IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Civil Action No. 16-cv-1356-WJM-CBS

ERIC BRANDT,

Plaintiff,

v.

THE CITY OF WESTMINSTER, COLORADO, municipality;
CHARLES RUSH, in his official and individual capacity;
RAY ESSLINGER, in his official and individual capacity;

Defendants.

ORDER ADOPTING MAY 1, 2017 RECOMMENDATION OF MAGISTRATE JUDGE DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

This matter is before the Court on the May 1, 2017 Recommendation of United States Magistrate Judge Craig B. Shaffer ("Recommendation," ECF No. 41) that Plaintiff's Motion for Leave to File an Amended Complaint (the "Motion," ECF No. 24) be denied. The Recommendation is incorporated herein by reference. *See* 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b). Plaintiff filed an objection to the Recommendation. ("Objection," ECF No. 48.) For the reasons set forth below, Plaintiff's Objection is overruled, the Magistrate Judge's Recommendation is adopted, and Plaintiff's Motion is denied.

I. STANDARD OF REVIEW

When a magistrate judge issues a recommendation on a dispositive matter, Federal Rule of Civil Procedure 72(b)(3) requires that the district judge "determine *de novo* any part of the magistrate judge's [recommendation] that has been properly

objected to." *See Lariviere, Grubman & Payne, LLP v. Phillips*, 2010 WL 4818101, at *5 (D. Colo. Nov. 9, 2010) (treating motion to amend complaint as a dispositive matter for purposes of Rule 72(b)); *see also Cuenca v. Univ. of Kansas*, 205 F. Supp. 2d 1226, 1228 (D. Kan. 2002) ("When the magistrate judge's order denying a motion to amend . . . effectively removes a . . . claim from the case, it may well be a dispositive ruling that the district court should review *de novo*.") An objection to a recommendation is properly made if it is both timely and specific. *United States v. One Parcel of Real Property Known as 2121 East 30th St.*, 73 F.3d 1057, 1059 (10th Cir. 1996). An objection is sufficiently specific if it "enables the district judge to focus attention on those issues—factual and legal—that are at the heart of the parties' dispute." *Id.* In conducting its review, "[t]he district court judge may accept, reject, or modify the recommendation; receive further evidence; or return the matter to the magistrate judge with instructions." *Id.* Here, Plaintiff filed a timely objection to Judge Shaffer's Recommendation. Therefore, this Court reviews the issues before it *de novo*.

II. BACKGROUND

No parties object to the recitation of facts set forth by Judge Shaffer in the May 1, 2017 Recommendation. (*See* ECF Nos. 41, 48, 51.) Accordingly, the Court adopts and incorporates the "Factual Background" section of the Recommendation as if set forth herein. (ECF No. 41 at 2–6.)

Briefly, on June 6, 2014, Plaintiff was charged with disorderly conduct for walking on a public sidewalk while holding a large sign that said "Fuck Cops." (ECF No. 1 ¶ 13.) Plaintiff's "aim in carrying his sign was, and continues to be, spreading awareness of

police brutality and misconduct." (*Id.* ¶ 16.) As Plaintiff was crossing the street, Defendants Officer Rush and Esslinger approached Plaintiff. (*Id.* ¶¶ 18, 20.) Officer Esslinger told Plaintiff that "he had been ordered by his superiors to arrest him." (*Id.* ¶ 21.) Plaintiff was then detained, patted down, and issued a citation and summons. (*Id.* ¶¶ 22–24.)

Based on this course of events, Plaintiff filed the instant action asserting six claims for relief under 42 U.S.C. § 1983, including violations of his First, Fourth, and Fourteenth Amendment rights. (*See id.* at 8–14.) In the proposed scheduling order the parties agreed to a September 26, 2016 deadline for joinder of parties and amendment to the pleadings, which was later adopted by Judge Shaffer. (ECF No. 12 at 9; the "Scheduling Order," ECF No. 16 at 9.) Towards the end of the Scheduling Order it states that the "order may be altered or amended only upon a showing of good cause." (ECF No. 16 at 12 (emphasis in the original).)

