No. 19- ______

In The
Supreme Court of the United States

Steven E. Greer, MD

Petitioner,

vs.

Dennis Mehiel, Robert Serpico,
The Battery Park City Authority

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

The Lozman question

Did the lower courts misapprehend, then ignore completely on appeal, Lozman v. City of Riviera Beach, Fla., 13 8 S. Ct. 1945 (2018) in denying the Rule 60 motion and appeal? Was Greer v Mehiel indeed remarkably similar to Lozman, and therefore the probable cause defense should not have defeated the two First Amendment retaliation claims (i.e. that Greer's rights to petition and to report in the press were violated as well as being retaliated against via eviction)?

The Monell question

Respondent Dennis Mehiel, who was both the CEO and Chair of the Board of the Battery Park City Authority ("BPCA") at the time, was considered by the lower courts as not having "final policymaking authority"? Did the lower courts misapprehend Monell v. Dept. of Soc. Srvcs. of the City of NY, 436 U.S. 658 (1978) and set a dangerous precedent making it virtually impossible for a citizen to sue a government agency unless the board meets and publicly agrees to violate a constitutional right?

Related, if an individual respondent is removed during early stages of motion to dismiss, as Mr. Mehiel was in this case, but then later admits under oath to the acts that violated the First Amendment, should the courts ignore that evidence?

List of Parties

The *pro se* Petitioner is Steven E. Greer, MD, who is a doctor as well as a member of the press.

The Respondents are The Battery Park City Authority ("BPCA"), a public benefit corporation of the State of New York, as well as Dennis Mehiel, the former CEO and Chair of the Board of the BPCA, and Robert Serpico, the former CFO and acting President of the BPCA. (The other real estate owner defendants in the lower courts were removed as part of a settlement agreement.)

Statement of Proceedings

- *Greer v. Mehiel*, 15-cv-06119 SDNY Order entered August 6, 2015 (ECF 4)
- *Greer v. Mehiel*, 15-cv-06119 SDNY Order entered February 24, 2016 (ECF 138)
- *Greer v. Mehiel*, 15-cv-06119 SDNY Order entered February 24, 2016 (ECF 138)
- *Greer v. Mehiel*, 15-cv-06119 SDNY Order entered September 30, 2016 (ECF 177)
- *Greer v. Mehiel*, 15-cv-06119 SDNY Order entered March 29, 2018 (ECF 433)
- *Greer v. Mehiel*, 15-cv-06119 SDNY Order entered January 31, 2019 (ECF 485)
- *Greer v. Mehiel*, 15-cv-06119 SDNY Order entered January 31, 2019 (ECF 485)
- *Greer v Mehiel* --- Fed.Appx. ----, 2020 WL 1280679 2d Cir. Order entered March 17, 2020

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Petition for a Writ of Certiorari

Steven E. Greer, MD, *pro se* respectfully petitions this court for a *writ of certiorari* to review the judgment of The United States Court of Appeals for the Second Circuit.

Opinions Below

The decision by The United States Court of Appeals for the Second Circuit denying Dr. Greer's direct appeal is reported as Greer v Mehiel --- Fed.Appx.---, 2020 WL 1280679 (2d Cir. Mar. 17, 2020).

The United States District Court for the Southern District of New York ("SDNY") denied Dr. Greer's motion for summary judgment, instead awarding the defendants summary judgment on March 29, 2018. The jury trial requested was never allowed to transpire. That order is attached in the Appendix B ("App.") at 12a.

After the summary judgment decisions, the SDNY then denied on January 31, 2019 Dr. Greer's Rule 60 motion that was primarily based on the newly created Lozman v. City of Riviera Beach decision that did not exist at the time of summary judgment. That order is attached in the Appendix C ("App.") at 38a.

Dr. Greer appealed to the Second Circuit, which affirmed the lower court decisions. That order is attached in the Appendix A ("App.") at 1a.

Jurisdiction

Dr. Greer's appeal to the Second Circuit was denied on March 17, 2020. Dr. Greer invokes this Court's jurisdiction under 28 U.S.C. § 1257, having timely filed this petition for a writ of certiorari within 90-days of the Second Circuit's judgment.

Constitutional Provisions Involved

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Statement of the Case

In the recent decision rendered on Lozman v. City of Riviera Beach, this Court further defined the powers of the First Amendment. It was held that a pretext of probable cause was not enough to defeat a First Amendment.

Mr. Lozman was an activist in Florida who had been evicted and then arrested by the local city government in retaliation for his peaceful petitioning at a public meeting during is allotted speaking time. In Greer v. Mehiel, Dr. Greer was not arrested by the BPCA (although arrest was threatened) but rather barred from future public meetings as well as evicted, all in retaliation for his news reporting on the BPCA. His exclusive stories had contributed to the ouster of several high-ranking officials of the BPCA, which was the local government body akin to the City of Riviera Beach in Lozman. Greer alleged that he too was evicted like Lozman, (i.e. one of the Retaliation claims), as well as prevented from attending public BPCA board meetings (i.e. the Equal Access claim, which was also a Retaliation claim.), similarly to Mr. Lozman being arrested during a public meeting.

The BPCA used a probable cause defense in both claims and succeeded in summary judgment, despite ample evidence that raised genuine disputes of material facts. The judge usurped a jury.

Since Greer was filed in 2015, every one of the individual defendants has been ousted from the BPCA. In fact, the entire Mehiel BPCA administration, including two different in-house chief legal counsel, has been removed, with some being clearly fired while others were allowed to "retire"

Several other federal lawsuits against the BPCA filed by other BPCA employees allege the same pattern of retaliation as in Greer. Greer argued in the lower courts that retaliation is the modus operandi of the BPCA.

Shortly after the summary judgment decisions in Greer, the Lozman decision was rendered by this Court in June of 2018. Dr. Greer promptly filed a Rule 60 motion primarily based on Lozman, as well as the fact that Mehiel had by that time admitted under oath that he ordered the actions that violated Dr. Greer's right to equal access (Mehiel and Serpico were both removed as defendants early in the motion to dismiss stage).

The district court misapprehended Lozman, Greer argues, and denied the Rule 60 motion. Later, in the appeals court, despite Lozman comprising a large portion of the Dr. Greer's briefs and oral argument, that court completely ignored Lozman, not mentioning it once in the summary order and decision that denied Dr. Greer on appeal.

The appeals court also denied Dr. Greer on the Equal Access claim. It sided with the district court, which used Monell v. Dept. of Soc. Srvcs. of the City of NY, 436 U.S. 658 (1978) and progeny cases to reason that the BPCA was not liable for the actions of Mr. Mehiel, even though he admitted to singling out Dr. Greer and barring him from public meetings, because Mr. Mehiel, who was both the CEO and Chair of the Board, lacked "final policymaking authority" for the BPCA. Those decisions now set a precedent making it virtually impossible to sue a government body.

Reasons for Granting the Writ

A. The First Amendment has never been in more jeopardy than it is today. To defend the First Amendment and new Lozman case law, this Court should review the decisions of the lower courts. The appeals court ignored completely the Lozman argument, not referencing it whatsoever in the summary order.

As previously explained, the case of Lozman v. City of Riviera Beach, Fla., 13 8 S. Ct. 1945 (2018) is remarkably similar to Greer not only in the actual series of events but also in the law. This Court held that a plaintiff need not prove the absence of probable cause when suing a government body (as opposed to an individual employee of the government), for retaliation. In Lozman, probable cause did not defeat Mr. Lozman's First Amendment claim against the City of Riviera Beach.

In Greer, the government of the BPCA was sued for violating Dr. Greer's First Amendment rights. His complaint alleged that the BPCA denied him equal access to public meetings and also colluded with the private real estate defendants in a retaliatory eviction scheme.

The BPCA successfully defended against Dr. Greer's retaliatory eviction claims in district court by arguing that probable cause for eviction existed (i.e. that he failed to pay rent on time, which was thoroughly refuted by Greer). The appeals court affirmed the decision and also used a probable cause reasoning,

> "…the evidence that defendants would have "taken exactly the same action absent [an] improper motive," *Coughlin*, 344 F.3d at 288 -- *i.e.*, declined to renew Greer's lease regardless of his blog posts -- was overwhelming."

However, Lozman makes both lower court decisions now bad law since probable cause cannot defeat a First Amendment retaliation claim.

For the Equal Access retaliation claim, the BPCA won in summary judgment after the district court volunteered a defense using Monell that the BPCA never used in their own briefs. In a rather convoluted manner of reasoning, the court ruled that the denial of access to a member of the press (i.e. Dr. Greer) to the public BPCA board meetings was not caused by official policy because the CEO and Chair of the Board, Mr. Mehiel, lacked "final policymaking authority". Had the actual merits of the claim been addressed (i.e. that Dr. Greer was not allowed into the meetings due to retaliation by the BPCA), a jury could well have determined that the BPCA retaliated and that it was indeed official policy. Therefore, Lozman would have been the governing law guiding the jury had the lower court not usurped a jury with summary judgment.

In Lozman, this Court assuaged concerns that a flood of lawsuits against high-level government officials would ensue because the ruling narrowly applied to lawsuits against cities. To that point in Greer, the defendants never argued and the lower courts also never ruled that Mr. Serpico, who was the

President and Chief Financial Officer of the BPCA at the time as well as the chief architect of the retaliatory eviction collusion scheme, lacked official policymaking authority or that the BPCA was not acting under official policy. Therefore, Lozman law applied. For the Equal Access claim, because Mr. Mehiel was removed as a defendant, Dr. Greer was only suing the BPCA, thus again making Lozman the governing law.

In Greer as in Lozman, the protected speech predated the retaliation by many months, thus eliminating concerns about causation between retaliatory animus and the retaliation. In other words, the BPCA decision to bar Dr. Greer from meetings was premeditated and orchestrated by several senior BPCA officials, at the instruction of Mr. Mehiel, well in advance of the first time that Dr. Greer was barred from several meetings.

