

UNITED STATES DISTRICT COURT
for the
District of New Jersey

LEE KENWORTHY as the
Administrator for the ESTATE
OF SHAYLING KENWORTHY AND LEE
KENWORTHY, Individually,

Plaintiff,

vs.

LYNDHURST POLICE DEPARTMENT,
OFFICER PHILIP REINA, in his
individual capacity, LYNDHURST
CHIEF OF POLICE JAMES
O'CONNOR, in his individual
capacity, SERGEANT RICHARD
PIZZUTI, in his individual
capacity, LYNDHURST TOWNSHIP
AMBULANCE SQUAD, TOWNSHIP OF
LYNDHURST, ROBERT MARTIN, ANN
MARTIN, RICHARD ANDERSON,
LAUREN ANDERSON, HOUSING
AUTHORITY OF BERGEN COUNTY,
ADAPT PHARMA - Distributor of
Naloxene,

Defendants.

Civil Action No.: 2:18-CV-
12822-MCA-CLW

Civil Action

**BRIEF IN OPPOSITION TO PLAINTIFF'S
MOTION TO AMEND THE COMPLAINT**

Of Counsel:

Harry D. Norton, Jr., Esq.

On the Brief:

Kelly P. Corrubia, Esq.

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STATEMENT OF RELEVANT FACTS AND PROCEDURAL HISTORY

The Motion before the Court arises from a Complaint filed by plaintiff, Lee Kenworthy, on August 16, 2018, naming, in part, the Lyndhurst Police Department, Officer Philip Reina, Police Officer Haggerty, Lyndhurst Chief of Police James O'Connor, Sergeant Richard Pizzuti, Lyndhurst Township Ambulance Squad, and the Township of Lyndhurst (hereinafter collectively referred to as the "Lyndhurst Defendants"). **Certification of Harry D. Norton, Jr., Esq. ("Certification"), Exhibit "A" (Complaint)**. In the initial pleadings, plaintiff set forth claims for negligence and wrongful death arising from an apartment he rented within the Township of Lyndhurst. Id.

Plaintiff's Complaint is presently the subject of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) filed on behalf of the Lyndhurst Defendants on November 13, 2018. Plaintiff sought permission of the Court for additional time to prepare and file opposition to the Motion which the Court granted. The Court's extension of time was limited only to permitting plaintiff to oppose the pending Motion to Dismiss. However, rather than file any opposition to the pending Motion, plaintiff has filed a Motion to File an Amended Complaint. Plaintiff's pending Motion does not address any of the arguments set forth in the Motion to Dismiss.

Notably, as set forth in the Lyndhurst Defendants' pending Motion to Dismiss, plaintiff had filed a Complaint in the New Jersey Superior Court on October 19, 2017, arising from the same incidents described in the District Court Complaint. **Certification, Exhibit "B" (Complaint)**. On August 3, 2018, the plaintiff's Complaint in Superior Court was dismissed without prejudice pursuant to N.J. Court R. 4:23-5 for failure to provide response to discovery. **Certification, Exhibit "C" (Order)**. Plaintiff continued to default on discovery in the Superior Court matter and, on January 9, 2019, the Superior Court entered an Order dismissing the complaint with prejudice. **Certification, Exhibit "D"**.

For the reasons set forth herein, and in the Lyndhurst Defendants pending Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b) (6) it is submitted that the Court deny plaintiff's Motion to Amend the Complaint, and that the Court grant the pending Motion to Dismiss, dismissing the Complaint with prejudice.

LEGAL ARGUMENT

I.

PLAINTIFF'S MOTION DOES NOT COMPLY WITH FED. R. CIV. P. 15.

Plaintiff seeks to amend his pleadings pursuant to Fed. R. Civ. P. 15 and Local Civ. Rule 15.1, but has failed to comply

with the requirements of the Rule. The Court permitted plaintiff only to file a late opposition to the pending Motion to Dismiss. The plaintiff has not, to date, sought the Court's permission to file the Motion to Amend, nor has he sought permission from the parties. The Rule provides,

Except as provided in section (b) of this Rule, or as may be excused by the Court, a party who seeks leave to amend a pleading shall do so by motion, which shall state whether such motion is opposed, and shall attach to the motion:

- (1) a copy of the proposed amended pleading; and
- (2) a form of the amended pleading that shall indicate in what respect(s) it differs from the pleading which it proposes to amend, by bracketing or striking through materials to be deleted and underlining materials to be added.

