UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

FERNANDO PAZ, Plaintiff, v. CITY OF ABERDEEN, Defendant.	CASE NO. C13-5104 RJB ORDER DENYING PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

This matter comes before the Court on Plaintiff's Motion for Leave to Amend Complaint. Dkt. 32. The Court has considered the pleadings in support of and in opposition to the motion and the record herein.

INTRODUCTION AND BACKGROUND

The Plaintiff Fernando Paz commenced this action on February 13, 2013. Dkt. 1. This action arises out of an abatement process initiated by the City of Aberdeen which culminated in the demolition of a building owned by Mr. Paz. *Id*. The Complaint asserts due process and trespass claims alleging that the City unlawfully demolished Paz's building without proper notice. Dkt. 1 pp. 12-14. and Dkt. 8 p. 1. The Complaint also alleges the City's ordinances,

acts, and omissions violated constitutional protections afforded under the Due Process Clause. *Id.*

On May 23, 2013, the Court entered its Fed. R. Civ. P. 16 (Rule 16) scheduling order. Dkt. 9. This Order sets the trial date for February 3, 2014. *Id.* All motions related to discovery must be filed by September 16, 2013, and discovery completed by October 7, 2013. *Id*. All dispositive motions must be filed by November 5, 2013. *Id*. The Rule 16 Order further provides that "these are firm dates that can be changed only by order of the Court." *Id.*

On October 15, 2013, the Court granted a stipulated motion to extend the discovery deadline to October 17, 2013, for the purposes of scheduling certain depositions. Dkt. 11. This stipulated Order specifically states that it does not necessitate any change to the other deadlines in this case or the trial date in this matter. *Id.*

On November 5, 2013, the City filed a motion for summary judgment. Dkt. 12

On the same date, November 5, 2013, Paz filed the instant motion for leave to amend the complaint. Dkt. 32. The motion seeks to amend the complaint to add an additional cause of action for violation of Paz's Fourth Amendment right to be free from unlawful searches. *Id.* Paz asserts that the entry and search of his building was conducted under an invalid search warrant. *Id.* Paz's justification for the motion to amend is the assertion that the facts providing the basis for the Fourth Amendment claim did not come to light until late October deposition testimony of the City's code enforcement officer. Dkt. 32 p. 7.

The City opposes Paz's motion to amend. The City argues that the motion is untimely, the product of undue delay, prejudices the City, and is futile. Dkt. 34. The City argues that Paz had the factual basis for making a Fourth Amendment claim nearly two years prior to filing the Complaint in this matter and unduly delayed bringing this claim. The City notes that the

affidavit, warrant and return were all disclosed to Paz in response to a public records request on March 21, 2011. Dkt. 35 p. 5. Additionally, the parties exchanged initial disclosures in accordance with the Court's scheduling orders on May 9, 2013. The City and Paz exchanged the documents related to the search. *Id*. pp. 2, 8. The City disclosed another copy of the abatement file with its Responses to Plaintiff's Interrogatories and Requests for Production on July 25, 2013. *Id*. pp. 1-2. These disclosures included copies of the search warrant, affidavit and notices that were included as exhibits at the depositions of the City's witnesses in this matter. *Id.* The City argues that this information provided Paz with the factual basis to assert a claim premised on an unlawful search and that the deposition testimony was unnecessary and superfluous.

The City also argues that it will be prejudiced by the amendment because discovery has closed and the deadline for dispositive motions passed. Dkt. 34 pp, 5-6. The City further argues that Paz's proposed amended complaint is not grounded in fact or law and, as such, is futile. *Id.* at pp. 6-10.

AMENDMENT STANDARDS

Amendments to pleadings involve the applicability of Rules 15 and 16 of the Federal Rules of Civil Procedure and are dependent upon the timing of the amendment request as it relates to the various deadlines established in the pretrial case management order. Rule 15(a)(2) provides that, except in circumstances not present here, "a party may amend its pleading only with the opposing party's written consent or the court's leave," which "[t]he court should freely give ... when justice so requires." Fed. R. Civ. P. 15(a)(2). Rule 16(b)(4) provides, however, that "[a] schedule [established pursuant to a Rule 16(b)(1) scheduling order] may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4).

Washington Local Civil Rule 16(b) provides that the court shall enter a written scheduling order and further provides that "[t]he parties are bound by the dates specified in the scheduling order. A schedule may be modified only for good cause and with the judge's consent. Mere failure to complete discovery within the time allowed does not constitute good cause for an extension or continuance." This provision is bolstered by Local Rule 16(m), which states that "[i]n order to accomplish effective pretrial procedures and to avoid wasting the time of the parties, counsel, and the court, the provisions of this rule will be strictly enforced."