The use of Lozman in Greer was not just as a minor footnote but rather as the primary basis of the Rule 60 motion in the district court and the appeal. However, the appeals court ignored Dr. Greer's argument and made no reference whatsoever to Lozman in the 11-page summary order.

Greer is possibly the first case to use Lozman in the appeals courts. Therefore, the impact of that case law on the lower courts has yet to be felt given that Greer's use of Lozman was ignored by the appeals court.

B. To reverse a dangerous precedent, this Court should review the application of Monell by the lower courts that now makes it virtually impossible to sue a government entity.

In Greer, the district court volunteered the use of Monell v. Dept. of Soc. Srvcs. of the City of NY, 436 U.S. 658 (1978) and progeny cases (i.e. the defendants failed to bring it up as a defense) to justify the summary judgment in favor of the BPCA. By first incorrectly removing the individual defendants, Mehiel and Serpico, early in the motion to dismiss stage, and then incorrectly ruling that Mr. Mehiel lacked "final policymaking authority", the lower courts allowed a rather convoluted reasoning to justify the decision in favor of the BPCA.

The case precedent standing now will forever be cited in association of Monell to mean that even the CEO and Chair of the Board of a government body cannot do anything to make a government liable, even when they admit under oath to the actions, and even when state law expressly grants them "final policymaking authority", as N.Y. Pub. Auth. Law § 1973(7) does, "[the BPCA] may delegate to one or more of its members, or to its officers, agents or employees, such powers and duties as it may deem proper."

Therefore, the lower courts have set the precedent that even the highest-ranking officials of a government entity cannot be deemed to have held "final policymaking authority" unless under rare circumstances when the board of the government meets and publicly proclaims that it approves actions that will violate the First Amendment. Of course, rarely do bad actors publicly codify malicious intent.

However, that was not the intent of this Court when it created Monell. The intent was to make it *more* possible, not *impossible*, to sue a government entity. The dangerous precedent established in Greer should be reversed.

This district court interpreted Monell in the summary judgment decision as,

> "A municipal entity can be sued under 42 U.S.C. § 1983 if its policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Monell v. Dep't of Soc. Servs.,* 436 U.S. 658, 694 (1978). The same law applies to public benefit corporations. *See Estes-El v. State Dep't of Motor Vehicles Office of Admin. Aqjudication Traffic Violation Bureau,* 95 Civ. 3454, 1997 WL 342481, at *4 (S.D.N.Y. June 23, 1997). "Where the contention is not that the actions complained of were taken pursuant to a local policy that was formally adopted or ratified but rather that they were taken or caused by an official whose actions represent official policy, the court must determine whether that official had final policymaking authority in the particular area involved." *Jeffes v. Barnes,* 208 F.3d 49, 57 (2d Cir. 2000)."

The question then for a jury should have been to decide whether or not Mr. Mehiel, holding the joint titles of CEO and Chair of the Board, acted under official policy when ordering Dr. Greer to be denied his right to equal Access. The district court went on to

explain the guiding law that it used to address this question as,

> "Courts look to state law in determining whether the official in question possessed final policymaking authority. *Id.* The Second Circuit has "explicitly rejected the view that mere exercise of discretion [is] sufficient to establish municipal liability." *Anthony v. City of New York,* 339 F.3d 129, 139 (2d Cir. 2003). "[W]hen a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with their policies." *City of St. Louis v. Praprotnik,* 485 U.S. 112, 127 (1988) (plurality opinion) (emphasis omitted). "Where a plaintiff relies... on the theory that the conduct of a given official represents official policy, it is incumbent on the plaintiff to establish that element as a matter of law. *Jeffes,* 208 F.3d at 57-58;"

Dr. Greer then provided the aforementioned required "matter of law" that granted Mr. Mehiel official policymaking authority. N.Y. Pub. Auth. Law § 1973(7) states, "[The BPCA] may delegate to one or more of its members, or to its officers, agents or employees, such powers and duties as it may deem proper."

Dr. Greer also pointed out that, while the BPCA could have *theoretically* reviewed and overturned Mr. Mehiel's decision to violate Dr. Greer's First Amendment rights, it was standard procedure for the BPCA board only to review large contract decisions during monthly meetings. Day-to-day operating decisions were not routinely reviewed by the board, as evidenced by decades of archived video of those boards. The defense never provided evidence of the BPCA board ever "reviewing" a CEO's decision similar to the one in this case. In addition, Dr. Greer pointed to various definitions of the job title "CEO" used by Corporate America that grant "final policymaking authority" to the CEO.

Moreover, the lower courts were wrong to presume that the BPCA board was not aware of and did not approve Mr. Mehiel's decision to violate a journalist's right to equal access. Dr. Greer was not simply denied to a single public meeting. Video evidence was provided to the lower courts that Dr. Greer was kept out of several monthly board meetings and BPCA town hall meetings. A reasonable jury very well could have concluded that the BPCA board knew all about the scheme to deny Dr. Greer access and then cover it up by claiming that the board room was too full.

Although a jury should have been allowed to decide whether Mr. Mehiel held "final policymaking authority", the district court judge instead made the conclusory decision in summary judgment that,

> "There is no evidence that the officials who decided to deny Plaintiff entry to the July 2015 board meeting had final

> policymaking authority… Although, as Plaintiff points out, *see* Dkt. No. 396 (Pl. BPCA Opp.) at 11, New York law allows the BPCA board to delegate "powers and duties as it may deem proper," there is no evidence that the BPCA in fact delegated to Mehiel the power to exclude individuals from board meetings."

Dr. Greer argued this was flawed reasoning that ignored the New York law on public authorities, the precedent set by years of previous BPCA board actions, and the nature of the title CEO and Chair of Board. Instead, the district court weighed heavier a *hypothetical* scenario whereby the BPCA *could have* reviewed Mehiel's actions.

Conclusion

For the foregoing reasons, Dr. Greer respectfully requests that this Court issue a *writ of certiorari* to review the summary order and decision of The United States Court of Appeals for the Second Circuit. The lower courts ignored the Lozman law and misapplied Monell.

Respectfully submitted,

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Appendix-A: Summary Order by the 2d Cir.

19-326-cv
Greer v. Mehiel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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 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 17. day of March, two thousand twenty.

PRESENT: DENNY CHIN,
RICHARD J. SULLIVAN,
WILLIAM J. NARDINI,
Circuit Judges.

---x

STEVEN E. GREER, M.D.,

Plaintiff-Counter-Defendant-Appellant,

v

DENNIS MEHIEL, an individual, ROBERT SERPICO, an individual, BATTERY PARK CITY AUTHORITY, a New York State authority,

Defendants-Appellees,

HOWARD P. MILSTEIN, an individual, STEVEN ROSSI, an individual, JANET MARTIN, an individual, MILFORD MANAGEMENT, a New York corporation, MARINERS COVE SITE B ASSOCIATES, a New York corporation,

Defendants-Counter-Claimants.

---x

FOR PLAINTIFF-COUNTER- DEFENDANT-APPELLANT:

STEVEN ERIC GREER, M.D., *pro se,*
Port Saint Lucie, Florida.

FOR DEFENDANTS-APPELLEES:

NOAM BIALE
(Michael Tremonte and Michael W. Gibaldi, *on the brief),*
Sher Tremonte LLP, New York, New York.

Appeal from a judgment of the United States District Court for the Southern District of New York (Nathan, *J.*, Cott, *M.J.*).

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

Plaintiff-counter-defendant-appellant Steven E. Greer, proceeding *pro se*, appeals the district court's orders granting in part defendants' motions to dismiss, granting summary judgment in favor of defendants, and denying his motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b). Greer sued the Battery Park City Authority (the "BPCA"), two BPCA officials (the "BPCA Defendants"), and several private individuals and corporations (the "Landlord Defendants"), claiming, *inter alia*, that they conspired to deprive him of his First Amendment rights. Specifically, Greer alleged that the Landlord Defendants and BPCA Defendants conspired, because of posts he made about the BPCA on his website, to (1) not renew his lease and evict him from his apartment

and (2) ban him from public BPCA meetings. The district court granted in part the motions to dismiss, allowing Greer's First Amendment retaliation claim and First Amendment equal access claim to move forward but, as relevant here, dismissing his equal access claim as to defendant Robert Serpico and the retaliation and equal access claims as to defendant Dennis Mehiel. The district court later granted summary judgment to defendants and denied Greer's Rule 60(b) motion. After summary judgment, Greer and the Landlord Defendants entered into a stipulation of settlement; thus, this appeal concerns only the claims against the BPCA and BPCA Defendants. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

I. Dismissal

We review *de novo* the dismissal of a complaint for failure to state a claim. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002). A complaint must plead "enough facts to state a claim to relief that is plausible on its face," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), and "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The district court must construe the complaint liberally, "accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." *Chambers*, 282 F.3d at 152.

The district court properly dismissed the retaliation claim against Mehiel and the equal access claim against both Serpico and Mehiel. "It is well settled that . . . to establish a defendant's individual

liability in a suit brought under § 1983, a plaintiff must show, *inter alia*, the defendant's personal involvement in the alleged constitutional deprivation." *Grullon v. City of New Haven*, 720 F.3d 133, 138 (2d Cir. 2013). Greer's second amended complaint did not allege any involvement by Serpico in the BPCA's decision to ban Greer from meetings and did not allege any involvement by Mehiel in either the decision not to renew his lease or the decision to ban him from the meetings. The complaint alleged that "[d]efendants" made those decisions without specifying which of the eight different defendants were involved. Appellant's Br. at 20. Such a vague reference did not sufficiently put the defendants on notice about the specific claims against each of them.

