IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Civil Action No. 16-cv-2155-WJM-CBS

RAYMOND LYALL,
GARRY ANDERSON,
THOMAS PETERSON,
FREDRICK JACKSON,
BRIAN COOKS, and
WILLIAM PEPPER,

Plaintiffs,

v.

CITY OF DENVER, a municipal corporation,

Defendant.

ORDER ON MOTIONS REGARDING DATES & INCIDENTS THAT MAY BE EXPLORED AT TRIAL

Plaintiffs are homeless persons living on Denver's streets. Proceeding via 42 U.S.C. § 1983, they bring this class action lawsuit against Defendant "City of Denver" (actually, the City and County of Denver; hereinafter, "Denver"), arguing that Denver clears homeless encampments through unconstitutional "sweeps." For purposes of this lawsuit, those sweeps are defined as "the City and County of Denver's alleged custom or practice (written or unwritten) of sending ten or more employees or agents to clear away an encampment of multiple homeless persons by immediately seizing and discarding the property found there." *Lyall v. City of Denver*, 319 F.R.D. 558, 567 (D. Colo. 2017) (ECF No. 106) ("*Lyall I*"). A trial is scheduled to begin on March 18, 2019. (ECF No. 177.)

Currently before the Court are two interrelated motions. The first is Denver's Motion for Order Regarding Dates and Incidents at Issue for Trial. (ECF No. 179.) It is in the nature of a motion *in limine* and seeks a ruling that Plaintiffs may not introduce evidence of alleged sweeps beyond those that the Court deemed relevant in its summary judgment order, *Lyall v. City of Denver*, 2018 WL 1470197 (D. Colo. Mar. 26, 2018) (ECF No. 167) ("*Lyall II*").[1] The second motion is Plaintiffs' Motion to Amend the Final Pretrial Order. (ECF No. 187.) Plaintiffs seek to "amend the Final Pretrial Order to add the videographer who witnessed [an alleged sweep on July 9, 2018], and his video, so that they may be presented at trial to prove Denver's ongoing custom, policy, and practice." (*Id*. at 2.)

For the reasons explained below, the Court grants Denver's motion in part and denies it in part, and grants Plaintiff's motion with the proviso—proposed by Plaintiffs themselves—that no incidents beyond July 9, 2018 will be explored at trial.

I. ANALYSIS: DENVER'S MOTION

At summary judgment, the Court ruled that five alleged sweeps—those occurring on March 8 & 9 (essentially one sweep), March 25, July 13, November 15, and November 28, 2016—were probative of whether Denver has a policy or practice of performing mass sweeps in an unconstitutional manner. In the Final Pretrial Order, however, Plaintiffs announce their intent to introduce evidence regarding additional alleged sweeps that occurred on December 15, 2015, September 19, 2016, and June 1, November 13, and December 5, 2017. (ECF No. 175 at 5.) "Denver seeks relief in the

[1] Although Denver's motion is in the nature of a motion *in limine*, the Court requested that Denver file the motion in light of matters raised at the June 12, 2018 status conference. (*See* ECF No. 177 at 3.) As trial approaches, Denver remains free to file a motion *in limine* under WJM Revised Practice Standard III.F.

form of an order limiting the specific incidents which Plaintiff may present at trial to those which have been previously identified, which meet the Court's class definition, and for which discovery was conducted." (ECF No. 179 at 5.)

A. Significance of Summary Judgment Order

Drawing on the Court's summary judgment order, Plaintiffs insist that this Court already ruled that any alleged sweep may come into evidence, whenever it occurred (or occurs). (ECF No. 181 at 3, 6–8, 9.) Plaintiffs then insist that the law of the case doctrine prevents the Court from going back on that ruling. (*Id*. at 7, 13.)

