UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

MARY M. LOMBARDO, individually and on behalf of all others similarly situated,

Plaintiff,

-vs- **Case No. 6:11-cv-1701-Orl-DAB**

CITY OF COCOA BEACH, AMERICAN TRAFFIC SOLUTIONS, LLC, and ATS AMERICAN TRAFFIC SOLUTIONS, INC.

Defendants.

ORDER

This cause came on for consideration without oral argument[1] on the following motions filed herein:

MOTION:	**MOTION TO AMEND SECOND AMENDED COMPLAINT (Doc. 43)**
FILED:	**March 8, 2012**
THEREON it is **ORDERED** that the motion is **GRANTED**.	

MOTION:	**MOTION TO REMAND (Doc. 45)**
FILED:	**March 9, 2012**
THEREON it is **ORDERED** that the motion is **GRANTED**.	

Plaintiff Mary Lombardo filed a class-action suit against Defendants City of Cocoa Beach and Defendants American Traffic Solutions and ATS American Traffic Solutions, Inc. challenging

[1]A Case Management and Scheduling Conference was held on March 13, 2012.

Florida's statute allowing camera-based enforcement of red-light violations as unconstitutional. Following the City's removal of the case from state court. The City moved to dismiss Plaintiff's Second Amended Complaint, arguing that Plaintiff failed to state a claim under the United States Constitution and under state law. Doc. 20. Plaintiff now seeks to amend her complaint to delete the federal claims and pursue only state remedies, as well as to add the Florida Department of Revenue[2] as a Defendant in a third amended complaint. Anticipating that the Court would allow Plaintiff to voluntarily dismiss her federal claims, Plaintiff also moved for remand of the case to state court. Because the Court finds that Plaintiff's amendment is timely filed, not in bad faith and not futile, the Motion to Amend is **GRANTED,** and the case will be remanded to state court.

Procedural Background[3]

On June 21, 2011 in state court, Plaintiff Mary Lombardo filed a class-action suit against Defendant City of Cocoa Beach challenging Florida Statute § 316.0083[4] allowing camera-based enforcement of red-light violations based on inadmissible hearsay. Doc. 1-1. In the Complaint for Injunctive Relief, Plaintiff alleged that the County Court of Brevard County had in fact already ruled on April 6, 2011, in an identical prosecution for alleged violation of a red light signal with the identical witness for the City, that the red-light citation was based on hearsay, and the court had granted an involuntary dismissal of the traffic citation. Doc. 1-1. On July 8, 2011, Defendant City of Cocoa Beach moved to dismiss Plaintiff's claims based on "longstanding Florida Supreme Court precedent" holding that when an individual voluntarily pays a fine issued under a city ordinance, the person is precluded from later seeking the return of those monies." Doc. 1-1 at 13-15 (citing *City of*

[2]Defendants have no objection to the addition of Florida Department of Revenue.

[3]An extended description of the history of the lawsuit, and the rulings, in state court is necessary given Defendants' argument that federal law and not state law controls in this case.

[4]The statute is called the "Mark Wandall Traffic Safety Program." Doc. 1-1.

Miami v. Keaton, 115 Soc.2d 547 (Fla. 1959) ("voluntary payment defense)). Defendant City also argued that Plaintiff's Complaint failed to meet the requirements for issuance of an injunction under Florida law. Doc. 1-1 at 16-17 (citing Florida District Court of Appeal caselaw). On August 31, 2011, the state circuit court judge granted the City's Motion to Dismiss and allowed Plaintiff thirty days in which to file an Amended Complaint, which Plaintiff had extended by another seven days. Doc. 1-1 at 29.

On October 12, 2011, Plaintiff subsequently amended the lawsuit to assert additional claims and to add the third-party company operating the red light cameras and processing the citations, Defendants American Traffic Solutions and ATS American Traffic Solutions, Inc. Doc. 3 (Class Action - First Amended Complaint for Civil Damages and Declaratory Relief). Plaintiff challenged the red-light traffic citation for violating the City's Ordinance, Ch. 26, Art. 3 Section 26-32 through 26-46 entitled, "Intersection Safety" (the "Ordinance"). Doc. 3 ¶ 1 (citing Ord. No. 1518 § 2, September 2, 2010). Plaintiff pled that the City's citation of Plaintiff (and other putative class members) based on their presumed guilt for violation of the Ordinance–merely by reason of their ownership of the vehicle that allegedly violated the red light signal, and the requirement that they prove they were not driving the vehicle at the time of the offense–violated the Constitution of the State of Florida and general law, and involved "the deprivation of the Plaintiff's constitutional and statutory rights." Doc. 3 ¶ 3, 20, 23(b). Plaintiff also alleged (for the first time) that the Ordinance and Florida Statute § 316.075 violated Plaintiff's right to due process pursuant to Fifth and Sixth Amendments of the United States Constitution and the State Constitution, Art. I § 9 and § 16, which provide for the reasonable cross-examination of witnesses, as well as the Florida evidence code. Doc. 3 ¶ 37-39. Plaintiff alleged additional violations of constitutional provisions for the right against self-incrimination and limitation of defenses and the shifting of the burden of proof. Doc. 3 at 9-10.

