In the United States District Court
for the District of Colorado

Civil Action No. 1:08-cv-01693-MSK-KLM

CHRISTINA ANN FOURHORN,
MUSE JAMA,
JOSE ERNESTO IBARRA,
DENNIS MICHAEL SMITH,
SAMUEL POWELL MOORE, and
DEDE DAVIS,

Plaintiffs,

v.

CITY AND COUNTY OF DENVER;
MARK DALVIT, a Denver Police Department detective, in his individual capacity;
CURT PETERSON, a Denver Police Department officer, in his individual capacity;
JOHN BISHOP, a Denver Police Department officer, in his individual capacity;
ALAN SIRHAL, Denver Sheriff Department deputy, in his individual capacity;
CHOICE JOHNSON, a Denver Police Department officer, in his individual capacity;
ANDREW RICHMOND, a Denver Police Department officer, in his individual capacity;
PAUL ORTEGA, a Denver Sheriff Department sergeant, in his individual capacity;
JOHN DOE 1, a Denver Police Department officer, whose identity is unknown, in his individual capacity;
JOHN DOE 2, a Denver Police Department officer, whose identity is unknown, in his individual capacity,

Defendants.

Mr. Sanchez's Motion for Leave to Intervene

Antonio Carlos Sanchez, through his attorneys, moves under Federal Rule of Civil Procedure 24 to intervene in this action as a party plaintiff. Mr. Sanchez is attaching the proposed Intervention Complaint with this Motion.

Certificate of conferral. Plaintiffs' counsel conferred with defense counsel about the subject matter of this Motion. The defendants oppose the relief requested.

Introduction

This action arises out of the unconstitutional arrests and detentions (collectively, "arrests") of the plaintiffs. The defendants had probable cause to arrest a suspect; instead, they arrested the plaintiffs, whom they had no legal basis to arrest. These mistaken arrests resulted in part from the defendant City and County of Denver's policies, procedures, practices and customs (collectively, "policies"), including the City's deliberately indifferent failure to establish policies, supervision and training that would have prevented the mistaken arrests or that would have promptly remedied them.

Mr. Sanchez's circumstances are similar. Wielding a warrant for someone else, Denver caused Mr. Sanchez's arrest—multiple times. As a result, Denver incarcerated him for weeks on someone else's warrants.

Unlike the plaintiffs, Mr. Sanchez seeks no monetary compensation. Like the plaintiffs, however, he seeks equitable relief under 42 U.S.C. § 1983—including changes in policies that will prevent him from being locked up again on another person's warrant.

Facts. The more-detailed facts as set forth in the proposed Intervention Complaint are incorporated by reference. On multiple occasions, Denver arrested Mr. Sanchez on warrants for Tony Sanchez. ("Tony Sanchez" will be referred to in this Motion by his full name.) A description of three of the arrests/detentions follows.

In March 2008, Denver law-enforcement officers arrested Mr. Sanchez on (a) *his* own Arapahoe County warrant (probation violation), and (b) *Tony Sanchez's* Arapahoe County warrant (vehicular assault) and *Tony Sanchez's* Denver warrant (trespass/theft). As a result of the mistaken arrest on Tony Sanchez's warrant, Mr. Sanchez sat in Denver's jail for about 6 weeks without any court appearance. That mistaken-identity detention was apparently eventually resolved only after jail deputies finally responded to Mr. Sanchez's complaints that he was being held on someone else's warrant.

In October 2008, Denver officers again took Mr. Sanchez into custody on a warrant for Tony Sanchez. For weeks, Mr. Sanchez sat in Denver's jail without a court appearance. Finally, in December 2008, Mr. Sanchez appeared in Denver District Court. The court ordered determined that Mr. Sanchez was not Tony Sanchez and released him from the case. By the time Denver released him,

Mr. Sanchez had been incarcerated for about 8 weeks on Tony Sanchez's Denver warrant.

