

**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,
BRANDON BARNES,
JOHN HUTTO,
AND FORT COLLINS POLICE DEPARTMENT
Defendants.

**DEFENDANT TODD HOPKINS' RESPONSE TO
PLAINTIFF'S MOTION FOR LEAVE TO AMEND SECOND AMENDED COMPLAINT**

Todd Hopkins, by and through his attorneys at Nathan Dumm & Mayer, P.C., appearing separately from the other named Defendants, hereby responds to Plaintiff's Motion for Leave to File a Third Amended Complaint [ECF 73] as follows:

Preliminarily, several statements contained in Plaintiff's Motion warrant clarification. First, Plaintiff's counsel was not "recently-retained" as alleged on page one of the Plaintiff's Motion. Rather, Plaintiff's counsel officially entered his appearance with the Court on August 26, 2019, some two months ago. [ECF 65]. However, Mr. Lane's involvement in this case on behalf of the Plaintiff began as far back as early July, 2019 when he contacted our office to discuss the case and his involvement was reiterated in the beginning of August 2019 in an email from the Plaintiff. As such, Plaintiff's counsel has had at least a few months, and more accurately four months, in which to take substantive action, but failed to do so and, thus, this is not the first opportunity for amendment as alleged on page six of Plaintiff's Motion.

Second, this is not the first amendment or attempted amendment of Plaintiff's complaint. As the ECF docket shows, if granted, this would be Plaintiff's third amendment and constitutes his fourth attempt at amendment.

Third, this case has been unreasonably delayed and not due to the fault of Defendant Hopkins. Plaintiff's initial complaint was filed back in early December 2018. [ECF 1]. A waiver of service, however, was not even requested of Defendant Hopkins until April 2019. Defendant Hopkins promptly agreed to waive service and timely filed his Motion to Dismiss back on June 14, 2019 and in doing so included the video pertinent to his interaction with the Plaintiff as an exhibit. [ECF 28]. As a result, Plaintiff has had the video and the Motion to Dismiss for more than four months and, yet, to date there has been no substantive response.

Fourth, Plaintiff's counsel conferral on the pending Motion was limited. Prior to filing the requested Motion, despite requests from Defense counsel, Plaintiff's counsel specifically refused to provide a copy of the proposed amended complaint. That refusal occurred despite the fact that a proposed amended complaint existed, as it was attached to the Motion to Amend. Both Judge Jackson and Judge Varholak's practice standards reference the importance of a sincere, good faith conferral.

Fifth, contrary to Plaintiff's assertion on page one of the Motion, the proposed Third Amended Complaint goes well beyond simply clarifying and/or cleaning up the prior complaint. While Defendant Hopkins recognizes the formatting of the *pro se* complaint form versus the format used by Plaintiff's counsel is different, in the last operative complaint, Plaintiff's Second Amended Complaint [ECF 17], the summary of the claims alleged and supporting facts constituted five pages in length. Plaintiff's proposed Third Amended Complaint, however,

contains sixteen pages and over 100 paragraphs of factual allegations and information regarding the alleged claims, despite the decrease in the number of claims being proposed.

Those preliminary matters aside, Defendant Hopkins' position regarding the Motion for Leave to Amend is as follows:

After review of the Motion and proposed Third Amended Complaint, Defendant Hopkins does not oppose the dismissal by Plaintiff of any claims against any of the Defendants and avers that such dismissal could easily be accomplished by a stipulated dismissal pleading. As such, Defendant Hopkins objection revolves solely around Plaintiff's attempted revisions and additions as to the two proposed remaining claims against Defendant Hopkins: one for unlawful seizure and one for excessive force. As to those claims, amendment is futile and was not timely pursued, and therefore, the Motion for Leave to Amend should be denied.

While Defendant Hopkins recognizes amendments under F.R.C.P. 15(a)(2) are often permitted,¹ a motion for leave to file an amended complaint should be denied when the amendment would be futile. *Jefferson County School Dist. No. R-1 v. Moody's Investor's Servs., Inc.*, 175 F.3d 848, 860-861 (10th Cir. 1999). An amendment is futile "when the proposed amended complaint would be subject to dismissal for any reason, including that the amendment would not survive a motion for summary judgment." *Bauchman for Bauchman v. West High School*, 132 F.3d 542, 561-62 (10th Cir. 1997); *see also Anderson v. Suiters*, 499 F.3d 1228, 1238 (10th Cir. 2007) (futile for failure to allege all elements of cause of action); *Lind v. Aetna Health*,

¹ Paragraph 13 of Plaintiff's Motion contains citations to two cases, both from other circuits. Those cases are not dispositive given the Tenth Circuit precedent cited herein nor are they even relevant in light of the fact that they reference a different standard than that set forth by the Tenth Circuit.