Plaintiff also asserted state tort claims and sought equitable relief in the form of restitution and declaratory relief. Doc. 3 at 10-13.

Defendant City timely removed the case from state court on October 21, 2011 on the basis of 28 U.S.C. § 1331, federal question jurisdiction, and § 1343(a)(3), civil rights deprivation, based on Plaintiff's allegations that the City violated the Fifth and Sixth Amendments to the United States Constitution. The City also asked the Court to exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a) over Plaintiff's state law constitutional, tort and equitable relief claims in Plaintiff's First Amended Complaint. Doc. 1-3. On November 21, 2011, the City moved to dismiss Plaintiff's Second Amended Complaint, arguing that Plaintiff failed to state a claim on which relief can be granted. Doc. 20. The City argued that Plaintiff had failed to seek the appropriate type of relief under the United States Constitution and Plaintiff had a heavy burden of proving it was facially unconstitutional, principally because the Ordinance is a non-criminal, non-moving violation with civil penalties; thus, the Fifth and Sixth Amendment rights would not apply. Doc. 20 at 9-10. The City also argued that Plaintiff failed to state a claim on her state and common law claims. Doc. 20.

On March 8, 2012, Plaintiff moved to amend her complaint to delete the federal claims and pursue only state remedies in a third amended complaint. Doc. 43. Plaintiff also moved, in the event that the Court allowed her to voluntarily dismiss her federal claims, for remand of the case to state court. Doc. 45.

ANALYSIS

Standard for Amendment of Complaint

Federal Rule of Civil Procedure 15(a) allows a party to amend its pleadings "by leave of court" and directs that "leave shall be freely given when justice so requires." The Eleventh Circuit has observed, "[t]he policy of the federal rules is to permit liberal amendment to facilitate

determination of claims on the merits." *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 598 (11th Cir. 1981). To further this policy, generally a district court may deny a motion for leave to amend only if there is a "substantial reason." *Id.* Generally, "[a] district court need not . . . allow an amendment (1) where there has been undue delay, bad faith, dilatory motive, or repeated failure to cure deficiencies by amendments previously allowed; (2) where allowing amendment would cause undue prejudice to the opposing party; or (3) where amendment would be futile." *Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001). The liberal amendment policy of Rule 15(a) is also bounded by the deadlines set forth in the trial court's scheduling order entered pursuant to Federal Rule of Civil Procedure 16. Fed. R. Civ. P. 16(b) (mandating that a district court "enter a scheduling order that limits the time . . . to amend the pleadings.").

Defendants argue that even if Plaintiff is allowed to amend her complaint, the case should not be remanded because it was properly removed based on federal question jurisdiction that existed at the time that the City removed the First Amended Complaint. The City is correct that the Court must look to the claims in the operative complaint at the time of removal, and in this case, federal question jurisdiction did exist at that time. *See Pintando v. Miami-Dade Housing Agency*, 501 F.3d 1241, 1243 n.2 (11th Cir. 2007) (the district court determines whether it had subject matter jurisdiction at the time of removal and later changes to the pleadings do not impact the court's exercise of that jurisdiction).

However, the City's arguments for the Court to retain jurisdiction are considered in light of § 1367(c)(3) which allows remand to the state court where the federal claim from the original complaint has been eliminated by the amended complaint. 28 U.S.C. § 1367(c)(3) ("The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . (3) the district court has dismissed all claims over which it has original jurisdiction."). The court may decline to continue its exercise of supplemental jurisdiction where Plaintiff has dismissed her federal claims

because "no basis for federal jurisdiction presently exists." *Cook ex rel. Estate of Tessier v. Sheriff of Monroe County, Fla.*, 402 F.3d 1092, 1123 (11th Cir. 2005). "In making this decision, the court 'should take into account concerns of comity, judicial economy, convenience, fairness, and the like.'" *Id.* (quoting *Lewis v. City of St. Petersburg*, 260 F.3d 1260, 1267 (11th Cir. 2001)); *see also Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 351 (1988) (allowing remand "when the exercise of [supplemental] jurisdiction is inappropriate."), *superseded by statute as stated in Parker v. Scrap Metal Processors, Inc.*, 468 F.3d 733, 745 (11th Cir. 2006) (recognizing that case was decided before supplemental jurisdiction was codified, but that Supreme Court referred to the principle which would become § 1367(c)(3)).

