

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CARLEO NALUAN,
Plaintiff,

v.

JOSEPH PURFIELD, et al.,
Defendants.

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CIVIL ACTION

NO. 05-6186

Memorandum and Order

YOHN, J.

November ____, 2006

Plaintiff Carleo Naluan brings this motion for leave to amend the complaint against defendants Joseph Purfield, LaVerne Towns, and John Pawlowski to include (or at least amplify) a claim for a violation of his right to access the courts under the United States Constitution. Defendants oppose the motion. For the following reasons, the court will deny Naluan's motion for leave to amend his complaint.

I. Factual & Procedural Background

In his complaint, Naluan makes the following allegations. (Am. Compl. 3-5, May 1, 2006.) At approximately 2 a.m. on October 9, 2005, Naluan exited a bar named Brazil's, which is located at 112 Chestnut Street, Philadelphia. (*Id.* at 3.) As Naluan walked to his car, several individuals fighting each other exited Dreemz, another bar, located at 120 Chestnut Street. (*Id.*) The fight, which did not involve Naluan, escalated and the participants began firing handguns at one another. (*Id.*) As a result, several people were shot. (*Id.*) Naluan began running down the

street once he heard shots fired. (*Id.* at 4.) Joseph Purfield, an off-duty police officer, who too had just exited a nearby bar, began chasing Naluan.¹ (*Id.*) Naluan heard someone yelling “get down” and then was struck in the head by the handle of Officer Purfield’s handgun. (*Id.*) Before losing consciousness, Naluan recalls seeing a handgun fall to the pavement. (*Id.*) When Naluan woke up sometime later, he was at the Pennsylvania Hospital Emergency Department and had been handcuffed. (*Id.*) Police officers then informed Naluan that he was being held as a suspect in the shootings. (*Id.*) Thereafter, three witnesses to the shootings were escorted into Naluan’s hospital room, one at a time. (*Id.*) Each witness informed the police that Naluan was not one of the shooters. (*Id.*) LaVerne Towns, a police officer present at Naluan’s apprehension, told a nurse at the hospital that Naluan’s injuries occurred when police officers tackled him during apprehension. (*Id.*) However, Officer Towns later told Naluan’s friends and family that an unknown assailant had struck Naluan over the head with a bottle. (*Id.* at 4-5.) Officer Towns again changed her story when she later told Naluan’s friends and family that two bar bouncers had injured plaintiff and escaped arrest. (*Id.*) John Pawlowski, a police officer also present during Naluan’s apprehension, remained silent as Officer Towns told her accounts to Naluan’s friends and family. (*Id.* at 5.) An eyewitness later confirmed that Naluan was actually knocked to the ground by two uniformed police officers and one police officer in street clothes. (*Id.*)

In his initial complaint filed on November 29, 2005,² Naluan claimed that the three

¹Before pursuing Naluan, defendants claim to have seen and heard an unidentified witness to the shootings point out Naluan as one of the shooters. (*See* Pl.’s Mot. Leave Am. 7.)

²Naluan’s initial complaint named several John Doe police officers as defendants. (Doc. No. 1.) Naluan filed an amended complaint on May 1, 2006 adding Officers Purfield and Pawlowski as defendants. (Doc. No. 12.)

aforementioned police officers, acting under color of state law, violated his substantive and procedural rights under the Fourth, Fifth, Eighth, and Fourteenth Amendments. Naluan asserted, among other things, that defendants violated his right to be free from unreasonable search and seizure, right to be free from stops absent reasonable suspicion, right to be free from arrest without probable cause, right to care in police custody, right to bodily integrity, right to be free from excessive force, and right to be free from cruel and unusual punishment. Although Naluan initially brought claims against the City of Philadelphia, those claims were dismissed after the City agreed to pay any judgment that may be entered against any of the defendants.

Trial was originally scheduled for September 25, 2006. While the parties argued motions in limine on that day, Naluan raised a claim asserting that defendants had violated his right to access the courts. Notably, Naluan only vaguely mentioned this claim in one line of the complaint without citing a single authority,³ and did not mention it at all in the documents subsequently submitted to the court, including Naluan's proposed instructions to the jury. I rescheduled trial to allow Naluan time to file a motion for leave to amend the complaint to include a claim for denial of the right to access the courts. In his motion for leave to amend the complaint, Naluan claims that defendants engaged in a cover-up of their apprehension of Naluan and thereby violated his right to obtain redress through the courts under the Privileges and Immunities Clauses of Article IV and the Fourteenth Amendment, the Due Process Clause of the Fourteenth Amendment, and the Petition Clause of the First Amendment.

