IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:18-cv-03112-RBJ-STV

SEAN SLATTON,

Plaintiff,

v.

TODD HOPKINS, in his individual capacity,
BRANDON BARNES, in his individual capacity,
JOHN HUTTO, in his individual capacity,
FORT COLLINS POLICE DEPARTMENT, a municipality,

Defendants.

MOTION FOR LEAVE TO AMEND SECOND AMENDED COMPLAINT

Plaintiff Sean Slatton, by and through his attorney David A. Lane of KILLMER, LANE & NEWMAN, LLP, respectfully seeks leave to amend his Second Amended Complaint as follows:

Recently-retained counsel for Plaintiff seeks leave to amend the Second Amended Complaint, which was filed *pro se*, as follows:

- Clarifying the factual and legal bases for the unlawful seizure and excessive force claims, as well as the bases of liability for Defendants Fort Collins, Hutton, and Officer Barnes liability;
- Dismissing the claims labeled "obstruction of justice" and "police misconduct";
- Consolidating the claims labeled "false arrest" and "false imprisonment" into one unlawful seizure claim;
- Making clear that the claim labeled "failure to intervene" is not a separate claim but rather a theory of liability under which Officer Barnes is liable for unlawful seizure;
- Dismissing all claims against Defendant Barnes other than the unlawful seizure claim;

- Dismissing all claims against Defendant Hutton other than the excessive force claim; and
- Dismissing all claims against Defendant Fort Collins other than the excessive force claim.

CERTIFICATION PURSUANT TO D.C.COLO.LCivR. 7.1

Counsel for Plaintiffs certify that they conferred with counsel for all Defendants regarding the relief requested herein. Plaintiff's counsel provided defense counsel with the above specifics regarding the amendments sought. Mark Ratner, counsel for Defendants Fort Collins, Hutto, and Barnes, stated that those Defendants would not take a position on any of the amendments unless Plaintiff's counsel shared a copy of the proposed amended complaint before filing. Counsel for Defendant Hopkins, Marni Koster, stated that without further information, Defendant Hopkins' opposed the proposed amendments.

I. PROCEDURAL HISTORY

1. The original Complaint in this case was filed *pro se* on December 3, 2018. *See* [Doc. 1].

2. An Amended Complaint was filed *pro se* on January 11, 2019, in response to an Order to Show Cause. *See* [Docs. 5, 7].

3. A scheduling conference was held on April 3, 2019, at which Plaintiff appeared *pro se*. Because Plaintiff had not yet served Defendants, no scheduling order was entered. *See* [Doc. 14]. Waivers of service were filed on May 17, 2019. *See* [Docs. 20-23].

4. A Second Amended Complaint was filed *pro se* on April 9, 2019. *See* [Doc. 17].

5. On June 14, 2019, Defendant Hopkins moved to dismiss the complaint, and the other Defendants moved to dismiss on June 17, 2019. *See* [Docs. 28, 39]. Responses to the motions to dismiss are currently due on October 30, 2019. *See* [Doc. 71].

6. Defendants moved to stay discovery in the entire case pending a decision on the motions to dismiss, which was granted on July 3, 2019. *See* [Doc. 46].

7. Because of the stay of discovery, no scheduling order has entered in this case, and no discovery has occurred.

8. Plaintiff filed a Third Amended Complaint *pro se*, but this Court struck it for failing to comply with the Rules of Civil Procedure and the Local Rules. *See* [Doc. 37].

9. Undersigned counsel entered his appearance as counsel for Plaintiff on August 26, 2019. *See* [Doc. 65].

10. The proposed Third Amended Complaint, attached as **Exhibit 1**, is counsel's first opportunity to set forth the factual and legal bases of Plaintiff's claims.[1] "Denying leave to amend would effectively negate [the retention] of counsel to aid plaintiff." *Barron v. McGovern*, No. 07-3179-JWL, 2008 U.S. Dist. LEXIS 83394, at *6 (D. Kan. Oct. 17, 2008).