In late December 2008, Denver mistakenly detained Mr. Sanchez again on a warrant for Tony Sanchez. Mr. Sanchez went to court and once again was ordered released because he was not Tony Sanchez. By the time Denver released him, Mr. Sanchez had been incarcerated for a number of days on Tony Sanchez's Denver warrant.

Argument

I. Mr. Sanchez is entitled to intervene.

Rule 24(a)(2), providing for intervention as of right, provides:

> On timely[1] motion, the court must permit anyone to intervene who . . . claims an interest relating to the . . . transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

The rule focuses on the practical effect of litigation on a prospective intervenor, not legal technicalities, and is intended to "expand the circumstances in which

[1]Mr. Sanchez's motion is timely. He had intended to move to intervene in February (less than a month after his most recent illegal arrest), but did not do so because of the parties' and court-approved January 30, 2009, moratorium on non-settlement-related activity in this case. There is no prejudice to the defendants, since plaintiffs' counsel notified the defendants before the moratorium about the existence of Mr. Sanchez and his repeated arrests, and also notified the defendants that Mr. Sanchez intended to intervene.

intervention as of right would be appropriate." *San Juan County, Utah v. United States*, 503 F.3d 1163, 1188 (10th Cir. 2007) (en banc).[2] "[I]f a person who would be affected *in a practical sense* by the disposition of an action is not joined as a party, he has a right to intervene unless he is adequately represented by an existing party." *Id.* at 1189 (internal quotations omitted). The factors mentioned in the rule "are not rigid, technical requirements." *Id.* at 1195. The determination of the right to intervene is at least in part a process of "equitable balancing." *Id.*

Mr. Sanchez satisfies all the factors.

Impaired interest. There is no wooden rule to assessing a prospective intervenor's interest and the impairment of that interest. No specific legal or equitable interest need be established. *See id.* at 1196. Instead, courts must "'make a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process,'" *id.* (quoting *South Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002)); *accord Ross v. Marshall*, 426 F.3d 745, 757 (5th Cir. 2005). Subject to practical judgment over the strength of the interest and the "potential risk of injury to that interest," the

[2]The Tenth Circuit's *en banc* opinion in *San Juan County* contains a comprehensive treatment of Rule 24(a)(2); so we rely principally on that decision to establish the applicable standards for intervention of right. (*San Juan County* construed and applied the rule prior to the 2007 amendments, but those amendments made no substantive change to the rule.)

Rule 24(a)(2) movant must have an interest that "could be adversely affected by the litigation." *San Juan County*, 503 F.3d at 1199.

Mr. Sanchez's interest in this litigation is in effecting a change in Denver's formal or *de facto* policies that repeatedly have resulted in Denver's unconstitutionally arresting and incarcerating him on the basis of a warrant for a different person. His interest could be impaired in a number of ways. For example:

- The plaintiffs may seek or otherwise obtain equitable relief, or enter into a consent decree or settlement, that either fails to correct the policies causing his arrests and incarceration or results in the adoption of policies that increase the likelihood that Denver will unconstitutionally arrest and incarcerate him in the future.

- One or more of the plaintiffs whose unconstitutional arrests and incarceration most approximate Mr. Sanchez's may resolve her lawsuit in such a way that she does not request equitable relief that would have any practical effect on the arrest and incarceration problem he is experiencing, or may forbear equitable relief altogether.

- One or more of the plaintiffs may litigate and fail to prevail on a factual or legal issue that bears on Mr. Sanchez's right to relief, and the failure may result from his absence, i.e., he would not be able to advance related arguments peculiar to his situation.