³Naluan's complaint states: "Defendants conspired in callous disregard for the safety of the Plaintiff to cover-up the assault by fabricating a story that he had been beaten by unknown bouncers and thereby deprived Mr. Naluan of his constitutional right to access to the courts." (Am. Compl. 7, May 1, 2006.)

II. Discussion

Federal Rule of Civil Procedure 15(a) provides “a party may amend the party’s pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.” Fed. R. Civ. P. 15(a). Amendments to the complaint, “although liberally granted, rest within the sound discretion of the trial court” under Rule 15. *Massarsky v. Gen. Motors Corp.*, 706 F.2d 111, 125 (3d Cir. 1983); *see also* Fed. R. Civ. P. 15. The overriding determination to be made by the court is whether the non-moving party will be prejudiced by granting leave to amend. *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1414 (3d Cir. 1993) (citing *Cornell & Co. v. OSHA Review Comm’n*, 573 F.2d 820, 833 (3d Cir. 1978)). Another consideration is whether amending the pleading would be a futile gesture. *F.D.I.C. v. Bathgate*, 27 F.3d 850, 874 (3d Cir. 1994); *Borkon v. Saidel*, 1995 U.S. Dist. LEXIS 11707, at *6 (E.D. Pa. Aug. 11, 1995). Thus, the court “may properly deny leave to amend where the amendment would not withstand a motion to dismiss,” *Massarsky*, 706 F.2d at 125, or a motion for summary judgment, *Wilson v. Am. Trans Air, Inc.*, 874 F.2d 386, 392 (7th Cir. 1989). Because the court finds that the proposed amendment to the complaint would be futile, I will deny Naluan’s motion for leave to amend his complaint.

The right to access the courts is a fundamental right that finds support in several provisions of the Constitution: the Privileges and Immunities Clause of Article IV, the Due Process Clause of the Fourteenth Amendment, and the Petition Clause of the First Amendment. *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002); *Gibson v. Superintendent of N.J. Dep’t of Law & Pub. Safety*, 411 F.3d 427, 441 (3d Cir. 2005). This right “not only protects one’s right

to physically enter the courthouse halls, but also insures that the access to the courts will be ‘adequate, effective, and meaningful.’” *Swekel v. River Rouge*, 119 F.3d 1259, 1262 (6th Cir. 1997); *see Ryland v. Shapiro*, 708 F.2d 967, 972 (5th Cir. 1983). The Third Circuit has recognized a right to access the courts claim in the context of Fourteenth Amendment substantive due process rights. *Gibson*, 411 F.3d at 441-42; *Estate of Smith v. Marasco*, 318 F.3d 497, 511-12 (3d Cir. 2003) (citing *Swekel*, 119 F.3d at 1261-64). In expounding on the nature of such a claim, the Third Circuit went on to state that in order to present a claim for denial of the right to access the courts, a plaintiff must show state officers:

wrongfully and intentionally conceal[ed] information crucial to a person’s ability to obtain redress through the courts, and [did] so for the purpose of frustrating that right, and that concealment and the delay engendered by it substantially reduce[d] the likelihood of one’s obtaining the relief to which one is otherwise entitled.

Gibson, 411 F.3d at 445 (approving and quoting *Swekel*, 119 F.3d at 1262-63). Further, “only prefiling conduct that either prevents a plaintiff from filing suit or renders the plaintiff’s access to the court ineffective or meaningless constitutes a constitutional violation.” *Marasco*, 318 F.3d at 511-12 (citing *Swekel*, 119 F.3d at 1261-64). Thus, “the [c]omplaint must identify a remedy that may be awarded as recompense but not otherwise available in some suit that may yet be brought.” *Gibson*, 411 F.3d at 442 (citing *Christopher*, 536 U.S. at 415 n.12).

In *Estate of Smith v. Marasco*, 318 F.3d 497 (3d Cir. 2003), plaintiffs, the family of the decedent, brought a wrongful death action against defendant state troopers. *Id.* at 505. In addition, plaintiffs brought a claim for denial of access to the courts against defendants alleging that defendants attempted to effectuate a cover-up of the effort to find the decedent’s body. *Id.* at 511-12. The Third Circuit concluded that plaintiffs could not show that “the defendants’ efforts

either prevented [them] from filing suit or rendered their access to the courts *ineffective and meaningless.*” *Id.* at 512 (emphasis added). The court stated that “[i]n any event, the [plaintiffs] were able to bring this action and *present substantial evidence of central importance to their case.*” *Id.* (emphasis added). The court thus concluded that “the alleged conduct did not prevent them from filing suit or render their access to the courts *ineffective or meaningless.* Indeed, this very opinion demonstrates that the [plaintiffs] have been *able to develop the facts in this case quite effectively.*” *Id.* (emphases added).