On appeal, Greer also argues that dismissal was improper because Mehiel later admitted during discovery that he had personally made the decision to ban Greer from the meetings. That later admission, however, does not affect the district court's decision on a motion to dismiss, which was properly based solely on the allegations in the complaint. To the extent Greer argues that the district court should have allowed Greer to amend the complaint based on that admission -- after the close of discovery and during briefing for summary judgment -- the district court did not abuse its discretion in finding that such a request for amendment was untimely. *See Grochowski*

v. Phoenix Constr., 318 F.3d 80, 86 (2d Cir. 2003) (denial of leave to amend is generally reviewed for abuse of discretion). "While generally leave to amend should be freely granted, it may be denied when there is a good reason to do so, such as futility, bad faith, or undue delay." *Kropelnicki v. Siegel*, 290 F.3d 118, 130 (2d Cir. 2002) (citation omitted). As the BPCA Defendants argue, they would have been prejudiced by such a late amendment because they had proceeded through discovery on the understanding that the equal access claim was against only the BPCA (and not Mehiel individually). *See McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 202 (2d Cir. 2007) (holding that the district court did not abuse its discretion in denying leave to amend where "discovery had closed, defendants had filed for summary judgment, and nearly two years had passed since the filing of the original complaint").

II. Summary Judgment

We review a grant of summary judgment *de novo*, "resolv[ing] all ambiguities and draw[ing] all inferences against the moving party." *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 judgment as a matter of law.'" *Doninger v. Niehoff,* 642 F.3d 334, 344 (2d Cir. 2011) (quoting Fed. R. Civ. P. 56(a)).

A. Retaliation

"To state a First Amendment retaliation claim, a plaintiff must show that: (1) he has a right protected by the First Amendment; (2) the defendant's actions were motivated or substantially caused by the plaintiff's exercise of that right; and (3) the defendant's actions caused the plaintiff some injury." *Ragbir v. Homan*, 923 F.3d 53, 66 (2d Cir. 2019) (internal quotation marks, brackets and citation omitted). Even where such a showing is made, however, "a defendant may be entitled to summary judgment if he can show dual motivation, *i.e.*, that even without the improper motivation the alleged retaliatory action would have occurred." *Scott v. Coughlin*, 344 F.3d 282, 287-88 (2d Cir. 2003) (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)). To succeed on this defense, the defendant bears the burden of showing that "it would have taken exactly the same action absent the improper motive." *Id.* at 288.

The district court did not err in granting summary judgment for defendants on Greer's First Amendment retaliation claim. The sole evidence in the record purportedly showing that an improper motive played any part in the decision not to renew Greer's lease came from the deposition testimony of two BPCA employees -- one who stated he believed that Serpico pressured Steven Rossi, a Landlord Defendant, to not renew Greer's lease after seeing Serpico "smirk[]" when directly asked if he had "anything to do with" the non-renewal, Dist. Ct. Dkt. No. 440-9 at 7, and another who stated that Serpico was angered by Greer's website and regularly discussed that website at the BPCA office. Of course, even assuming Serpico "smirked" and regularly discussed Greer's website, that is hardly concrete evidence that Serpico and others sought to punish Greer for exercising his First

Amendment rights, or that Serpico had the wherewithal to influence the Landlord Defendants into not renewing Greer's lease.

In contrast to this speculative testimony, the evidence that defendants would have "taken exactly the same action absent [an] improper motive," *Coughlin*, 344 F.3d at 288 -- *i.e.*, declined to renew Greer's lease regardless of his blog posts -- was overwhelming. The undisputed evidence showed that Greer was routinely 30 or even 60 days late with his rent payments. Greer's own emails and copies of rent checks showed he was late with his rent payments in at least eight months throughout 2012 and 2013. Although Greer adamantly disputed the evidence that showed his arrears, he did not present any evidence contradicting that evidence; instead, the emails he submitted (showing disputes about amounts owed) supported defendants' contention that he was frequently late in making payments. These emails also showed Greer repeatedly making excuses for his late payments, including that he "mistakenly" wrote a check from a recently closed account. Dist. Ct. Dkt. No. 381 Ex. 17. Indeed, defendants' evidence showed that by the time the eviction lawsuit against Greer commenced, he was $10,887 in arrears. Defendants further submitted competent evidence, in the form of Legal Action Status Reports, showing that they had taken "legal action" against tenants who were behind in rent payments. Although Greer challenged that evidence, he did so only in a conclusory manner, and, despite the opportunity to conduct discovery, he did not identify any other tenant who was similarly in frequent arrears who was *not* subjected to legal action.

On this record, no reasonable juror could conclude that a "smirk" and office chit chat transformed what would otherwise have been routine

landlord conduct -- declining to renew the lease of a tenant who repeatedly failed to make timely rent payments -- into First Amendment retaliation. *See Harlen Assocs. v. Inc. Vill. of Mineola,* 273 F.3d 494, 499 (2d Cir. 2001) ("Although all inferences must be drawn in favor of the nonmoving party, mere speculation and conjecture is insufficient to preclude the granting of (a summary judgment] motion.").[1] Accordingly, the dismissal of Greer's First Amendment retaliation claim is affirmed.

B. Equal Access

The district court properly held that Greer's equal access claim against the BPCA failed as a matter of law. The BPCA is a "public benefit corporation" created by New York state law. *See In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 892 F.3d 108, 109-10 (2d Cir. 2018). It therefore can be held liable under § 1983 only if the alleged constitutional deprivation is the result of a "policy or custom." *Patterson v. County of Oneida*, 375 F.3d 206, 226 (2d Cir. 2004) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 692-94 (1978)); *see also Dangler v. N.Y.C. Off Track Betting Corp.*, 193 F.3d 130, 142-43 (2d Cir. 1999) (applying *Monell* to claims against another public benefit corporation). To hold a governmental entity liable for a decision by a government official, the plaintiff must show that the official has "final policymaking authority" with respect to "the

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[1] Notably, in a related state court litigation concerning Greer's eviction, a state court ruled that Greer's apartment was unregulated and that, accordingly, the Landlord Defendants were under no obligation to renew Greer's lease. *See, e.g., Dime Sav. Bank of N.Y., FSB v. Montague St. Realty Assocs.*, 686 N.E.2d 1340, 1342 (N.Y. 1997).

particular conduct challenged in the lawsuit." *Roe v. City of Waterbury*, 542 F.3d 31, 37 (2d Cir. 2008). "Whether an official has final policymaking authority is a legal question, determined on the basis of state law." *Id.*

As the district court correctly determined, Greer failed to demonstrate a genuine issue of material fact as to whether Mehiel -- who made the decision to ban Greer from public BPCA meetings -- had final policymaking authority with respect to that ban. Although Greer correctly points to N.Y. Pub. Auth. Law § 1973(7) -- which provides that final policymaking authority *may* be delegated to an individual BPCA board member or officer -- Greer failed to present evidence that the BPCA in fact delegated such authority to Mehiel. Instead, the BPCA Defendants presented evidence that such final authority had not been delegated to Mehiel, as Mehiel affirmed that the BPCA board could have reviewed his decision (but chose not to). *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (plurality opinion) ("[W]hen a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with their policies." (emphasis omitted)). Further, Greer's argument that Mehiel, as CEO, must have had final policymaking authority is unpersuasive; although CEOs may have such authority in typical private corporations, Greer provided no evidence that the CEO of the BPCA -a public benefit corporation -- had such authority. We therefore affirm the grant of summary judgment to the BPCA on this claim.

III. Rule 60 Motion

We review the denial of Rule 60(b) motions for abuse of discretion. *Gomez v. City of New York*, 805 F.3d 419, 423 (2d Cir. 2015). "A district court is said to abuse its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. . . ." *Id.* (internal quotation marks omitted). Rule 60(b) is "a mechanism for 'extraordinary judicial relief' invoked only if the moving party demonstrates 'exceptional circumstances.'" *Ruotolo v. City of New York*, 514 F.3d 184, 191 (2d Cir. 2008) (quoting *Paddington Partners v. Bouchard*, 34 F.3d 1132, 1142 (2d Cir. 1994)). Here, the district court did not abuse its discretion in finding that Greer failed to demonstrate "exceptional circumstances" warranting relief. *Id.*

IV ***Discovery***

We review discovery rulings for abuse of discretion. *DG Creditor Corp. v. Dabah,* 151 F.3d 75, 79 (2d Cir. 1998). We likewise conclude that the magistrate judge and the district court did not abuse their discretion in their discovery rulings.

We have considered Greer's remaining arguments and conclude they are without merit. For the foregoing reasons, we **AFFIRM** the judgment of the district court.

FOR THE COURT: Catherine O'Hagan Wolfe, Clerk of Courts

Appendix-B: Summary Judgment Opinion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Steven E. Greer, 15-cv-6119 (AJN)

Plaintiff,

—v—

Dennis Mehiel, et al,

Defendants.

MEMORANDUM
OPINION & ORDER

ALISON J. NATHAN, District Judge:

Pro se Plaintiff Steven E. Greer brings this suit against the company that owns his former apartment, the company that manages that apartment building, the Battery Park City Authority ("BPCA"), and several individuals associated with those entities. At this stage, two claims remain in Plaintiffs suit-a First Amendment retaliation claim and a First Amendment equal access claim. Before the Court are three motions for summary judgment: one from Plaintiff, one from a group of Defendants defined below as the Landlord Defendants, and one from a group of Defendants defined below as the BPCA Defendants. Also before the Court are requests by Plaintiff for sanctions and

to "reinstate" two previously dismissed defendants, as well as several sealing requests from all parties. For the reasons set forth below, Plaintiff's motion for summary judgment is denied, and Defendants' motions for summary judgment are granted. Plaintiff's other requests are also denied. The sealing requests are granted in part and denied in part.

I. BACKGROUND

Plaintiff rented Apartment 35F in the building located at 200 Rector Place from 2002 through April 2014. Dkt. No. 381 (Rossi Decl.) ¶¶ 1, 5; Dkt. No. 373, Ex. 16 (Non-Renewal Notice); Dkt. No. 382 (L 56.1) ¶¶ 7-9.

