UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

MARIA FERNANDA RICO ANDRADE, *Individually and on behalf of the estate of* Gerardo Lozano Rico, *deceased*,	§	
	§	CIVIL ACTION NO.
Plaintiff,	§	
v.	§	2:15-CV-0103
UNITED STATES OF AMERICA, ET AL,	§	
Defendants.	§	

OPPOSITION TO RECONSIDERATION

Defendant, United States of America, opposes plaintiff Maria Andrade's motion seeking reconsideration of the Memorandum and Order of July 12, 2017 (Dkt. 31). Plaintiff argues that the Court "overlooked" two arguments raised in Andrade's opposition to Defendants' motion to dismiss. (Dkt. 32-1, motion, at p. 5). Defendant suggests that the Court did not overlook the arguments, and there is nothing new in her motion that merits reconsideration. The Court correctly concluded that plaintiff's FTCA and *Bivens* claims were untimely filed, she failed to prove fraudulent concealment and failed to diligently pursue her claims. Also, plaintiff's claims under the Alien Tort Statute ("ATS") do not waive the sovereign immunity of the United States. Her motion for reconsideration presents the same arguments that were found unpersuasive by the Court. Because she has failed to prove grounds for reconsideration under Rule 59(e), her motion should be denied.

I. LEGAL STANDARD

Fed. R. Civ. P. 59(e) requires that a motion to alter or amend a judgment be filed within

twenty-eight days of judgment, otherwise the motion should be treated as a motion for relief from judgment under Rule 60(b). *Lavespere v. Niagra Mach. & Tool Works, Inc.*, 910 F.2d 167, 174 (5th Cir. 1990), *cert. denied*, 910 U.S. 167 (1993), *rev'd on other grounds*; *SB Intern., Inc. v. Jindal*, 3:06-CV-1174-G, 2007 WL 2410007, *1 (N.D. Tex. Aug. 23, 2007) (Fish, J.). Because the Memorandum and Order (Dkt. 31), was entered on July 13, 2017, and plaintiff's motion was filed on August 9, 2017 (Dkt. 32), the motion appears to have been timely filed.

Rule 59(e) "serves the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence" but "is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been raised before the entry of judgment." *Templet v. HydroChem Inc.*, 367 F.3d 473, 478-79 (5th Cir. 2004); *Shiller v. Physicians Resource Group Inc.*, 342 F.3d 563, 567 (5th Cir. 2003). The Rule does not specify grounds for altering or amending a judgment, and it is well settled that district courts have considerable discretion in considering such a motion. *Edward H. Bohin Co. v. Banning Co.*, 6 F.3d 350, 355 (5th Cir. 1993) (*citing Lavespere, supra*); *Ayanbadejo v. Chertoff*, 462 F. Supp.2d 736, 746 (S.D. Tex. 2006); 11 Wright, Miller & Kane, Federal Practice and Procedure: § 2810.1 (2d ed. 1995). However, the movant has the burden of establishing valid reasons for disturbing a judgment and the district court's discretion is not limitless. *Edward H. Bohin Co., supra*, (*citing Lavespere, supra*). Rule 59 relief is regarded as "an extraordinary remedy that should be used sparingly." *Templet, supra*, at 479; *Ayanbadejo, supra*. The Fifth Circuit has stated that the Rule 59(e) standard, "favors denial of motions to alter or amend a judgment." *Southern Constructors Group, Inc., v. Dynalectric Co.*, 2 F.3d 606, 611 (5th Cir. 1993). Well recognized factors that are considered are: (1) whether the judgment is based on upon a manifest error of law or fact; (2) the existence of newly discovered or previously unavailable evidence; (3) that reconsideration is necessary to prevent manifest

injustice; or (4) an intervening change in controlling law. *Ayanbadejo, supra,* at 745 (*citing* 11 Wright, Miller & Kane, Federal Practice and Procedure: § 2810.1 (2d ed. 1995)).

III. ARGUMENT

In the instant case, plaintiff has not met her burden of showing that reconsideration is warranted. She has not shown that the Memorandum and Order (Dkt. 31) is based on a manifest error of law or fact. She has not shown the existence of newly discovered or previously unavailable evidence. She has not shown that reconsideration is necessary to prevent manifest injustice, or that there has been an intervening change in controlling law. Her memorandum (Dkt. 32-1) merely re-hashes the same unpersuasive arguments.

