UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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MARTIN TANKLEFF,

Plaintiff,

-against-

MEMORANDUM AND ORDER
CV 09-1207 (JS)(AYS)

THE COUNTY OF SUFFOLK, K. JAMES MCCREADY, NORMAN REIN, CHARLES KOSCIUK, ROBERT DOYLE, JOHN MCELHONE, JOHN DOE POLICE OFFICERS #1-10, and RICHARD ROE SUFFOLK COUNTY EMPLOYEES #1-10,

Defendants.
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ANNE Y. SHIELDS, United States Magistrate Judge:

Plaintiff Martin Tankleff ("Plaintiff" or "Tankleff") commenced this action seeking recovery for injuries attributable to alleged violations of federal and state law. Such violations are alleged to have occurred in connection with Tankleff's prosecution and incarceration for the 1988 murder of his parents. Named as Defendants are the County of Suffolk (the "County") and now-retired Suffolk County Detectives K. James McCready ("McCready"), Norman Rein ("Rein"), Charles Kosciuk ("Kosciuk"), Robert Doyle ("Doyle") and John McElhone ("McElhone") (collectively the "Detective Defendants"). Plaintiff also names ten County Police Officers as "John Doe Police Officers #1-10" and ten County employees, named as "Richard Roe #1-10" (collectively, "Defendants").

The original complaint, filed in 2009, alleged federal causes of action pursuant to 42 U.S.C. §1983 ("Section 1983"), as well as several state law claims. The County sought dismissal of all claims pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. In a Memorandum and Order dated December 10, 2010, the District Court granted in part and denied in part that motion. See Docket Entry ("DE") 66. Among the claims dismissed was Plaintiff's Fourth Claim for relief.

That claim alleged a Section 1983 claim based upon Defendants' alleged withholding of exculpatory evidence in violation of Plaintiff's Fourteenth Amendment right to a fair trial as recognized in Brady v. Maryland, 373 U.S. 83 (1963).

Discovery continued during the pendency of the motion to dismiss and is now closed. Presently before the Court is Plaintiff's motion to amend his complaint. In addition to conforming to the District Court's opinion by deleting the dismissed causes of action,[1] the proposed amended complaint (the "Amended Complaint") sets forth a new Section 1983 violation. That cause of action alleges a Brady violation based upon facts stated to have been revealed during discovery.

As discussed more specifically below, Plaintiff seeks to allege that his Brady rights were violated when the Detective Defendants failed to reveal to prosecutors the medical examiner's exculpatory statements with regard to the alleged murder weapon. Specifically, Defendants are alleged to have failed to disclose the medical examiner's opinion "that there was no reasonable medical or scientific possibility" that the actual murder weapon was the knife stated by the prosecution to have been used to attack Arlene Tankleff.[2]

The District Court has referred the motion to amend to this Court for decision. For the reasons set forth below the motion to amend is granted.

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[1] Plaintiff has reserved the right to appeal such dismissals when such appeal is procedurally appropriate.

[2] The first paragraph of the Brady claim Plaintiff seeks to allege also sets forth an initial paragraph in which Plaintiff alleges that the "truth about how" the detectives elicited a confession was material evidence was favorable, material and not disclosed to prosecutors. This is the same language that appeared in the now-dismissed "Count III" of Plaintiff's complaint, which alleged a Brady claim based upon different facts than those at issue in this motion. Compare DE 1 ¶160 with DE 145-1 ¶164. The parties have not briefed any positions regarding these facts, and the Court makes no findings with respect thereto.

BACKGROUND

I. Facts

The facts set forth in Plaintiff's original complaint detail Plaintiff's version of events surrounding his arrest, prosecution, conviction and eventual release from prison. Except where discussed below, the factual allegations in the original complaint are identical to those alleged in the Amended Complaint. The Court assumes familiarity with those facts, which are set forth in detail in the District Court's 2010 Decision, and will not repeat such facts herein. Instead, the Court recites herein only those facts relevant to the claim sought to be added.

