

Fed. R. Civ. P. 59(e) (Supp. 2007). A Rule 59(e) motion “calls into question the correctness of a judgment.” *In re Transtexas Gas Corp.*, 303 F.3d 571, 581 (5th Cir. 2002). Plaintiffs’ Motion was filed within ten (10) days of entry of the Court’s Final Judgment in this case (which entry date was April 1, 2008). *See Lavespere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167, 175 (5th Cir. 1990). Such a motion is not the proper vehicle, however, for rehashing evidence, legal theories or arguments that were or could have been offered or raised before the entry of judgment. *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990). 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). Reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly. *See Clancy v. Employer’s Health Ins. Co.*, 101 F.Supp.2d 463, 465 (E.D. La. 2000) (citing 11 CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY K. KANE, *Federal Practice & Procedure*, § 2810.1, at 124 (2d ed. 1995)).

Plaintiffs’ Motion asserts, as its grounds for requesting this Court to vacate its judgment and reinstate Plaintiffs’ case, the following: (1) the Court’s commission of a “manifest error of law” by applying the statute of limitations to the facts alleged in this case; and (2) the Court’s appearing “to have been influenced, in part, by Plaintiff Frame’s various ADA lawsuits filed over the past give (sic) (5) years.” Plaintiffs’ Motion, p. 1.¹ Plaintiffs have attached to their motion the Affidavit of Richard Frame, ostensibly in support of Plaintiffs’ Motion.² For the

¹ Plaintiffs’ Motion does not assert as a ground for relief that the Court’s other ruling, that Plaintiffs do not have standing to enforce through a private right of action the transition plan regulation, should be changed.

² Notwithstanding this Court’s prior admonitions to Plaintiffs’ counsel to comply with this Court’s Local Rules (*see* this Court’s Order Granting Amended Motion for Extension and Rendering Moot Motion for Sanctions, filed December 14, 2005, at n.1; and Order Striking and Unfiling Document, filed August 25, 2006), Defendant notes that Plaintiffs’ Motion does not comply with this Court’s Local Rule 7.1, or the Court’s rules regarding electronic case filing procedures, in the following particulars: (a) the motion, brief and appendix are all contained in one document rather than in three separate documents, (b) no proposed order was submitted to the Court, (c) no paper copy of Plaintiffs’ Motion appears to have been forwarded to the Court, (d) the certificate of service is in incorrect form, and **DEFENDANT’S RESPONSE TO PLAINTIFFS’ MOTION TO ALTER AND/OR AMEND JUDGMENT – PAGE 2**

reasons set forth herein, in the Court's Order Granting Third Renewed Motion to Dismiss, dated March 31, 2008 (the "Court's Order"), in Defendant City of Arlington's Third Renewed Rule 12(b)(6) Motion to Dismiss Plaintiffs' Claims ("Defendant's Motion to Dismiss"), in Defendant's Brief in Support of Its Third Renewed Rule 12(b)(6) Motion to Dismiss Plaintiffs' Claims ("Defendant's Brief"), and in Defendant's Reply to Plaintiffs' Brief in Response to Defendant's Third Renewed Motion to Dismiss ("Defendant's Reply"), Plaintiffs' Motion should be denied in its entirety.

II. ARGUMENT AND AUTHORITIES

Plaintiffs' Motion needlessly requests this Court to review the same argument and authorities it already considered when it entered Final Judgment in this case. One of the grounds asserted in Defendant's Motion to Dismiss was that the applicable statute of limitations barred Plaintiffs' discrimination claims because Plaintiffs failed to allege that Defendant's discriminatory events occurred within two years prior to the filing of this lawsuit. *See* Defendant's Motion to Dismiss, p. 4; and Defendant's Brief, pp. 4-8. The Court correctly observed that there was no allegation that Defendant's creation of alleged barriers occurred within two years of Plaintiffs' filing suit. *See* Court's Order, pp. 6-8.

Plaintiffs' Motion nonetheless asserts that the "date the City of Arlington ('Arlington') created a barrier is not when a cause of action accrues." Plaintiffs' Motion, p. 1. Plaintiffs' Motion fails to refer the Court, however, to **any authority whatsoever** to support Plaintiffs' argument. *See, generally*, Plaintiffs' Motion. Plaintiffs based their claims on alleged defective construction and/or alteration of Defendant's sidewalk and curb ramp facilities. *See, generally*,

(e) the signatures appearing in the signature block and certificate of service are in improper form. *See, also*, this Court's Local Rule 11.1.

Plaintiffs' Fourth Amended Complaint. Plaintiffs' Motion's attempt to shift the focus of their case by asserting, on the one hand, that Defendant should be liable for failing to properly construct its sidewalk and curb ramp facilities at any time after 1992, yet on the other hand, that liability should attach to Defendant when any disabled person personally learns of such construction failure more than two years prior to filing suit, inconsistently applies the law. In other words, Plaintiffs' Motion fails to explain Plaintiffs' inconsistent attempt to point to Defendant's allegedly defective construction, on the one hand, yet on the other hand disregard the date of construction by focusing on Plaintiffs' alleged discovery of these events, in order to avoid application of the statute of limitations. This Court's analysis, therefore, was correct, and the Final Judgment should not be altered or amended.

