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Pritchard v. County of Erie

Case No.: 1:04-cv-00534-RJA-HBS

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK, BUFFALO DIVISION

November 8, 2017

Reporter
2017 U.S. DIST. CT. MOTIONS LEXIS 102173 *

Pritchard et al v. The County of Erie et al

Type: Motion

Judges

Richard J. Arcara

Title

RESPONSE IN OPPOSITION

Text

[*1] DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR VOLUNTARY DISCONTINUANCE

Defendants County of Erie ("County"), Patrick M. Gallivan, Timothy Howard, Donald Livingston and Robert Huggins (collectively referred to herein as "Defendants") submit this response in opposition to Plaintiffs' motion (Docket No. 315) which seeks an order of the Court granting Plaintiffs voluntary dismissal of the case pursuant to Fed. R. Civ. Pro. ("FRCP") 41(a)(2).

1. Defendants respectfully request that the Court deny this motion and proceed with determining the pending motions on their merits.1

1 Defendants hereby incorporate by reference their summary judgment motion (Docket No. 301), their opposition to Plaintiffs' motion for leave to amend their complaint (Docket No. 305), and their response (Docket No. 311) to Plaintiffs' initial request for leave to file this motion (Docket No. 310) - on which the Court did not rule before Plaintiff once again decided to ignore the Court's direction and simply file the present motion. Defendants respectfully refer the Court to those submissions for a full recitation of the relevant background, facts, and law applicable to this matter.

2. Plaintiffs' **[*2]** representations to this Court that they now seek voluntary dismissal of this action as some good faith recognition of the ultimate invalidity of their claims is the height of disingenuousness. This is nothing more than the last desperate and improper attempt by Plaintiffs to circumvent what should be the definitive and inevitable conclusion to the case that they commenced over thirteen (13) years ago.

3. As stated in Defendants' summary judgment motion (Docket No. 301), opposition to Plaintiffs' motion for leave to amend their complaint (Docket No. 305), and opposition to Plaintiffs' request for a further stay of the summary judgment briefing (Docket No. 310), when the United States Supreme Court issued its decision in 2012 in *Florence v. Board of Chosen Freeholders of the County of Burlington, 566 US 318, 132 S. Ct 1510 (2012)*, it was abundantly clear that Plaintiffs' claims in this action were without merit.

4. Yet, Plaintiffs did nothing at that time and insisted that their claims still had merit.

5. Five years later, this Court conducted a conference during which the Defendants again reiterated that Florence barred the Plaintiffs' claims in this matter. Plaintiffs still insisted that their claims had merit and that they should be entitled to the opportunity to "amend" **[*3]** their complaint to reflect the purportedly still-meritorious aspect of their claims.

6. As a result of Plaintiffs' conduct, Defendants were required to file an extensive summary judgment motion rehashing the voluminous discovery that was conducted in this matter over a decade ago. See Docket No. 301.2

7. Plaintiffs also proceeded (past the Court's deadline) to file their motion for leave to amend their complaint, asserting theories of liability that (a) could have been asserted when

2 Defendants filed their motion pursuant to the Court's scheduling order and have otherwise complied with every deadline set by the Court. Plaintiffs, on the other hand, have not met one deadline set by the Court and have repeatedly sought extensions at the 11th hour and/or proceeded without direction from the Court.

this matter was filed thirteen (13) years ago in 2004 and (b) were without merit in any event based on well-settled law. See Docket No. 303.

8. Defendants opposed Plaintiffs' motion for leave to amend, demonstrating the utter lack of merit to Plaintiffs' proposed amendments as well as demonstrating the undue delay on the part of Plaintiffs in failing to seek timely amendment **[*4]** of their complaint and the prejudice that would result to Defendants if Plaintiffs were permitted to file (an albeit baseless) amended complaint thirteen years after this action was commenced and over ten years after discovery was completed. See Docket No. 305.

9. Plaintiffs had five years after Florence in which they could have decided that their case was without merit. They did absolutely nothing during that time to either prosecute or dismiss their claims. Instead, they let this action sit and when Defendants asserted that the case should be dismissed based on Florence, Plaintiffs insisted that their claims were still meritorious and required the Defendants, and the Court, to expend additional time and resources on this meritless action.

10. Plaintiffs admit that they now seek to have the Court dismiss this action pursuant to Fed. R. Civ. Pro. ("FRCP") 41(a)(2) so that they can avoid the statute of limitations bar and commence a totally new action in New York State court asserting an entirely new claim pursuant to the New York State Constitution - a claim that was never previously asserted in this action.

See *Extebank v Finkelstein, 188 AD2d 513, 513 (2d Dept 1992)* (holding that a dismissal by court order pursuant to *FRCP Rule **[*5]** 41(a)(2)* does not constitute a "voluntary discontinuance" under New York CPLR §) 205(a), thereby allowing a plaintiff a six month grace period under New York law to file a new action); *Censor v Mead Reinsurance Corp., 176 AD2d 600, 601* (1st

Dept 1991)(same).