As noted, Plaintiff seeks to allege a Brady violation based upon statements alleged to have been made by the medical examiner to Detective Defendants during the autopsy of Arlene Tankleff. That medical examiner was Dr. Vernard Adams, a witness whose deposition was taken in this matter on August 5, 2015. The transcript of that deposition is before the Court as Exhibit A to Defendant's motion in opposition. DE 149-1. References to that deposition herein are cited as "Adams Dep."

At his deposition, Dr. Adams was asked a series of questions about his observations and opinions regarding Arlene Tankleff's knife wounds. Those questions were directed toward drawing out Dr. Adams' recollection and opinions regarding: (1) whether the wounds observed could have been made by the alleged murder weapon – a watermelon knife found at the scene of the murders and (2) whether those opinions were communicated to Suffolk County detectives present at the autopsy.

It must be noted that the deposition testimony quoted below consists of Dr. Adams' responses to questions as to which there were objections to form. Thus, it is certainly not clear that

any of this deposition testimony would be admissible, in its present form, at trial and the Court makes no finding with respect to admissibility. Moreover, the deposition was conducted pursuant to Plaintiff's notice and, as is the case in such depositions, cross-examination by defense counsel was of short duration. This is especially true in this case where the transcript makes clear that the deposition was taken out of state, and counsel needed to conclude the deposition by a particular time in order to be on time for a flight. Nonetheless, among the statements made by Dr. Adams at his deposition concerning the type of knife that could have made the wounds observed on Arlene Tankleff's body were statements that:

- "the only way the watermelon knife could have been the weapon is if it was used gingerly and carefully . . . ." (Adams Dep. 203-04)
- "if I had to pick the perfect knife to make these wounds, I would pick a utility knife." (Adams Dep. 188)
- "all of these wounds . . . could have been made by a utility knife." (Adams Dep. 190)
- "it could have been a utility knife." (Adams Dep. 194)

Additionally, when asked about the possibility that Arlene Tankleff's knife wounds were made by the watermelon knife, Dr. Adams testified that he "would agree that it's not a reasonable possibility," and that an "assailant with [the watermelon] knife should have been penetrating body cavities." (Adams Dep. at 192).

With respect to the issue of whether Dr. Adams' opinions regarding the watermelon knife were communicated to Suffolk County Detectives, Dr. Adams agreed with counsel's statement that he "would have been sharing this information with the detectives, at least one of whom appears to have been making notations on a diagram, correct?" (Adams Dep. 191). When asked whether he

told any detective that the wounds were made by a small knife, Dr. Adams responded that he "could have said that or I could have said nothing," and that he could have said, "I don't like that very much for these wounds." (Adams Dep. 191). In response to the question whether "it would be fair to say that you would communicate with the detectives at the time of the autopsy that, in your judgment, there was no reasonable possibility that the watermelon knife could have been the murder weapon," Dr. Adams responded "I think that's a reasonable supposition. I don't have any recollection of what we actually communicated, but that seems reasonable." (Adams Dep. 193). While Dr. Adams did not testify as to a clear and specific recollection regarding any conversation with a detective in which he ruled out the watermelon knife as the murder weapon, he agreed that he "could have" communicated to detectives his opinion that the watermelon knife was not used to stab Arlene Tankleff, stating further that he thought he "must have communicated that in some sense, if not those words." (Adams Dep. 193).

In addition to being asked to recall his opinions regarding the murder weapon and conversations with detectives, Dr. Adams was questioned about his knowledge of the practice of his office, at the time of the autopsy, with respect to allowing defense counsel access to the medical examiner and his files. As to this issue, Dr. Adams agreed that it was his "policy" to allow defense attorneys to "go in and talk with the medical examiner and look at the entire file and review everything." (Adams Dep. 197). Adams had no idea, however, whether Plaintiff's criminal defense lawyers were, in fact, told anything about any policy with regard to approaching the medical examiner. (Adams Dep. 197-98).