Although Rule 15 generally provides for liberal amendment to pleadings, once a pretrial scheduling order has been entered pursuant to Rule 16(b)(1), an additional showing of "good cause" for amendment must be made if the scheduling order's deadline for amending pleadings has passed. *Johnson v. Mammoth Recreation, Inc.*, 975 F.2d 604, 608 (9th Cir. 1992). Where the court has issued a pretrial scheduling order establishing a timetable, the pretrial order controls the subsequent course of the action and may be modified only upon a showing of good cause. *Chao v. Westside Drywall, Inc*., 709 F.Supp.2d. 1037, 1071–72 (D. Or. 2010). A party seeking to amend a pleading after the date specified in the scheduling order must first show good cause for amendment under Rule 16, then, if good cause be shown, the party must demonstrate that amendment was proper under Rule 15. *Johnson*, at 608.

For purposes of Rule 16, "good cause" means the scheduling deadlines cannot be met despite the party's diligence. *Johnson*, at 609. The pretrial schedule may be modified if it cannot reasonably be met despite the diligence of the party seeking the extension. If the party seeking the modification was not diligent, the inquiry should end and the motion to modify should not be granted. *Millenkamp v. Davisco Foods Intern., Inc*., 448 Fed. Appx. 720, 721 (9th Cir. 2011); *Zivkovic v. Southern California Edison Co*., 302 F.3d 1080, 1087 (9th Cir. 2002).

Although this Court's scheduling order does not set a specific deadline for seeking amendments to the complaint, Paz's motion, if granted, necessarily requires modification of the scheduling order. Permitting the amendment to add a new cause of action would necessarily require the Court to extend the discovery deadline to permit the City to respond to the new allegations. The amendment would also require an extension of the deadline for dispositive motions in order that the City may challenge the claim, if appropriate. Good cause must be shown to justify any modification of the scheduling order. See *Kowalow v. Correctional Services Corp*., 35 Fed. Appx. 344, 346-47 (9th Cir. 2002)(Affirming denial of a motion to amend complaint filed the day after the discovery deadline where Plaintiff failed to show "good cause" for the delay and amendment would require modification of discovery and substantive motions deadlines).

Moreover, a district court may deny as untimely an amendment motion filed after the scheduling order's cut-off date where no request to modify the scheduling order has been made. *Johnson,* 975 F.2d at 608–09 ("We see no reason to deviate from that approach here, but the result would not change if Johnson's motion to amend the complaint were treated as a de facto motion to amend the scheduling order). See also *U.S. Dominator, Inc. v. Factory Ship Robert E. Resoff,* 768 F.2d 1099, 1104 (9th Cir. 1985).

Paz has failed to demonstrate diligence in attempting to comply with the scheduling order and has also failed to demonstrate good cause for modifying the scheduling order. Here, the proffered reasons for the proposed untimely amendment do not constitute good cause, particularly where a primary element of good cause is due diligence. Paz had the factual basis for the assertion of a Fourth Amendment claim from the onset of this litigation. The City disclosed its entire abatement file, including the search warrant, warrant application and notices

as early as March 21, 2011. The subsequent deposition testimony (taken after the close of discovery) does not provide new evidence that supports "good cause" for extending the deadlines.

Even if Paz were able to establish due diligence in attempting to comply with the scheduling order, Paz still must demonstrate that an amendment of the complaint would be proper under Rule 15. If "good cause" can be shown, the movant must then demonstrate that amendment is warranted under Fed. R. Civ. P. 15. *Johnson v. Mammoth Recreation, Inc.*, 975 F.2d 604, 608 (9th Cir. 1992). Courts are to consider the following factors when determining whether or not granting leave is proper: undue delay, bad faith or dilatory motive on the part of the moving party, undue prejudice to the opposing party, and futility of amendment. *Forman v. Davis*, 371 U.S. 178, 182 (1962); *Lockheed Martin Corp. v. Network Solutions, Inc*., 194 F.3d 980, 986 (9th Cir. 1999). These factors, however, are not of equal weight in that delay, by itself, is insufficient to justify denial of leave to amend. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1986). The other factors used to determine the propriety of a motion for leave to amend could each, independently, support a denial of leave to amend a pleading. *Lockheed Martin Corp. v. Network Solutions, Inc*. ., 194 F.3d 980, 986 (9th Cir. 1999). Of these factors, prejudice to the opposing party is the most important factor. *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990).