11. The point is worth reiterating - in the thirteen (13) years that this case has been pending, Plaintiffs never sought to raise any claims under New York state law until they filed their motion for leave to amend their complaint less than a month ago.

12. Plaintiffs could have asserted a state law claim at the time they filed their complaint in 2004, after discovery was substantially completed in 2006, or at any time during the eight years that this action was pending before Florence.

13. Plaintiffs chose not to include such a claim when they filed this action and chose not to amend their complaint when they had ample opportunity to do so.

14. The law and the facts of this case do not, and should not, afford Plaintiffs the ability to avoid the consequences of their decisions.

15. As an initial matter, as discussed in detail in Defendants' opposition to Plaintiffs' motion for leave to amend their complaint (Docket No. 305), the state law claims that Plaintiffs **[*6]** now seek to assert are without precedence or merit. No New York court has made any ruling concerning strip searches of inmates being admitted to a correctional facility.

16. Rather, the vast body of case law that has developed in this area has been in the federal arena - and, with and following Florence, that body of law has been significantly clarified.

17. Regardless, a dismissal pursuant to Rule 41(a)(2) is left to the Court's discretion and it is not in any way automatic. See *Shady Records, Inc. v. Source Enters., 371 F. Supp. 2d 394 (S.D.N.Y. 2005)*; *Hinfin Realty Corp. v. Pittston Co., 206 F.R.D. 350 (E.D.N.Y. 2002)*; *Manners v. Fawcett Publications, Inc., 85 F.R.D. 63 (S.D.N.Y. 1979)*.

18. More particularly, as stated in Hinfin, "[t]he decision whether to grant a motion for voluntary dismissal rests with the sound discretion of the trial court." *206 F.R.D. at 355*, citing, inter alia, *Catanzano v. Wing, 277 F.3d 99, 109 (2d Cir. 2001)*.

19. The motion should not be granted where it would result in prejudice to the defendant. Id. In considering whether the defendant would be prejudiced, the court can consider a number of factors, including: (1) the plaintiff's diligence in bringing the motion; (2) any "undue vexatiousness" on the plaintiff's part; (3) the extent to which the case has progressed, including the defendant's efforts and expense in preparation for trial; (4) the duplicative expense of relitigation; and, (5) the **[*7]** adequacy of the plaintiff's explanation for a need to dismiss." Id. citing *Catanzano, 277 F.3d at 100*; *D'Alto v. Dahon California, Inc., 100 F.3d 281, 283 (2d Cir. 1996)*; *Zagano v. Fordham Univ., 900 F.2d 12, 14 (2d Cir. 1990)*.

20. Applying these factors to this action demonstrates that Plaintiff's motion should absolutely be denied, and the Court should proceed with determining the pending motions (Defendants' motion for summary judgment and Plaintiffs' motion for leave to amend its complaint) on their merits.3

21. Plaintiffs were not diligent in bringing this motion. As stated above, Plaintiffs had five years since Florence to bring this motion. Not only did Plaintiffs not bring the motion during those five years, but, even when Defendants insisted that Florence resolved this matter,

3 Resolution of these motions should be simple and straightforward given that Plaintiffs have now admitted that their claims are without merit. However, in the unlikely event that the Court is inclined to grant Plaintiffs' motion for voluntary dismissal, Defendants respectfully request that the Court also award Defendants their costs and fees associated with the defense of this matter. See *Hinfin, supra, at 357* ("Where a plaintiff successfully dismisses a suit without prejudice under Rule 41(a)(2), courts often **[*8]** grant the defendant an award of costs or fees...The purpose of such awards is generally to reimburse the defendant for the litigation costs incurred, in view of the risk (often the certainty) faced by the defendant that the same suit will be refiled and will impose duplicative expenses upon him.") (internal citations omitted). While, for all of the reasons set forth herein, the Court should deny this motion and proceed with a substantive determination dismissing this actions on its merits, should the Court decided to grant the motion, Defendants request that the Court set a separate date for Defendants to submit an application detailing their costs and fees of this litigation to be reimbursed.

Plaintiffs insisted that their claims had merit and forced Defendants to file not only a motion for summary judgment but also opposition to their motion for leave to amend their complaint. This is the opposite of diligence, and also leads directly to the second factor.

22. Plaintiffs' conduct is vexatious and harassing. Again, rather than concede the inevitable consequences of Florence five years ago, Plaintiffs persisted in a course of action that caused Defendants to expend substantial **[*9]** additional time and resources defending claims that Plaintiffs knew were without merit. Because of such conduct by the Plaintiffs, over the past four months, Defendants have had to scour through the immense record in this matter (over 30 depositions and thousands of pages of records) to prepare a summary judgment motion and opposition to Plaintiffs' motion for leave to amend their complaint.

23. All of this additional time and effort could have been avoided if the Plaintiffs had been diligent and reasonable five years ago when the Court directed the parties to determine the impact of Florence and agree on a path forward. Again, Plaintiffs would not agree to dismiss their claims at that time and insisted that they should be permitted to proceed with the litigation.

See Docket Nos. 293 and 294.4

24. The third factor - the extent to which the case has progressed including the defendants' efforts and expense in preparing for trial - also weighs against voluntary dismissal.

