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# Fuselier v. Gusman

United States District Court for the Eastern District of Louisiana

November 16, 2009, Decided; November 16, 2009, Filed

CIVIL ACTION NO: 08-3974, SECTION: "A" (4)

**Reporter**
2009 U.S. Dist. LEXIS 145550 *

DANIEL FUSELIER, INDIVIDUALLY AND ON BEHALF OF HIS DECEASED FATHER, OSCAR FUSELIER VERSUS MARLIN GUSMAN, ORLEANS PARISH CRIMINAL SHERIFF, ET AL.

**Prior History:** *Fuselier v. Gusman, 2009 U.S. Dist. LEXIS 38432 (E.D. La., Apr. 21, 2009)*

## Core Terms

amend, individual capacity, presiding judge, futility, Memorandum

**Counsel:** **[*1]** For Daniel Fuselier, individually and on behalf of his deceased father, Oscar Fuselier, Plaintiff: Michele Gaudin, LEAD ATTORNEY, Michele Gaudin, LLC, Attorney and Counselor at Law, New Orleans, LA USA.

For Marlin N. Gusman, Orleans Parish Criminal Sheriff, Defendant: Timothy R. Richardson, LEAD ATTORNEY, Richardson Law Group, LLC, Madisonville, LA USA; Freeman Rudolph Matthews, Orleans Parish Criminal Sheriff's Office, New Orleans, LA USA; Jason Paul Wixom, Preis PLC (New Orleans), Pan American Life Center 601 Poydras St. Suite 1700, New Orleans, LA USA; Stacey G. Roland, Derbes Law Firm, LLC, Metairie, LA USA.

For Jonathan Griffin, Hezekiah Ilechukwu, Melvin Joseph, William Hunter, Defendants: Freeman Rudolph Matthews, LEAD ATTORNEY, Orleans Parish Criminal Sheriff's Office, New Orleans, LA USA; Jason Paul Wixom, Preis PLC (New Orleans), Pan American Life Center 601 Poydras St. Suite 1700, New Orleans, LA USA; Timothy R. Richardson, Richardson Law Group, LLC, Madisonville, LA USA.

**Judges:** KAREN WELLS ROBY, UNITED STATES MAGISTRATE JUDGE.

**Opinion by:** KAREN WELLS ROBY

## Opinion

**ORDER**

Before the Court is a **Motion and Incorporated Memorandum Thereto to File First Amended Complaint, and Order (R. Doc. 36)**, filed by the Plaintiff, **[*2]** Daniel Fuselier ("Fuselier"), individually and on behalf of his deceased father, Oscar Fuselier ("the elder Fuselier"), seeking leave of the Court to amend his Complaint. Defendant, Marlin Gusman, Orleans Parish Criminal Sheriff ("Gusman") filed an opposition to Fuselier's motion. (R. Doc. 37.) Fuselier then filed a Memorandum in Reply to Defendant's Opposition to Plaintiff's Motion to File First Amended Complaint. (R. Doc. 40.) The motion was heard without oral arguments on September 16, 2009.

**I. Background**

Daniel Fuselier instituted this wrongful death and survival action against Gusman and other officers with the Orleans Parish, based upon the untimely and brutal death of his father, Oscar Fuselier, a 58-year old, disabled veteran. (R. Doc. 1.) Oscar Fuselier was arrested on an outstanding warrant for a traffic offense and transported to the Orleans Parish Prison. (R. Doc.1.) Subsequently, the elder Fuselier was placed in a cell with "high-security-risk" inmates, at which time he allegedly was beaten to death by a group of the inmates. (R. Docs. 1, 17.)

Fuselier now seeks leave to file a First Amended Complaint on September 1, 2009, the deadline for amendments set out in the presiding **[*3]** Judge's Case Management Order. (*See* R. Doc. 35, p. 1.) Fuselier seeks to add Defendants, factual allegations, and causes of action to his original Complaint. (R. Doc. 36-

5.) In his opposition, Gusman claims that the Presiding Judge granted his motion to dismiss under Federal Rule of Civil Procedure ("Rule") 12(b)(6) as to Fuselier's claims against him in his personal capacity. (R. Doc. 37, p. 2.) However, Gusman does not object to the addition of new parties. (R. Doc. 37, p. 1.) In his reply, Fuselier claims that he is entitled to amend within the time period set by the Court. (R. Doc. 40, p. 1.)