Relevant to evaluating the delay issue is whether the moving party knew or should have known the facts and theories raised by the amendment in the original pleading. *Jackson,* at 1388. A party that contends it learned "new" facts to support a claim should not assert a claim that it could have pleaded in previous pleadings. See, *Chodos v. West Publishing Co*., 292 F.3d 992, 1003 (9th Cir. 2002). As previously noted, the facts necessary to plead a Fourth Amendment

claim premised on the search warrant were available to Paz long before the close of discovery and the deposition testimony upon which Paz relies.

The second factor to consider is the potential prejudice to the City. Prejudice may effectively be established by demonstrating that a motion to amend was made after the cutoff date for such motions, or when discovery had closed or was about to close. See, e.g., *Zivkovic v. Southern Cal. Edison Co*., 302 F.3d 1080, 1087 (9th Cir. 2002) (affirming denial of plaintiff's motion for leave to amend where proposed amendment would have added additional causes of action which would have required further discovery and discovery was set to close five days after motion to amend was filed); *Lockheed Martin Corp. v. Network Solutions, Inc*., 194 F.3d 980, 986 (9th Cir. 1999) (stating that "[a] need to reopen discovery and therefore delay the proceedings supports a district court's finding of prejudice from a delayed motion to amend the complaint"); *Solomon v. North Am. Life & Cas. Ins. Co*., 151 F.3d 1132, 1139 (9th Cir. 1998) (affirming the denial of leave to amend where the motion was made "on the eve of the discovery deadline" and "[a]llowing the motion would have required re-opening discovery, thus delaying the proceedings"). When "additional discovery would have to be undertaken" because the amended pleading contains "different legal theories and require[s] proof of different fact[s]," the opposing party may be prejudiced. *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990).

Paz's addition of a Fourth Amendment claim late in this litigation prejudices the City because it will require additional fact discovery. Allowing the amendment would deny the City the ability to conduct discovery to clarify the basis upon which Paz seeks to impose Fourth Amendment liability against the City and deny any discovery as to what evidence exists in support of the claim that the City's customs and policies violate the Fourth Amendment.

Because the discovery deadline has passed, the Court would need to reopen those deadlines. Additionally, the dispositive motion deadline has passed. The Court would have to reopen this deadline. The City has filed a timely dispositive motion and Paz's amendment will cause the City to incur additional legal costs in defending a new claim and refashioning its dispositive motion. Therefore, the factor of prejudice to the opposing party weighs against granting leave for Paz to amend the complaint.

Bad faith in filing a motion for leave to amend exists when the addition of new legal theories are baseless and presented for the purpose of prolonging the litigation. See *Griggs v. Pace American Group, Inc*., 170 F.3d 877, 881 (9th Cir. 1999). The Court finds no evidence that the amendment is sought in bad faith.

Leave to amend need not be given under Rule 15 if it would be futile to do so, such as "if a complaint, as amended, is subject to dismissal." *Moore v. Kayport Package Exp., Inc*., 885 F.2d 531, 538 (9th Cir. 1989). A proposed amendment is futile only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense. *Miller v. Rykoff–Sexton, Inc*., 845 F.2d 209, 214 (9th Cir. 1988).

Paz's proposed amendment appears to premise a Fourth Amendment claim on the basis that the search warrant was unreasonable and unlawful. Paz argues that the warrant was for an administrative search and was not criminal in nature because the notices for administrative hearing or request to conduct a full inspection do not state or identify any alleged criminal violations. These notices do not state that the City seeks action to conduct a "criminal" investigation. Thus, Paz argues, the method of obtaining the warrant violated the Fourth Amendment. Dkt. 36 pp. 3-5.

The City contends that Paz's proposed amendment to the complaint is futile. The City states that the search warrants were issued based upon probable cause to believe that there were numerous criminal violations of City codes identified on the face of the affidavit for the warrant; that these various codes make violations a misdemeanor; that the warrant itself states that there is probable cause to believe that there is evidence of a crime at the plaintiff's building; that the Aberdeen Municipal Court has jurisdiction to issue criminal search warrants; and that the warrant is authorized on a showing of probable cause, upon presentation of an affidavit under oath or sworn testimony establishing the grounds therefore. The Aberdeen Municipal Court acted within its authority and criminal jurisdiction. Dkt. 34 pp. 6-10.

Although it appears likely that Paz's proposed amendment would ultimately be proved to be futile, there is no need to reach the factor of futility because the finding of both prejudice and undue delay are sufficient to deny the motion to amend the complaint.

CONCLUSION

Paz unduly delayed bringing this motion to amend the complaint. Granting the request would prejudice the City of Aberdeen and require a modification of the scheduling order without a showing of good cause.

Therefore, it is herby ORDERED:

Plaintiff's Motion for Leave to Amend Complaint (Dkt. 32) is **DENIED.**

Dated this 25th day of November, 2013.

ROBERT J. BRYAN
United States District Judge