Further, in an emotional argument, Plaintiffs assert that "it is irrelevant *when* the barrier was created by Arlington, so long as it was created after the 1992 enactment of the ADA." Plaintiffs' Motion, pp. 3-4. Again, Plaintiffs cite no authority for their position. *Id.* Plaintiffs' argument focuses on the encounter by Plaintiffs of the alleged sidewalk or curb ramp barrier rather than on the date of alleged improper construction of the sidewalk or curb ramp, even after the Court's Order Denying as Moot Motion to Dismiss and Directing Amended Complaint, at p. 2, requested more specific factual allegations about construction dates. Plaintiffs' five pleading attempts nonetheless never complied with the Court's request, nor did Plaintiffs provide any factual allegations in order to show their compliance with the applicable statute of limitations. Plaintiffs' Motion's egregious lack of citation to any authority to support Plaintiffs' position renders Plaintiffs' Motion somewhat frivolous.

Plaintiffs' Motion then asserts, as did Plaintiffs' responses to Defendant's Motion to Dismiss, that the continuing violation theory causes their claims to survive Defendant's Motion to Dismiss. Plaintiffs' Motion, pp. 4-6. As the Court's Order correctly analyzed, at pp. 7-8,

Plaintiffs failed to allege any construction or alteration by Defendant of any sidewalk or curb ramp sooner than three years before the Plaintiffs' complaint was filed. *Id. See, also*, Defendant's Brief, pp. 4-8; and Defendant's Reply, pp. 3-4. Plaintiffs' Motion likewise provides the Court no basis upon which to reverse the Final Judgment in this issue.

Plaintiffs' Motion asserts that the Court incorrectly applied *Deck v. City of Toledo*, 56 F.Supp.2d 886 (N.D. Ohio 1999). Plaintiffs' Motion, pp. 5-6. Plaintiffs' response to Defendant's Motion to Dismiss did not differentiate the holding in *Deck*, where *Deck* held that the two-year statute of limitations in Ohio applied to the ADA claims asserted by the *Deck* plaintiffs. *See* Plaintiffs' Response, p. 7. The same is true in Plaintiffs' Motion. This Court adequately reviewed Plaintiffs' claims, and the applicable cases that address the statute of limitations applicable to Plaintiffs' claims, and correctly found that, in light of Plaintiffs' failure to allege any specific construction or alteration that was made within the two-year limitations period, Plaintiffs' claims necessarily should be dismissed. *See* Court's Order, pp. 6-8. Nothing in Plaintiffs' Motion adds new argument or authority to this Court's analysis of that issue.

Next, Plaintiffs expressed displeasure with footnote 1 in the Court's Order. Plaintiffs' Motion, pp. 6-7, and Affidavit of Richard Frame, attached as Exhibit A to Plaintiffs' Motion. Plaintiff Frame's Affidavit does not cure any of the statute of limitations defects outlined in the Court's Order, and does not justify this Court's reversal of the Final Judgment entered in this case. While the Affidavit of Richard Frame confirms the Court's observation regarding the numerous lawsuits filed in this Court by Plaintiff Frame over the past several years, the Affidavit completely omits any pre-litigation attempts to contact and resolve potential disputes with the

numerous companies he sued prior to filing suit. Plaintiff Frame, therefore, does not add any new relevant evidence to the Court's consideration of this matter.³

Finally, the pleading standard invoked by Plaintiffs' Motion is that Plaintiffs' complaint should not be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Plaintiffs' Motion, p. 3 (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). As this Court noted, in the Court's Order, at p. 3, and as was urged in Defendant's Reply, at p. 2, Plaintiffs fail to address the recent United States Supreme Court decision in *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, 127 S.Ct. 1955 (2007) vis-à-vis pleading requirements in federal court. In *Bell Atlantic*, the Supreme Court abrogated the very language relied upon and quoted in Plaintiffs' Motion from the *Conley* case. In other words, under the *Bell Atlantic* case, *Conley* is no longer the law, and Plaintiffs were required to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic*, 127 S.Ct. at 1974. Additionally, "factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic*, 127 S.Ct. at 1965. As the Court's Order found, Plaintiffs did not plead a plausible claim of discrimination under the ADA or the Rehabilitation Act beyond the purely speculative level. See Court's Order, pp. 6-8. Nothing in Plaintiffs' Motion presents anything more than was presented to the Court previously. Plaintiffs' Motion merely attempts to rehash the pleadings, legal theories and arguments that were already raised before the entry of Final Judgment. As a result, Plaintiffs' Motion should be denied.

WHEREFORE, PREMISES CONSIDERED, Defendant City of Arlington, Texas, prays that Plaintiffs' Motion to Alter and/or Amend the Judgment of Dismissal and Memorandum of

³ While Plaintiffs' Motion asserts, at p. 6, that Plaintiff Frame's actions "are largely selfless," such an argument leaves open the observation that Plaintiff Frame's efforts are not totally selfless, by implication. In any event, the Affidavit of Richard Frame forms no basis upon which this Court should reverse the Final Judgment in this case.

Law in Support Thereof be denied, and Defendant prays for such other and further relief to which it may be justly entitled.

Respectfully submitted,

By: /s/ Edwin P. Voss, Jr.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this document was served by certified mail, return receipt requested, upon Mr. John M. Nevins, Moseley Law PC, 3878 Oak Lawn Avenue, Suite 400, Dallas, Texas 75219-4469 (Plaintiffs' local counsel), and upon Messrs. Miguel M. de la O and Charles D. Ferguson, De la O, Marko, Magolnick & Leyton, 3001 S.W. 3rd Avenue, Miami, Florida 33129, lead counsel for Plaintiffs, on the 29th day of April, 2008, in addition to service provided by the Court's ECF procedures.

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