The parties exchanged initial disclosures on September 2, 2016. (ECF No. 51 at 4.) In Defendants initial disclosures they listed Officer Carnes as a person "likely to have discoverable information who may be used to support defenses." (ECF No. 32-1 at 1.) The disclosures also state that Officer William Carnes "spoke with several witnesses on June 6, 2014 in relation to complaints against Plaintiff," and that "Officer Carnes may have knowledge and information regarding same and the allegations in Plaintiff's Complaint." (*Id*.) Also on September 2, 2016, Defendants disclosed a Westminster Police Case Report, prepared by Officer Carnes, in which he summarizes his contacts with three named individuals who described seeing Plaintiff with his sign.

(*See* ECF No. 32-2.) Lastly, Defendants disclosed an additional supplemental report prepared by Officer Rush, in which he stated that he "learned through Officer Carnes that probable cause for the charge of disorderly conduct existed." (*Id.* at 7.)

On February 21, 2017, Plaintiff moved to amend his Complaint to add Officer Carnes as a defendant. (ECF No. 24.) On April 10, 2017, Judge Shaffer held a hearing on Plaintiff's Motion. (ECF No. 36.) Subsequently, on May 1, 2017, Judge Shaffer issued his Recommendation. (ECF No. 41.) After considering the parties' briefs and oral argument made during the April 10, 2017 hearing, Judge Shaffer recommended that Plaintiff's Motion be denied. (*Id*. at 2.) To reach that recommendation Judge Shaffer found that Plaintiff failed to demonstrate the diligence required for a finding of good cause under Federal Rule of Civil Procedure 16(b). (*Id.* at 15.)

Plaintiff filed his Objection on May 15, 2017 (ECF No. 48), to which Defendants filed a response on May 30, 2017 (ECF No. 51). Plaintiff objects to Judge Shaffer's findings, arguing that he "was diligent in moving to amend his Complaint" and that Judge Shaffer "erred by failing to consider the prejudice to Defendants." (ECF No. 48 at 4, 8.) The Court will review *de novo* the portion of the Recommendation to which these specific objections were made.

III. ANALYSIS

Where a party seeks to amend its pleadings after the deadline for such amendments set forth in the scheduling order, the Tenth Circuit has not definitively stated whether the "good cause" standard to modify the scheduling order under Rule

16(b) must be met. *See Bylin v. Billings*, 568 F.3d 1224, 1231 (10th Cir. 2009). However, the majority of courts have held that the party must meet the two-part test of first showing good cause to amend the scheduling order under Rule 16(b), and then showing that amendment should be allowed under Rule 15(a).[1] *Id.* ("Most circuits have held that when a party amends a pleading after a deadline set by a scheduling order, Rule 16 and its 'good cause' standard are implicated. . . . This circuit, however, has not ruled on that question in the context of an amendment to an existing pleading.") (citing *Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1205 (10th Cir. 2006) ("We do not decide whether a party seeking to amend its pleadings after the scheduling order deadline must show 'good cause' for the amendment under Rule 16(b) in addition to the Rule 15(a) requirements.")).

Under Rule 16(b)(4), the scheduling order "may be modified only for good cause and with the judge's consent," requiring the moving party to show that a deadline "cannot reasonably be met despite the diligence of the party seeking the extension." Fed. R. Civ. P. 16, advisory committee's note. As noted in the Recommendation, in contrast to the more lenient standard of Rule 15(a), Rule "16(b) does not focus on the bad faith of the movant or the prejudice to the opposing party . . . . Properly construed, good cause means that scheduling deadlines cannot be met despite a party's diligent efforts. Carelessness is not compatible with a finding of diligence and offers no reason

[1] Judge Shaffer followed the two-part test in his Recommendation, and the parties here appear to agree that both Rule 16(b) and Rule 15(a) must be satisfied to permit such a belated amendment. (*See* ECF Nos. 41 at 6–7; 48 at 4; 51 at 6.) Given the parties' agreement and lack of any objection to Judge Shaffer's determination of the legal standard, the Court will follow the majority rule and apply the two-part test.

for a grant of relief." (ECF No. 41 at 8.)[2] District courts are "afforded wide discretion" to apply the "good cause" standard under Rule 16(b). *Bylin*, 568 F.3d at 1231.

Judge Shaffer found that "[u]questionably, by September 2, 2016, Plaintiff's counsel knew of Officer Carnes' interviews relating to the events of June 6, 2014, were aware that Officer Carnes made the probable cause determination that culminated in [Plaintiff's] citation for disorderly conduct, and knew that Defendants Rush and Esslinger had acted in reliance upon Officer Carnes' determination in issuing that citation." (ECF No. 41 at 4.) Therefore, Judge Shaffer found that "Plaintiff was aware of Officer Carnes' role in his arrest 24 days before the deadline for joining parties and amending the Complaint passed on September 26, 2016." (*Id*.)

