

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:09-cv-02802-REB- MEH

JEREMY C. MYERS,

Plaintiff,

v.

BRIAN KOOPMAN, in his individual capacity,

Defendant.

**DEFENDANT'S OBJECTION TO MAGISTRATE HEGARTY'S
ORDER RE: SCOPE OF DISCOVERY**

DEFENDANT Brian Koopman ("Koopman"), by and through his attorneys, the Loveland City Attorney's Office and Wick & Trautwein, LLC, and pursuant to Fed.R.Civ.P. 72(a) and 28 U.S.C. §636(b)(1), hereby objects to Magistrate Hegarty's Order [Docket #142], filed June 29, 2011, and Recommendation of United States Magistrate Judge [Docket #145], filed June 30, 2011, insofar as they pertain to the scope of discovery, and in support hereof states as follows:

D.C.COLO.LCivR. 7.1A Certificate

1. Per D.C.COLO.LCivR. 7.1A, undersigned defense counsel hereby certifies that he has conferred with Plaintiff's counsel. Plaintiff is opposed to the relief requested in this Objection.

BACKGROUND

2. This case involves a civil rights claim of malicious prosecution deriving from a search of Plaintiff's premises that occurred on September 7, 2007, and the

criminal prosecution of Plaintiff following the search. The Court in its Order Concerning Motions for Summary Judgment [Docket #126], filed February 11, 2011, denied without prejudice Koopman's Motion for Summary Judgment Based Upon Qualified Immunity and also ordered dismissed without prejudice the Complaint. The Court specifically provided in said Order that,

"If the Plaintiffs file an amended complaint, and they plead one or more of these claims adequately, then I will direct that discovery narrowly tailored to the qualified immunity issues be conducted."

Id. at 9.

"The Court, after considering the procedural circumstances that then existed, stated that,

"discovery that is tailored narrowly to determine only those facts needed to resolve the qualified immunity claims is appropriate."

Id. at 8-9.

3. Plaintiff, Jeremy Myers ("Myers"), filed an Amended Complaint and Jury Demand [Docket #127] on March 2, 2011. Defendants Koopman and City of Loveland filed their Defendants' Motion to Dismiss Plaintiff's Amended Complaint [Docket #128] on March 11, 2011. The Court entered its Order Concerning Defendants' Motion to Dismiss [Docket #140] on June 17, 2011. Therein the Court, after granting the Motion in part and denying it in part, simply stated with respect to discovery that "the stay on discovery in this case is LIFTED." *Id.* at 12.

4. During the Status Conference held before United States Magistrate Judge Michael E. Hegarty on June 29, 2011, Koopman's counsel requested Magistrate Hegarty limit the scope of discovery to that specified in the Court's Order Concerning

Motions for Summary Judgment [#126] discussed above, but Magistrate Hegarty declined to do so. On June 29, 2011, Magistrate Hegarty entered an order permitting apparently unrestricted discovery and imposed discovery and expert disclosure deadlines, including a general discovery deadline of October 31, 2011, with expert disclosure deadlines of September 15, 2011, for Plaintiff and October 15, 2011, for Defendant, followed by a dispositive motion deadline of November 30, 2011 [Docket #142]. On June 30, 2011, Magistrate Hegarty entered a Recommendation of Magistrate Judge [Docket #145] which requires Koopman file a motion concerning the scope of discovery at this stage of the proceedings.¹

STANDARD OF REVIEW

5. Fed.R.Civ.P.72(a) provides:

"A party may serve and file objections to the order within 14 days after being served with a copy. A party may not assign as error a defect in the order not timely objected to. The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law."

See also 28 U.S.C. §636(b)(1).

6. "A district judge reviewing a magistrate judge's order on a nondispositive matter must modify or set aside any portion of the order that is clearly erroneous or contrary to law." 14-72 Moores' Federal Practice—Civil §72.11. "The clearly erroneous standard . . . requires that the reviewing court affirm unless it 'on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458, 1464 (10th Cir. 1988) (quoting *United States v.*

¹ Koopman does not object to Magistrate Hegarty's recommendation that the Court enter an order vacating the September 26, 2011 trial date.

U.S. Gypsum Co. 333 U.S. 364, 395 (1948)). Here, Defendant objects to Magistrate Hegarty's ruling as to the scope of discovery. As this matter is "nondispositive," the clearly erroneous standard is the proper standard of review.

