

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

BILLIE JO FORTIER,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Civil No. 97-295-P-H
)	
JAMES THERIAULT, et al.,)	
)	
<i>Defendants</i>)	

RECOMMENDED DECISION¹ ON PLAINTIFF’S MOTION TO AMEND COMPLAINT

In this action, the plaintiff invokes 42 U.S.C. § 1983 to allege the violation of her constitutional rights relating to substantive due process and equal protection of the laws. She also asserts state-law claims of negligence and fraud. The defendants identified in the First Amended Complaint (Docket No. 2) are the Town of Mexico, Police Chief James Theriault and certain unknown police officers employed by the town. The essence of the plaintiff’s case is that she became the victim of domestic violence as the result of certain acts and omissions by the Mexico Police Department.

Now pending is the plaintiff’s motion, filed pursuant to Fed. R. Civ. P. 15(a), seeking leave to file a Second Amended Complaint. The proposed amendments would substitute Sgt. Robert Gallant for the unknown police officers named in the First Amended Complaint, eliminate Counts III and IV of the First Amended Complaint and add a new section 1983 claim alleging the violation

¹ The pending motion is a dispositive pretrial matter within the meaning of 28 U.S.C. § 636(b)(1)(B), and thus a recommended decision is the appropriate exercise of my authority. *See Allendale Mut. Ins. Co. v. Rutherford*, 1998 WL 139399 at *1-*2 and *2 n.2 (D.Me. Mar. 18, 1998) (distinguishing *Jacobsen v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.*, 594 F.Supp. 583 (D.Me. 1984)).

of the plaintiff's constitutional right to procedural due process. At my initiative, the parties appeared through counsel for a chambers conference yesterday and each side had an opportunity to explain its position on the pending motion fully. The parties indicated they stipulate to the dismissal of Counts III and IV of the First Amended Complaint, which are section 1983 claims alleging that the defendants failed to fulfill certain duties following the issuance of a warrant for the arrest of the perpetrator of the domestic violence at issue. The plaintiff explained that she learned through discovery that no such warrant ever issued. Accordingly, Counts III and IV of the First Amended complaint are dismissed. Concerning the remainder of the Rule 15(a) motion, for the reasons that follow I recommend that the plaintiff's request for leave to amend her complaint be denied.

Under Fed. R. Civ. P. 15(a), a party must seek leave of the court to amend a pleading after the deadline for the filing of such an amendment has expired or if the pleading has already been amended once. Such leave "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Although this language from Rule 15(a) "evinces a definite bias in favor of granting leave to amend," the rule nevertheless "frowns upon undue delay in the amendment of pleadings, particularly if no legitimate justification for the delay is forthcoming." *Rodriguez v. Doral Mortgage Corp.*, 57 F.3d 1168, 1178 n.11 (1st Cir. 1995) (citations omitted); *see also Tiernan v. Blyth, Eastman, Dillon & Co.*, 719 F.2d 1, 4 (1st Cir. 1983) (though court may not deny amendment without consideration of prejudice to the opposing party, "it is clear that 'undue delay' can be a basis for denial") (citation omitted). The matter is consigned to the discretion of the trial court. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

In recommending that the court exercise its discretion by not allowing the proposed amendment, I am mindful that "[t]he further along a case is toward trial, the greater the threat of

prejudice and delay when new claims are belatedly added.” *Executive Leasing Corp. v. Banco Popular de Puerto Rico*, 48 F.3d 66, 71 (1st Cir. 1995) (citation omitted). This matter appears on Chief Judge Hornby’s July trial list; a final pretrial conference is scheduled for June 12. Pursuant to the scheduling order entered in November 1997, the deadline for joinder of parties and amendment of pleadings was January 30, 1998; the discovery period closed on April 17, 1998. Thus, the plaintiff proposed to add a new claim and a new party after the close of discovery, some three months after the relevant deadline and when the case was nearly ready for trial.

I am also mindful that the original motion deadline under the Scheduling Order was April 24, 1998, subsequently enlarged to May 8, 1998 to permit the defendant to complete the preparation of a summary judgment motion in light of the plaintiff’s late designation of her expert witness. The extension of the motion deadline came out of a conference of counsel I conducted on April 16, 1998. At the conference, the plaintiff gave no indication that a request for leave to amend the complaint would be forthcoming. Such an indication would certainly have led the defendants to seek leave to hold their summary judgment filing in abeyance pending resolution of precisely what claims would be pending against them. Instead, the defendants were forced to file their summary judgment motion on May 8 with the knowledge that there may be additional claims in the case not addressed by their motion.

At the chambers conference of counsel I convened yesterday to discuss the Rule 15(a) motion, counsel for the plaintiff indicated that the facts underlying the proposed amendment came to light when she deposed Gallant on April 1, 1998 and thereby determined that the plaintiff could meet the applicable standard set out by the First Circuit in *Soto v. Flores*, 103 F.3d 1056 (1st Cir.), *cert. denied*, 118 S.Ct. 71 (1997). This explanation is unsatisfactory twice over. First, *Soto* concerns

the showing a victim of domestic violence must make to prove an equal protection violation. *See Soto*, 103 F.3d at 1067 (victim “must . . . show that the relevant policymakers and actors were motivated, at least in part, by a discriminatory purpose.”). Thus, to the extent that Gallant’s deposition testimony implicated the First Circuit’s holding in *Soto*, this in itself would not have amounted to a revelation that the plaintiff had a valid claim on the issue of procedural due process.² Second, even assuming the Gallant deposition put the plaintiff on notice that a new and valid theory of recovery existed, the plaintiff offers no explanation for why the Gallant deposition was not conducted sooner.

