IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 13-cv-01469-CMA-KLM

DAVID E. WILKENSON,
Plaintiff,

v.

STATE OF COLORADO, et al.,
MESA COUNTY, COLORADO, et al.,
Defendants.

"MESA COUNTY"'S MOTIONS TO DISMISS PURSUANT TO FED.R.CIV.P. 12(b)(2), 12(b)(5) AND 12(b)(6)

Conferral Statement: Under D.C.COLO.LCivR 7.1(A), parties are not required to confer for motions filed pursuant to Fed.R.Civ.P. 12 unless the defect is correctable by the filing of an amended pleading. The defects in the First Amended Complaint cannot be cured by an amended pleading. There has been no conferral with Plaintiff prior to the filing of this motion.

COMES NOW "Mesa County," by and through Alan N. Hassler of The Hassler Law Firm, P.C., and moves for dismissal of the First Amended Complaint (Doc 14, 07/10/2013) ("FAC" herein), on any of the following grounds:

INTRODUCTION

1. By and large, the FAC covers exactly the same matters that were alleged in a dismissed prior suit, *David E. Wilkenson v. Mesa County District Court, State of*

Colorado, et al., Case Number 98-M-1839. A copy of the Court's August 29, 2000 Order of Dismissal has been submitted by the State of Colorado, Doc 15-1, 07/23/2013. The caption of that Order lists numerous people who are now listed by name or office in the FAC. The August 29, 2000 Order, p. 5 (Doc 15-1, p. 6), noted that the "district judges, magistrates, prosecuting attorneys and court clerks are protected by absolute immunity," and that "the caseworkers and other employees of the Mesa County Department of Human Services also acted in the course of judicial proceedings and are at least within such qualified immunity."

2. That Order of Dismissal also contains the description of the defendants in that case (Order, Appendix A, Doc 15-1, pp. 9–13) and the causes of action are identified by Plaintiff in the prior proceeding (Doc 15-1, pp. 14–29).

I. PLEADING STANDARDS FOR MOTIONS TO DISMISS

3. In order to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face and not merely possible. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 and 570 (2007); *Van Zanen v. Qwest Wireless, L.L.C.*, 522 F.3d 1127, 1129-30 (10th Cir.2008). Plausibility, in turn, requires that the pleaded factual content allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Bell Atlantic*, 550 U.S. at 556. The factual allegations need not themselves be plausible as they are assumed to be true, but relief must follow from the facts alleged. *Robbins v. Oklahoma ex rel. Dep't of Human Servs.*, 519 F.3d 1242, 1247 (10th Cir.2008).

4. The court does not have to accept as true any legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009),

5. Furthermore, in making all reasonable inferences in the plaintiff's favor, the Court must distinguish well-pleaded facts from conclusory allegations. *Ruiz v. McDonnell*, 299 F.3d 1173, 1181 (10th Cir.2002). The issue in reviewing the sufficiency of a plaintiff's complaint is not whether the plaintiff will prevail, but whether the plaintiff is entitled to offer evidence to support his claims. *See*, *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

6. While not necessarily couched in F.R.Civ.P. 8 terms, this Court has long required complaints involving multiple claims and several defendants to clearly attribute to each defendant the conduct complained of and specify what conduct gives rise to what claims. *See, e.g., Weiszmann v. Kirkland & Ellis*, 732 F. Supp. 1540, 1549 (D. Colo. 1990).

7. The practice of using blanket references to defendants, and failing to specify time, place or person involved has been rejected. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, (2007), at n.10. In *Robbins v. Oklahoma*, 519 F.3d 1242, 1248 (10th Cir. 2008), identified the "complaint's use of either the collective term 'Defendants' or a list of the defendants named individually but with no distinction as to what acts are attributable to whom, it is impossible for any of these individuals to ascertain what particular unconstitutional acts they are alleged to have committed."

8. The remedy is dismissal of the Complaint. *Robbins* @ 1250 (*citing Atuahene v. City of Hartford,* 10 Fed.Appx. 33, 34 (2d Cir., May 31, 2001); *Medina v. Bauer*, 2004 WL 136636, *6 (S.D.N.Y., Jan.27, 2004); *Lane v. Capital Acquisitions and Mgmt. Co.*, 2006 WL 4590705, *5 (S.D.Fla., April 14, 2006); and *Robbins* itself, p. 1253.