Plaintiffs exaggerate the Court's prior ruling. Denver argued in summary judgment proceedings that, from its perspective, the sweeps alleged in the complaint established the scope of the lawsuit. (*See* ECF No. 152-1 at 7–9.) The Court disagreed. Because Plaintiffs are seeking an injunction against an allegedly ongoing practice, "[a]ll alleged sweeps, whenever they happened, are relevant" to the question of whether an ongoing practice exists and whether it will likely continue to affect Plaintiffs in the future. *Lyall II*, 2018 WL 1470197, at *7. "Indeed," the Court continued, "later-in-time incidents, including incidents that post-date the complaint, are particularly relevant . . . ." *Id*. But the Court also qualified this statement: "Even so, if this evidence truly came as a surprise to Denver, Denver may still have a claim of prejudice." *Id*. at *8. Accordingly, the question (with one exception, *see* Part I.B.1) is the prejudice to Denver if Plaintiffs may explore at trial events on the additional dates listed in the Final Pretrial Order.

B. Denver's Objections Regarding Specific Dates

1. <u>December 15, 2015</u>

The Court ruled at summary judgment that an alleged sweep on December 15,

2015 was not the sort of operation with which this lawsuit is concerned, nor was it "remotely probative of whether mass sweeps take place." *Lyall II*, 2018 WL 1470197, at *16. Plaintiffs nonetheless included it in the Final Pretrial Order in a list of sweeps allegedly evidencing an unconstitutional custom or practice. (ECF No. 175 at 5.)

In response to Denver's argument that the irrelevance of the December 15, 2015 event has already been decided, Plaintiffs offer nothing specific. But Plaintiffs appear to address this argument indirectly when they say,

> The Court did not ask for briefing as to whether evidence regarding the sweeps that were outlined in Plaintiffs' summary judgment motion and listed in the Final Pretrial Order can be introduced at trial. This Court has already decided that issue. [Citing the portion of the summary judgment order discussed in Part I.A, above.] And Denver should not be allowed to relitigate it, for the reasons discussed *infra* [presumably referring to law of the case].

(ECF No. 181 at 5 (citations omitted).)

This argument is difficult to understand. Regardless of whether the Court asked for briefing specifically about the alleged December 15, 2015 sweep, Denver has raised the issue and the Court has not struck Denver's motion (or that part of it). Nor does the Court find it an inappropriate issue to raise in this context. As for already deciding the issue, law of the case would dictate that the evidence of the December 15, 2015 incident be *excluded*, not included. The Court accordingly grants Denver's request to exclude evidence of the December 15, 2015 incident at trial.

2. <u>September 19, 2016 (Allegedly Derivative of August 20, 2016)</u>

The complaint alleges that a sweep occurred on August 20, 2016 "down [by] the Platte River." (ECF No. 54 ¶ 60.) After the close of discovery, Plaintiffs disclosed to Denver that an individual named Rafael Blanes had information regarding this sweep

(*see* ECF No. 181-2) and Plaintiffs also provided a declaration from Blanes regarding his memories from August 20, 2016 (ECF No. 181-1). The Magistrate Judge reopened discovery to permit Denver to depose Blanes. (*See* ECF No. 112.) Counsel for Denver represents, and Plaintiffs do not dispute, that Denver noticed Blanes's deposition but he did not appear. (ECF No. 179 at 4 n.3.) In summary judgment briefing, Plaintiffs did not include August 20, 2016 in their "chart outlin[ing] the evidence showing the unconstitutionality of numerous sweeps that occurred throughout 2015 and 2016." (ECF No. 143 at 30–32.) Unsurprisingly, therefore, the Court did not address August 20, 2016 in its summary judgment order, and that appeared to be the end of it.

However, Plaintiffs list Blanes on the Final Pretrial Order as a witness to a sweep that allegedly occurred on September 19, 2016. (ECF No. 175-1 at 10.) Denver argues that September 19, 2016 has never been at issue in this lawsuit and should have been disclosed long before, considering that the currently operative complaint was filed on October 17, 2016. (ECF No. 186 at 3–5.) In response, Plaintiffs casually announce in a footnote that the August 20, 2016 sweep "continued on September 19, 2016." (ECF No. 181 at 3 n.3.)

The Court grants this portion of Denver's motion for two reasons. First, the Court agrees with Denver that Plaintiffs never provided notice before the Final Pretrial Order (much less before the close of discovery) that September 19, 2016 might be at issue, or that the August 20, 2016 sweep—about which Plaintiffs have no evidence anyway—"continued" in some unspecified sense on September 19, 2016. Second, Blanes did not appear for his deposition, and the rule in this lawsuit has been that a witness who fails to appear for his or her deposition will not be permitted to testify at trial. (*See, e.g.*, ECF

No. 177 at 2.) Because Plaintiffs will have no witness to testify regarding September 19, 2016, Plaintiffs may not raise any incident alleged to have occurred on such date at trial.

