

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ALANA ORR,

Plaintiff,

v.

1:17-CV-1280
(GLS/TWD)

ANTHONY McGINTY,

Defendant.

APPEARANCES:

OF COUNSEL:

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THÉRÈSE WILEY DANCKS, United States Magistrate Judge

ORDER

Presently before the Court in this action is Plaintiff's motion to amend the amended complaint. (Dkt. No. 133.) Defendant opposes the motion. (Dkt. No. 138.) Also before the Court is Plaintiff's motion to lift the Protective Order (Dkt. No. 120) regarding the deposition of Defendant. (Dkt. No. 124.) Defendant opposes that motion as well. (Dkt. Nos. 126, 131.) Oral argument was conducted in connection with the motions on December 13, 2021. At the close of argument the Court issued a bench decision which denied both motions. In the bench decision, the

Court provided further detail regarding its reasoning and addressing the specific issues raised by the parties in the motion papers.

After due deliberation, and based up the Court's oral bench decision, which has been transcribed, is attached to this Order and is incorporated in its entirety by reference herein, it is hereby,

ORDERED that Plaintiff's motion (Dkt. No. 133) to amend the complaint is **DENIED**; and it is further

ORDERED that Plaintiff's motion (Dkt. No. 124) to lift the Protective Order (Dkt. No. 120) is **DENIED**, and the Protective Order shall remain in effect at this time; and it is further

ORDERED that the dispositive motion deadline is reset to January 31, 2022.

SO ORDERED.

Dated: December 17, 2021
Syracuse, New York


Therese Wiley Dancks
United States Magistrate Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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ALANA ORR,

Plaintiff,

vs.

1:17-CV-1280

ANTHONY MCGINTY,

Defendant.
-----x

Transcript of a Decision held during a
Telephone Conference on December 13, 2021, the
HONORABLE THÉRÈSE WILEY DANCKS, United States
Magistrate Judge, Presiding.

A P P E A R A N C E S

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1 (The Court and counsel present by telephone.)

2 THE COURT: So I'm prepared to issue my decision,
3 and nothing I've heard in argument today has changed that.
4 This part of the transcript will be attached to and
5 incorporated in an order which the court will prepare and
6 file as soon as possible.

7 Presently there are two motions pending before the
8 court: One being plaintiff's motion to file a third amended
9 complaint, and the other being plaintiff's motion to lift the
10 protective order regarding defendant's deposition.

11 First, the court thoroughly reviewed the procedural
12 aspects of this case and as set forth in its decision issued
13 in early March of 2021 at Docket Number 103, which denied
14 plaintiff's earlier motion to file a second amended
15 complaint. Thus, the amended complaint at Docket Number 50
16 is the operative pleading. And rather than restating all of
17 the procedural history up through March of 2021, the court
18 fully incorporates the procedural history as set forth in
19 Docket 103 by reference herein. Additionally, the court
20 notes that the plaintiff has previously been directed by this
21 court in Docket Number 93 not to attempt to resurrect claims
22 already dismissed by this court.

23 Since the court's decision at Docket Number 103
24 denying plaintiff's motion to file a second amended
25 complaint, the following procedural events have occurred:

1 Attorney Douglass has appeared for the plaintiff; further
2 discovery, including depositions of plaintiff and defendant,
3 has been completed and the pretrial discovery deadlines have
4 expired. Regarding the deposition of the defendant,
5 plaintiff was permitted to videotape the deposition despite
6 Attorney Douglass not providing proper notice of same.
7 However, the court issued a protective order at Docket Number
8 120 prohibiting the parties from discussing defendant's
9 testimony or disseminating the video deposition or the
10 transcript of the deposition beyond the parties until further
11 order of the court. Plaintiff currently has a letter motion
12 pending at Docket Number 124 to lift that protective order,
13 which I will address below.

14 Then, after a request by plaintiff's counsel, the
15 court at Docket Number 132 permitted plaintiff to file
16 another motion to amend her amended complaint. Plaintiff
17 then filed a further motion to file a third amended complaint
18 to add causes of action against defendant in his individual
19 and official capacity under 42 U.S.C. Section 1983 for
20 alleged violations of her 14th Amendment procedural and
21 substantive due process rights, in addition to the existing
22 cause of action for injunctive relief under the Americans
23 with Disabilities Act, or the ADA. Plaintiff also seeks
24 retroactive injunctive relief regarding orders of custody of
25 her minor daughter and monetary damages and plaintiff

1 reasserts her existing request for prospective injunctive
2 relief regarding the ADA claim in the proposed third amended
3 complaint. Defendant opposes the motion.

