed to demonstrate the existence of a policy pursuant to which he was injured. This Court grants summary judgment because a reasonable jury could not find that any municipal policy caused Okongwu's alleged constitutional injury. It does not reach the merits of Defendant's argument that a county cannot , as a matter of law, be held liable for the actions of a sheriff's deputy. This Court has rejected this argument, and in the Second Circuit, courts have held that a sheriff's office can act as a policymaker for a county for the purposes of liability under § 1983. (See Docket No. 23 at p. 5; see also Jeffes v. Barnes, 208 F.3d 49 (2d Cir. 2000); Leather v. Ten Eyck, 2 F. App'x 145 (2d Cir . 2001)

(finding that a county could be sued under § 1983 for sheriff's practices); Dudek v. Nassau Cty., 991 F. Supp. 2d 402, 413 (E.D.N.Y. 2013); Lin v. Cty. of Monroe, 66 F. Supp. 3d 341, 351 (W.D.N.Y. 2014) (dismissing claim against county but rejecting county's argument that plaintiff failed to establish Monell liability because the county is not responsible for developing and implementing the policies, procedures, and regulations pertaining to the conduct of its sheriff's deputies)). Because, as discussed above, liability does not lie under any theory of Monell, it is not necessary to revisit this question here in order to resolve the County's motion. D. Because there is no Monell liability, whether Okongwu has established

malicious prosecution claim is not a necessary inquiry. The other element of a failure-to-train claim is the existence of a constitutional violation. Monell does not provide a separate cause of action for the failure by the government to train its employees; it extends liability to a municipal organization where that organization's failure to train, or the policies or customs that it has sanctioned, led to an independent constitutional violation. Segal v. City of New York, 459 F.3d 207, 219 (2d Cir. 2006) (citing Monell, 436 U.S. at 694 (involving a policy that was "the moving force of the constitutional violation")); see also City of Canton v. Harris, 489 U.S. 378, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989) (involving a failure to train municipal employees that led to the constitutional injury). But here, because there is no theory under which the County could be held liable for any violation Okongwu may have suffered, this Court need not address the parties' arguments about whether a jury could find that Okongwu was subjected to malicious prosecution in violation of his constitutional rights.

IV. CONCLUSION For the reasons stated above, Defendant' s Motion for Summary Judgment is granted. Because a reasonable jury could not find that any sheriff's deputies who interacted with Okongwu's daughters acted pursuant to a policy of Erie County, summary judgment is granted to Erie County.

V. ORDERS IT HEREBY IS ORDERED, that Defendant's Motion for Summary Judgment (Docket No. 66) is GRANTED. The Clerk of Court is hereby DIRECTED to close this case.

SO ORDERED.

Dated: March 23, 2021

Buffalo, New York

s/William M. Skretny

WILLIAM M. SKRETNY United States District Judge