However, in his Objection, Plaintiff asserts that "the only thing that is clear from the police report of the June 6, 2014 incident, provided to Plaintiff in Defendants' initial disclosures, is that Officer Carnes relayed information to Defendants indicating that there was probable cause to arrest Plaintiff for disorderly conduct, not the exact information that was relayed." (ECF No. 48 at 5.) Further, "it was only discovered during the deposition of Defendant Rush that the exact information that Officer Carnes

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[2] In Plaintiff's Objection, he contends that "in determining whether good cause" exists to amend the scheduling order, a "court may inquire as to whether the amendment will significantly prejudice the nonmoving party." (ECF No. 48 at 9 (internal quotation marks and citation omitted).) Plaintiff further contends that Judge Shaffer "failed to weigh" any lack of prejudice to Defendants "in determining whether Plaintiff had not shown good cause under Fed. R. Civ. P. 16(b)." (*Id.* at 8, 10.)

Contrary to Plaintiff's argument, the Court finds that Judge Shaffer need not have analyzed any prejudice to Defendants as courts in this district have repeatedly held that "Rule 16(b) does not focus on the bad faith of the movant, or the prejudice to the opposing party. Rather, it focuses on the diligence of the party seeking leave to modify the scheduling order." *Pumpco*, 204 F.R.D. at 668; *see also Colo. Visionary Acad. v. Medtronic, Inc.*, 194 F.R.D. 684, 684 (D. Colo. 2000); *Schroer v. United States*, 250 F.R.D. 531, 538 (D. Colo. 2008). Accordingly, Plaintiff's objection to this portion of the Recommendation is overruled.

relayed to Defendants was the simple statement that there was probable cause to arrest Plaintiff for disorderly conduct, not the basis for the probable cause determination." (*Id.*) On this basis, Plaintiff contends that because "Plaintiff moved to amend immediately following discovery of [the] evidence, [this] is consistent with exercising diligence." (*Id.*)

The Court is not swayed by Plaintiff's argument. It "simply strains logic to suggest that Plaintiff's counsel were unaware of Officer Carnes' central role in the events of June 6, 2014, until they took Officer Rush's deposition on February 21, 2017." (ECF No. 41 at 11.) Further, in the Court's view, a closer reading of the initial disclosures, the Westminster Police Case Report, and the supplemental report prepared by Officer Rush, all disclosed to Plaintiff on September 2, 2016, would have revealed Officer Carnes' integral role from the inception of this action. Given the information provided in these disclosures, Plaintiff should have timely moved to amend before the September 26, 2016 deadline. Moreover, "Plaintiff's counsel acknowledged that no efforts were made to depose Officer Carnes during the pretrial process, notwithstanding the information provided on September 2, 2016." (*Id*. at 6 n.3.)

Given this record, the Court agrees with Judge Shaffer's Recommendation and finds that Plaintiff's five month delay in moving to amend his Complaint did not demonstrate reasonable diligence, and Plaintiff therefore fails to make a showing of good cause under Rule 16(b) for untimely modification of the Scheduling Order. Thus, Judge Shaffer correctly did not consider whether Plaintiff met the Rule 15(a) standard to amend his pleadings. Accordingly, Plaintiff's objection to the Recommendation is overruled.

IV. CONCLUSION

For the reasons set forth above, the Court ORDERS as follows:

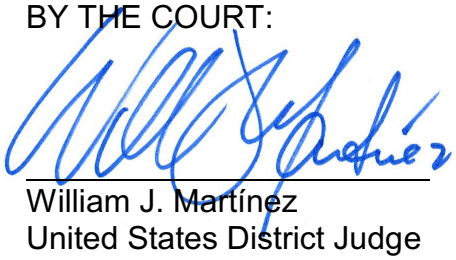
1. Plaintiff's Objection (ECF No. 48) to the Magistrate Judge's Recommendation is OVERRULED;

2. The Magistrate Judge's Recommendation (ECF No. 41) is ADOPTED in its entirety; and

3. Plaintiff's Motion for Leave to File an Amended Complaint (ECF No. 24) is DENIED.

Dated this 19th day of July, 2017.

BY THE COURT:



William J. Martínez
United States District Judge