Here, Naluan makes several allegations in support of his claim that his right to access the courts was made ineffective or meaningless by defendants. First, Naluan asserts that defendants’ conduct has reduced the clarity of the available facts. (Pl.’s Mot. Leave Am. 6.) Defendants allegedly provided four different versions of the events leading up to Naluan’s apprehension, refrained from filling out requisite forms for arrest and use of force, and did not subject Officer Purfield to a blood alcohol content (“BAC”) test as required by police standards. (*Id.*) Naluan also claims that defendants inexplicably failed to acquire the name and address of the eye-witness to the shootings who pointed out Naluan as the shooter to Officer Purfield. (*Id.*) Lastly, Naluan asserts that he is without possible evidence from Officer Purfield’s gun, such as findings of Naluan’s hair and blood, because defendants did not examine it for evidence. (*Id.*)

Even if the court accepts all of Naluan’s allegations as true, the right to access the courts claim Naluan seeks to add would not survive a motion to dismiss or a motion for summary judgment. *See Massarsky*, 706 F.2d at 125; *Wilson*, 874 F.2d at 392. Although Naluan alleges that defendants wrongfully and intentionally concealed information for the purpose of frustrating his right to access the courts, Naluan has not demonstrated that the concealed information is

“crucial” and that the concealment “substantially reduced” his likelihood of relief to which he is otherwise entitled. *See Gibson*, 411 F.3d at 445 (approving and quoting *Swekel*, 119 F.3d at 1262-63). Defendants’ alleged concealment did not prevent or delay Naluan from filing suit. Further, the alleged concealment did not render Naluan’s right of access to the courts “ineffective or meaningless.” *See Marasco*, 317 F.3d at 512.

While it is true that “[d]elay alone causes ‘stale evidence and the fading of material facts in the minds of potential witnesses,’” *Swekel*, 119 F.3d at 1264 (quoting *Ryland*, 708 F.2d at 975), Naluan has not shown that his right to access the courts has been made ineffective or meaningless by the delay in bringing suit caused by defendants’ conduct. In fact, Naluan was able to file suit within less than two months from the night of his apprehension.⁴ Naluan’s very presence before this court at this stage—his trial is imminent—demonstrates that he has been able to develop the facts in this case effectively. *See Marasco*, 318 F.3d at 512 (stating “this very opinion demonstrates that the [plaintiffs] have been able to develop the facts in this case quite effectively”). Like the plaintiff in *Marasco*, Naluan is “able to bring this action and present substantial evidence of central importance to [his] case.” *Id.* Thus, Naluan’s knowledge of the identities of defendants and ability to bring the instant action promptly against defendants demonstrate that his right to access the courts has not been made ineffective or meaningless. *See Swekel*, 119 F.3d at 1263 (discussing *Joyce v. Mavromatis*, 783 F.2d 56, 57 (6th Cir. 1986)).

Further, the information unavailable to Naluan as a result of defendants’ alleged efforts of concealment has not made his right to access the courts ineffective or meaningless. Even if the

⁴Naluan was allegedly apprehended by defendants on October 9, 2005. (Pl.’s Mot. Leave Am. 4.) Naluan filed his initial complaint on November 29, 2005. (Doc. No. 1.)

defendants did fail to fill out the requisite police reports and subject Officer Purfield to a BAC test, Naluan himself claims to have eyewitnesses to his apprehension and evidence that Officer Purfield was at a bar for some time before the alleged incident. (Pl.'s Mot. Leave Am. 4-5.) In addition, Naluan can use the officers' failure to fill out requisite police reports and subject Officer Purfield to a BAC test at trial on cross-examination. Likewise, Naluan can impeach defendants with their failure to acquire the name and address of the supposed eye-witness to the shooting who allegedly identified Naluan as the shooter. Naluan can also impeach the credibility of Officer Towns with her multiple accounts of the night in question. Therefore, the court concludes that the defendants' alleged concealment did not cause Naluan's right to access the courts to be ineffective or meaningless. Indeed, I am sure that defendants' alleged deficiencies in their investigation and the claim of "cover-up" which they entail will be used quite effectively by plaintiff's counsel at trial in support of his other claims.

III. Conclusion

For the foregoing reasons, the court concludes defendants' alleged conduct, while deeply troubling if true, did not render Naluan's right to access the courts ineffective or meaningless. Therefore, because Naluan's amendment to his complaint would be futile, I will deny Naluan's motion for leave to amend the complaint. An appropriate order follows.

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YOHN, J.

AND NOW on this ____ day of November 2006, upon consideration of plaintiff's motion for leave to amend the complaint (Doc. No. 46), the defendants' response thereto, and plaintiff's reply, it is hereby ORDERED that the motion is DENIED.

s/ William H. Yohn Jr.

William H. Yohn Jr., Judge