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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Karen L. Cwiak,
Plaintiff,
vs.
City of Phoenix, et al.,
Defendant.

) No. CV 09-1858-PHX-MHM

) **ORDER**

Currently before this Court are Defendants’ Motion to Dismiss, (Dkt. #6); Motion to Strike re Plaintiff’s Second Amended Complaint, (Dkt. #9); and Motion to Transfer and Consolidate, (Dkt. #17); and Plaintiff’s Motion to Amend Complaint. (Dkt. #11). After reviewing the pleadings, and determining that oral argument is unnecessary, the Court issues the following Order.

I. PROCEDURAL HISTORY

This case was originally filed in Maricopa County Superior Court. On September 4, 2009, Defendants removed this case to federal court. (Dkt. #1). Prior to removal, Plaintiff amended her complaint, alleging false imprisonment, wrongful prosecution, assault/excessive force, and civil rights violations pursuant to 42 U.S.C. § 1983.¹ On September 9, 2009,

¹It does not appear that Plaintiff’s original complaint was included with the documents attached to the notice of removal.

1 Defendants filed a Motion to Dismiss. (Dkt. #6). In response, on September 21, 2009,
2 Plaintiff filed her Second Amended Complaint, but did so without leave from this Court or
3 Defendants' permission. (Dkt. #7). As a result, on September 28, 2009, Defendants filed
4 their Motion to Strike re Plaintiff's Second Amended Complaint. (Dkt. #9). Plaintiff
5 responded on October 9, 2009, asking the Court to deny Defendants' strike motion, and
6 motioning in the alternative to amend its complaint. (Dkt. #11). Finally, on December 28,
7 2009, Defendants filed their Motion to Transfer and Consolidate, alleging the instant action
8 is identical to one currently before Magistrate Judge Duncan, CV-09-02686. (Dkt. #17).
9 Plaintiff has not filed papers in opposition to Defendants' Motion to Transfer and
10 Consolidate.

11 II. DEFENDANTS' MOTION TO TRANSFER AND CONSOLIDATE

12 Pursuant to L.R.CIV. 42.1, Defendants request that a case currently before Magistrate
13 Judge Duncan, CV-09-02686, be transferred and consolidated with the instant case. Rule
14 42.1(a) provide

15 Any party may file a motion to transfer the case or cases involved to a single
16 Judge whenever two or more cases are pending before different Judges and
17 any party believes that such cases: (1) arise from substantially the same
18 transaction or event; (2) involve substantially the same parties or property; (3)
19 involve the same patent, trademark, or copyright; (4) call for determination of
20 substantially the same questions of law; or (5) for any other reason would
21 entail substantial duplication of labor if heard by different Judges.

22 Having reviewed the Complaint filed in CV-09-02686 and compared it to Plaintiff's Second
23 Amended Complaint, the Court finds that the two cases arise from the same event—Plaintiff's arrest
24 on March 7, 2008—involve the same questions of law, and that their continued separation would
25 entail substantial duplication of labor if heard by different Judges. In fact, the complaints in each
26 of these two cases are nearly identical. In light of the foregoing and Plaintiff's lack of opposition
27 to Defendants' motion, the Court will grant Defendants' Motion to Transfer and Consolidate.

28 III. MOTION TO STRIKE RE PLAINTIFF'S SECOND AMENDED COMPLAINT

The Court turns first to Defendants' Motion to Strike. Defendant asks that this Court
strike Plaintiff's Second Amended Complaint pursuant to L.R.CIV. 7.2 because it is not in
compliance with Federal Rule of Civil Procedure ("FRCP") 15(a)(1)(2). See LRCiv 7.2

1 (authorizing a motion to strike when a party seeks “to strike any part of a filing or submission
2 on the ground that it is prohibited (or not authorized) by a statute, rule, or court order.”).
3 FRCP 15 governs the manner in which a party may amend its pleading during the course of
4 litigation. See generally FED. R. CIV. P. 15. In pertinent part, Rule 15 permits a plaintiff
5 to amend its pleading “once as a matter of course” within twenty-one days after service, or
6 “if the pleading is one to which a responsive pleading is required, 21 days after service of a
7 responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f),
8 whichever is earlier.” FED. R. CIV. P. 15(1)(A)–(B). Otherwise, a party wishing to amend
9 its pleading must obtain either the opposing party’s written consent or leave from the court.
10 FED. R. CIV. P. 15(2).