Discovery is complete - and has been complete since 2006. Defendants have filed their motion for summary judgment - again, as a direct result of Plaintiffs' conduct and insistence on pursuing their claims. **[*10]** Defendants have expended substantial time and resources in preparing this matter for disposition over the course of years of active and heavy litigation.

4 These submissions were made at the request of the Court in the aftermath of Florence and the Plaintiffs certainly could have agreed to dismiss their claims at that time - especially since absolutely nothing has changed in terms of this case and the directly applicable law since then. However, Plaintiffs refused to do so and insisted that the matter should proceed.

25. The fourth factor - expense of relitigation - also weighs against granting the motion. Plaintiffs admit that they intend on using the voluntary dismissal of this action as a means to avoid the statute of limitations and commence a new action in New York State court.

This would require Defendants to expend further significant time and resources to defend the new action.5 This is particularly relevant in this case because, as previously stated, Plaintiffs could have included a state law cause of action in their original complaint in 2004. They did not, and are now attempting to use this motion to circumvent their lack of diligence.

26. The final factor - **[*11]** adequacy of Plaintiffs' explanation - also weighs against the Plaintiffs. Plaintiffs' explanation is disingenuous and hollow. Plaintiffs are not seeking dismissal based on their timely and good faith assessment that their claims lack merit. Plaintiffs are only seeking voluntary dismissal as a last ditch effort to abuse a New York law loophole so that they can bring a completely new state court action based on a claim that they never asserted in the 13 years this matter has been pending.

27. As stated above and set forth in detail in Defendants' opposition to Plaintiff's motion for leave to amend (Docket No. 305), Plaintiffs could have asserted a claim based on the New York State Constitution when this action was commenced in 2004 or at any time thereafter.

There has been no change in New York law or in the facts of this matter that somehow made the New York State Constitution relevant now rather than in 2004.

28. Rather, the Plaintiffs' sole purpose in seeking voluntary dismissal now - after Defendants have moved for summary judgment and after Defendants have submitted their

5 As also set forth in Defendants' opposition to Plaintiffs' motion for leave to amend their complaint, **[*12]** Defendants would suffer gross and significant prejudice if they were forced to defend a new lawsuit based on a new theory when the events occurred well over a decade ago and witnesses have, in some instances, moved on, retired, or died. See Docket No. 305, and more specifically, Docket No. 305-2, which is an affidavit from Defendant Timothy Howard discussing the numerous witnesses who are no longer available.

opposition to Plaintiffs' motion for leave to amend - is so that Plaintiffs can abuse the grace period of CPLR 205 to bring a meritless and untimely action in New York State Court.

29. Based on all of the factors identified above, Plaintiffs should not be permitted to abuse a procedural technicality to avoid an ultimate, and necessary, conclusion to this over a decade-old litigation.

30. Indeed, New York law does not countenance this sort of abuse of CPLR 205: "The restorative provisions of CPLR 205(a)...reflect the idea that a diligent litigant who commenced a timely action but who failed on some generally technical ground, deserves an adjudication on the merits." See, e.g., *Matter of Winston v Freshwater Wetlands Appeals Bd., 224 AD2d 160, 164 (2d Dept 1996)*.

31. Plaintiffs' claims here are not subject to dismissal "on some generally technical ground." **[*13]**

32. Rather, Plaintiffs' claims in this action are subject to dismissal on the merits based on the now-settled law from the United States Supreme Court and the extensive record developed over the course of more than a decade of litigation.

33. Defendants have spent years and substantial resources defending this matter and, after 13 years, are entitled to their adjudication of these claim ON THE MERITS to finally put to rest the claims that Plaintiffs brought against them. Defendants are entitled to an adjudication that will end this matter once and for all, and that will not permit the Plaintiffs to disingenuously pursue an entirely new action in New York State Court over thirteen years after the events at issue in this matter.

34. Plaintiffs are not and have not been the "diligent litigants" that either *FRCP Rule 41(a)* or CPLR §)205(a) are intended to protect.

35. The Court should refuse to countenance Plaintiffs' gamesmanship and determine, on the merits, Defendants' pending motion for summary judgment and Plaintiffs' motion for leave to amend their complaint on the merits.

36. The Plaintiffs should not be rewarded for further unpermitted and unnecessary delay.

37. **[*14]** This case should be determined based on the pending motion on its merits and with dismissed in its entirety with prejudice.

WHEREFORE, for all of the reasons detailed herein, in Defendants' prior submissions, including Defendants' Summary Judgment Motion and Defendants' opposition to Plaintiffs' motion for leave to file an amended complaint, the Court should: (1) deny Plaintiffs' motion for voluntary dismissal under *FRCP Rule 41(a)(2)*; (2) deny Plaintiffs' motion for leave to amend their complaint; (3) grant Defendants' motion for summary judgment; (4) dismiss the Plaintiffs' Complaint with prejudice; and, (5) grant such other and further relief as the Court deems just and necessary.

DATED: November 8, 2017

Respectfully submitted,

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[SEE ATTACHMENT IN ORIGINAL]