3. June 1, 2017

The Court previously addressed Plaintiffs' inclusion of a June 1, 2017 alleged sweep in the Final Pretrial Order. At the June 12, 2018 status conference, the Court ordered that Denver could depose those witnesses designated to testify about the June 1, 2017 sweep whom Denver had not previously deposed. (ECF No. 177 at 2.) Denver represents that two of the three potential witnesses failed to appear for their depositions and that the third appeared but testified that she was not present at the alleged June 1, 2017 sweep. (ECF No. 186 at 7 & n.2.)

However, the Final Pretrial Order also alleges that two witnesses whom Denver *did* previously depose about a *July 2016* alleged sweep—Roy Browne and Mary Dotson—are prepared to testify about June 1, 2017. (ECF No. 175-1 at 5, 6.) Plaintiffs do not dispute Denver's assertion that it had no warning before Plaintiffs submitted their proposed portion of the Final Pretrial Order that Browne and Dotson had knowledge of a June 1, 2017 sweep. (ECF No. 186 at 6.) Denver further complains that it deposed Brown and Dotson about the July 2016 alleged sweep on July 15, 2017, two weeks after the alleged June 1, 2017 incident, but June 1, 2017 never came up in those depositions despite Denver asking each of them to describe all of the sweeps they could remember. (*Id*. at 6–7.)

Denver appears to have a strong basis to impeach Browne and Dotson regarding their memories of June 1, 2017. Under the circumstances, however, the Court does not

consider this to be enough, without more, to completely exclude June 1, 2017 from the scope of inquiry at trial. Rather, the Court finds it in the interest of justice to permit Denver to re-depose Browne and Dotson within 75 days of this order. As with the other alleged witnesses to the June 1, 2017 incident, Denver may notice those depositions and Plaintiffs will be responsible for producing Browne and Dotson. (*See* ECF No. 177 at 2.) If either fails to appear, he or she will not be permitted to testify at trial about the June 1, 2017 alleged sweep.

4. November 13 & December 5, 2017

The Final Pretrial Order asserts that sweeps happened on November 13 and December 5, 2017, but discloses no witness prepared to testify about either one—not even a hostile Denver witness that may have knowledge of the events (assuming they occurred). Obviously if Plaintiffs have no witness prepared to testify about a particular sweep, that sweep will not be a part of the upcoming trial. However, given the unique circumstances of the Plaintiff class, and Plaintiffs' burden to prove an ongoing practice and a likelihood that it will likely affect them in the future, the Court will grant Plaintiffs 30 days to disclose at least one witness regarding each date, and then Denver will receive 45 days to depose the witness(es). Denver need only notice the deposition(s) and it shall be Plaintiffs' responsibility to produce the witness(es) at the appointed time and location. Any witness that fails to appear for his or her deposition will not be permitted to testify at trial.

II. ANALYSIS: PLAINTIFF'S MOTION

Plaintiffs move to amend the Final Pretrial Order to add Guillermo Roques Escolar as a witness and to add a video he created as an exhibit. (ECF No. 187.) The

video, which Escolar posted on YouTube,[2] purports to show "ten or more Denver officials trash[ing] . . . an entire shopping cart full of one of Plaintiff Class Members' belongings" on July 9, 2018. (*Id*. at 1.) The video is frankly not clear about how many Denver employees were involved, to whom the shopping cart belonged, or whether this incident affected multiple homeless persons. In any event, the incident appears arguably similar to the March 25, 2016 incident that the Court previously ruled "has at least some tendency to prove that larger-scale operations with ten persons or more are occurring," *Lyall II*, 2018 WL 1470197, at *16, and so Escolar's personal knowledge of the incident appears arguably relevant.

"The court may modify the order issued after a final pretrial conference only to prevent manifest injustice." Fed. R. Civ. P. 16(e). "[T]he standard for modifying a final pretrial order is as high as it is to ensure everyone involved has sufficient incentive to fulfill the order's dual purposes of encouraging self-editing and providing reasonably fair disclosure to the court and opposing parties alike of their real trial intentions." *Monfore v. Phillips*, 778 F.3d 849, 851 (10th Cir. 2015). The "decision to amend or not to amend a pretrial order" is nonetheless within the district court's discretion. *Id*.