II. LEGAL STANDARD

11. "Fed. R. Civ. P. 15(a) provides for liberal amendment of pleadings," and "[a]mendment under the rule has been freely granted." *Starr v. City of Lakewood*, 2008 U.S. Dist. LEXIS 103929, at *2 (D. Colo. Dec. 16, 2008). "Refusing leave to amend is generally only justified upon a showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of

[1] Plaintiff's counsel attempted to comply with the Local Court Rules requiring a party to submit a copy of the proposed complaint with strikes through and underlines to show the text to be deleted and added. However, it soon became clear that due to the different structure of a *pro se* complaint and a complaint drafted by counsel, as well as the different styles of writing between Mr. Slatton and counsel, a redlined version of the proposed complaint was too difficult to create. Plaintiff respectfully requests that this Court excuse his failure to comply with D.C. Colo. LCivR 15.1(b), and accept instead Plaintiff's description of the proposed amendments at the top of this document.

amendment." *Bylin v. Billings*, 568 F.3d 1224, 1229 (10th Cir. 2009) (citation omitted).

12. Additionally, "[i]n keeping with the purposes of the rule, the court should consider judicial economy and whether the amendments would lead to expeditious disposition of the merits of the litigation." *Chitimacha Tribe of La. V. Harry L. Laws Co.*, 690 F.2d 1157, 1163 (5th Cir. 1982). "The underlying purpose of Fed. R. Civ. P. 15(a) is, of course, to facilitate a decision on the merits." *Polhemus v. Great-West Life & Annuity Ins. Co.*, No. 09-cv-00093-MSK-KMT, 2009 U.S. Dist. LEXIS 102714, at *12 (D. Colo. Oct. 16, 2009); *see also Kennington v. United States Dep't of the Treasury*, 490 F. App'x 939, 943 (10th Cir. 2012) (finding reversible error when court did not adequately justify denying Plaintiff's motion for leave to amend pleading). As such, the nonmoving party has the burden of showing that the proposed amendment is sought in bad faith, causes undue delay, substantial prejudice, or that the amendment would be futile. *Riggs v. Johnson*, No. 09-cv-01226-WYD-KLM, 2010 U.S. Dist. LEXIS 48125, at *9 (D. Colo. Apr. 27, 2010).

13. Under the liberal standard for granting leave, Plaintiff only needs to demonstrate that the claims pleaded in the proposed amendment complaint are not "clearly frivolous or legally insufficient on [their] face. If the proposed claim sets forth facts and circumstances which may entitle the plaintiff to relief, then futility is not a proper basis on which to deny the amendment." *Gallegos v. Brandeis Sch.*, 189 F.R.D. 256, 259 (E.D.N.Y. 1999) (citation omitted). "[E]ven where the possibility of relief is remote, amendment must be permitted because it is the possibility of recovery, not its likelihood, that guides the court's analysis." *Id*. (citing *Vermont Plastics, Inc. v. Brine, Inc.*, 79 F.3d 272 (2d Cir. 1996)).

14. "The court should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2).

III. JUSTICE REQUIRES LEAVE TO AMEND

15. Given that the amendment is not sought in bad faith or for the purpose of causing undue delay, Defendants will suffer no prejudice, and the amended complaint is not clearly frivolous or legally insufficient on its face, Plaintiff should be allowed to amend his complaint to more narrowly focus the facts and claims on which he could be entitled to relief.

16. Plaintiff's proposed amendment would result in only two claims remaining in the case: an excessive force claim and an unlawful seizure claim. The former would be brought against three Defendants, and the latter against only two. The proposed amendment would therefore facilitate a decision on the merits by "reducing the scope of the litigation." *Carskadon v. Diva Int'l, Inc.*, No. 12-cv-01886-MSK-KMT, 2013 U.S. Dist. LEXIS 63668, at *11 (D. Colo. May 3, 2013) (granting leave to amend because, among other reasons, the proposed amendments sought to withdraw several claims).

