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.

PLAINTIFF'S UNOPPOSED MOTION FOR LEAVE TO FILE A FOURTH AMENDED COMPLAINT

Plaintiff Sean Slatton, through counsel, David A. Lane and Helen Oh of KILLMER, LANE & NEWMAN, LLP, submits the following Motion for Leave to File a Fourth Amended Complaint, and states as follows:

INTRODUCTION

Mr. Slatton seeks leave to amend his Complaint to: (1) substitute the defendant "Fort Collins Police Department" with "City of Fort Collins," and (2) add a claim of excessive force under the Fourteenth Amendment against Defendants Hopkins, Hutto, and the City of Fort Collins. A redlined version of Mr. Slatton's proposed Fourth Amended Complaint is attached to this motion as **Exhibit 1** and a clean version is attached as **Exhibit 2**.

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

Counsel for Plaintiff certify that they conferred with counsel for all Defendants regarding the relief requested herein. Plaintiff's counsel provided defense counsel with a redlined version

of the proposed amended complaint with the above specifics regarding the amendments sought. Mark Ratner, counsel for Defendants City of Fort Collins, Hutto, and Barnes, stated that these Defendants do not oppose Plaintiff's motion. Nicholas Poppe, counsel for Defendant Hopkins, stated that Defendant Hopkins also does not oppose this motion.

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].

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. 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].

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

9. Plaintiff filed a Third Amended Complaint on October 30, 2019, which was counsel's first opportunity to set forth the factual and legal bases of Plaintiff's claims. *See* [Doc.

81]. The Third Amended Complaint was accepted by the court on November 22, 2019. *See* [Doc. 80].

10. Defendants filed letters concerning their intent to file a motion to dismiss the Third Amended Complaint on December 10, 2019 and December 11, 2019. *See* [Docs. 82 and 83].

11. On December 13, 2019, Defendants filed unopposed motions for extension of time for filing their motions to dismiss based on Plaintiff's notification that Plaintiff intends to seek leave to file a Fourth Amended Complaint. *See* [Docs. 84 and 85].

12. On December 16, 2019, this Court granted the motions for extension of time, granting Defendants an extension until 14 days after the filing of the Fourth Amended Complaint.

13. Plaintiff now seeks leave to file Fourth Amended Complaint, for reasons set for below.

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

I. LEGAL STANDARD

15. "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). "Generally, the Court liberally should allow for amendments to pleadings under Federal Rule of Civil Procedure 15(a)." *Harger v. Talley,* 2005 U.S. Dist. LEXIS 14509, at *6 (D. Nev. 2005). "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 amendment." *Bylin v. Billings*, 568 F.3d 1224, 1229 (10th Cir. 2009) (citation omitted).

16. 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 to facilitate a decision on the merits. *See 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 the 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).

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

II. JUSTICE REQUIRES LEAVE TO AMEND

18. Mr. Slatton's amendment is not sought in bad faith, and Defendants will not suffer prejudice because there has been no undue delay and will be no surprise to Defendants.

19. Prejudice is the "most important" factor in deciding a motion to amend. *Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1207 (10th Cir. 2006). Granting Mr. Slatton leave to amend would not cause Defendants any cognizable prejudice, particularly considering that Mr. Slatton's proposed additional claim against Defendants and substitution of a party are based on the same

core set of facts as his existing claims.

20. "Prejudice in this context 'means undue difficulty in prosecuting [or defending] a lawsuit as a result of a change of tactics or theories on the part of the other party.'" *Qdoba Rest. Corp. v. Taylors, LLC*, No. 08-cv-01179-MSK-KLM, 2008 U.S. Dist. LEXIS 82849, at *8 (D. Colo. Sept. 25, 2008) (quoting *Taliaferro v. Kansas City, Kan.*, 128 F.R.D. 675, 678 (D. Kan. 1989)). 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).

21. Because the added Fourteenth Amendment claim arises entirely out of the same transaction or occurrence as previously alleged by Mr. Slatton, there is no surprise or prejudice to Defendants such that it would unfairly affect Defendants' ability to prepare a defense. The few 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 already within Defendants' own possession.

22. Similarly, Defendants will suffer no prejudice with the substitution of the City of Fort Collins for Defendant Fort Collins Police Service. In accord with Rule 15(c), Defendants had notice and understood that Mr. Slatton intended to bring his claims against the City of Fort

Collins and that naming the Fort Collins Police Department was an error.

23. Defendants will also suffer no prejudice because no scheduling order has entered, and discovery has not yet begun. *See Justice v. Fabey*, 541 F. Supp. 1019 (E.D. Pa. 1982). When no scheduling order has entered and discovery has not commenced, the Tenth Circuit has stated that, "the preferred practice is to accord a plaintiff…an opportunity to amend his complaint before acting upon a motion to dismiss." *McKinney v. Okla.*, 925 F.2d 363, 365 (10th Cir. 1991). Alleged prejudice resulting from time spent researching and opposing a complaint is not type of detriment which constitutes undue prejudice to a defendant and, therefore, in light of absence of bad faith on part of a plaintiff, liberal amendment policy of Federal Rules permits plaintiff to amend his complaint. *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).