Equitable Tolling Is Unwarranted

First, it is undisputed that plaintiff's FTCA and *Bivens* claims were not timely filed in accordance with their respective statutes of limitation, and plaintiff failed to show actual diligence in pursuing her claims. (Dkt. 31, at pp. 20-23). Andrade argued equitable tolling based on fraudulent concealment of a preposterous Vehicle Policy that would have law enforcement officers risking their lives by *intentionally* jumping into the path of moving vehicles in order to justify their use of lethal force. The Court reasonably concluded that plaintiff failed to prove the elements of fraudulent concealment (Dkt. 31, at pp. 17-18), and that there was no plausible explanation why a reasonable person could not have investigated or brought a timely suit within two years of Lozano's death. Plaintiff had notice of her son's death and the cause of death (the shooting), but failed to investigate, consult an attorney, or file a claim within two years of November 3, 2011. (Dkt. 31, at pp. 20-23). In fact, undisputed evidence shows that she waited more than two years before she even consulted with an attorney. (Dkt. 25, motion, at Ex. 4, excerpts from Attorney Employment Contract). "[T]he accrual date is not postponed until the

injured party knows every fact [or legal theory] necessary to bring his action." *Zeleznik v. United States*, 770 F.2d 20, 23 (3rd Cir. 1985). As the Court correctly concluded, Andrade's claims were not diligently pursued and not timely filed. Plaintiff's first ground for reconsideration fails.

Scope of Employment Under the Alien Torts Statute

Plaintiff also argues for reconsideration based on the Court having never considered Andrade's challenge to scope-of-employment under her claims brought pursuant to the Alien Tort Statute ("ATS"). (See Dkt. 32-1, memorandum, at p. 7, ¶ 2). She cites Counts 1-3 of the Complaint as the relevant claims (Dkt. 1, at ¶¶ 74-116). This argument is unfounded and futile. The Memorandum and Order specifically addressed plaintiff's claims brought pursuant to the law of nations and the ATS. (Dkt. 31, at pp 23-27). In accordance with *Hernandez v. United States*, 757 F.3d 249, 259 (5th Cir. 2014), *adhered to in part on reh'g en banc*, 785 F.3d 117 (5th Cir. 2015) (per curiam), the Court concluded that the ATS has been interpreted as a jurisdictional statute only and does not waive the sovereign immunity of the United States. The law of nations and ATS claims were properly dismissed pursuant to the Westfall Act. (Dkt. 31, at p. 27).

Also, within Counts 1-3, plaintiff did not challenge scope of employment (Dkt. 1, ¶¶ 74-116), and actually pled that "[e]ach of the Agents acted under color of official authority…" (Dkt. 1, at ¶ 108). The complaint repeatedly claimed that all government agents and employees were acting under color of law and *within the purported course and scope of their employment* . (*See e.g.*, Dkt. 1, Complaint, at ¶¶ 4, 149-150) Under "Jurisdiction and Venue," Andrade pled that her relief is "based on civil rights and human rights violations committed by officers and employees of the United States, all of whom were acting under color of law and *within the course and scope of their employment* …" (Dkt. 1, Complaint, at ¶ 20). Finally, plaintiff failed challenge the "Certification of Scope of Employment" by Rupa Bhattacharyya, Director of the

DOJ's Torts Branch that clearly established that the named agents were at all times acting within the scope of their official duties. (Dkt. 21, at Ex. A).

It is futile at this juncture to challenge scope of employment after entry of judgment. It is well established that Rule 59 motions may not be used to re-litigate old matters, raise new arguments, or present evidence that could, or should have been raised prior to the entry of the judgment. *Templet v. HydroChem Inc.*, 367 F.3d 473, 478-79 (5th Cir. 2004). This ground for reconsideration also fails.

IV. CONCLUSION

Because plaintiff Maria Andrade has not met her burden under Rule 59(e), reconsideration should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing pleading was electronically served through the court's electronic filing system, or by U.S. Mail postage prepaid, on this 30th day of August, 2017, to the following counsel of record:

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