## II. Standard of Review

Federal Rule of Civil Procedure ("Rule") 15(a)(2) governs the amendment of pleadings and provides that a "court should freely give leave when justice so requires." The Rules "reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." Conley v. Gibson, 355 U.S. 41, 48, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957).

Thus, Rule 15(a) evinces a liberal amendment policy and a motion to amend should not be denied absent a substantial reason to do so. *See* Jacobsen v. Osborne, 133 F.3d 315, 318 (5th Cir. 1998). Furthermore, "this 'policy' is strongest when the motion challenged is the first motion to amend." Thompson v. New York Life Ins. Co., 644 F.2d 439, 444 (5th Cir. 1981). Permission may be granted even though the original **[*4]** pleading is defective in its statement of a claim for relief or defense. *Id.*

However, leave to amend is by no means automatic. Addington v Farmer's Elevator Mut. Ins. Co., 650 F.2d 663, 666 (5th Cir. 1981). The decision to grant or deny a motion for leave to amend lies within the sound discretion of the trial court. *Id.* In exercising its discretion, the trial court may consider such factors as: (1) undue delay, bad faith, or dilatory motive by the movant; (2) the repeated failure to cure deficiencies by previously allowed amendments; (3) undue prejudice to the opposing party if the amendment is allowed; and (4) futility of the amendment. Gregory v. Mitchell, 634 F.2d 199, 203 (5th Cir. 1981).

## III. Analysis

First, the Court considers whether the presiding Judge's June 1, 2009, Order precludes the allegations made in Fuselier's Amended Complaint against Gusman in his individual capacity. In dismissing the claims brought against Gusman in his individual capacity, the presiding Judge stated that "[i]t is undisputed that Gusman was not personally involved in the decision to detain [the elder] Fuselier unnecessarily that evening or to place him in the cell with Jackson and the other violent offenders." (R. Doc. 33, p. 4.)

The Fifth Circuit has stated: "Although a court may dismiss the claim, it should not do so without granting **[*5]** leave to amend, unless the defect is simply incurable or the plaintiff has failed to plead with particularity after being afforded repeated opportunities to do so." Hart v. Bayer Corp., 199 F.3d 239, 248 n.6 (5th Cir. 2000) (citing O'Brien v. Nat'l Prop. Analysts Partners, 936 F.2d 674, 675-76 (2d Cir. 1991)). Here, the presiding Judge did not expressly grant Fuselier leave to amend his Complaint, however, the Order also stated that Fuselier's Complaint and arguments did not "suggest that Gusman was aware of any facts from which he could have inferred that [the elder] Fuselier was in danger and faced serious risk of harm." (R. Doc. 33, p. 4.) Therefore, the Order implies that the defects in Fuselier's original Complaint might be curable with different facts and does not preclude amendment on this issue.

On September 1, 2009, Fuselier filed the instant motion seeking leave to file his First Amended Complaint. The Court notes that Fuselier failed to attach a memorandum in support of the motion as required by Local Rule 7.4. However, the Court will consider the arguments made by Fuselier in his reply memorandum and Gusman's opposition in considering the motion. The Court further notes that Fuselier fails to address the factors for allowing amendment under Rule 15(a) and both parties focus their arguments on the futility factor only.

Notwithstanding **[*6]** Fuselier's failure to argue under the Rule 15(a) standard, the Court will address Fuselier's motion using the Rule 15(a) factors as stated above. First, Fuselier does not address whether the amendment was filed with undue delay, bad faith, or dilatory motive. In the Amended Complaint, Fuselier states that the information that led to the Amended Complaint was gathered through discovery (*See* R. Doc. 36-5, p. 2), but he does not say what information, how it was gathered, or when it was obtained. Fuselier did not provide sufficient information for the Court to evaluate this factor and it therefore weighs against allowing amendment.

Fuselier also fails to make any arguments regarding

repeated failures to cure deficiencies. As to the claims against Gusman in his individual capacity, it is clear that Fuselier was aware of the deficiencies of his claims as of June 1, 2009, the date of the presiding Judge issued the Order dismissing the claims against Gusman in his individual capacity. Fuselier does not explain why he delayed curing this deficiency until three months later. However, the Court also notes that this is Fuselier's first attempt to amend. Therefore, this factor is neutral as to allowing amendment.