24. Defendants have filed letters concerning their intent to file a motion to dismiss [Docs. 82 and 83]. After reading Defendants' letters, undersigned counsel informed Defendants that they intended to file a Fourth Amended Complaint to addresses a pleading deficiency raised by Defendants regarding the naming of the wrong defendant, and add a new claim in response to an argument raised by Defendant Hopkins in his Motion to Dismiss. Specifically, Mr. Slatton's Fourth Amended Complaint adds an excessive force claim under the Fourteenth Amendment as an alternative legal claim to protect his interest in the event the Court holds that there was no seizure under the Fourth Amendment, and substitutes the correct Defendant—City of Fort Collins—for an improper defendant—the Fort Collins Police Department, a change unopposed

by counsel for Defendant Fort Collins.

25. It is routine to allow amendment of pleadings in the context of a motion to dismiss.

> Dismissal of a case under Fed. R. Civ. P. 12(b)(6) is a harsh remedy to be used cautiously so as to promote the liberal rules of pleading while protecting the interests of justice. As such, in this jurisdiction, the Court typically does not dismiss a claim under Rule 12(b)(6) until the plaintiff has been provided notice and an opportunity to amend the complaint to cure the defective allegations.

Douglas v. City of Fort Collins, 2013 WL 5609350 *6 (D. Colo. Oct. 11, 2013) (citations omitted); *see also Greenway Nutrients v. Blackburn*, 2014 U.S. Dist. LEXIS 40153, *70-71 (D. Colo. Feb. 10, 2014) (explaining that the court could permit a plaintiff to attempt to cure pleading deficiencies identified in a motion to dismiss by an amended complaint).

26. Comporting with Rule 15 of the Federal Rules of Civil Procedure, granting leave to amend before acting upon a motion to dismiss would help facilitate a decision on the merits and expedite the determination of issues because the proposed amendments cure alleged deficiencies in the Third Amended Complaint without causing undue prejudice or delay to Defendants. *See McKinney*, 925 F.2d at 365.

27. Finally, under the liberal Rule 15(a) standard, Mr. Slatton only has to demonstrate that his proposed additional allegations 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). Under the rule 12(b)(6) standard, "dismissal without affording the plaintiff notice or an opportunity to amend is proper *only when it is patently obvious that the plaintiff could not prevail on the facts alleged*, and allowing him an opportunity to amend would be futile." *Curley v. Perry*, 246 F.3d 1278, 1281-82 (10th Cir. 2001)

(emphasis added). In other words, "even 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." *Gallegos*, 189 F.R.D. at 259 (citing *Vermont Plastics, Inc. v. Brine, Inc.*, 79 F.3d 272 (2d Cir. 1996). Mr. Slatton's proposed amendments are not futile because they contain factual allegations that give rise to valid causes of action and a high likelihood of relief.

28. Accordingly, there is no sound reason here to depart from the longstanding presumption that a plaintiff "ought to be afforded an opportunity to test his claim on the merits" if "the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

III. MR. SLATTON'S AMENDMENTS RELATE BACK TO THE DATE OF THE FILING OF THE ORIGINAL COMPLAINT

A. Substituting Defendant Fort Collins Police Department with City of Fort Collins Relates Back Under Fed. R. Civ. P. 15(c).

29. Rule 15(c)(3) provides that an amendment of a complaint relates back to the date of the original complaint when the amendment "changes the party or the naming of the party against whom a claim is asserted," and (1) the party has received notice such that it will not be prejudiced in defending on the merits, and (2) the party "knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity." The reasoning behind this rule "is that 'a party who has been notified of litigation concerning a particular occurrence has been given all the notice that statutes of limitations were intended to provide.'" *Laratta v. Raemisch*, No. 12–cv–02079, 2014 WL 1237880, at *15 (D. Colo., March 26, 2014), *quoting Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 149 n.3 (1984).

30. The requirements of Rule 15(c)(3) are met here. Defendant Fort Collins had

notice of the lawsuit and knew that but for a technical mistake concerning naming the proper party, the action would have been brought against the City of Fort Collins. *See Herman v. Utah Nat. Guard*, 1991 WL 50203, at *2 (10th Cir. 1991), *citing* F.R.C.P. 15(c).

B. The Fourteenth Amendment Excessive Force Claim Relates Back Under Fed. R. Civ. P. 15(c).

29. "As a general rule, amendments will relate back if they amplify the facts previously alleged, correct a technical defect in the prior complaint, assert a new legal theory of relief, or add another claim arising out of the same facts." *Benton v. Bd. of Cty. Comm'rs*, No. 06-cv-01406-PSF-MEH, 2007 U.S. Dist. LEXIS 84157, at *8 (D. Colo. Nov. 14, 2007) (citation omitted). The additional claim need not be based on an identical theory of recovery. *Id.*

30. Mr. Slatton's proposed amendment to add an excessive force claim under the Fourteenth Amendment relates back to the date of the original pleading because the facts underlying the claim are based on the *same exact conduct, transaction, or occurrence as that alleged in the original complaint*. Fed. R. Civ. P. 15(c)(1)(B). Therefore, the additional Fourteenth Amendment claim relates back to the original pleading.

CONCLUSION

WHEREFORE, Plaintiff respectfully requests that the Court grant his Motion for Leave to File a Fourth Amended Complaint, and therefore enter the proposed Fourth Amended Complaint as the operative complaint in this case.

DATED this 18th day of December 2019.

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