Inc., 466 F.3d 1195, 1200 (10th Cir. 2006) (futile because amended claim would seek relief barred by statute).

Defendant Hopkins recognizes that substantive issues about the validity or futility of a claim are often deferred by Magistrates to the assigned Article III Judge. However, this case presents a unique situation for two reasons. First, Defendant Hopkins has already filed a motion to dismiss and shown therein why *any* Fourth Amendment claim is futile, including the amendments now sought in Plaintiff's proposed Third Amended Complaint. [ECF 28 (pgs. 5-10 analyzes why dismissal of an unlawful seizure claim and excessive force claim against Defendant Hopkins is warranted as a matter of law. *See in part Brooks v. Gaenzle*, 614 F.3d 1213 (10th Cir. 2010))]. Second, Defendant Hopkins' Motion was specifically referred by Judge Jackson to Judge Varholak in ECF 31. Consequentially, a ruling by Judge Varholak on futility will not usurp Judge Jackson's role.

Those procedural matters aside, despite Plaintiff's counsel's best attempt to reword or revise the allegations in the newest draft complaint, the fundamental underlying events involving Defendant Hopkins are on the video attached to the previously filed Motion to Dismiss. That video, not Plaintiff's recent, self-serving and conclusory opinions articulated by legal counsel, is the best evidence of what transpired as to the use of force. Additionally, it is undisputed that Defendant Hopkins was not the one who actually arrested Plaintiff, as Plaintiff fled from Defendant Hopkins.²

² Even in his proposed Third Amended Complaint, Plaintiff has admitted that he fled from Defendant Hopkins and that he was detained by other others, not Defendant Hopkins, and that the warrantless arrest affidavit was prepared and signed by someone other than Defendant Hopkins. [ECF 73-1 (¶¶39, 41, & 45)].

In light of the above, permitting an amendment despite the futility will do nothing more than necessitate another round of dispositive motion briefing, thereby further delaying the relief sought by Defendant Hopkins back in June 2019 and costing City tax payers more in terms of attorney fees and costs. If one or both of Plaintiff's two alleged remaining claims survived the pending Motion to Dismiss, amendment of the complaint could always be addressed at that point, if really necessary, without unduly delaying and/or wasting resources.

Beyond the futility of the amendment, the court may refuse leave to amend for other reasons, such as undue delay or failure to cure deficiencies by amendments previously. *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1365 (10th Cir. 1993). Related thereto, the Tenth Circuit has held that “a party who delays in seeking an amendment is acting contrary to the spirit of the rule and runs the risk of the court denying permission because of the passage of time,” *Minter v. Prime Equipment, Co.*, 451 F.3d 1196, 1205 (10th Cir. 2006); and also that “the longer the delay, the more likely the motion to amend will be denied, as protracted delay, with its attendant burdens on the opponent and the court, is itself a sufficient reason for the court to withhold permission to amend.” *Id.* (citing *Steir v. Girl Scouts of the USA*, 383 F.3d 7, 12 (1st Cir. 2004)).

In looking specifically at the issue of undue delay, the law holds that “denial of leave to amend is appropriate when the party filing the motion has no adequate explanation for the delay.” *Minter*, 451 F.3d at 1205 (citing *Frank*, 3 F.3d at 1365-66). Further, delay is found to be undue “when the party seeking amendment knows or should have known of the facts upon which the proposed amendment is based but fails to include them in the original complaint.” *Chambers v. Mosness*, 2015 WL 888191, *8 (D. Colo. 2015) (citing *Las Vegas Ice & Cold Storage Co. v. Far West Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990)).

Here, all that Plaintiff says about delay is the very brief, conclusory and inaccurate statement in paragraph eighteen of the Motion to Amend. Plaintiff's Motion fails to explain why the amendments requested now were not or could not have been requested months ago when Plaintiff's counsel officially entered his appearance, or even before then given his earlier involvement. Plaintiff also fails to explain in his Motion why none of the requested amendments were made in the three previous attempts at amendment. Similarly, the Motion does not articulate that any new facts were uncovered. As a result, Plaintiff utterly fails to provide why amendment is necessary and not the result of undue delay.

In conclusion, Defendant Hopkin avers that the requested amendments, other than dismissal of claims, are futile and the result of undue delay. Defendant Hopkins therefore respectfully requests this Court grant the dismissals requested by Plaintiff, but deny Plaintiff's request to otherwise amend the complaint and, instead, direct that the Second Amended Complaint is the operative pleading and a substantive response to the pending Motions to Dismiss be filed.

Respectfully submitted this 12th day of November, 2019.

/s/ Marni Nathan Kloster

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November, 2019, I electronically filed the foregoing **DEFENDANT TODD HOPKINS' RESPONSE TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND SECOND AMENDED COMPLAINT** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following at their e-mail addresses:.

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