That these interests "may as a practical matter" be impaired is sufficient to meet the "impaired interest" factor. It is irrelevant that the plaintiffs might win the lawsuit (and therefore Mr. Sanchez's interest would not be impaired), since "[t]he purpose of intervention is to *increase the likelihood of that victory*," *id.* at 1200 (emphasis supplied). It is irrelevant that the defendants might win and his interests

nonetheless might not be impaired, since "[t]he issue is the *practical* effect of a judgment in favor of the [defendants], not the *legally compelled* effect," *id.* Here, the practical effect of the defendants' victory is their conclusion that their policies and conduct caused no unconstitutional harm and may be freely continued.

The conclusion that Mr. Sanchez's interest in the subject matter of this litigation satisfies Rule 24(a)(2)'s conditions "is strengthened by [the Tenth Circuit's] practice of considering the public interests at stake when weighing the equities," *id.* at 1201; *see id.* ("'The Tenth Circuit follows a very broad interpretation of the interest requirement with respect to public law issues.'") (quoting 6 James W. Moore *et al*., MOORE'S FEDERAL PRACTICE § 24.03[2][c], at 24-35 (3d ed. 2006); ellipses omitted). The Supreme Court's decision in *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967), teaches that "the requirements for intervention may be relaxed in cases raising significant public interests." *Id.*

Adequate representation. When a party to an action is pursuing multiple interests and there is concern that she may not adequately pursue "the particular interest of the [Rule 24 movant]," the prospective intervenor "need make only a minimal showing to establish that its interests are not adequately represented by existing parties." *Id.* at 1203-04; *accord Trbovich v. United Mine Workers*, 404

U.S 528, 538 n.10 (1972). A prospective intervenor need not show that representation in fact will be inadequate. *Grutter v. Bollinger*, 188 F.3d 394, 400 (6th Cir. 1999). "[I]t may be enough to show that the existing party who purports to seek the same outcome will not make all of the prospective intervenor's arguments." *Id.* (internal quotations omitted).

Mr. Sanchez makes such a showing. It is apparent from the Amended Complaint. For example: Each of the party-plaintiffs has requested monetary compensation (in addition to whatever additional relief the court deems just). Mr. Sanchez makes no request for monetary compensation, only equitable relief under § 1983. The facts of each of the plaintiffs'[3] unconstitutional arrests and detention are different from Mr. Sanchez's. Perhaps the plaintiff with facts closest to Mr. Sanchez is Mr. Ibarra. Even so, Mr. Ibarra's arrest and detention are markedly different for Rule 24 purposes. He was initially properly arrested and detained on his own warrants, he properly resolved his warrants, and then was held for an additional 25 days on five other warrants naming someone else. Unlike

[3]We are considering only plaintiffs Jose Ibarra, Muse Jama and Dennis Smith. The others have accepted a Rule 68 offer of judgment (i.e., Ms. Davis) or have reached a damages settlement with the defendants (i.e., Mr. Moore and Ms. FourHorn).

Mr. Sanchez, Mr. Ibarra was not repeatedly arrested and re-arrested on the same person's warrants.[4]

In these ways alone, the plaintiffs have demonstrated that they have a "broader spectrum of views"[5] (damages and/or equitable relief) and have the ability or desire to seek equitable relief that may be inconsistent with and in any event not "identical to"[6] that of Mr. Sanchez.

II. Irrespective of intervention of right, the Court should permit intervention under Rule 24(b)(1)(B).

Rule 24(b)(1)(B) authorizes a court to permit any person on timely motion to intervene who "has a claim or defense that shares with the main action a common question of law or fact." This is the same standard as Rule 20(a)(1)(B), under which this Court in December 2008 granted plaintiffs' motion to permit Ms. Davis to join this action.

In deciding whether permissive intervention is warranted once the threshold requirement of a common question of law or fact is satisfied, courts may consider such factors as: (1) whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights; (2) whether the would-be intervenor's

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[4]Mr. Moore was arrested and re-arrested repeatedly on someone else's warrant, but he has reached a damages settlement with the defendants.

[5]*Id.* at 1204 (internal quotations omitted).