ARGUMENT

7. As this Court specifically noted in its "Order Concerning Motions for Summary Judgment [#126], in circumstances such as the Court has determined to be present here where Plaintiff has not had a sufficient opportunity to conduct discovery necessary for the Plaintiff to uncover facts relevant to the qualified immunity claim of Koopman, "discovery that is tailored narrowly to determine only those facts needed to resolve the qualified immunity claims is appropriate" (*citing Hansen v. PT Bank Negara Indonesia (Persero), TBK*, 601 F.3d 1059, 1064 (10th Cir. 2010); *Maxey by Maxey v. Fulton*, 890 F.2d 279, 282 (10th Cir. 1989)). The Court, in said order, while discussing the malicious prosecution claim (which is the sole claim for relief asserted in the Amended Complaint), focused on the factual issue which the Court presumably intended to be the scope of "narrowly tailored" discovery pertaining to Koopman, namely, the issue concerning whether or not Koopman, a member of the Loveland Police Department, knowingly included false information in the warrant affidavit and that, absent the false information, there was not probable cause for the search or for Myers' arrest. *Id.* at 11. With all due respect, Magistrate Hegarty's ruling was clearly erroneous in failing to limit the scope of discovery to that permitted by governing Tenth Circuit authority and the District Judge's earlier order.

8. The Tenth Circuit stated in *Hansen*, 601 F.3d at 1064:

"In the qualified immunity context . . . we have held that discovery orders 'which are narrowly tailored to uncover only those facts needed to rule on the immunity claim' are not immediately appealable because they do not subject the defendant to the burdensome pre-trial discovery that qualified immunity protects against."

Similarly, the Tenth Circuit in *Maxey*, 890 F.2d at 282-83, empowered district courts, when unable to rule on the qualified immunity defense without further clarification of the facts, to enter discovery orders which are "narrowly tailored to uncover only those facts needed to rule on the immunity claim"

9. Unless discovery in this case is "narrowly tailored" to uncover only those facts needed for the Court to rule on a full and final, and therefore dispositive, basis on Koopman's qualified immunity claim, Koopman would effectively lose his qualified immunity shield from "discovery which is either avoidable or overly broad." *Id.* at 282 (agreeing with *Lion Boulos v. Wilson*, 834 F.2d 504, 507 (5th Cir. 1987) and citing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), *Mitchell v. Forsyth* 472 U.S. 511 (1985) and *Jacquez v. Procunier*, 801 F.2d 789 (5th Cir. 1986)). Magistrate Hegarty's Order and Recommendation, however, is overly broad in that it requires Koopman lose his claimed exemption from avoidable, burdensome, pre-trial matters and falls outside of the rule of permissible "narrowly tailored" discovery necessary to decide the qualified immunity defense.

CONCLUSION

10. Magistrate Hegarty's ruling declining to limit the scope of permissible discovery in a "narrowly tailored" fashion to just discovery pertinent to Koopman's qualified immunity defense is clearly erroneous and contrary to law and must be reversed.

WHEREFORE, Defendant objects to Magistrate Hegarty's scope of discovery order and requests that this Court reverse Magistrate Hegarty's ruling and enter an Order reiterating this Court's prior direction that "discovery narrowly tailored to the qualified immunity issues be conducted." Given the circumstances, Koopman respectfully requests an expedited ruling.

DATED this 1st day of July, 2011.

WICK & TRAUTWEIN, LLC

LOVELAND CITY ATTORNEY'S OFFICE

By: s/Kent N. Campbell
Kent N. Campbell
Kimberly B. Schutt
323 S. College Avenue, Suite 3
Fort Collins, Colorado 80524
Telephone: (970) 482-4011
Fax: (970) 482-8929
kcampbell@wicklaw.com
kschutt@wicklaw.com
Attorneys for Defendant Brian
Koopman

By: s/John R. Duval
John R. Duval
500 East 3rd Street
Loveland, Colorado 80537
Telephone: (970) 962-2540
Fax: (970) 962-2900
duval@ci.loveland.co.us
Attorneys for Defendant Brian
Koopman

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2011, I electronically filed the foregoing DEFENDANT'S OBJECTION TO MAGISTRATE HEGARTY'S ORDER RE: SCOPE OF DISCOVERY with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

Randall R. Meyers, Esq.
315 W. Oak, Suite 100
Fort Collins, CO 80521
randy.meyers@att.net
Attorney for Plaintiff

s/Jennifer Jones
Legal Assistant to Kent N. Campbell