4 Plaintiff's moving papers at Docket Number 133 have
5 been carefully reviewed and defendant's opposition papers at
6 Docket Number 138 have likewise been thoroughly reviewed.
7 The court also thoroughly reviewed all docket entries and all
8 of the prior decisions issued by the court in this matter.
9 The court has also heard from counsel on both motions today.

10 First I want to talk about the motion to amend.
11 Generally, motions for leave to amend are analyzed pursuant
12 to Rule 15(a) of the Federal Rules of Civil Procedure which
13 provides that, "The court should freely give leave to amend
14 when justice so requires." In elaborating on the standard,
15 the Supreme Court has explained in *Foman v. Davis*, 371 U.S.
16 178, essentially that leave to amend should not be denied
17 unless there is evidence of undue delay, bad faith, undue
18 prejudice to the nonmovant, or futility.

19 In opposing the motion, defendant initially argues
20 it should be denied for failing to comply with Local Rule
21 15.1. Defendant also argues futility of the proposed
22 amendments, along with delay and prejudice. The defendant is
23 correct that plaintiff has failed to follow Local Rule 15.1
24 in her motion to amend. Local Rule 15.1 provides that when a
25 motion to amend is made, the motion "must set forth

1 specifically the proposed insertions and deletions of
2 language and identify the amendments in the proposed
3 pleading, either through the submission of a
4 redline/strikeout version of the pleading sought to be
5 amended, or through other equivalent means." Plaintiff's
6 proposed amended complaint is completely lacking in any
7 indication as to what language plaintiff has inserted or
8 deleted when compared to the current amended complaint at
9 Docket Number 50 which is the operative pleading. Plaintiff
10 does not provide any other equivalent means of identifying
11 the changes made in the proposed third amended complaint
12 other than submitting a letter brief at Docket Number 133
13 setting forth her arguments as to why the amended complaint
14 should be permitted. This is insufficient under Local Rule
15 15.1. A review of the docket also shows that the court
16 previously directed plaintiff to follow the local rules. For
17 example, the minutes of the August 18, 2021 telephone
18 conference indicate that, "Plaintiff is directed to follow
19 the local rules for any other nondispositive motions that may
20 be made."

21 Again on October 5th, 2021, just three days before
22 plaintiff's current motion to amend was filed, the current --
23 the court stated in Docket Number 132 that, "Plaintiff should
24 also review all local rules pertaining to motions to amend
25 the pleadings." Since plaintiff, who is no longer pro se,

1 has failed to follow the letter or even the spirit of Local
2 Rule 15.1, the motion to amend is denied.

3 Even if the court did not deny the motion for
4 failure to abide by Local Rule 15.1, the court agrees with
5 the defendant for the reasons stated by defendant in his
6 brief at Docket Number 138-1 that the proposed amendment
7 would be futile. In addition to those reasons, the court
8 adds the following analysis. The court measures futility
9 under the same standard as a motion to dismiss under Rule
10 12(b)(6) of the Federal Rules of Civil Procedure. A
11 defendant may move to dismiss a complaint under that rule on
12 the ground that the complaint fails to state a claim upon
13 which relief can be granted. In order to state a claim upon
14 which relief can be granted, a complaint must contain, among
15 other things, "a short and plain statement of the claim
16 showing that the pleader is entitled to relief." The
17 requirement that a plaintiff show an entitlement to relief
18 means that a complaint must contain sufficient factual
19 matter, accepted as true, to state a claim to relief that is
20 plausible on its face. The issue to consider is not whether
21 plaintiff will ultimately prevail, but whether the claimant
22 is entitled to offer evidence to support the claims. In
23 other words, the court must determine whether the complaint
24 itself is legally sufficient.