Plaintiff relies on the foregoing testimony and the evidence developed in this case in support of the motion to set forth a claim alleging that Defendants withheld exculpatory evidence about the watermelon knife and therefore violated his Fourteenth Amendment Brady rights.

Defendants oppose the motion on the ground that any such claim would be futile. After setting forth the standards for deciding Plaintiff's motion the Court will turn to the merits thereof.

DISCUSSION

I. Legal Standard on Motions to Amend

Rule 15(a) of the Federal Rules of Civil Procedure provides, in pertinent part, that "a party may amend [its] pleading . . . by leave of court," and that "leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a); see also Pangburn v. Culbertson, 200 F.3d 65, 70 (2d Cir. 1999) (quoting Foman v. Davis, 371 U.S. 178, 182 (1962)). While amendments are generally favored because "they tend to facilitate a proper decision on the merits," Blaskiewicz v. County of Suffolk, 29 F. Supp. 2d 134, 137 (E.D.N.Y. 1998) (citation omitted), it is ultimately, "within the sound discretion of the court whether to grant leave to amend." John Hancock Mut. Life Ins. Co. v. Amerford Int'l Corp., 22 F.3d 458, 462 (2d Cir. 1994) (citing Foman, 371 U.S. at 182).

Generally, amendments should only be denied for good reasons such as undue delay, prejudice to the defendant, dilatory motive on the part of the movant and/or futility of the proposed amendment. Ruotolo v. City of New York, 514 F.3d 184, 191 (2d Cir. 2008); MacDraw, Inc. v. CIT Group Equip. Fin., Inc., 157 F.3d 956, 962 (2d Cir. 1998); Harrison v. NBD, Inc., 990 F. Supp. 179, 185 (E.D.N.Y. 1998); see Foman v. Davis, 371 U.S. 178, 182 (1962).

An amendment will be deemed futile if the proposed claim would be unable to withstand a Rule 12(b)(6) motion to dismiss. See Lucente v. Int'l Bus. Machines Corp., 310 F.3d 243, 258 (2d Cir. 2002); Amna v. New York State Dep't of Health, 2009 WL 6497844, at *1 (E.D.N.Y. Sept. 3, 2009) (quoting Crippen v. Town of Hempstead, 2009 WL 803117, at *1 n.1 (E.D.N.Y. Mar. 25, 2009)). Thus, to withstand a motion to dismiss under Rule 15, the proposed claim must plead facts sufficient "to state a claim for relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550

U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). Plausibility "is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id.

Where, as here, the court must decide whether to allow a Rule 15 amendment, the Court's focus is on the proposed pleading. See Milanese v. Rust–Oleum Corp., 244 F.3d 104, 110 (2d Cir. 2001) (citing Ricciuti v. N.Y.C. Transit Auth., 941 F.2d 119, 123 (2d Cir. 1991)). Such circumstances are different that those presented where a party seeks to amend a pleading in response to a summary judgment motion. In that setting, "the rule is different," because the parties in such cases "have fully briefed the issue whether the proposed amended complaint could raise a genuine issue of fact and have presented all relevant evidence in support of their positions." Milanese, 244 F.3d at 110. In the Rule 56 context, "even if the amended complaint would state a valid claim on its face, the court may deny the amendment as futile when the evidence in support of the plaintiff's proposed new claim creates no triable issue of fact and the defendant would be entitled to judgment as a matter of law under Fed .R. Civ. P. 56(c)." Id. See also Sorrell v. Incorporated Village of Lynbrook, 2012 WL 1999642 *4 (E.D.N.Y. 2012).

II. Disposition of the Motion to Amend

A. The Parties' Positions

At the outset the Court notes that the parties appear to be in agreement that the proposed amendment does not require a re-opening of discovery or additional deposition testimony. Thus, Plaintiff states that while the proposed Brady claim is based on newly discovered information, it is related to Plaintiff's original claims and requires no additional witnesses or documentary discovery. DE 145 at 5. Additionally, Plaintiff notes that the claims in Plaintiff's original complaint and the

evidence establishing Plaintiff's Brady theory, i.e., that the Detective Defendants knew of and suppressed material exculpatory or impeachment evidence, is relevant to the already pled Section 1983 and state-law malicious prosecution claims. Id. at 6. As to the merits of the proposed claim, Plaintiff argues that Dr. Adams' testimony provides more than sufficient factual support to allow a Rule 15 amendment.