[6]*Id.*

input adds value to the existing litigation; (3) whether the petitioner's interests are adequately represented by the existing parties; and (4) the availability of an adequate remedy in another action. *Lower Arkansas Valley Water Conserv. Dist. v. United States*, 252 F.R.D. 687, 690-91 (D. Colo. 2008).

The intervention will not cause delay or prejudice. Plaintiffs already have served the defendants with discovery relating to Mr. Sanchez, and responses are due within 20 days; so documents and other information relating to Mr. Sanchez already will be part of this case, irrespective of whether Mr. Sanchez is made a party to this litigation. Mr. Sanchez does not sue individual law enforcement officers, only Denver; and he does not seek damages; so the scope of discovery pursued by Mr. Sanchez and the scope of discovery requested of him will be narrow as compared to the existing plaintiffs. The parties expect to complete lay discovery by July 2009. It is unlikely that that expectation will be affected by Mr. Sanchez's intervention. For example, the parties will know most of the facts relating to Denver's illegal arrests and incarceration of him within 20 days.

Mr. Sanchez's intervention "is likely to make a significant and useful contribution to the development of the underlying factual and legal issues." *Id.* at 691 (internal quotations omitted). As discussed above, the arrests and incarceration of Mr. Sanchez differ in significant ways from the plaintiffs' arrests and

incarceration. Additionally, it is unknown whether any of the remaining plaintiffs ultimately will resolve their claims without insisting on equitable relief; Mr. Sanchez's intervention focuses on equitable relief.

For the reasons stated above, plaintiffs do not adequately represent Mr. Sanchez's interests.

Mr. Sanchez could bring a separate action, but that would make no sense from a number of perspectives. One, the facts relating to his situation are already an integral part of this action. As noted, the plaintiffs have already requested discovery relating to him. For example, they have requested all documents relating to Mr. Sanchez's illegal arrests. Whether he is permitted to intervene, the facts surrounding his multiple illegal arrests will be part of the plaintiffs' § 1983 case, and he likely will be called to testify on behalf of the plaintiffs. Two, as discussed in Argument I, if Mr. Sanchez were not a party, adverse rulings on legal issues could well harm his later-filed action. *See, e.g., Coalition of Ariz./N.M. Counties for Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 844 (10th Cir. 1996) (stating that "the *stare decisis* effect of [a] district court's judgment is sufficient impairment for intervention"), *quoted in Lower Arkansas Valley Water Conserv. Dist.*, 252 F.R.D. at 692.

Conclusion

For the foregoing reasons, this Court should permit Mr. Sanchez's intervention.

Dated: March 11, 2008.

Respectfully submitted,

s/ Ty Gee
Ty Gee
HADDON, MORGAN, MUELLER, JORDAN, MACKEY & FOREMAN, P.C.
150 East Tenth Avenue
Denver, CO 80203
303.831.7364

In cooperation with the American Civil Liberties Union Foundation of Colorado

s/ Veronica Rossman
Veronica Rossman
Visiting Lawyering Process Professor
UNIVERSITY OF DENVER
STURM COLLEGE OF LAW
Ricketson Law Building, 463-A
2255 E. Evans Avenue
Denver, CO 80208
303.871.6894

In cooperation with the American Civil Liberties Union Foundation of Colorado

s/ Mark Silverstein
Mark Silverstein
Taylor Pendergrass
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO
400 Corona Street
Denver, CO 80218
303.777.5482

Attorneys for Plaintiffs

Certificate of Service: I certify that on March 11, 2008, I electronically filed the foregoing *Motion to Intervene* with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following email addresses:

Stuart L. Shapiro: stuart.shapiro@ci.denver.co.us
Douglas Jewell: ldjewell@bcjlpc.com
Sarah E. McCutcheon: smccutcheon@bcjlpc.com
Thomas S. Rice: trice@sgrllc.com
Sonja S. McKenzie: smckenzie@sgrllc.

s/ Jennifer Bell