In the unique circumstances of this case, the Court finds the "manifest injustice" standard satisfied. As the Court has repeatedly noted above and in its summary judgment order, *see Lyall II*, 2018 WL 1470197, at *7, *13, Plaintiffs' case turns largely on proving an ongoing practice or custom, so later-in-time incidents are relevant. Furthermore, the incident in question took place on July 9, 2018, after entry of the Final Pretrial Order, so Plaintiffs could not have disclosed it earlier. *Cf*. *Davey v. Lockheed*

[2] *See* https://www.youtube.com/watch?v=7xQVJulQpaA.

Martin Corp., 301 F.3d 1204, 1208–12 (10th Cir. 2002) (reversing district court's unwillingness to permit amendment of the final pretrial order where a Supreme Court decision decided shortly before the trial gave the defendant a new potential affirmative defense, and factors such as trial disruption did not weigh in favor of denying amendment). There is also more than sufficient time to permit Denver to depose Escolar before trial. And finally, the Court accepts Plaintiffs' proposal that it "only allow evidence [at trial] of sweeps that have been disclosed up to this point in time" (ECF No. 181 at 5), meaning that the July 9, 2018 incident will be the latest-in-time event the Court will consider. This addresses Denver's legitimate worry about new allegations arising all the way through to the eve of trial, for which Denver will have insufficient time to prepare a defense.

Accordingly, Denver may depose Escolar within 75 days of the date of this order. As before, Denver need only notice his deposition and it shall be Plaintiffs' duty to produce him. If he does not appear, he may not testify at trial and his video will be excluded.

III. CONCLUSION

For the reasons set forth above, the Court ORDERS as follows:

1. Denver's Motion for Order Regarding Dates and Incidents at Issue for Trial (ECF No. 179) is GRANTED IN PART and DENIED IN PART to the following extent:
    a. Evidence and testimony regarding the December 15, 2015 and September 19, 2016 alleged sweeps is EXCLUDED;
    b. Denver may re-depose Roy Browne and Mary Dotson on or before **December 20, 2018** regarding the June 1, 2017 alleged sweep, and if

either appears at his or her deposition and confirms personal knowledge of a June 1, 2017 alleged sweep, or if Denver elects not to re-depose one or both of them, their respective testimony regarding that alleged sweep may be presented at trial;

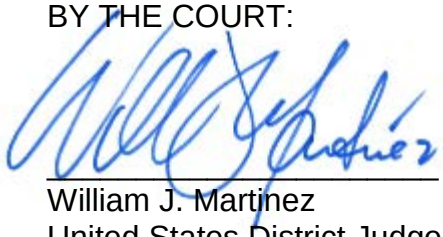
c. Plaintiffs may disclose a witness to the November 13, 2017 and/or December 5, 2017 alleged sweeps on or before **November 5, 2018**, and if Plaintiffs make such a disclosure, Denver may depose any of those disclosed persons on or before **December 20, 2018**. If the witness appears at the deposition and confirms personal knowledge of at least one of those alleged sweeps, or if Denver elects not to depose the witness, Plaintiffs may include the witness on their final witness list submitted under WJM Revised Practice Standard IV.B.4.a; and

2. Plaintiffs' Motion to Amend the Final Pretrial Order (ECF No. 187) is GRANTED on condition that Denver may depose Guillermo Roques Escolar on or before **December 20, 2018**. If Escolar appears at his deposition and confirms knowledge of the July 9, 2018 alleged sweep, or if Denver elects not to depose Escolar, Plaintiffs may include Escolar as a witness on the final witness list Plaintiffs must file prior to the Final Trial Preparation Conference, *see* WJM Revised Practice Standard IV.B.4.a, and may include Escolar's video on the final exhibit list, *see id*. at IV.B.4.b; and

3. The upcoming trial will not explore alleged sweeps occurring after **July 9, 2018.**

Dated this 5th day of October, 2018.

BY THE COURT:



William J. Martínez
United States District Judge