At all relevant times, Milford Management ("Milford") managed the property located at 200 Rector Place. L 56.1 ¶ 2; Rossi Decl. ¶¶ 1-2. Stephen Rossi is the Vice President and Director of Management Services for Milford. Rossi Decl. ¶ 1. Mariners Cove Site B Associates ("Mariners Cove"), where Howard Milstein is a partner, owns certain units in the building located at 200 Rector Place. Rossi Decl. ¶¶ 1-2. Janet Martin is involved in the management of properties that Milstein has an interest in. Rossi Decl. ¶ 2. Milstein, Rossi, Martin, Milford, and Mariners Cove comprise the "Landlord Defendants."

The BPCA owns the land on which 200 Rector Place is located. *See* Rossi Decl. ¶¶ 54, 59-60; Dkt. No. 376 (Hyman Decl.) ¶ 5. The BPCA is a New York State public benefit corporation. *See* N.Y. Pub. Auth. Law§ 1973(1). The membership of the BPCA consists of seven members, a majority of which constitutes "a quorum for the transaction of any business or the exercise of any power or function of the authority." N.Y. Pub. Auth. Law§ 1973(1), (7). The members elect

one of themselves as chairman, and the BPCA may delegate to one or more members, officers, agents, or employees "such powers and duties as it may deem proper." N.Y. Pub. Auth. Law § 1973(2), (7). The BPCA has the power to "acquire, lease, hold, mortgage and dispose of real property." N.Y. Pub. Auth. Law§ 1974(3). Beginning June 20, 2012, Dennis Mehiel was the Chairman and CEO of the BPCA. Dkt. No. 375 (Mehiel Decl.) ¶ 1. At all times relevant to this litigation, Robert Serpico served as the Chief Financial Officer of the BPCA. Dkt. No. 374 (Serpico Decl.) ¶ 1. The Court refers to Serpico and the BPCA, together, as the "BPCA Defendants."

In 2009, Plaintiff created a blog called BatteryPark.TV, where he published articles about the BPCA's activities. Dkt. No. 377 (BPCA 56.1) ¶ 9; Dkt. No. 394 (Pl. Counter to BPCA 56.1) ¶ 9. According to one BPCA employee, Plaintiffs reporting angered Serpico, who told the BPCA staff that the blog was not credible and discouraged the staff from reading it. Dkt. No. 395, Ex.16 (Ford Depo.) at 10:15-11:7.

Serpico and Rossi sometimes met for lunch or coffee, including one such meeting during the fall of 2013. *See* Serpico Decl.¶ 3; Rossi Decl. ¶¶ 61-63; Dkt. No. 395, Ex. 20 (Swanson Depo.) at 21 :8-22:4.

In a letter dated January 24, 2014, Milford informed Plaintiff that his lease would not be renewed and instructed him to vacate his apartment by April 30, 2014. Non-Renewal Notice. Plaintiff insists that there is no proof that he failed to pay rent, *see, e.g.,* Dkt. No. 368 (Pl. 56. l) ¶ 28, but there is evidence in the record that Plaintiff often submitted late payments or owed money on his apartment. *See* Greer Ex. T (Greer Checks); Dkt. No. 373, Ex. 25 (Spreadsheet); Dkt. No. 381, Ex. 6 (7/2/12 Email from

Greer); Dkt. No. 381, Ex. 7 (7/30/12 Email Rossi-Greer); Dkt. No. 381, Ex. 9 (9/27/12 Greer-Hill Emails); Dkt. No. 381, Ex. 10 (12/6/12 Email from Greer); Dkt. No. 381, Ex. 11 (3/20/13 Greer-Hill Emails); Dkt. No. 381, Ex. 12 (4/25/13 Email from Greer); Dkt. No. 381, Ex. 15 (5/16/13 Email from Greer); Dkt. No. 381, Ex. 16 (8/7/13
Email from Greer); Dkt. No. 381, Ex. 17; Dkt. No. 381, Ex. 20 (7/3/12 Greer-Rossi Emails). Though disputed, there is also some evidence that the Landlord Defendants took legal action against other tenants when they owed two months' rent or more. *See* L 56.1 ¶¶ 55, 58, 60; Dkt. No. 381, Exs. 34-43.

When one BPCA employee asked Serpico "if [Serpico] had anything to do with Greer not getting his lease renewed," Serpico, according to the employee, visibly smirked, shrugged," and did not answer the question. Swanson Depo. at 19:9-21, 24:7-20.

Despite the non-renewal notice, Plaintiff did not vacate his apartment by April 30, 2014. *See* BPCA 56.1 ¶13; Pl. Counter to BPCA 56.1 ¶13. Accordingly, Mariners Cove began an eviction proceeding against Plaintiff. *See* Pl. 56.1 ¶ 46. In response to an email from Plaintiff warning Defendants not to delete any emails, Serpico emailed Rossi on May 28, 2014, and asked, "Is [Plaintiff] now evicted? Where is he living?" Dkt. No. 374, Ex. 1 (5/28/14 Serpico Email).

Plaintiff was ultimately evicted from his apartment in the spring of 2016. Dkt. No. 184, Ex. D (Housing Court Decision).

Defendants contend that Plaintiff regularly harassed and bothered BPCA employees and Battery Park City residents. *See, e.g.,* BPCA 56.1 ¶ 14. Plaintiff denies those accusations and emphasizes that any alleged misconduct occurred after Plaintiffs

lease was not renewed. Pl. Counter to BPCA 56.1 ¶ 14. However, there is evidence that the BPCA Defendants were aware of at least one incident in which Plaintiff acted antagonistically before January 2014. *See* Dkt. No. 3 73, Ex. 11 (March 11, 2013 Email) (detailing an incident in which a woman called the police because Plaintiff was yelling at her and trying to videotape her).

Plaintiff attended the BPCA board meeting held on June 9, 2015. BPCA 56.1 ¶¶ 40-42; Pl. Counter to BPCA 56.1 ¶ 41. At the end of the meeting, the BPCA board transitioned to an executive session, which was closed to the public. *See* BPCA 56.l ¶ 43; Pl. Counter to BPCA 56.1 ¶¶ 41-42. However, Plaintiff refused to leave the meeting room. BPCA 56.l ¶ 44; Pl. Counter to BPCA 56.1 ¶ 43. Kevin McCabe, Mehiel's Chief of Staff, asked Plaintiff to leave the room and advised Plaintiff that if he did not leave the police would be called. BPCA 56.1 ¶¶ 44-48; Pl. Counter to BPCA 56.1¶47. Plaintiff then left the room. Pl. Counter to BPCA 56.1¶ 48.

After the June 9, 2015, board meeting, Mehiel decided to exclude Plaintiff from the BPCA offices, including future BPCA board meetings, to ensure safety and minimize disruptions. Mehiel Decl.¶¶ 13-15; *see also* Dkt. No. 373, Ex. 3 (McCabe Depo.) at 32:24-33:3 (McCabe stating that Mehiel directed security to ban Plaintiff from BPCA offices because of Plaintiffs "abusive and disruptive behavior"); Dkt. No. 376, Ex. 13 (6/9/15 Email from Mehiel) (instructing security to exclude Plaintiff from the BPCA office because of his "[c]onsistent hostile behavior"). According to Mehiel, the BPCA could have reviewed that decision but chose not to. Mehiel Decl. if 16. Instead of attending the July 29, 2015 BPCA board meeting, Plaintiff was allowed to watch a live video

feed of the meeting in a building several blocks away from the BPCA main offices. *See* Mehiel Decl. if 14; BPCA 56.1 if 56; Pl. Counter to BPCA 56.1 if 50.

On August 4, 2015, Plaintiff filed a complaint in this action. Dkt. No. 1. He filed a Second Amended Complaint on November 4, 2015. Dkt. No. 85 (SAC). Plaintiff alleged, inter alia, that Defendants violated his First Amendment rights. Specifically, he claimed that the nonrenewal of his lease, which led to his ultimate eviction, was the result of a conspiracy by the Landlord Defendants and the BPCA, Mehiel, and Serpico to retaliate against Plaintiff for his blog. *See* SAC 42-43, 64. In addition, Plaintiff claimed that the BPCA, Mehiel, and Serpico unlawfully excluded him from the July 2015 board meeting. *See* SAC ¶¶ 68-73. Plaintiff initially sought an order enjoining Defendants from evicting him. *See* SAC if 36; Dkt. No. 2. On February 24, 2016, the court denied Plaintiffs motion for a preliminary injunction enjoining the then-ongoing eviction proceedings in state court. Dkt. No. 138.

Defendants filed motions to dismiss, Dkt. Nos. 102, 114, which the Court granted in part and denied in part on September 30, 2016,[2] *see* Dkt. No. 177. Relevant here, the Court granted a motion to dismiss the retaliation claim against Mehiel but denied the motion to dismiss that claim against the Landlord Defendants, the BPCA, and Serpico. *See* Dkt. No. 177

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[2] The Court granted the motion to dismiss Plaintiffs First Amendment claim alleging harassment by security officers, Dkt. No. 177 at 6, his claim for a suhstantive violation of the Fair Housing Act, Dkt. No. 177 at 15-19, his claim for retaliation under the Fair Housing Act, Dkt. No. 177 at 19-21, and his defamation claim, Dkt. No. 177 at 21-23. The Court later denied Plaintiffs motion to dismiss the Landlord Defendants' counterclaim for attorney's fees. *See* Dkt. No. 425.

at 6. The Court also granted a motion to dismiss the second claim-unlawful exclusion from the board meeting-against Mehiel and Serpico but allowed the claim to continue against the BPCA. *See* Dkt. No. 177 at 6. Accordingly, at this point, Plaintiff has two remaining claims: (1) a First Amendment retaliation claim against Defendants BPCA and Robert Serpico (the "BPCA Defendants") and Defendants Mariners Cove Site B Associates, Howard Milstein, Steve Rossi, Janet Martin, and Milford Management (the "Landlord Defendants"), and (2) a First Amendment equal access claim against the BPCA.