Local Civ. R. 15.1; Fed. R. Civ. P. 15(B)(2) ("...a party may amend its pleading only with the opposing party's written consent or the court's leave.").

Plaintiff has not sought consent of counsel, nor has he sought permission of the Court to file the present Motion. Further, plaintiff has failed to set forth in his brief the reason for the delay in pleading the causes of action he seeks now to include the in the Complaint. See Johnson v. Gloucester Cty. Improvement Authority, 2017 U.S. Dist. LEXIS 210045 (D.N.J. Dec. 21, 2017) (requiring that the proposed amendment complaint must confirm with the Rule by providing a "black-lined" version

comparing the prior pleading with the proposed amended pleading).

Plaintiff's present Motion is nothing more than an attempt to circumvent the Superior Court's dismissal of his action, and to further avoid addressing the defendants' pending Motions to Dismiss on the merits. The Court has generously granted plaintiff extensions to oppose the Motions, and plaintiff has, again, ignored the Court Order and the Rules of Civil Procedure. The Motion must be denied as procedurally deficient, and the pending Motion to Dismiss granted.

II.

**THE PROPOSED AMENDED COMPLAINT IS FUTILE
PURSUANT TO FED. R. CIV. P. 12(b) (6).**

Although Fed. R. Civ. P. 15 provides a liberal standard for amendments of pleadings, the amendment must be denied if it would be futile. Massarsky v. General Motors Corp., 706 F.2d 111, 125 (3d Cir.), cert. denied, 464 U.S. 937 (1983). The analysis as to whether an amendment is futile is "essentially the same as a Rule 12(b)(6) motion." Aruanno v. New Jersey, 2009 U.S. Dist. LEXIS 2744 (D.N.J. Jan. 15, 2009), * 6. Plaintiff's Motion does not set forth a cause of action against the Lyndhurst Defendants, and plaintiff has already attempted to

litigate this matter in Superior Court. The pending motion must be denied.

A. THE PLAINTIFF'S PROPOSED AMENDED COMPLAINT IS AN ATTEMPT TO CIRCUMVENT THE NEW JERSEY SUPERIOR COURT'S ORDER.

The allegations set forth in the plaintiff's proposed Complaint are identical to those plaintiff has already filed in the New Jersey Superior Court. **Certification, Exhibit "B"**. As set forth at length in the Lyndhurst Defendants' motion to dismiss pursuant to R. 12(b) (6), plaintiff has failed to set forth grounds for jurisdiction, and, even assuming jurisdiction existed, the District Court must abstain from exercising jurisdiction pursuant to Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976). The application of the Colorado River doctrine has been argued at length in the Lyndhurst Defendants' Brief in support of the Motion to Dismiss, and plaintiff has not addressed those arguments.

Further, as argued by co-defendant Housing Authority of Bergen County ("HABC") in opposition to the pending Motion, plaintiff's proposed Amended Complaint is barred by the holdings set forth by the United States Supreme Court in Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983). Known as the Rooker-Feldman doctrine, the decisions require lower federal courts from exercising jurisdiction over claims that

were "actually litigated or 'inextricably intertwined' with adjudication by a state's court." Parkview Assocs. Partnership v. City of Lebanon, 225 F. 3d 321, 325 (3d Cir. 2000), quoting Gulla v. North Stravate Twp., 146 F.3d 168, 171 (3d Cir. 1998). As recognized in the Brief of the HABC, plaintiff seeks a "second bite at the apple" in the present matter, instead of appealing the dismissal of his Superior Court matter. The Court must not permit plaintiff to keep coming back where his litigation lacks merit, and must not permit him to circumvent the ruling of the Superior Court.

CONCLUSION

For the aforementioned reasons, it is submitted that the Motion to Amend filed by the Plaintiff be denied.



HARRY D. NORTON, JR., ESQ.

Dated: March 20, 2019