17. The proposed amendment would clarify and expound on the basis of liability for each Defendant on the two claims that would remain, unlawful seizure and excessive force. Although Plaintiff's *pro se* complaint included the same claims and Defendants, and alleged the most salient facts, the proposed amended complaint, which is pleaded by counsel, is considerably more detailed. Were this Court to deny the amendment, the denial would in effect constitute a decision based on a procedural barrier, rather than the merits. *See In re Thornburg Mortgage, Inc. Sec. Litig.*, 265 F.R.D. 571, 580 (D.N.M. 2010) ("Because the Court finds that the policy of allowing plaintiffs to have all of their claims decided on the merits, rather than on procedural barriers, outweighs the Defendants' arguments to the contrary, the Court will allow the amendment."). As "the underlying facts or circumstances relied upon by [Plaintiff] may be a proper subject of relief, [Plaintiff] ought to be afforded an opportunity to test [his] claim[s] on

the merits." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

18. There is no undue delay, bad faith, or lack of diligence on the part of Plaintiff's counsel. As stated, this is the first opportunity Plaintiff's counsel has had to amend the complaint. *See Scavetta v. King Soopers, Inc.*, No. 10–cv–02986–WJM–KLM, 2012 U.S. Dist. LEXIS 1901, at *5 (D. Colo. Jan 5, 2012) (Granting leave under Fed. R. Civ. P. 15 because "leave should generally be permitted unless the moving party unduly delayed or failed to cure, the opposing party would be unduly prejudiced, or the proposed amendment would be futile.").

19. There is also absolutely no prejudice to Defendants. As discussed above, *see supra* ¶ 7, because of the stay Defendants sought, no scheduling order has entered, and no discovery has occurred. Defendants have invested extraordinarily minimal time and expense litigating Plaintiff's case to date. "[T]he mere fact that a defendant's motion to dismiss may be rendered moot if leave to amend is granted ordinarily is not sufficient to establish undue prejudice." *Carskadon*, 2013 U.S. Dist. LEXIS 63668, at *10-11; *see also Barbarino v. Anchor Motor Freight, Inc.*, 421 F. Supp. 1003 (W.D.N.Y. 1976) (explaining that any alleged prejudice resulting from time spent researching and opposing initial complaint is not type of detriment which constitutes undue prejudice to the defendant and, therefore, in light of absence of bad faith on part of the plaintiff, liberal amendment policy of Federal Rules permits the plaintiff to amend his complaint).

20. Courts typically find prejudice only when amendment would unfairly affect defendants in terms of preparing a defense, which occurs most often when amended claims arise out of different subject matter from existing claims, which is not the case here. *See Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1204–1211 (10th Cir. 2006). None of the proposed amended allegations "would significantly change the case and the defense that [Defendants]…would need

to prepare." *Tex. Instruments, Inc. v. Biax Corp.*, No. 07-cv-02730-WDM-MEH, 2009 U.S. Dist. LEXIS 90209, at *8-9 (D. Colo. Sep. 28, 2009) (denying leave to amend because the plaintiff sought to assert new claims that would significantly change the case, discovery was already closed, and the matter was moving towards trial). Moreover, any facts added in the proposed amended complaint that amplify facts previously alleged are not surprising to Defendants in any way because they all relate to information within Defendants' own possession.

21. Conversely, denying leave to amend the complaint would be extremely prejudicial to Plaintiff and wholly inconsistent with the liberal manner in which Rule 15 have been construed for many decades. *See Walker v. THI of N.M. at Hobbs Ctr.*, 262 F.R.D. 599, 602 (D.N.M. 2009) (applying the more stringent standards for amending under Rule 16 and explaining that "rigid adherence to pretrial conference agreements should not be exacted, especially where to do so will result in injustice to one party and relaxing of such agreement will not cause prejudice to the other party" (citation omitted)).

IV. CONCLUSION

WHEREFORE, Plaintiff respectfully requests that this Court grant the motion to amend and accept **Exhibit 1**, the proposed Third Amended Complaint, for filing.

Respectfully submitted this 30th day of October 2019.

KILLMER, LANE & NEWMAN, LLP

s/ David A. Lane

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CERTIFICATE OF SERVICE

I certify that on this 30th day of October 2019, I filed a true and correct copy of the foregoing via CM/ECF which will generate e-mailed notice to the following:

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