11 Defendants allege, and Plaintiff does not deny, that Plaintiff filed her Second
12 Amended Complaint without Defendants’ permission and without leave from this Court.
13 Plaintiff argues, however, that her Second Amended Complaint is not violative of Rule 15
14 because it represents the first amendment she has made to her Complaint since removal
15 brought it under the purview of the FRCP. In other words, Plaintiff takes the position that
16 the number of amendments a party has made to its complaint prior to removal from state
17 court is irrelevant, as once a case is removed, only then does the FRCP become applicable,
18 and Rule 15 entitles a party to one amendment as a matter of course. Although a clever
19 argument, Plaintiff’s position is incorrect.

20 It is well established that after a case has been removed to federal court, the case must
21 proceed as if it had been brought in federal court originally. Sanchez Pinero v. HUD, 592
22 F. Supp. 2d 233, 239 (D.P.R. 2008) (noting that after removal “[t]he case will proceed as if
23 it had been brought in the federal court originally” (quoting WRIGHT & MILLER, FEDERAL
24 PRACTICE AND PROCEDURE § 3738 (3d ed. 1998))); G.G.G. Pizza, Inc. v. Domino’s Pizza,
25 Inc., 67 F. Supp. 2d 99, 102 (E.D.N.Y. 1999) (same). Accordingly, this Court must treat the
26 amendment Plaintiff made to her original complaint while in state court as the single “matter
27 of course” amendment permitted under Rule 15. Defendants are correct, therefore, that
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1 Plaintiff violated Rule 15 by failing to secure either their permission or this Court's leave
2 before filing her Second Amended Complaint.

3 While granting Defendants' Motion to Strike is clearly warranted under L.R.CIV. 7.2,
4 the Court declines to do so. First, Plaintiff's filing of its Second Amended Complaint was
5 clearly predicated on a misunderstanding of the rules, not bad faith. Secondly, Plaintiff avers
6 that its Second Amended Complaint is an attempt to alleviate deficiencies in its pleadings
7 identified by Defendants in their Motion to Dismiss. Even if this Court granted Defendants'
8 Motion to Strike, then went on to grant its Motion to Dismiss, it would likely do so without
9 prejudice, giving Plaintiff an opportunity to amend its pleadings to address any deficiencies.
10 Rather than playing out that whole process only to arrive back at the same procedural posture
11 in which the case is now—a Second Amended Complaint and an outstanding motion to
12 dismiss—the Court will grant Plaintiff's request for retroactive leave to file its Second
13 Amended Complaint, but with one caveat; absent exceptional circumstances, any adverse
14 decision to Plaintiff reached by the Court in a subsequent motion to dismiss will be made
15 with prejudice. This caveat is intended to alleviate any prejudice Defendants feel they have
16 suffered as a result of Plaintiff being allowed to file its Second Amended Complaint after
17 having read Defendants' Motion to Dismiss. Finally, in light of the forthcoming
18 consolidation of the instant case with a nearly identical action, denying Defendants' Motion
19 to Strike will promote judicial economy by preventing this Court from having to consider
20 piecemeal and duplicative motions to dismiss.

21 **Accordingly,**

22 **IT IS HEREBY ORDERED** granting Defendants' Motion to Transfer and
23 Consolidate. (Dkt. #17). The Clerk of the Court is directed to transfer CV-09-02686 and
24 consolidate it with the instant case.

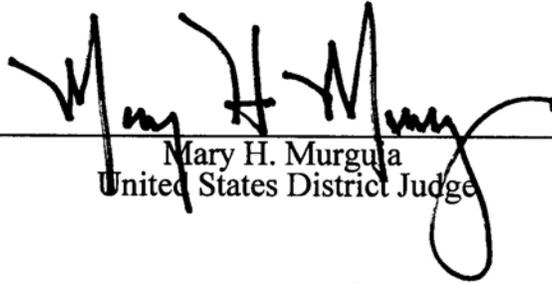
25 **IT IS FURTHER ORDERED** denying Defendants' Motion to Strike re Plaintiff's
26 Second Amended Complaint. (Dkt. #9).

27 **IT IS FURTHER ORDERED** denying as moot Defendants' Motion to Dismiss.
28 (Dkt. #6)

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IT IS FURTHER ORDERED granting Plaintiff's Motion to Amend Complaint.
(Dkt. #11). Defendants Second Amended Complaint is retroactively authorized and deemed properly filed.

DATED this 23rd day of April, 2010.



Mary H. Murgula
United States District Judge