For their part, Defendants make no allegation of undue delay or bad faith by the Plaintiff, or that the Amended Complaint would be unfairly prejudicial. Instead, Defendants oppose the motion on the ground that asserting the Brady claim would be futile. See Defendants' Memorandum of Law in Opposition to Plaintiff's Motion to Amend [DE 149-2] at 1-2. Specifically, Defendants argue: (1) that the Amended Complaint fails to set forth facts sufficient to state a Brady violation and (2) even if such facts are sufficiently stated, the claimed evidence was not "suppressed" within the meaning of Brady, as it was equally available to both the prosecution and the defense. DE 149-2 at 3-8.

As the foregoing demonstrates, the parties' positions focus on whether or not Plaintiff states a claim that is legally sufficient to warrant a Rule 15 amendment. The Court will therefore first outline the legal basis for stating a Brady claim, and then turn to decide whether or not to allow a Rule 15 amendment here.

B. Stating a Brady Violation

Brady and its progeny impose upon the government the due process obligation to disclose, without delay, material information that is favorable to the accused, either because it is exculpatory, or because it is impeaching. Brady v. Maryland, 373 U.S. 83, 87 (1963); see, e.g., Strickler v. Greene, 527 U.S. 263, 281-82 (1999); United States v. Rodriguez, 496 F.3d 221, 225 (2d Cir. 2007); United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998); Chandler v. Superintendent of

Upstate Correctional Facility, 2011 WL 3348128 *5 (E.D.N.Y. 2011). The rationale underlying Brady is that the defendant should not be denied access to exculpatory evidence only known to the government. United States v. Zackson, 6 F.3d 911, 918 (2d Cir. 1993).The prosecution is not, however, required to disclose evidence it does not possess or of which it is not aware, see United States v. Tillem, 906 F.2d 814, 824 (2d Cir. 1990), and there is no due process requirement that the government use any particular investigative tool, including quantitative testing, to secure exculpatory evidence. Arizona v. Youngblood, 488 U.S. 51, 58-59 (1988). Nor does the government commit a Brady violation when the evidence was equally available to the defense, and the defense chose not to pursue a particular course of investigation. Cf. Morgan v. Salamack, 735 F.2d 354, 358 (2d Cir. 1984); see also United States v. LeRoy, 687 F.2d 610, 618 (2d Cir. 1982) (no obligation to disclose exculpatory evidence "if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence").

To prevail on a claim of a Brady violation, a defendant must demonstrate: "(1) that the evidence at issue is 'favorable to the accused, either because it is exculpatory, or because it is impeaching'; (2) the 'evidence [was] suppressed by the State, either willfully or inadvertently'; and (3) 'prejudice ... ensued.' " United States v. Paulino, 445 F.3d 211, 224 (2d Cir.2006) (quoting Strickler, 527 U.S. at 281–82). The prejudice requirement will be satisfied if the petitioner can demonstrate a 'reasonable probability of a different result' had the material been timely disclosed." Ferranti v. United States, No. 05–CV–5222, 2010 WL 307445, at *10 (E.D.N.Y. Jan. 26, 2010) (quoting Kyles, 514 U.S. at 434). "Evidence is not considered to have been suppressed within the meaning of Brady doctrine if the defendant or his attorney either knew or should have known of the essential facts permitting him to take advantage of the exculpatory evidence." Paulino, 445 F.3d 211, 225 (2d Cir. 2006).