The Landlord Defendants and the BPCA Defendants each move for summary judgment. Dkt. Nos. 371, 379. Plaintiff also moves for summary judgment. Dkt. No. 366.

II. MOTIONS FOR SUMMARY JUDGMENT

A. Legal Standard

A party is entitled to summary judgment only if there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law. *Ramos v. Baldor Specialty Foods, Inc.,* 687 F.3d 554, 558 (2d Cir. 2012). In reviewing the evidence on a motion for summary judgment, courts construe the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *Id.* "A fact is material if it might affect the outcome of the suit under the governing law, and an issue of fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* (quoting *Niagara Mohawk Power Corp. v. Hudson River-Black River Regulating Dist.,* 673 F.3d 84, 94 (2d Cir. 2012)).

B. First Amendment Retaliation Claim

Plaintiff contends that he is entitled to summary judgment because he has established Defendants' liability on his First Amendment retaliation claim. Dkt. No. 367 (Pl. Memo) at 12-19. Each set of Defendants has cross-moved for summary judgment on the claim.

Because the Landlord Defendants are private actors, to succeed on his § 1983 claim
against them Plaintiff must demonstrate that they conspired with the BPCA Defendants, who are state actors, to retaliate against Plaintiff. *See Pangburn v. Culbertson,* 200 F.3d 65, 72 (2d Cir. 1999) ("To prove a § 1983 conspiracy, a plaintiff must show: (1) an agreement between ... a state actor and a private entity; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages."). The BPCA Defendants and the Landlord Defendants contend there is no evidence of a conspiracy between them; Plaintiff argues that the evidence clearly establishes that a conspiracy existed. *See* Pl. Memo at 12-16; Dkt. No. 380 (L Memo) at 7-10; Dkt. No. 372 (BPCA Memo) at 3-7. The Landlord Defendants further argue that, even if there were evidence of a conspiracy, they would be entitled to summary judgment because Plaintiff's failure to pay rent on time and his harassment of building tenants and staff caused the Landlord Defendants not to renew Plaintiff's lease. L Memo at 10-18.

Assuming arguendo that sufficient evidence exists to support a conclusion that the BPCA Defendants and the Landlord Defendants conspired to retaliate against Plaintiff, Defendants are entitled to summary judgment on Plaintiff's First Amendment retaliation claim because there is no genuine issue of

material fact that could lead a reasonable juror to conclude that Defendants retaliated against Plaintiff.

To succeed on a First Amendment retaliation claim, a plaintiff must prove that "(1) he has an interest protected by the First Amendment; (2) defendants' actions were motivated or substantially caused by the exercise of that right; and (3) defendants' actions caused" the plaintiff some injury. *Curley v. Village of Suffern,* 268 F.3d 65, 73 (2d Cir. 2001); *see also Beechwood Restorative Care Center v. Leeds,* 436 F.3d 147, 152 (2d Cir. 2006) ("To survive summary judgment on a section 1983 First Amendment retaliation claim a plaintiff must demonstrate that he engaged in protected speech, and that the speech was a substantial or motivating factor in an adverse decision taken by the defendant."). "A causal relationship [between the protected activity and the adverse action] can be demonstrated either indirectly by means of circumstantial evidence, including that the protected speech was followed by adverse treatment, or by direct evidence of animus." *Wrobel v. County of Erie,* 692 F.3d 22, 32 (2d Cir. 2012); *see also Gorman-Bakos v. Cornell Co-op Extension of Schenectady County,* 252 F.3d 545, 554 (2d Cir. 2001) (explaining that a causal connection may be established by showing that the adverse action closely followed the protected activity). In the context of speech-based retaliation, the defendant may prevail "by demonstrating by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected speech." *Mandell v. County of Suffolk,* 316 F.3d 368, 382 (2d Cir. 2003); *see also Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 286-87 (1977) (same).

Here, the heart of the retaliation issue is whether the non-renewal of Plaintiffs lease was

motivated by Plaintiffs exercise of his First Amendment right. Because the record could not lead a reasonable juror to conclude that it was, Defendants are entitled to summary judgment on this claim.

Plaintiffs evidence of retaliation rests on little more than speculation. Although Serpico was aware of and disapproved of Plaintiffs blog, *see* Ford Depo. at 9: 15-11 :7, and may have been involved in the decision not to renew Plaintiffs lease, *see, e.g.,* Swanson Depo. at 19:9-21, 24:7-20, there is no evidence in the record that Serpico wanted to harm Plaintiff *because of* Plaintiffs blog. Indeed, Plaintiff had been operating his blog for several years before the nonrenewal of his lease, BPCA 56.1 ¶ 9; Pl. Counter to BPCA 56.1¶9; Pl. 56.1¶2, and at all times during that period Serpico was the Chief Financial Officer of the BPCA, Serpico Decl. ¶ 1.

By contrast, the record contains extensive evidence to support a conclusion that Defendants would not have renewed Plaintiffs lease even in the absence of Plaintiffs blog. Most significantly, the undisputed record demonstrates that Plaintiff did not consistently pay rent on time. Copies of rent checks from Plaintiff show that he paid rent late on several occasions throughout 2012 and 2013. *See* Greer Ex. T ("Greer Checks") (check dated January 1, 2013, for December rent; check dated February 19, 2013, for January rent; check dated March 1, 2013 for February and March rent; check dated March 31, 2013 for March rent-presumably for the amount remaining after the March 1, 2013 check; check dated December 25, 2013, for December rent); Dkt. No. 381, Ex. 17 (check dated August 31, 2012, for August and September rent; check dated December 1, 2012, for November rent); *see also* Dkt. No. 184, Ex. A (filings in housing court listing payments owed by Plaintiff).

In addition, emails between the Landlord Defendants and Plaintiff from 2012 and 2013 reveal discussions in which Plaintiff acknowledges that he owes money to the Landlord Defendants. *See 7130112* Email Rossi-Greer (Plaintiff explaining to Rossi that he is "getting some banking matters corrected" and will bring a check shortly for money that was outstanding" from July); 8/7 /13 Email from Greer (Plaintiff stating, "I screwed up. I recently closed an account but failed to throw away that checkbook .... I mistakenly gave you a check from the wrong closed out account."); *see also 712112* Email from Greer (Plaintiff stating that rent for June 2012 and July 2012 would be arriving soon); 9/27/12 Greer-Hill Emails (showing that Plaintiff owed unpaid storage fees); 12/6/12 Email from Greer ("I see that I owe as of today $4,142 for apartment rent, including December, and $214 for storage. *I did miss a few months* (but not 6!).") (emphasis added)); 5/16/13 Email from Greer (Plaintiff stating that he would drop off the May rent if he receives his countersigned lease); 7 /3/12 Greer-Rossi Emails (Rossi explaining that a late fee would be charged for the June rent). Although in one email from April 2013, Plaintiff claims that he paid rent every month for 11 years, *see 4/25/13* email from Greer, the evidence outlined above shows that he did not pay that rent on time. And even in that April 2013 email Plaintiff admits that he owes a balance in excess of $3000. 4/25/13 Email from Greer.

Besides the contemporaneous admissions by Plaintiff of his late payments, Plaintiff has also made statements recognizing that the evidence produced in this litigation demonstrates that he failed to consistently pay his rent on time. For example, Plaintiff cites to rent checks for the years 2012 and 2013 and states that they prove "he paid on the first

of the month *and was never more than 30-days late."* PI. 56.1 ¶ 31 (emphasis added). Plaintiff also recognizes that there were "[o]ngoing disagreements over the actual balances owed." Pl. 56.1 ¶ 31. In addition, Plaintiff acknowledges that a spreadsheet submitted by the BPCA Defendants, Dkt. No. 373, Ex. 25[3], shows that Plaintiff had "running balances equal to two-months or more of rent," Pl. Counter to BPCA 56.1 ¶ 81. However, Plaintiff argues that the balance appears because Milford was late in processing his payments. Pl. Counter to BPCA 56.1 ¶ 81. Nevertheless, although there are emails indicating that the Landlord Defendants sometimes reduced the amounts that Plaintiff owed in response to his protestations, *see* Dkt. No. 370, Ex. W, there is no evidence that the Landlord Defendants' accounting system was inaccurate-or at least that its inaccuracy accounts for every late payment by Plaintiff.

In his final counter-argument to the overwhelming evidence of his non-payment of rent, Plaintiff asks why, if he was "truly failing to pay rent for two-months at a time" the Landlord Defendants renewed his lease in 2012 and 2013. *See* Pl. Counter to BPCA 56.1 ¶ 81. Although the record provides no clear answer why Plaintiffs lease was not renewed in 2014 as opposed to any other year, there is no evidence that Plaintiffs blog motivated the non-renewal.

Furthermore, there is evidence that the Landlord Defendants took legal action against other tenants who owed amounts comparable to that owed by Plaintiff. Rossi Decl. ¶¶ 42-50. Plaintiff adamantly

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[3] Plaintiff refers to Docket Number 373, Exhibit 17 in his Counter Statement to the BPCA Defendants' 56.1 Statement, but it appears from the context of Plaintiffs Counter Statement and the 56.1 Statement that he is countering that Plaintiff likely intended to reference Exhibit 25.

disputes that conclusion and insists that there is no evidence the other tenants were taken to court or evicted. *See* Dkt. No. 397 (Pl. Counter to Landlord 56.1) ¶ 53. Plaintiff is correct that Defendants have not provided eviction notices or court filings for other tenants. But the "Legal Action Update Report" shows when legal action was taken against a particular tenant, and the Reports in the record show that action was often taken when tenants owed two months' rent. *See* Dkt. No. 381, Exs. 34-43.