Other district courts in the Eleventh Circuit have held that remand is appropriate pursuant to § 1367 when a case is in the earliest stages and comity weighs in favor of remand because the remaining claims raise state constitutional issues. *See, e.g., Shelley v. City of Headland*, Case No. 1:09-cv-509WKW, 2009 WL 2171898 (M.D. Ala. July 21, 2009) (remanding case in which plaintiff amended very early in the pleadings and the only remaining claim was a state-law constitutional claim involving a city zoning ordinance); *see also Lake County v. NRG/Recovery Group, Inc.*, 144 F.Supp.2d 1316, 1319 (M.D. Fla. 2001) (remanding case because the case and discovery were in the very early stages and comity weighed in favor of remand among other factors).

This case, although removed several months ago, is still in its earliest stages. The parties have filed the Case Management Report, but the Court has not yet entered a Case Management and Scheduling Order. Instead, the Court held a Scheduling Conference on March 13, 2012, when the

parties discussed their positions[5] on Plaintiff's Motions to Amend and Remand. The Court deferred entering the CMSO until this remand issue was decided. *See* Doc. 47.

In the parties' Case Management Report, however, the parties had agreed to a deadline for amended pleadings of March 23, 2012. Doc. 38. Plaintiff's Motion to Amend was timely filed before the parties' agreed deadline for motions to amend, and it will not be denied as untimely. Moreover, it is still "very early" in the case – discovery has not even begun, no trial date has been set, and the Case Management and Scheduling Order has yet to be entered. *Carnegie-Mellon*, 484 U.S. at 351, 108 S.Ct. at 619 (holding that "[w]hen the single federal law claim in the action [is] eliminated at an early stage of the litigation, the district court [has] a powerful reason to choose not to continue to exercise jurisdiction").

Defendants' arguments that Plaintiff's proposed complaint is "a moving target" or suggesting "new theories" is equally unavailing because Plaintiff is *deleting* the federal claims, and not adding them. As to the state claims she asserts, they allege theories for violation of the Florida Constitution and § 316.640 – both already at issue in the operative Second Amended Complaint. The Court need not address the issue of the futility of the amendment of the state claims or whether they would fail to state a claim for relief, which will be decided by the state court, except to point out that Plaintiff's additional state court claims merely expand on her existing constitutional claims challenging the same Ordinance and § Florida Statute § 316.0083, and do not add any unique claims challenging any other newly-asserted state statute or constitutional provision.

The fact that a case is still in the early stages of the proceeding weighs in favor of remand. "'When federal law claims have dropped out of the lawsuit in its early stages and only state-law

[5]When the issue was discussed at the Case Management and Scheduling Conference on March 13, 2012, Defendants had not yet filed their Response but stated their intention to oppose the Motions.

claims remain, the federal court should decline the exercise of jurisdiction,'" *Baggett v. First Nat. Bank of Gainesville*, 117 F.3d 1342, 1353 (11th Cir. 1997) (quoting *Carnegie-Mellon Univ.*, 484 U.S. 343, 108 S.Ct. 614, 98 L.Ed.2d 720)); *Shelley v. City of Headland*, Case No. 1:09-cv-509WKW, 2009 WL 2171898 (M.D. Ala. July 21, 2009) (remanding where plaintiff amended very early in the pleadings); *Lake County v. NRG/Recovery Group, Inc.*, 144 F.Supp.2d 1316, 1319 (M.D. Fla. 2001) (remanding where the case and discovery were in the very early stages and the federal court had not expended a significant amount of judicial labor).

Moreover, in this case, Plaintiff will have only state constitutional and tort law claims remaining and those are optimally decided by the state court, particularly here, where a county court judge as already invalidated red-light camera citations based on the exact same Ordinance. Defendants argue that the Court should retain jurisdiction over Plaintiff's state law claims because "[t]here is no weighty state interest in deciding" the state law constitutional claims that Plaintiff asserts where they "follow [in] form the federal claims she seeks to delete." Doc. 48 at 10. Defendants cite no authority or case that the Court should retain jurisdiction over Plaintiff's *purely state* constitutional claims specifically to decide them under *federal* constitutional standards. Defendants argue the Court should decline to remand the case because the "Florida Constitution's self-incrimination and confrontation provisions use language that is nearly identical to the Fifth and Sixth Amendment provisions upon which they are based," and their scope is "coextensive with that of the Fifth and Sixth Amendments." Doc. 48 at 3-4.

