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Pembroke By and Through **Pembroke v. City of San Rafael**N.D.Cal.,1994.Only the Westlaw citation is currently available.

United States District Court, N.D. California.

Cassandra PEMBROKE, a minor By and Through her guardian ad litem, Donna PEMBROKE, Plaintiff,
v.
CITY OF SAN RAFAEL, et al., Defendants.
No. C 92 1869 BAC.

Aug. 2, 1994.

ORDER

CAULFIELD, District Judge.

***1** This case comes before the court for consideration of three motions by the parties. Upon due consideration of the materials presented, the court rules as follows: (1) plaintiff's motion for leave to file and serve a first amended complaint is DENIED; (2) defendant's motion to exclude plaintiff's experts at trial is GRANTED; and (3) plaintiff's motion to modify pretrial order to allow designation of expert witnesses is DENIED.

BACKGROUND

On May 26, 1992, plaintiff filed a complaint for the alleged use of excessive force by police officers and unlawful arrest of plaintiff. The complaint alleged claims for relief for civil rights violations-excessive force, Civil Code Section 51.7, negligence, and negligent infliction of emotional distress. Named as defendants were the City of San Rafael, the San Rafael Police Department, and chief of the San Rafael Police Department.

The court issued a scheduling order on October 12, 1992 setting certain deadlines in this action. The order set the deadlines: April 30, 1993-discovery cut-off; May 15, 1993-designation of expert witnesses; June 9, 1993-pretrial conference; and June 21, 1993-trial.

In January 1993, plaintiff obtained responses to interrogatories and a document production identifying Officer Charles Hubler, Corporal Douglas Fletcher, and Sergeant James Kelly of the San Rafael Police Department as the police officers involved in the alleged wrongful actions toward plaintiff which form the basis of the Complaint. Plaintiff took the depositions of the three officers in March and April 1993.

On October 12, 1993-five months late-plaintiff submitted her pretrial statement and therein designated two expert witnesses. Defendant has moved to exclude expert testimony at trial for plaintiff's failure to timely designate experts. Plaintiff has filed a cross-motion to modify the scheduling order to permit the designation of experts.

On November 10, 1993, plaintiff filed her motion for leave to amend her complaint to add as defendants three members of the San Rafael Police Department: Officer Charles Hubler, Corporal Douglas Fletcher, and Sergeant James Kelly.

DISCUSSION

A. *Amendment Of The Complaint.*

Leave to amend "shall be freely given when justice so requires." Fed.R.Civ.Proc. 15(a). Although delay alone does not justify denial of leave to amend, undue delay plus prejudice to the opposing party may justify denial of leave to amend. *See Loehr v. Ventura County Community College Dist., 743 F.2d 1310, 1319-20 (9th Cir.1984)*. Here, the combined undue delay and prejudice to the opponent necessitates denial of leave to amend. The futility of the proposed amendment provides a separate basis for denying leave to amend. *See id.*

There was undue delay before this motion was made. Plaintiff actually knew of the existence of the proposed defendants for at least ten months before filing this motion. The police officers' identities were provided in defendants' responses to interrogatories and document production in January 1993. Plaintiff deposed the police officers in March and April 1993. Plaintiff offers no convincing reason for the delay in moving to amend until November 1993.[FN1]

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***2** Both the proposed and the existing defendants may be prejudiced by the amendment of the complaint at this late date because this motion was filed after the completion of discovery, the pre-trial proceedings, and trial preparation. The existing defendants have shown prejudice. The defendants have approached this case-based on a fair reading of plaintiff's complaint-as one for municipal liability based on an alleged pattern and practice of inadequate training and supervision. The addition of individual officers may well change the defense strategy. Defendants may well have pursued a different strategy had they known earlier-before the discovery cut-off and before preparing for trial-that plaintiff intended to name the individual police officers. Had the proposed defendants been timely named in this action, both they and the defense counsel might have chosen to proceed differently at the depositions.

Amendment at this late date would complicate and delay the case because the individual officers would be entitled to conduct discovery, and may need additional time to prepare for the trial of this case. The existing defendants would be subject to additional discovery to accommodate the individual defendants. The individual officers would not be required to simply step in and accept this case as they find it, without being afforded the opportunity to prepare their own defenses. Although plaintiff lumps the existing and proposed defendants into a single group, each defendant is entitled to chart his own defense. The individual officers may wish to choose their own attorneys and prepare their own defenses, because they may be personally liable for any punitive damages awarded. The individual officers may take a different approach to the defense of this case than that taken by the existing defendants. Plaintiff does not explain why the existing and proposed defendants, rather than plaintiff, should suffer the consequences of her delay in bringing the individual officers into the case.