Finally, Defendants argue that incidents of harassment by Plaintiff also contributed to the decision not to renew Plaintiffs lease and to his ultimate eviction. However, several of the incidents that Defendants highlight occurred *after* the non-renewal of Plaintiffs lease on January 24, 2014. The Court declines to consider those incidents because they could not have motivated the non-renewal of Plaintiffs lease. Nevertheless, there is evidence that the BPCA Defendants were aware of at least one instance of Plaintiffs antagonistic behavior before January 2014. *See* March 11, 2013 Email (describing an incident in which Plaintiff yelled at a woman and tried to videotape her, prompting the woman to call the police).

Despite Plaintiffs arguments to the contrary, there is no evidence beyond mere speculation that Plaintiffs blog motivated Defendants not to renew Plaintiffs lease. Speculation alone is insufficient to support Plaintiffs claims at this stage. *See Harlen Assocs. v. Inc. Village of Mineola,* 273 F .3d 494, 499 (2d Cir. 2001). Instead, the evidence, taken in the light most favorable to Plaintiff, only supports a conclusion that Defendants "would have taken the same adverse action in the absence of the protected speech." *Mandell,* 316 F.3d at 382. No reasonable jury could

conclude otherwise. Indeed, there is extensive evidence of Plaintiffs frequent untimely rent payments and Defendants' taking legal action against other tenants in similar circumstances. Because the undisputed evidence does not support a reasonable conclusion that the decision not to renew Plaintiffs lease was motivated or substantially caused by Plaintiffs exercise of his First Amendment rights, the Landlord Defendants and the BPCA Defendants are entitled to summary judgment on Plaintiffs First Amendment retaliation claim.

C. First Amendment Equal Access Claim

The BPCA also moves for summary judgment on Plaintiffs equal access claim, as does Plaintiff. *See* BPCA Memo at 8-13; Pl. Memo at 5-12. Plaintiff maintains that he "proved" his equal access claim, while the BPCA responds that it did not violate Plaintiffs First Amendment rights by excluding him from the July 29, 2015, board meeting. The BPCA emphasizes that the decision to exclude Plaintiff was a response to Plaintiffs prior disruptive and threatening behavior and that Plaintiff was still allowed to watch the meeting from a different room. BPCA Memo at 2, 8-13. The BPCA also argues that it is entitled to summary judgment because Plaintiffs exclusion from the July 29, 2015, board meeting was not the result of an official policy or custom, as required to impose liability on the BPCA.[4] *See* BPCA Memo at 13-17.

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[4] The BPCA further argues that for the same reason, summary judgment should be entered in favor of Serpico, in his official capacity, on the equal access claim. *See* BPCA Memo at 13, 17 n.13. Because the operative complaint, Dkt. No. 85, lists "Robert Serpico, an individual," as a defendant and does not assert claims against Serpico in his official capacity, the Court does not consider that argument.

A municipal entity can be sued under § 1983 if its "policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Monell v. Dep 't of Soc. Servs.,* 436 U.S. 658, 694 (1978). The same law applies to public benefit corporations. *See Estes-El v. State Dep 't of Motor Vehicles Office of Admin. Adjudication Traffic Violation Bureau,* 95 Civ. 3454, 1997 WL 342481, at *4 (S.D.N.Y. June 23, 1997). "Where the contention is not that the actions complained of were taken pursuant to a local policy that was formally adopted or ratified but rather that they were taken or caused by an official whose actions represent official policy, the court must determine whether that official had final policymaking authority in the particular area involved." *Jeffes v. Barnes,* 208 F.3d 49, 57 (2d Cir. 2000). Courts look to state law in determining whether the official in question possessed final policymaking authority. *Id.* The Second Circuit has "explicitly rejected the view that mere exercise of discretion [is] sufficient to establish municipal liability." *Anthony v. City of New York,* 339 F.3d 129, 139 (2d Cir. 2003). "[W]hen a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with their policies." *City of St. Louis v. Praprotnik,* 485 U.S. 112, 127 (1988) (plurality opinion) (emphasis omitted). "Where a plaintiff relies ... on the theory that the conduct of a given official represents official policy, it is incumbent on the plaintiff to establish that element as a matter of law. *Jeffes,* 208 F.3d at 57-58; *see also Roe v. City of Waterbury,* 542 F.3d 31, 37 (2d Cir. 2008) (stating that, when a plaintiff "seeks to hold a municipality liable for a single decision by a municipal policymaker, the plaintiff must show that

the official had final policymaking power" (internal quotations omitted)).

New York law establishes the BPCA as a public benefit corporation. N.Y. Pub. Auth. Law § 1973(1). The law provides that the BPCA shall consist of seven members. N. Y. Pub. Auth. Law§ 1973(1). A majority of the members of the BPCA "shall constitute a quorum for the transaction of any business or the exercise of any power or function of the authority." N.Y. Pub. Auth. Law § 1973(7). Still, the BPCA "may delegate to one or more of its members, or to its officers, agents or employees, such powers and duties as it may deem proper." N.Y. Pub.
Auth. Law § 1973(7).

There is no evidence that the officials who decided to deny Plaintiff entry to the July 2015 board meeting had final policymaking authority. Mehiel, Chairman and CEO of the BPCA, made the decision to exclude Plaintiff from the BPCA board meeting after concluding "that Plaintiff posed a threat to public safety, the orderly conduct of BPCA board meetings, and the smooth continued operations of the BPCA." Mehiel Decl. ¶ 13; *see also* McCabe Depo. At 32:24-33:3 (McCabe stating that Mehiel told security to exclude Plaintiff from BPCA offices); *619115* Email from Mehiel (instructing security to ban Plaintiff from the BPCA office). According to Mehiel, the "BPCA board could have, if it so chose, reviewed [Mehiel' s] decision." Mehiel Decl.¶ 16. The record contains no evidence to contradict that assertion. Although, as Plaintiff points out, *see* Dkt. No. 396 (Pl. BPCA Opp.) at 11, New York law allows the BPCA board to delegate "powers and duties as it may deem proper," there is no evidence that the BPCA in fact delegated to Mehiel the power to exclude individuals from board meetings. Similarly, that Mehiel was both Chairman

of the Board and CEO, *see* Pl. BPCA Opp. at 11, does not on its own demonstrate that he had final policymaking power. Plaintiffs other argument-that the BPCA failed to train anyone on the New York Open Meeting Law, document retention, or ethics, *see* Pl. BPCA Opp. at 11-12-is not relevant to the question whether Plaintiffs exclusion from the July 2015 board meeting represented official policy.

Because the undisputed evidence shows that Mehiel' s decision to exclude Plaintiff was "subject to review" by the BPCA board, *Praprotnik,* 485 U.S. at 127, the record does not support a conclusion that Mehiel had "final policymaking authority," *Jeffes,* 208 F.3d at 57.

III. PLAINTIFF'S REQUEST FOR SANCTIONS

Plaintiff alleges an "egregious pattern of spoliation by all defendants" and requests sanctions pursuant to Federal Rule of Civil Procedure 37 or the Court's inherent powers. Pl. Memo at 19-22. Specifically, Plaintiff alleges that (1) Defendants deleted emails, including an email from Serpico to Rossi that Serpico's secretary, Linda Soriero, witnessed; (2) the BPCA engaged in witness tampering by firing that secretary after she began to assist Plaintiff in this case; and (3) Serpico's counsel inappropriately instructed Serpico not to answer certain questions during his deposition. Pl. Memo at 19-20. As a sanction, Plaintiff seeks entry of summary judgment or default judgment against Defendants. *See* Pl. Memo at 21-22.

Federal Rule of Civil Procedure 37 provides that, "[i]f electronically stored information that should have been preserved ... is lost because a party failed to take reasonable steps to preserve it, and it cannot be

restored or replaced through additional discovery," the court may, "upon finding prejudice to another party from loss of the information, ... order measures no greater than necessary to cure the prejudice." Fed. R. Civ. Proc. 37(e)(l). In addition, "upon funding that the party acted with the intent to deprive another party of the information's use in the litigation," the court may "presume that the lost information was unfavorable to the party [or] ... dismiss the action or enter a default judgment."[5] Fed. R. Civ. Proc. 37(e)(2). "[D]ismissing a complaint or entering judgment against a defendant[] are severe sanctions, but they may be appropriate in 'extreme situations,' as 'when a court finds willfulness, bad faith, or any fault on the part of the' noncompliant party." *Guggenheim Capital, LLC v. Birnbaum,* 722 F.3d 444, 450-51 (2d Cir. 2013) (quoting *Bobal v. Rensselaer Polytechnic Inst.,* 916 F.2d 759, 764 (2d Cir. 1990)).

The Court declines to impose sanctions on Defendants. As an initial matter, Plaintiff's contention that the BPCA engaged in witness tampering is mere speculation and lacks any evidentiary support. Moreover, sanctions are not warranted against Serpico or the BPCA as a result of their attorney's instruction to not answer certain questions during Serpico's deposition. Counsel stated on the record his basis for directing Serpico not to answer those questions. *See* Greer Ex. H (Serpico Depo.) at 31: 18-33:22. Finally, although there is

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[5] Plaintiff argues that sanctions are appropriate pursuant to Federal Rule of Civil Procedure 37(c). *See* Pl. Memo at 20-21. Rule 37(c) provides for sanctions if a party "fails to provide information or identify a witness as required by Rule 26(a) or (e)." However, the heart of Plaintiff's request is the argument that Defendants deleted emails, to which Rule 37(e), which provides for sanctions if a party fails to preserve electronically stored information, is more applicable.

evidence that some of the Landlord Defendants' emails were deleted, the BPCA Defendants produced copies of those emails. Those emails thus *can* "be restored or replaced through additional discovery." Fed. R. Civ. Proc. 37(e). To the extent that Plaintiff believes that a "smoking gun" email was deleted and not produced by either group of Defendants, there is simply no basis to conclude that such an email existed. The only evidence Plaintiff cites is Soriero's statement that she saw an email between Serpico and Rossi discussing Plaintiff. However, assuming arguendo that the Court should consider Soriero' s statement, the record contains no details regarding the alleged "smoking gun" email. It is thus quite possible that the May 2014 email between Serpico and Rossi was the one Soriero was alluding to. In any event, Plaintiff has not demonstrated "willfulness, bad faith, or any fault" on the part of Defendants that would justify the "severe" sanction of the entry of summary or default judgment. Plaintiffs request for sanctions is denied.