Defendants' arguments conflict very strongly with established principles of comity that are present in this case. It is far better for the state courts to decide the issues of state constitutional law, and potentially be in a position to resolve any conflicting issues within the state appellate courts for other challenges to the constitutionality of the authorizing Florida statute or local ordinances

authorizing the use of red-light cameras.[6] This factor, and the fact that this is a putative class-action for thousands who received tickets in Brevard County, makes this case easily distinguishable from those cited by Defendants which only involved individual plaintiff's claims for violations for employment discrimination and breach of contract which did not raise any comity concerns. Doc. 48 at 7-8 (citing *Young v. Roy's Restaurant*, Case No. 6:06-cv-178-Orl-19JGG, 2006 WL 2024946 at *2 (M.D. Fla. July 17, 2006) and *Lieu v. Sandy Sansing Cars, Inc.*, No. 3:07-cv-345-MCR/MD, 2007 WL 4287642 (N.D. Fla. Dec. 5, 2007). The state court will also be in a better position to consider state law issues (for example, statutory interpretation and waiver) that may resolve this case without reaching the constitutional issues.

Defendants also argue that Plaintiff moves to amend in bad faith and that by seeking to delete her federal claims, "the proposed amendment is a tactical effort to manipulate the Court's jurisdiction." Doc. 48 at 10. In citing to cases illustrating bad faith, Defendants concede they are citing to cases which are based on *diversity* jurisdiction, and argue that "[a]lthough diversity removals operate under a different statute, the underlying principle should be no different in a federal question case." Doc. 48 at 10. By focusing on a different type of jurisdiction, Defendants fail to rely on the proper line of authority.

Another district court considering remand where the plaintiff dropped her federal constitutional challenge to an ordinance and left only state constitutional claims, the city argued against remand as "forum manipulation," and in rejecting that argument, the district court relied on Supreme Court precedent in finding there was no prohibition on remand under the circumstances:

[6]In September 2010, there were at least 26 lawsuits filed throughout the state aimed at invalidating the use of red light cameras. *See "Lawsuit Seeks To Invalidate Red Light Camera Law,"* The Palm Beach Post, www.palmbeachpost.com article, Sept. 9, 2010 (visited April 6, 2010).

> Although forum "manipulation" is a "legitimate and serious" concern when a plaintiff dismisses the federal claims that were the basis for federal jurisdiction and moves to remand, that concern does not require a "blanket prohibition on remands when the federal district court's jurisdiction over a case is inherently discretionary." *Carnegie-Melon Univ.*, 484 U.S. at 356 n. 12. "A district court can consider whether the plaintiff has engaged in any manipulative tactics when it decides whether to remand a case" but that "behavior" is only taken into account as part of "the balance of factors" for determining whether remand is appropriate. *Id*. at 357. There is no "categorical prohibition" on remanding in these circumstances " regardless of whether the plaintiff has attempted to manipulate the forum." *Id*. (emphasis added).

Shelley, 2009 WL 2171898, *2 (citing *Carnegie-Melon Univ.*, 484 U.S. at 356 n. 12). On the whole, in balancing the various factors, the Court find that remand is appropriate here where the case is in the very earliest stages and there is no judicial economy in having this federal court continue the case, and comity concerns weigh heavily in its favor of remand to the state court to decide the fate of the use of red-light cameras. The parties did not discuss convenience of the parties but that weighs slightly in favor of remand in that Plaintiff and the City are located in Brevard County and this court is an hour away in Orange County; for the out-of-state Defendants, the difference for convenience's sake is negligible.

Accordingly, Plaintiff's Motion to Amend is **GRANTED** and the Third Amended Complaint (Doc. 44) is deemed timely filed. However, Plaintiff is estopped and barred from reasserting any constitutional claim under the United States Constitution in a future pleading following remand.

This case is **REMANDED** to the Eighteenth Judicial Circuit, Brevard County, Florida, Case Number 2011-CA-14614. The Motions to Dismiss the Second Amended Complaint (Docs. 20 and 29) are **DENIED** without prejudice as moot. No fees to be awarded.

DONE and **ORDERED** in Orlando, Florida on April 12, 2012.

David A. Baker

DAVID A. BAKER
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Parties