Nor is the court in a position to conclude that the taking of Gallant’s deposition on April 1 excuses any delay in naming him as a defendant. The original complaint filed in this action alleged that the plaintiff “was assured by an UNKNOWN POLICE OFFICER or OFFICERS” between October 2 and October 6, 1995 that her abuser “would be arrested on sight” and that, on October 6, the abuser actually presented himself for arrest but was turned away, again by unknown officers. Complaint (Docket No. 1) at ¶¶ 25, 29. Thus, the plaintiff had presumably placed her attorney on notice from the outset of this litigation that determining the identity of the unknown officer or officers was an important objective. I am aware of nothing that stood in the way of counsel making such identification a priority as discovery commenced. The plaintiff produces no explanation for the delay, which is in no sense mitigated by the fact that Gallant’s deposition, when finally conducted at the end of the discovery period, proved to strengthen the plaintiff’s position according to her

² Indeed, the plaintiff points out in the memorandum accompanying her Rule 15(a) motion that her proposed procedural due process claim is grounded in a Sixth Circuit case, *Meador v. Cabinet for Human Resources*, 902 F.2d 474 (6th Cir. 1990). The relevant holding in *Meador* is that official indifference to a safety entitlement established under state statute can become the basis for a substantive due process claim alleging the deprivation of a liberty interest. *Id.* at 476-77.

theory of the case. The plaintiff conspicuously omits mention of at what point she learned that Gallant was an appropriate defendant, although she does allege that it was clear to the named defendants throughout that Gallant had been involved in the events giving rise to the lawsuit. If so, Gallant's identity would have been readily available to the plaintiff from the outset of discovery via the posing of an appropriate interrogatory to the named defendants.

On the issue of prejudice, the defendants point out that allowance of the proposed Second Amended Complaint would require them to conduct further discovery, in the form of interrogatories and a likely additional deposition, to seek leave to file an additional summary judgment motion taking up the plaintiff's new claims, and then to prepare such a dispositive motion.³ These proceedings would cause the defendants to incur additional costs that would not have been imposed had the plaintiff sought leave to amend the complaint sooner. The additional discovery and motion practice would also inevitably force the court to postpone the trial. While it is, of course, always possible to continue a matter scheduled for trial and to mitigate at least some of the prejudice to the defendants by awarding them their costs for the additional discovery and motion practice, other courts have recognized that the attendant delay in finally resolving a case is itself a form of prejudice to the non-amending party that merits consideration in the Rule 15(a) context. *See, e.g., Block v. First Blood Assoc.*, 988 F.2d 344, 350 (2d Cir. 1993); *Gulf Oil Trading Co. v. M/V Caribe Mar*, 757 F.2d 743, 751-52 (5th Cir. 1985); *Arrington v. Dickerson*, 915 F.Supp. 1516, 1521 (M.D.Ala. 1996). The same concern for prompt resolution of disputes underlies Local Rule 16.2, pursuant to which the case was assigned to the court's standard case-management track with its attendant early

³ Counsel for the defendants represents that she will also be appearing on behalf of Gallant in the event he is added to the case.

deadlines for joinder/amendment, completion of discovery and filing of motions. The joinder and amendment deadline is a key element of this case management protocol because it facilitates orderly discovery, which, in turn, permits the case to progress efficiently toward trial. Granting the Rule 15(a) motion in the circumstances, which include a complete lack of any cognizable explanation⁴ for a three-month delay and resulting prejudice to the defendants, would turn the process of setting a joinder and amendment deadline into a meaningless exercise. The bottom line is that the prejudice to the defendants is palpable and not at all offset by a legitimate explanation by the plaintiff for the delay in seeking to amend her complaint a second time.

For the foregoing reasons, with the exception of the stipulated-to dismissal of Counts III and IV of the First Amended Complaint, I recommend that the plaintiff's motion for leave to file a Second Amended Complaint be **DENIED**.

⁴ An explanation proffered by the plaintiff in her motion does not withstand scrutiny. She noted that her present counsel only became involved in the case upon the dissolution of her partnership with another attorney, who had previously appeared as the plaintiff's counsel. As it happens, the dissolution coincided with the joinder and amendment deadline in this case. *See* Plaintiff's Unopposed Motion to Amend Scheduling Order (Docket No. 6) at 1. I do not believe that the plaintiff's present counsel can disassociate herself in these circumstances from the manner in which her former partner chose to litigate the case. Even assuming she could, it would be to no avail. Any acts or omissions by the attorney who formerly represented the plaintiff are visited upon the client. *United States v. One Lot of \$25,721.00 in Currency*, 938 F.2d 1417, 1422 (1st Cir. 1991). Thus, the plaintiff must account here for any failure by her former attorney to meet the original joinder and amendment deadline. No such explanation is offered. Further, even assuming the court could disregard everything that happened prior to January 30, the plaintiff's present counsel does not account for the ensuing three-month delay that unassailably took place on her watch.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 20th day of May, 1998.

*David M. Cohen
United States Magistrate Judge*