IV. PLAINTIFF'S REQUEST TO REINSTATE MEHIEL AND SERPICO AS DEFENDANTS

In its September 30, 2016 Order, the Court explained that Plaintiff had included "no allegations in the complaint that either [Mehiel or Serpico] had a role in excluding Greer from the [July 2015 board] meeting." Dkt. No. 177 at 12. Accordingly, the Court granted the motion to dismiss the First Amendment equal access claim against those individuals. *See id.* ‘

Plaintiff now requests that his First Amendment equal access claim be reinstated against Mehiel and Serpico. Pl. Memo at 6. Plaintiff appears to cite to Federal Rule of Civil Procedure 60(b) in support of his request. *See* Pl. Memo at 6 & n.4. However, Rule 60(b) is not applicable here because the

Court's decision regarding Defendants' motions to dismiss is not a final order. *See Glendora v. Malone,* 165 F.R.D. 42, 43 (S.D.N.Y. 1996) (stating that an order dismissing certain defendants is not final, "unless the court makes the findings contemplated by Fed. R. Civ. P. 54(b) and enters partial final judgment as to those parties").

Alternatively, if Plaintiffs argument is construed as a motion for reconsideration of the Court's September 30, 2016 Order, it is untimely. *See McDowell v. Eli Lilly & Co.,* No. 13 Civ. 3786, 2015 WL 4240736, at *1 (S.D.N.Y. July 13, 2015) ("Under Local Civil Rule 6.3, 'a notice of motion for reconsideration or reargument of a court order determining a motion shall be served within fourteen (14) days after the entry of the Court's determination of the original motion, or in the case of a court order resulting in a judgment, within fourteen (14) days after the entry of the judgment.'" (quoting Local Civil Rule 6.3)).

Finally, to the extent that Plaintiff is seeking to amend his complaint under Federal Rule of Civil Procedure 15, that request is denied. As an initial matter, the Court notes that Plaintiff previously sought to amend his complaint for a third time to clarify other claims, and the Court denied that request because Plaintiff had chosen not to amend his complaint in response to Defendants' motions to dismiss. *See* Dkt. No. 192; *see also* Dkt. No. 221. In any event, at this point, Plaintiff has already amended his complaint twice, discovery has been completed, and all parties have moved for summary judgment. To allow Plaintiff to amend his complaint now would unduly delay this litigation. Although some of the discovery regarding Serpico's and Mehiel's alleged involvement in Plaintiff's exclusion from the board

meeting undoubtedly would overlap with some of the discovery that has already occurred, additional discovery, at least as to Serpico's role, would likely be needed. Indeed, there is no evidence in the record that Serpico was involved in the decision to exclude Plaintiff from the meeting, thus suggesting that amendment as to the claim against Serpico would be futile. *See McCarthy v. Dun & Bradstreet Corp.,* 482 F.3d 184, 200 (2d Cir. 2007) ("A district court has discretion to deny leave [to amend] for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party."). Moreover, Mehiel has raised the defense of qualified immunity, Dkt. No. 400 (BPCA Opp. to P) at 19-21, a question that the parties would likely need an opportunity to brief. Given the late stage of litigation, the Court denies Plaintiff leave to amend his complaint.

V. SEALING REQUESTS

The parties also make several sealing requests. The BPCA Defendants request that Exhibits 1 and 2 to the Declaration of Shari Hyman, Dkt. No. 376, be filed in redacted form to protect the identities and personal information of third parties. That request is granted. Those documents already appear on the docket in redacted form and shall remain on the docket in that form. Within three weeks of the date of this Order, the BPCA Defendants shall file unredacted versions of those exhibits under seal.

The BPCA Defendants have also requested to file under seal certain documents and testimony that Plaintiff has produced and designated as "Confidential." Specifically, Plaintiff informed the BPCA Defendants that he wanted to maintain the following exhibits under seal: Exhibits 2, 9, 10, 15, 16, 17, 19, 20, 21, 22, 23, and 24 to the Declaration of

Michael Tremonte, Dkt. No. 373. There does not appear to be any valid reason to file those documents under seal. As the BPCA Defendants point out, Exhibits 15 and 16 have already been filed publicly in this case. Accordingly, the BPCA Defendants are instructed to file the exhibits at issue on the public docket within three weeks of the date of this Order.

Furthermore, on July 20, 2017, Plaintiff informed the Court that Docket Numbers 381-1, 381-3, 381-5-filed by the Landlord Defendants-revealed Plaintiffs bank account information. Dkt. No. 407. The Court ordered that the exhibits be temporarily sealed. Dkt. No. 408. On July 24, 2017, the BPCA Defendants informed the Court that Docket Number 381-5, filed by the Landlord Defendants and which the Court had temporarily sealed, was the same as Docket Number 373-5, filed by the BPCA Defendants. Dkt. No. 409. Accordingly, the Court temporarily sealed Docket Number 373-5. Dkt. No. 411.

The Landlord Defendants have since acknowledged that redactions to Docket Numbers 381-1 and 381-3 are necessary to protect Plaintiff's bank account information. Accordingly, the Landlord Defendants' request to file redacted versions of 381-1 and 381-3 on the public docket is granted. Within three weeks of the date of this Order, the Landlord Defendants shall file redacted versions of those exhibits on the public docket. The unredacted versions of 381-1 and 381-3 shall be filed and remain under seal. Document 381-5 does not, however, include any bank account information. Accordingly, the temporary seal on Docket Numbers 381-5 and 373-5 is lifted. Within three weeks of the date of this Order, the Landlord Defendants shall file unredacted versions of 381-5 and 373-5 on the public docket. In his July 20, 2017 letter, Plaintiff also stated that 381-4, 381-9,

381-17, 381-19, 381-25, 381-26, 381-27, 381-29, 381-30, and 404-6 were classified as "Confidential" and should not have been filed on the public docket. Dkt. No. 407. The Court ordered that the exhibits be temporarily sealed. Dkt. No. 408. Similarly, at Plaintiff's request, the Landlord Defendants requested to file under seal the following exhibits: Exhibits 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 17, 20, 58, 62, 64, 65, 66, and 67 to the Declarations of Stephen Rossi and Deborah Riegel, Dkt. Nos. 381 & 383. The Landlord Defendants also requested to seal certain documents that quote from the "Confidential" documents, specifically: the memorandum of law in support of their motion for summary judgment, Dkt. No. 380; the 56.1 statement of material facts, Dkt. No. 382; Stephen Rossi's declaration, Dkt. No. 381; and Deborah Riegel's declaration, Dkt. Nos. 383. Since making that sealing application essentially on Plaintiff's behalf, the Landlord Defendants have acknowledged that some redactions to those exhibits are necessary to protect Plaintiff's bank account number. There does not appear to be any other basis to redact or file under seal the documents identified by Plaintiff. Accordingly, within three weeks of the date of this Order, the Landlord Defendants shall file all exhibits and documents that were the subject of the sealing application on the public docket, with only Plaintiffs bank account information redacted as necessary. Finally, Plaintiff has requested that several of his own exhibits be filed under seal. As to the exhibits to his memorandum of law in support of his motion for summary judgment, Dkt. No. 367, Plaintiff complains that Exhibits B, D, J, T, U, W, X, zD, and zE "would be embarrassing and harmful to [his] reputation." Although some of the exhibits may harm Plaintiffs reputation by demonstrating that he

failed to pay rent in a timely manner or was thought to be a security threat, those issues are at the core of this case. Accordingly, Plaintiffs request to seal those documents because they may damage his reputation are denied. However, Exhibits T, U, and W appear to contain banking information for Plaintiff. Those exhibits should thus be filed in redacted form, with the banking information removed. Within three weeks of the date of this Order, Defendants[6] shall file on the public docket Exhibits B, D, J, X, and zE and a redacted version of Exhibits T, U, and W. In addition, the Court is in receipt of only a redacted version of Exhibit zD. To fully evaluate whether the redactions are necessary, Plaintiff shall submit via email a clean, unredacted version of Exhibit zD to the Court within three weeks of the date of this Order. For other exhibits to his motion for summary judgment (Exhibits A, F-M, 0-V, Y), Plaintiff makes no argument why they should be sealed and states that if the Court decides that the exhibits are "not worthy of being sealed," he "will not contest that decision." Similarly, Plaintiff requests that Exhibits 1-11, 13-16, and 19 to his declaration in opposition to the Landlord Defendants' motion for summary judgment, Dkt. No. 399, be filed under seal, but he does not make specific arguments why they should be sealed and again states that he will not contest the Court's decision that the exhibits are "not worthy of being sealed." Plaintiff takes the same approach regarding Exhibits 3-7, 9, 10-12, 13, 17-19, 21, and 22 to Plaintiff's declaration in opposition to the BPCA Defendants' motion for summary judgment, Dkt. No. 395. Neither the Landlord Defendants nor the BPCA Defendants contend that those exhibits should be filed under seal.

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[6] Because Plaintiff is pro se, the Court requests that Defendants file the documents at issue on the docket.

Accordingly, the Court rejects the request to file under seal Exhibits A, F-M, 0-V, and Y to Plaintiff's motion for summary judgment; Exhibits 1-11, 13-16, and 19 to Plaintiffs declaration in opposition to the Landlord Defendants' motion for summary judgment; and Exhibits 3-7, 9, 10-12, 13, 17-19, 21, and 22 to Plaintiff's declaration in opposition to the BPCA Defendants' motion for summary judgment. Within three weeks of the date of this Order, Defendants shall file those exhibits on the public docket.