25 In addition to reasserting the only claim remaining

1 for violations of the ADA, plaintiff's proposed third amended
2 complaint also seeks to add back in causes of action against
3 defendant in his individual and official capacity for alleged
4 constitutional violations pursuant to 42 U.S.C. Section 1983,
5 and she seeks retroactive injunctive and monetary relief for
6 these claims. However, these claims have already been
7 dismissed with prejudice per the court's decisions set forth
8 at Docket Numbers 47 and 73. The court has also denied an
9 earlier motion by plaintiff to amend her claims in a similar
10 manner per the court's order at Docket Number 103. This
11 current third proposed amended complaint attempts to restate
12 the claims against the defendant based upon his actions and
13 decisions as a Family Court judge. The court has already
14 determined in its order at Docket Number 47 at page 5 that
15 the defendant judge cannot be held liable to plaintiff based
16 upon his handling of the underlying Family Court matters and
17 decisions issued therein, as the doctrine of judicial
18 immunity applies to such actions. Claims against the
19 defendant in his official capacity pursuant to 42 U.S.C.
20 Section 1983 were also properly dismissed with prejudice
21 pursuant to the 11th Amendment sovereign immunity standard
22 and claims against the defendant judge in his individual
23 capacity were properly dismissed with prejudice pursuant to
24 the doctrine of judicial immunity. And for further
25 discussion on those issues, see Docket Number 47 at pages 4

1 and 5. Thus, this court has already determined that
2 plaintiff may not maintain claims against the defendant
3 Family Court judge in his official or individual capacity
4 pursuant to 42 U.S.C. Section 1983 because he is entitled to
5 sovereign immunity and judicial immunity.

6 I also note that the 11th Amendment does not permit
7 judgments against state officers, declaring that they
8 violated federal law in the past, and for that see *Puerto*
9 *Rico Aqueduct v. Metcalf* at 506 U.S. 139.

10 Furthermore, the newly proposed claims in the
11 proposed third amended complaint against the defendant in his
12 individual capacity for his judicial orders, actions, and
13 decisions issued in the underlying Family Court proceedings
14 clearly are for actions of the defendant performing his
15 judicial functions and thus are still barred by the doctrine
16 of judicial immunity. And for that see *Shtrauch v. Dowd* at
17 651 F.App'x 72. Nothing alleged in the current proposed
18 third amended complaint changes that or shows that defendant
19 was acting without jurisdiction or legal authority to preside
20 over the underlying Family Court action. Rather, as noted,
21 it's a further attempt to resurrect claims that were
22 previously dismissed with prejudice. As such, the claims are
23 futile and for that reason, the motion is denied.

24 The court also finds that the plaintiff's proposed
25 third amended complaint fails for reasons of undue prejudice

1 and delay. This action was commenced in 2017. Plaintiff has
2 had prior opportunities to amend her complaint per Docket
3 Numbers 47 and 93 and her last date to move to amend expired
4 on June 19, 2020, per the directives set forth in Docket
5 Number 93. The court allowed this current opportunity to
6 amend but plaintiff has shown no satisfactory reason for the
7 delay other than to assert that she previously appeared pro
8 se. However, the court does not find this to be good cause
9 for the delay since, similar to the previous motion to amend
10 made by the plaintiff while she was pro se, the current
11 motion to amend also ignored the court's prior directive set
12 forth in Docket Number 93 not to reassert claims previously
13 dismissed with prejudice. Additionally, it would be
14 prejudicial to the defendant to grant this motion since
15 defendant would again have to expend time and resources
16 moving to dismiss previously dismissed claims. As such, this
17 motion to amend made more than a year after the time to amend
18 expired and without good cause shown for the delay and after
19 prior amendments and which seeks to reassert claims
20 previously dismissed with prejudice is denied.

21 Turning now to the issue of the protective order
22 regarding defendant's testimony and the videotaping of that
23 testimony. The court at Docket Number 120 previously issued
24 a temporary protective order prohibiting "discussion of any
25 testimony or dissemination of the videotape or written

1 transcript of the deposition of defendant Anthony McGinty
2 beyond the existing parties to this action at this time until
3 further order of this court."

4 Plaintiff at Docket Number 124 has now requested
5 the court to remove the protective order. Defendant opposes
6 that request with submissions found at Docket Numbers 126 and
7 131. The deposition of defendant McGinty occurred on
8 August 20, 2021, and the deposition of plaintiff occurred on
9 August 5, 2021. Copies of both deposition transcripts have
10 been submitted to the court, per the court's direction, for
11 an in camera review in connection with plaintiff's request to
12 remove the protective order.