A second basis for denying leave to amend is that the proposed amendment would be futile. An amendment is futile if the pleading is to be amended to assert a claim barred by the statute of limitations. Plaintiff's motion to amend was filed after the expiration of the two year statute of limitations; the only hope for plaintiff is to show that the amendment would relate back to the original timely filed complaint.

Where a plaintiff seeks to add a new party, relation back is controlled by Federal Rule of Civil Procedure 15(c)(3), which permits relation back of the amended pleading only if several conditions are satisfied. One condition for amendment-and the condition that presents an insurmountable hurdle for plaintiff-is that it must be established that the defendant "knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." Fed.R.Civ.P. 15(c)(3)(B). This permits amendment to cure a formal defect such as a misnomer or misidentification.

***3** Here, the individual officers were not misnamed. They were not named at all, and they cannot be named after the limitation period has expired. *See* *Worthington v. Wilson,* 8 F.3d 1253, 1256-57 (7th Cir.1993); *Maior v. Koletsos,* 823 F.Supp. 497, 498 (N.D.Ill.1993). Plaintiff knew from the day she was detained by the police that individual officers had taken the action she complains of, but made no attempt to identify them in the complaint or to otherwise signal her intent to seek redress from them. Plaintiff could easily have obtained the names of the police officers from the publicly-available police report, but failed to do so. The court will not permit relation back of the proposed amendment because plaintiff seeks to add new defendants, the existence of whom she had known about since the day she was arrested and the identity of whom she had known about for ten months before seeking leave to amend. *See* *G.F. Co. v. Pan Ocean Shipping Co., Ltd.,* 23 F.3d 1498, 1503 (9th Cir.1994) (" 'Rule 15(c) was never intended to assist a plaintiff who ignores or fails to respond in a reasonable fashion to notice of a potential party.' ").

B. *Designation of Expert Witnesses.*

Federal Rule of Civil Procedure 16(b) provides that a scheduling order "shall not be modified except upon a showing of good cause and by leave of the district judge...."

[C]arelessness is not compatible with a finding of diligence and offers no reason for a grant of relief.... Although the existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving party's reason for seeking

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modification.... If that party was not diligent, the inquiry should end. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir.1992).

The scheduling order set a deadline of May 15, 1993 for disclosure of expert witnesses. Plaintiff failed to meet that deadline and, in fact, did not disclose experts until five months later. Plaintiff was not diligent in attempting to comply with the court's scheduling order or in seeking a modification of the order. Plaintiff's claimed excuses for failing to comply with the scheduling order and for failing to promptly seek its modification are unpersuasive. Plaintiff claims that her discovery efforts were interrupted when defendants filed a motion for summary judgment two days before the discovery cut-off. The impact of this is unclear because plaintiff does not state that she was in the process of responding to any discovery at the time the motion was filed. If plaintiff meant that she intended to propound discovery requests in that two day time period, the argument fails because the scheduling order required that the discovery responses-not requests-be completed by the discovery cut-off. Plaintiff also argues that she designated her experts at the "most appropriate opportunity" by including them in her October 1993 pretrial statement. The designation of pretrial experts is separate and apart from the pretrial conference statement. Nothing prevented plaintiff from designating the experts in the intervening five months. There was no reason for plaintiff to wait until the resolution of the summary judgment motion to designate her experts. Finally, plaintiff argues that some uncertainty existed because the court postponed the June 21, 1993 trial date at some time "during the period of time between April 28, 1993 and May 26, 1993." The postponement cannot excuse the failure to timely designate experts because the trial date was postponed by the court's order of May 26-eleven days after the expert designation was due. Additionally, a change of one date does not automatically change all dates on the scheduling order. Plaintiff has failed to show good cause to modify the scheduling order to permit a late designation of expert witnesses. Because the experts were not timely designated by plaintiff, they cannot testify at trial.

DISPOSITION

***4** 1. Plaintiff's motion for leave to amend is DENIED.

2. Defendants' motion to exclude experts at trial is GRANTED. Testimony of plaintiff's experts shall not be permitted at trial. Defendants' request for sanctions in the motion is DENIED.

3. Plaintiff's motion to modify the pretrial scheduling order to permit designation of experts is DENIED.

IT IS SO ORDERED.

FN1. Plaintiff did mention in a footnote in her May 1993 opposition to the motion for summary judgment that she wanted to name the police officers as defendants. That was not sufficient to obtain the required leave to amend the complaint. The fact that plaintiff mentioned the intent to amend in May 1993 yet waited until November 1993 shows a clear delay. Plaintiff suggests that she was unaware of the need and could not make the motion until after the court ruled upon the defendants' summary judgment motion. The pendency of a motion for summary judgment does not stay activity in a case.

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Pembroke, By and Through Pembroke v. City of San Rafael
Not Reported in F.Supp., 1994 WL 443683 (N.D.Cal.)

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• 3:92CV01869 (Docket) (May. 26, 1992)

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