VI. CONCLUSION

Defendants' motions for summary judgment are granted, while Plaintiff's motion for summary judgment is denied. This resolves Docket Numbers 366, 371, and 379. Within three weeks of the date of this Order, Defendants shall file on the public docket the documents discussed above. Similarly, within three weeks of the date of this Order, Plaintiff shall submit to the Court a clean, unredacted copy of Exhibit zD to Plaintiff's motion for summary judgment. In addition, within three weeks of the date of this Order, the parties shall submit a status update regarding the remaining counterclaim for attorneys' fees and a proposed schedule for resolution of that claim. *See* Dkt. Nos. 235, 425.

SO ORDERED

Dated: March 28, 2019
New York, New York
/s/ Alison J. Nathan District Judge

Appendix-C: Rule 60 Motion Opinion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Steven E. Greer, 15-cv-6119 (AJN)

Plaintiff,

—v— MEMORANDUM OPINION & ORDER

Dennis Mehiel, *et al.*,

Defendants,

ALISON J. NATHAN, District Judge:

Pro se Plaintiff Steven E. Greer moves pursuant to Federal Rule of Civil Procedure 60(b) for reconsideration of the Court's March 28, 2018 Memorandum Opinion & Order granting summary judgment in favor of Defendants. Dkt. No. 466. For the reasons set forth below, Plaintiffs motion for relief under rule 60(b) is denied.

I. BACKGROUND

Pro se Plaintiff Steven E. Greer brought this suit against the company that owns his former apartment, the company that manages that apartment building, the Battery Park City Authority

("BPCA"), and several individuals associated with those entities. The facts are described in the Court's March 28, 2018 Memorandum Opinion & Order. Dkt. No. 433. Briefly, in 2009, Plaintiff created a blog called BatteryPark.TV, where he published articles about the BCPA's activities. On January 24, 2014, Defendant Milford Management informed Plaintiff that his lease would not be renewed. When Plaintiff did not vacate his apartment as requested, Defendant Mariners Cove began an eviction proceeding against him, which was ultimately successful in the spring of 2016. In June 2015, while the eviction proceedings were ongoing, Plaintiff was asked to leave a BPCA board meeting when the board planned to transition to an executive session. Plaintiff refused until a BPCA employee threatened to call the police. Following that incident, BPCA Chairman Dennis Mehiel decided to exclude Plaintiff from the BPCA offices, including future board meetings. Shortly thereafter, Plaintiff filed his complaint in this action.

At issue in the Court's March 28, 2018 Order were two remaining claims that survived the motion to dismiss phase-a First Amendment retaliation claim and a First Amendment equal access claim against BPCA only. With respect to the retaliation claim, Plaintiff alleged that the non-renewal of his lease, which led to his ultimate eviction, was an action taken in retaliation for articles posted on his blog. Based on the evidence in the record, though, the Court assessed that "Plaintiffs evidence of retaliation rest[ed] on little more than speculation," whereas there was "extensive evidence to support a conclusion that Defendants would not have renewed Plaintiffs lease even in the absence of Plaintiffs blog." Dkt. No. 433 at 8-9. As for the equal access claim, Plaintiff alleged that he was unlawfully excluded from a July 2015 meeting of the

BPCA board. As a matter of law, to succeed on this claim against a municipal entity like BPCA, Plaintiff needed to demonstrate that Mehiel 's actions represented official policy-in other words, that Mehiel exercised final decision-making authority. Reviewing the record, however, the Court concluded that "undisputed evidence" showed that Mehiel's decision to exclude Plaintiff from the meeting was subject to review by the BPCA board. Dkt. No. 433 at 15. The Curt accordingly granted summary judgment in favor of Defendants on both claims.

On July 5, 2018, Plaintiff filed the instant motion. Dkt. No. 466. Plaintiff moves pursuant to FRCP 60(b)(l), FRCP 60(b)(3), and FRCP 60(b)(6) for relief from the Court's grant of summary judgment in favor of Defendants. *See id.* The BCP A Defendants[7] filed their opposition on July 16, 2018. Dkt. No. 472. Plaintiff filed a reply on July 18, 2018.

II. DISCUSSION

Rule 60(b) of the Federal Rules of Civil Procedure provides that a court may, in its discretion, relieve a party from a final judgment or order on the following grounds:

> (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 (whether previously called intrinsic or

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[7] The Landlord Defendants requested an extension of time to oppose the motion and ultimately reached a settlement agreement with Plaintiff that terminated their involvement in this litigation. *See* Dkt. Nos. 469, 482-83.

> extrinsic), 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). The burden of proof is on the party seeking relief from judgment, and the Second Circuit has repeatedly recognized that such relief is "extraordinary, exceptional and generally not favored." *Ognibene v. Parkes,* No. 08-01335 (LTM), 2015 WL 12991206, at *2 (S.D.N.Y. June 19, 2015) (describing Second Circuit precedent). Rule 60(b) is not intended to "provide [the] movant an additional opportunity to make arguments or attempt to win a point already carefully analyzed and justifiably disposed." *In re Bulk Oil (USA) Inc.,* No. 89-B-13380, No. 93-cv-4492, 93-cv-4494 (PKL), 2007 WLl 121739, at* 10 (S.D.N.Y. Apr. 11, 2007) (internal quotation marks omitted). If none of the grounds enumerated in Rules 60(b)(1) through (5) are present, relief under Rule 60(b)(6) is only proper if "the failure to grant relief would work an extreme hardship on the movant." *ISC Holding AG v. Nobel Biocare Fin. AG,* 688 F.3d 98, 109 (2d Cir. 2012).

Plaintiff's primary argument in favor of Rule 60(b) relief is that the Supreme Court's June 18, 2018 opinion in *Lozman v. City of Riviera Beach, Fla.,* 13 8 S. Ct. 1945 (2018), created new law that governs this case. According to Plaintiff, *Lozman* "establishes that the 'official policy' question is unnecessary to decide when the 'probable cause' defense is used ... and that

a jury should have decided the 'official policy' question." Dkt. No. 467 at 1. But Plaintiff misreads the opinion in *Lozman,* which decided only the limited question of whether the presence of probable cause for an arrest precludes a retaliatory arrest claim. *See Lozman,* 138 S. Ct. at 1949. It is therefore inapplicable to Plaintiffs case.

Indeed, the portions of the opinion cited by Plaintiff do not support his argument for relief. Plaintiff points to the Supreme Court's statement that it assumes -rather than requires proof, as did this Court -that "the arrest was taken pursuant to an official city policy." Dkt. No. 467 at 3 (quoting *Lozman,* 13 8 S. Ct. at 1951). But this sentence illustrates that the Supreme Court did not reach the issue of whether there was an official policy. In fact, the Court expressly affirmed elsewhere that such a showing would nevertheless be required on remand. *See Lozman,* 13 8 S. Ct. at 1951 ("It is well established that in a § 1983 case a city or other local governmental entity cannot be subject to liability at all unless the harm was caused in the implementation of "official municipal policy.") (citation omitted). Second, Plaintiff analogizes probable cause for an arrest to Mehiel's public safety justification for excluding him from meetings, concluding that under *Lozman,* this justification does not defeat a First Amendment claim. *See* Dkt. No. 467 at 4. Plaintiffs equal access claim did not survive summary judgment because there was undisputed evidence that his exclusion from meetings was subject to review and therefore not an official policy, however, not because the BPCA had a justification for its decision. Dkt. No. 433 at 14-15. Third, Plaintiff highlights language from the opinion affirming that the right to petition is "one of the most precious of the liberties safeguarded by the Bill of

Rights." Dkt. No. 467 at 5 (quoting *Lozman,* 138 S. Ct. at 1954). This statement is not "new law," nor does the importance of the constitutional right alter the legal standard for a decision on summary judgment. Though *Lozman* may have certain factual similarities with Plaintiff's case, the precedent on which the Court ruled against Plaintiff on his retaliation and equal access claims are unaltered by the opinion. As a result, there is no "new law" to justify relief under Rule 60(b)(6).

With respect to his other arguments, Plaintiff does not point to any facts or law that the Court overlooked that would alter the conclusions reached in the Court's March 28, 2018 Memorandum Opinion and Order.[8] Instead, Plaintiff relitigates the underlying factual disputes already briefed and considered by the Court during motion practice in this case. First, Plaintiff argues that the Court's conclusion that Plaintiff's evidence of retaliation was simply speculative is "contradictory to the evidence and to the previous Court's opinion," which found that Plaintiff had sufficiently *alleged* retaliation in his complaint. Dkt. No. 467 at 6. Second, Plaintiff contends that the Court ignored his rebuttal arguments on the issue of rent payments, *id.* at 7, but the Court did consider and address these arguments, though it was ultimately unpersuaded, Dkt. No. 433 at 9-10. Third, Plaintiff accuses the Court of considering evidence of an alleged altercation

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[8] Plaintiffs Rule 60(b)(3) argument rests on allegations of fraud in the billing statements submitted by counsel for the Landlord Defendants. Dkt. No. 467 at JO. Because the alleged misrepresentations concern a motion for attorneys' fees that was never decided and was ultimately resolved by Plaintiffs settlement agreement with the Landlord Defendants, no relief would be available even if the Court did credit Plaintiffs allegations.

involving Plaintiff in its analysis of the retaliation claim, when that evidence was submitted by the BPCA Defendants as relevant to the equal access claim. *Id.* at 9. Plaintiff does not, however, raise any new arguments to undermine the credibility of that evidence.

A Rule 60(b) motion is not a substitute for appeal. *See Nemaizer v. Baker,* 793 F.2d 58, 61 (2d Cir. 1986). Plaintiff has made no argument that warrants disturbing the summary judgment order in this case.

III. CONCLUSION

The Court denies Plaintiffs Rule 60 motion. The Clerk of the Court is respectfully directed to close this case.

SO ORDERED

Dated: January 31, 2019
New York, New York

/s/ Alison J. Nathan