UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

AMIR MESHAL,	)	
Plaintiff,	)	
v.	)	No. 09-cv-2178 (EGS)
CHRIS HIGGINBOTHAM, *et al.*,	)	
Defendants.	)	

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Pursuant to Local Civil Rule 7(b), Defendants Steve Hersem, Chris Higginbotham, John Doe 1, and John Doe 2 (collectively, the "Defendants") respectfully submit this response to Plaintiff's Motion For Leave to File a Second Amended Complaint, filed January 18, 2012. In his motion, Plaintiff requests "the Court to direct the Defendants to file only a short supplemental memorandum in support of their pending motion to dismiss, with the Plaintiff's response to be equally limited and short." Mot. For Leave at 5. Plaintiff's counsel indicated to the undersigned their position that any supplemental briefing be no more than ten (10) pages, although the local rules plainly permit memoranda supporting motions to dismiss to be 45 pages. L. Civ. R. 7(e).

For the reasons stated below, Defendants do not oppose amendment on the condition that they are given an additional 30 days from the 14-day time period provided under Fed.R.Civ.P. 15(a)(3) after leave to amend is granted in which to respond to the amended complaint and that they be permitted to respond fully in the manner that the rules contemplate. Counsel for Defendants contacted Plaintiff's counsel regarding this request, and was advised that Plaintiff

would not agree to additional time to respond to the Second Amended Complaint and would not agree to a response other than short supplemental memoranda.

Discussion

Defendants do not dispute that a motion for leave to amend a complaint[1] should be liberally granted when justice so requires; Fed.R.Civ.P. 15(a)(2) says as much. However there is no basis for Plaintiff's claim that not only should he be permitted to freely amend his complaint more than two years after he initiated this litigation, but he should also be able to dictate the length and manner of the Defendants' response to the newly operative pleading, limiting it to only a short supplemental memorandum. Several principles counsel against the procedure that Plaintiff asks this Court to endorse. First, "because an amended complaint supercedes [sic] all prior complaints," any earlier pleadings, including the Defendants' Motion to Dismiss and the Opposition and Reply thereto, are "a nullity. . ." Drake v. City of Detroit, MI, 266 Fed.Appx. 444, 448, 2008 WL 482283, 2 (6th Cir. 2008) (citing, Pintando v. Miami-Dade Housing Agency, 501 F.3d 1241, 1243 (11th Cir. 2007)); accord Rhodes v. Robinson, 621 F.3d 1002, 1005 (9th Cir. 2010) ("As a general rule, when a plaintiff files an amended complaint, '[t]he amended complaint supercedes [sic] the original, the latter being treated thereafter as non-existent.') (citations omitted); see also 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1476 (3d ed.) (stating that "[a] pleading that has been amended under Rule 15(a) supersedes the pleading it modifies" and that "[o]nce an amended pleading is interposed, the

[1] Plaintiff's original complaint in this case was filed on November 10, 2009. See Docket # 3. Defendants moved to dismiss that complaint in April, 2010. Plaintiff's filed an Amended Complaint on May 10, 2010, see Docket # 31, and Defendants moved to dismiss the Amended Complaint on June 23, 2010, see Docket # 33. That motion to dismiss was argued on July 12, 2011, and remains under submission.

original pleading no longer performs any function in the case"). Second, since the completion of the briefing on the Defendants' Motion to Dismiss, which was filed in June, 2010, the Court has heard oral argument and the parties, collectively, have filed five separate notices of supplemental authority or responses thereto.[2] On January 23, 2012, less than a week after Plaintiff's motion for leave to amend was filed, the United States Court of Appeals for the Fourth Circuit issued another decision directly bearing on the issues raised in Defendants' Motion to Dismiss and Plaintiff's Opposition. See Lebron v. Rumsfeld, 2012 WL 213352 (4th Cir. 2012). Some paragraphs in Plaintiff's newly amended complaint have changed, and while the new facts pled are not extensive, they may still impact Defendants' response to the Second Amended Complaint. The full impact of these new allegations needs to be analyzed and addressed.

For all of these reasons, Defendants respectfully submit that their willingness to not oppose further amendment to this complaint on the condition that they be given 30 days in addition to the 14 days contemplated under Fed.R.Civ.P. 15(a)(3) to respond, and that they be permitted to respond in the manner that the rules contemplate is eminently reasonable. Moreover, this additional time is needed due to the sensitivity and complexity of the issues raised in this case, and will neither prejudice the Plaintiff nor cause unjustified delay.

A proposed order is attached.

[2] One of the cases at issue in the statements of supplemental authority, Vance v. Rumsfeld, is scheduled for argument *en banc* on February 8, 2012.

Respectfully submitted,

Dated: January __, 2012

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