13 Federal Rule of Civil Procedure 26(c)(1) provides
14 that any party, for good cause, may seek a protective order
15 to preclude or limit discovery to protect a party or person
16 from annoyance, embarrassment, oppression, or undue burden or
17 expense. Before a protective order is issued, Rule 26(c)(1)
18 requires a showing of good cause. If good cause is not
19 shown, the discovery materials in question should not receive
20 judicial protection and therefore would be open to the public
21 for inspection. Broad allegations of harm, unsubstantiated
22 by specific examples or articulated reasoning, do not satisfy
23 the Rule 26(c) test. Instead, a party may meet its burden to
24 establish good cause by setting forth particular and specific
25 facts. And see *Rofail v. United States*, 227 F.R.D. 53. It's

1 well established that the party seeking a protective order
2 has the burden of showing that good cause exists for the
3 issuance of that order. The question of whether good cause
4 has been demonstrated is a fact-sensitive inquiry. If the
5 movant establishes good cause for the protection, the court
6 may balance the countervailing interests to determine whether
7 to exercise discretion and grant the order. These
8 countervailing interests might include whether the order will
9 prevent the threatened harm, whether there are less
10 restrictive means of preventing the threatened harm, the
11 interests of the party opposing the motion, and the interests
12 of the public.

13 In determining whether to grant the protective
14 order, a court should weigh the privacy rights of the parties
15 against the general public's interest in the information at
16 issue. However, there is no public right of access to
17 materials produced during the initial stages of discovery,
18 and it is well settled that courts have broad power to enter
19 protective orders under Rule 26(c) that prohibit parties from
20 sharing discovery materials with non-litigants.

21 Plaintiff argues that the deposition of defendant
22 is inherently public in nature and there's no basis for any
23 exception to apply in this case. However, while plaintiff is
24 correct that the common law right to inspect and copy
25 judicial records applies to any item entered into evidence at

1 a public session of a trial, the protective order here
2 applies to a discovery deposition, not trial evidence. To
3 support her request that the court should lift the protective
4 order regarding defendant's deposition, plaintiff cites
5 *United States v. Salerno*, 828 F.2d 958. However, that case
6 involved videotape deposition exhibits being introduced at a
7 public trial. The court noted that redaction of any
8 objectionable material would be made prior to the videotape
9 being admitted into evidence. No such safeguards are present
10 for a pretrial videotaped deposition being disseminated to
11 non-litigants before a trial, as plaintiff seeks to do here.

12 Defendant argues initially that plaintiff did not
13 give proper notice under Federal Rule of Civil Procedure
14 30(b)(3) prior to the deposition that it was going to be
15 videotaped. This appears correct based upon the parties'
16 submissions. However, that alone is not a reason to protect
17 the defendant's deposition video or transcript from
18 dissemination beyond the parties. Defendant further argues
19 that the plaintiff's purpose in publishing the video
20 recording of defendant's deposition and the transcript is to
21 annoy, harass, embarrass, or oppress defendant in order to
22 influence the outcome of her underlying Family Court matter.
23 To support that argument, plaintiff submitted an article at
24 Docket Number 131-1 from the *Daily Freeman*, a Kingston area
25 news publisher, in which plaintiff's attorney indicated he

1 was hoping the videotape deposition would be released and was
2 quoted as saying in reference to defendant, "They're holding
3 back." Defendant also argues that because he is a sworn
4 officer of the Ulster County Family Court, he is tasked with
5 adjudicating Family Court matters which impact families in
6 that county. He notes he has already received a threat
7 related to publicity of plaintiff's disclosures to the press
8 and that threat apparently required him to recuse himself
9 from the matter.

10 Given that information, the court finds that a
11 serious injury to defendant and/or to the adjudication of
12 matters in the Ulster County Family Court could result from
13 the disclosure of the transcript and videotape of the
14 deposition of defendant. This is more than a generalized
15 concern that plaintiff will publicize discovery materials
16 which may lead to embarrassment. Rather, it is a specific
17 clearly defined specific harm. As such, the court finds good
18 cause to keep the protective order in place regarding the
19 deposition of defendant, including the videotape and the
20 transcript. This directive is also limited in scope because
21 it only applies to the defendant's deposition and the
22 protective order is therefore warranted at this time.

23 Accordingly, plaintiff's motion to lift the stay
24 concerning the videotaped deposition of defendant and the
25 accompanying transcript of that deposition is denied. The

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protective order shall remain in place at this time.

(Whereupon the proceedings continued.)

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CERTIFICATE OF OFFICIAL REPORTER

I, JODI L. HIBBARD, RPR, CRR, CSR, Federal Official Realtime Court Reporter, in and for the United States District Court for the Northern District of New York, DO HEREBY CERTIFY that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 14th day of December, 2021.

/S/ JODI L. HIBBARD
JODI L. HIBBARD, RPR, CRR, CSR
Official U.S. Court Reporter