C. The Brady Claim May be Asserted

Defendants argue that Plaintiff's proposed Brady claim is futile because: (1) Plaintiff fails to allege a sufficient factual basis for the claim and (2) even if such facts are alleged, Plaintiff cannot show that the exculpatory evidence was suppressed. The first argument focuses on the plausibility of the facts alleged to support the claim that Dr. Adams excluded the watermelon knife as the murder weapon and that exculpatory information was communicated to Defendants. The second argument takes the position that no Brady violation can be stated because, even assuming the factual veracity of the Plaintiff's characterization of Dr. Adams' statement, such information was equally available to both the prosecution and the defense.

As to factual plausibility, Defendants argue that Plaintiff's amendment should be denied because Plaintiff fails to specifically identify the detective who heard (or acknowledged hearing) and then withheld, Dr. Adams' alleged statement that the watermelon knife could not have been the murder weapon. Defendants therefore assert that Plaintiff draws an unsupported conclusion that McCready, as lead detective on the Tankleff case, would have been informed of Dr. Adams' findings by the detectives who had attended the autopsies, and that McCready willfully withheld the information. 149-2 at 3.

Upon review of the Amended Complaint, and the parties' positions, the Court holds that Plaintiff has alleged facts sufficient to support a plausible Brady claim. The Court notes that while the Amended Complaint might not specify every detail of the violation, it does assert that "Dr. Adams told Detective Rein there was no reasonable possibility that the watermelon knife could have been the murder weapon." Amended Complaint at ¶ 98. It also alleges that Dr. Adams' conclusion was never disclosed by Suffolk County law enforcement to the prosecutor or Plaintiff's attorney. Id. ¶ 101. Such statements provide enough detail to state a plausible claim that

Defendants knew of and failed to inform prosecutors of exculpatory testimony.

In addition to arguing factual implausibility, Defendants argue futility on the ground that the allegedly withheld information cannot be considered "suppressed" within the meaning of Brady, because such information was available to both parties. DE 149-2 at 7. In support of their position, Defendants point to Dr. Adams' testimony regarding his policy to make himself and his files available to defense attorneys. While the Court agrees that Dr. Adams testimony can be interpreted to support Defendants' position, the Court is unwilling to deny amendment based solely upon that testimony and the record presently before the Court. Indeed, to do so would require this Court to make a finding, generally made only in the summary judgment context, that there is no question of fact as to whether or not the evidence was suppressed. Such a decision may be properly made where a motion to amend arises in the context of a summary judgment motion where "the parties have fully briefed the issue whether the proposed amended complaint could raise a genuine issue of fact and have presented all relevant evidence in support of their positions." Sorrell, 2012 WL 1999642 *4 (quoting, Milanese v. Rust-Oleum Corp., 244 F.3d 104, 110 (2d Cir. 2001). That is not the case presented here. Instead, the issue here is whether Plaintiff's proposed amendment satisfies the requirements of Rule 15, and consequently, Rule 12. Applying that standard here the Court holds that the complaint may be amended to state the Brady claim alleged.

By allowing the amendment the Court makes no finding as to whether or not the claim will survive a motion for summary judgment. Indeed, Defendants may prevail if it is ultimately held that the "the defendant or his attorney either knew, or should have known, of the essential facts permitting him to take advantage" of the exculpatory evidence. United States v. Jackson, 345 F.3d 59, 73 (2d Cir. 2003) (citing United States v. Payne, 63 F.3d 1200, 1208 (2d Cir.1995) (quoting United States v. Zackson, 6 F.3d 911, 918 (2d Cir.1993))); United States v. Gonzalez, 110 F.3d

936, 944 (2d Cir. 1997). Such a finding is properly made only when the matter is fully briefed in the Rule 56 context giving the parties the full opportunity to present all evidence in support of their positions. There has been no such opportunity here. Accordingly, on the motion papers properly to be considered, the Court holds that the Plaintiff has sufficiently alleged a Brady claim and therefore grants the Rule 15 motion to amend.

Conclusion

For the foregoing reasons, Plaintiff's motion for leave to file an amended complaint is granted.

SO ORDERED.

/S/
Anne Y. Shields

Central Islip, New York
May 05, 2015