

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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FIVE BOROUGH BICYCLE CLUB, et al.,

Plaintiffs,

-against-

07 Civ. 2448 (LAK)

THE CITY OF NEW YORK, et al.,

Defendants.

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**MEMORANDUM AND ORDER**

LEWIS A. KAPLAN, *District Judge.*

Plaintiffs, advocates of large group bicycle rides through New York City, claim that they should be free to ride in large groups wherever, whenever, and however they wish, free from municipal regulation. The City regulates these events by requiring permits that would enable the New York City Police Department to know where and when the groups will ride in order to facilitate the flow of traffic and protect the safety of all concerned.

Plaintiffs initially brought this action, contending that the permitting scheme infringes upon their constitutional rights to travel, expressive association, and free speech. Their motion for a preliminary injunction was denied and that ruling recently affirmed by the Court of Appeals.<sup>1</sup> Nine days after the Court of Appeals decision – and more than a year after the deadline for seeking leave to amend the pleadings – plaintiffs moved for leave to amend. That motion now is ripe for decision.

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*Five Borough Bicycle Club v. City of New York*, 483 F. Supp.2d 351 (S.D.N.Y. 2007), *aff'd*, No. 07-2154-cv, 2009 WL 196207 (2d Cir. Jan. 28, 2009).

*Facts*

This action was filed on March 27, 2007, nearly two full years ago. The complaint contained six claims for relief. The first through fourth sought to invalidate the City's parade rules on four different constitutional theories. The fifth and sixth, which were brought only on behalf of the individual plaintiffs, complained, respectively, that the arrests of individual plaintiffs were made in retaliation for protected activity and constituted selective enforcement. The complaint sought principally injunctive relief. There was no damage claim.

On May 21, 2007, the Court signed a consent scheduling order that provided, *inter alia*, that no amendments to the pleadings would be permitted after August 15, 2007, a date later extended to November 16, 2007.

Plaintiffs filed an amended complaint on November 16, 2007. It was substantially the same as the original save that it added a seventh claim for relief in which the individual plaintiffs contended that the City's allegedly selective enforcement of the traffic laws against them violated Section 1231 of the New York Vehicle and Traffic Law. As before, however, the amended complaint sought no damages.

Although the consent order was amended a number of times, the Court repeatedly made clear that extensions would not lightly be granted. Moreover, plaintiffs ultimately consented, on or about both October 3, 2008, and December 1, 2008, to orders that provided that "[t]he parties may not . . . amend their pleadings."<sup>2</sup> Consistent with this agreement, the plaintiffs said nothing, at least to the Court, about any desire to amend again from November 16, 2007 until after the Court of Appeals' affirmance of the denial of the preliminary injunction motion.

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Docket items 80, 91.

While the denial of a motion for a preliminary injunction is a provisional decision in the sense that a different and fuller view of the facts sometimes may result in a different outcome at trial, its resolution of legal issues on occasion presages the ultimate outcome of a lawsuit. But it perhaps is not unfair to say that the Court of Appeals' rejection of plaintiffs' legal arguments reasonably might be perceived as likely fatal to the plaintiffs' attack on the City's parade rules. The emergence of plaintiffs' desire to amend just days later may well be related to such a perception. Whatever its motivation, however, the proposed amendment, if allowed, would inject two new matters into the case. First, it would attempt to make out a claim for associational standing on behalf of plaintiff Five Borough Bicycle Club ("5BBC"). Second, it would assert claims for damages on behalf of the individual plaintiffs.

#### *Discussion*

Plaintiffs now seek leave to amend more than 15 months after the expiration of the period for doing so that was established by the Rule 16 scheduling order and, indeed, long after consenting to orders specifically prohibiting further amendments. At worst, their consent to the latter orders waived any right to amend on any basis. At best, they may be permitted to amend only if they have shown "good cause" within the meaning of Rule 16(b).<sup>3</sup> Good cause, moreover, would depend primarily on "whether the moving party can demonstrate diligence" in pursuing its interests.<sup>4</sup>

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*Parker v. Columbia Pictures, Inc.*, 204 F.3d 326, 340 (2d Cir. 2000); *Global Aerospace, Inc. v. Hartford Fire Ins. Co.*, No. 06 Civ. 7104(LAK), 2009 WL 89122, at \*4 (S.D.N.Y. Jan. 13, 2009).

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*Parker*, 204 F.3d at 340.

The desire to amend to assert damage claims on behalf of the individual plaintiffs does not reflect diligence. It reflects a deliberate change in strategy at the eleventh hour of a long and burdensome litigation. The proposed damage claims are contained in a proposed eighth claim for relief, under 42 U.S.C. § 1983, which would do no more than repeat and reallege the essence of claims made on behalf of the individual plaintiffs in the original and amended complaints. Plaintiffs thus have been aware of the possibility of seeking damages here since before they commenced the lawsuit. The fact that they have had a change of heart about the desirability of doing so does not constitute good cause, especially at this late date. Indeed, allowing such an amendment at this point would require extensive additional discovery, as defendants would be entitled and well advised to seek detailed information about the damages claims that they had no reason to pursue earlier. The incidental discovery about such matters as summonses issued to and arrests of individual plaintiffs that has taken place to date simply has not been of the depth that would be appropriate to the defense of a damage claim.

More broadly, plaintiffs have offered no convincing justification for this belated application.

They contend, for example, that “[d]efendants have long been aware of the basis for 5BBC’s associational standing.”<sup>5</sup> But if defendants long have been aware of that basis, so too must plaintiffs have been. Yet they advance no reason for their failure to have made that claim long ago.

Plaintiffs make a somewhat more direct attempt to justify their inaction with respect to the damage claims, claiming that “[p]laintiffs have learned, through depositions held in recent months, of facts bearing upon the arrests, summons, imprisonment and detainer of the Individual

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Plaintiffs . . .” But surely the individual plaintiffs have been aware from the outset that if they were arrested, given summonses, imprisoned or detained. Moreover, the contention that plaintiffs only recently learned that the City had acted in bad faith in enforcing the laws is at war with the original complaint. The original complaint specifically alleged that individual plaintiffs were arrested and ticketed in retaliation for the exercise of their First Amendment rights and a part of an unconstitutional campaign of selective enforcement.<sup>6</sup> Allegations of retaliation and selective enforcement at the outset of the case cannot be squared with the claim of unawareness of a basis for a claim that the City acted in bad faith. The best plaintiffs could say is that they now have more evidence than they had two years ago. But they knew of their claim of bad faith enforcement then and, armed with that knowledge, chose not to seek damages. They have not shown good cause to be relieved of the consequences of that informed decision

### *Conclusion*

Plaintiffs specifically waived their right to seek any further amendment of the pleadings when they consented to the sixth and seventh amended scheduling orders.<sup>7</sup> Alternatively, they have not established good cause for this untimely attempt to amend. The Court is not satisfied that the plaintiffs have shown appropriate diligence. Moreover, the defendants quite plainly would be prejudiced by the proposed amendment to the extent it would assert a claim for damages.

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Docket item 1, ¶¶ 94-102.

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Docket items 80, 91.

The motion for leave to amend<sup>8</sup> is denied.

SO ORDERED.

Dated: February 24, 2009



Lewis A. Kaplan  
United States District Judge

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