

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DOUGLAS K. UHDE,

Plaintiff,

v.

ORDER

03-C-323-C

MARK K. BITSKY, Deputy Sheriff;
GARY A. SILKA, Deputy Sheriff and Detective;
TAMMY L. KROETZ, Deputy Sheriff,
BRIAN EZMAN, Warden Badge Number 211;
MATTHEW SHERD, Police Officer,

Defendants.

Plaintiff is proceeding in this case on his claims that 1) defendants Mark Bitsky and Matthew Sherd violated his right to be free from unreasonable searches and seizures on August 20, 2001, when they entered his house, searched his automobile and his person without consent, placed him in handcuffs and arrested him; 2) defendant Tammy Kroetz violated his Fourth Amendment rights when she entered his house without his consent; and (3) defendants Bitsky, Silka and Ezman fabricated evidence against plaintiff in violation of his right to due process under the Fourteenth Amendment. Presently before the court is plaintiff's motion to amend his complaint. Also, plaintiff has filed a response to defendants' answer. I will address plaintiff's latter submission first.

It is not necessary for plaintiff to respond to defendants' answer. Indeed, Fed. R. Civ. P. 7(a) forbids a plaintiff to submit a reply to an answer unless the court directs a reply to be filed. No such order has been made in this case. Plaintiff should be aware, however, that he is not prejudiced by Rule 7(a). Fed. R. Civ. P. 8(a) provides that a party is deemed to deny averments in pleadings to which a response is not allowed. Therefore, although plaintiff is not permitted to respond to defendants' answer, the court considers that he has denied the factual statements and affirmative defenses raised in that answer.

Turning to plaintiff's motion to amend his complaint, I note that plaintiff has submitted a proposed amended complaint in which he has drawn a line through the allegations that he no longer wishes the court to consider and highlighted all new allegations that he wishes to add to the complaint. A number of the changes plaintiff has made to his complaint are superficial, that is, they do not alter the legal claims on which plaintiff has been allowed to proceed or raise new claims against defendants who have been dismissed from the suit. However, two of plaintiff's modifications are significant. In paragraph 3A, plaintiff alleges that defendant Kroetz joined with defendants Bitsky, Silka and Ezman to fabricate evidence against him in violation of his Fourteenth Amendment rights (related to claim 3, above). Plaintiff had not mentioned defendant Kroetz as having been involved in this alleged wrongdoing in his first complaint. Also, in paragraph 25A, plaintiff alleges an entirely new claim. He states that after he had been taken into custody and booked at the Adams County jail, defendants Silka, Kroetz and Ezman conspired with defendant Bitsky

to perform a second search of plaintiff's car on August 21, 2001, without first obtaining consent from plaintiff or having either a valid search warrant or other legal authority to do so in violation of his Fourth Amendment rights.

Plaintiff's motion to amend will be granted. However, plaintiff is reminded that he faces the same challenge with respect to his new Fourth Amendment claim as he faces with his earlier Fourth Amendment claim: if he asserted and lost during his state court criminal proceedings a Fourth Amendment claim pertaining to the alleged illegal search of his car on August 21, 2001, he will be barred from litigating the issue again in this lawsuit.

ORDER

IT IS ORDERED that plaintiff's motion to amend his complaint is GRANTED. The amended complaint is accepted as of this date as the operative pleading in the case. Defendants may have ten days in which to file a responsive pleading to the amended complaint.

Further, IT IS ORDERED that plaintiff's response to defendants' answer will be

placed in the court's file but will not be considered.

Entered this 24th day of September, 2003.

BY THE COURT:
BARBARA B. CRABB
District Judge