II. FED.R.CIV.P. 12(b)(2) MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION – FAILURE TO DESIGNATE A SUEABLE PARTY

9. This suit is captioned, "*David E. Wilkenson v. State of Colorado, et al., Mesa County, Colorado, et al.*" This caption fails to identify any defendants other than the State of Colorado. The designation, "Mesa County," does not name a public entity cognizable at law. There are no individuals named. The failure to identify any other party destroys personal jurisdiction.

10. C.R.S. § 30-11-105 states:

> "In all suits or proceedings by or against county, the name in which the county shall sue or be sued shall be, 'The board of county commissioners of the county of _____;' but this provision shall not prevent county officers, when authorized by law, from suing in their name of office for the benefit of the county."

11. This statute has been applied consistently in state court proceedings beginning with *Board of Commissioners v. Churning*, 4 Colo. App. 321, 322, 35 P. 918, 919 (1894), through *Macurdy v. Faure*, 176 P.3d 880, 881 (Colo. App. 2007) (affirmed on other grounds) to preclude suits naming "_____ County."

12. The court in *Churning* explained:

> "A county is a political subdivision of the state for government purposes, and, at common law, could neither sue or be sued. It is only by virtue of statutory enactment that any action can be maintained either in its behalf or against it. The right to sue a county being clearly statutory, where the mode of instituting the suit is prescribed by statute, it must be strictly followed. (*citations omitted*) . . . that is the corporate name of the county for the purpose of the suit, and there is no authority to sue it by any other name."

Churning, 4 Colo. App. @ 322, 35 P. @ 319.

13. The Tenth Circuit noted the statute is jurisdictional in *Gonzales v. Martinez*, 403 F.3d 1179, 1182 n. 7 (10th Cir. 2005). The statute has been applied in this Court a number of times, including *Handy v. Cummings*, 11-cv-00581-WYD-KMT, Doc 182, pp. 2–3, adopting Recommendation, Doc 180, p. 4. The *Handy* Recommendation also cited a number of District Court cases applying the statute to different circumstances, *e.g.*, *DeHerrera v. Cnty. of Costilla*, 10-cv-02743-REB-BNB, 2011 WL 1154901 @ *3 (D. Colo. Mar. 29, 2011); *Sisneros v. Cnty. of Pueblo*, 09-cv-01656-PAB-MJW, 201 WL 1782017, @ *2 (D. Colo. May 3, 2010); and *Dixon v. Adams Cnty.*, 08-cv-00942-LTB-BNB, 209 WL 440940, at *3 (D. Colo. Feb. 23, 2009).

14. There are no individuals named defendant. The caption does not comply with Fed.R.Civ.P. 10(a). The Rule requires that the title of the complaint name all the parties. Failure to name a person in a caption, or even in the text of the complaint, violates the Rule. *Trackwell v. U.S. Government*, 472 F.3d 1242, 1243-44 (10th Cir. 2007). Failure to identify by name the defendants means that no case has been

commenced with respect to those persons, and the federal court lacks jurisdiction over such unnamed parties. *WNJ v. Yocom*, 257 F.3d 1171, 1172 (10th Cir. 2001).

15. *Mitchell v. Maynard*, 80 F.3d 1433, 1441 (10th Cir. 1996), states that a party not named in the caption may be a party if the allegations of the complaint "make it plain the party is intended as a defendant." Even in the text of the FAC, there is no clear designation or identification of a person who is both identified with "Mesa County" and who committed an actionable wrong.

16. While these jurisdictional defects may be cured by filing an amended complaint, the exercise would be futile, because, as set forth below, Plaintiff cannot state a claim against any actor identified in the FAC.

17. Under Fed.R.Civ.P. 15(a), leave to amend should be freely given, within limits established by case law.

> "Our case law establishes a limitation to this principle: the district court may dismiss without granting leave to amend when it would be futile to allow the plaintiff an opportunity to amend his complaint (*citation omitted*). Where a complaint fails to state a claim, and no amendment could cure the defect, a dismissal [ ] may be appropriate. (*Citation omitted.*) If such a dismissal operates on the merits of the complaint, it will ordinarily be entered with prejudice."

Brereton v. Bountiful City Corp., 434 F.3d 1213, 1219 (10th Cir. 2006). The question of whether or not the amendment is futile is resolved by the question of whether or not "the complaint, as amended, would be subject to dismissal." *Jefferson County Sch. Dist. v. Moody's Investor's Services*, 175 F.3d 848, 859 (10th Cir. 1999).