Fuselier **[*7]** also makes no arguments as to whether the proposed amendment will result in prejudice to the proposed Defendants. The Case Management Order set the discovery deadline for January 22, 2010. (R. Doc. 35, p. 1.) The Amended Complaint adds numerous new parties, facts, and claims. (*See* R. Doc. 36-5.) Absent argument from Fuselier to the contrary, this factor weighs against allowing amendment.

Finally, as to the futility of the amendment, Fuselier limits his arguments to the futility of the claims against Gusman in his individual capacity. However, the Court further notes that Gusman specifically stated that he "does not object to the addition of new parties in this matter . . . ." (R. Doc. 37, p. 1.) Fuselier argues that Gusman improperly seeks to prematurely oppose the merits of the amendment, when Fuselier's right to amend is the issue before the Court. (R. Doc. 40, p. 1.) Fuselier further contends that the proposed Amended Complaint remedies the deficiencies in the original Complaint, and therefore alleges sufficient facts to bring a claim against Gusman in his individual capacity. (R. Doc. 40, p. 2.)

In response, Gusman contends that Fuselier is attempting to amend his Complaint to defeat **[*8]** the presiding Judge's ruling, which dismissed Fuselier's claims against Gusman in his individual capacity. (R. Doc. 37, p. 2.) Gusman contends that Fuselier's Amended Complaint merely asserts negligence against Gusman, which is not sufficient to make Gusman individually liable under § 1983. (R. Doc. 37, p. 4.) After review of Fuselier's Amended Complaint and the presiding Judge's Order dismissing the federal claims against Gusman in his individual capacity, the Court finds that Fuselier's Amended Complaint does nothing to cure the deficiencies noted by the presiding Judge, and is therefore futile.

In his Order dismissing the federal claims against Gusman in his individual capacity, the presiding Judge noted that Fuselier did not allege that Gusman was personally involved in any of the decisions on August 2, 2009, that led to the elder Fuselier's death. (R. Doc. 33, p. 4.) The presiding Judge noted that to the extent that Fuselier alleged that Gusman's policies led to the his father's death, those acts were committed by Gusman in his official capacity. (R. Doc. 33, p. 4.) Finally, the presiding Judge pointed out that Fuselier had not suggested that Gusman was aware of any facts from which **[*9]** he could have inferred that the elder Fuselier "was in danger and faced serious risk of harm." (R. Doc. 33, p. 4.)

Fuselier's Amended Complaint primarily asserts that Gusman's policies were a primary cause of his father's death. As stated by the presiding Judge, these allegations relate to Gusman's actions in his official, not individual capacity. Furthermore, Fuselier's Amended Complaint does not allege that Gusman was aware of any facts from which he could have inferred that the elder Fuselier was in danger. The only allegation made by Fuselier that Gusman had personal knowledge of the elder Fuselier's ordeal was the conclusory assertion that Gusman had "personal and direct knowledge" of the fact that the elder Fuselier was sent to the hospital handcuffed and chained to his bed despite a Court Order releasing him. (R. Doc. 36-5, p. 15.)

First, this allegation is conclusory and provides no factual basis for the claim that Gusman had personal knowledge of either the elder Fuselier's release Order or the fact that he was sent to the hospital chained to his bed. Second, even if Gusman was aware of these facts, Fuselier does not explain how being chained to the bed after being beaten subjected **[*10]** the elder Fuselier to a serious risk of harm. At the point the elder Fuselier was sent to the hospital, he had already sustained the beating that would lead to his death and Fuselier does not explain how the alleged actions by Gusman further subjected his father to serious risk of harm.

Therefore, based on the above factors, and specifically Fuselier's failure to remedy the deficiencies noted by the presiding Judge, the Court finds that as to Fuselier's federal claims against Gusman in his individual capacity, the amendment is futile and is hereby denied. Futhermore, in light of Fuselier's failure to present arguments justifying his amendment and the prejudice to the proposed Defendants, the Court also denies Fuselier's motion for leave to amend in all other respects.

**IV. Conclusion**

Accordingly,

**IT IS ORDERED** that Fuselier's **Motion and Incorporated Memorandum Thereto to File First Amended Complaint, and Order (R. Doc. 36)** is hereby **DENIED**.

New Orleans, Louisiana, this 16th day of November 2009.

/s/ Karen Wells Roby

**KAREN WELLS ROBY**

**UNITED STATES MAGISTRATE JUDGE**

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