

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

FILED
U. S. DISTRICT COURT
DISTRICT OF NEBRASKA

93 NOV 19 AM 11:56

ROBERT J. EBEL
CLERK
CB

PAUL A. BONACCI,)
Plaintiff,) 4:CV91-3037
v.)
THE CATHOLIC ARCHBISHOP)
OF OMAHA, et al.,) MEMORANDUM AND ORDER
Defendants.)

Having now conferred with court personnel and received the suggestions of counsel, the following procedures are adopted for the viewing of the materials described in the order of September 9, 1993.

IT IS ORDERED:

I. CUSTODY AND POSSESSION LIST; ACCESS;

1. The "Materials" shall remain under seal in the possession and custody of the Court until further order of the Court.

2. The clerk shall deliver to counsel for each party the listing of the items which constitute the "Materials," previously provided by the defendant City, but the clerk shall first expunge from the City's listing the name(s) of any person and any detail as to the contents of the documents or what is portrayed by the film, tape or photo, that would reveal the identity of any party or other person. For this purpose, the clerk may identify the items, or in appropriate cases, groups of items, by numbering them for purposes of subsequent identification; this amended list, herein called "Materials List" or "List" is used to identify items of the materials in these proceedings. The City's listing and the List, as amended, shall be subject to the non-disclosure provisions of the order of September 9, 1993.

3. Counsel of record for the parties, members and regular employees of counsel's firms thereof whose assistance had been certified by counsel in writing as required by counsel for the preparation of trial of this action (called "counsel's affiliates") and outside or independent expert witnesses and consultants who are certified by counsel in writing to have been retained for services in connection with this action (called "counsel's experts") shall be the only persons to whom access to the materials is permitted, subject to further order of the court. Access to said persons shall be permitted only in accordance with procedures established by the clerk and upon the following conditions:

(a) No person shall be permitted access to the "material" unless he or she shall have presented to the clerk an "Acknowledgment" in the form of a copy of the order of this Court entered September 9, 1993, with an endorsement thereon, signed by the person seeking access, as follows:

ACKNOWLEDGMENT

"Undersigned, representing him/herself to be counsel of record, affiliate of counsel or counsel's expert (strike two) declare and affirm that I have read the order of this court entered September 9, 1993, to a copy of which this endorsement is appended, that I understand the said order and its restrictions against disclosure of the materials described therein or information or knowledge derived from such materials, and that I expressly agree to be bound by the provisions of said order.

Dated _____, 199__.

Signature

Printed Name

Undersigned, _____,
counsel of record for _____,
a party _____ in the above-
captioned action, certify that
_____, being the person who
executed the foregoing endorsement, is an
"affiliate"/"expert" (strike one) of counsel
as that term is defined in the order of this
court dated _____, 1993,
and the provisions of this paragraph 3 above.

Dated _____, 199__.

Signature of Counsel of Record

Printed Name

(b) Each person who shall request access to the "Materials" shall arrange the date and time with the clerk at least five working days in advance of the viewing, and shall give each other party not less than four working days notice of the date and time in the manner provided for service of notice of deposition on oral examination. The clerk shall be given a copy of such notice.

(c) Access to Material shall be had only in the office of the clerk or at some other location in the Robert V. Denney Federal Building and Courthouse as designated by the clerk. Equipment for viewing shall be that available at the clerk's office; however, if such equipment is not capable of being used for the materials, counsel shall obtain appropriate equipment at the expense of the party or parties who desire to view those materials. Access shall be limited to those times when clerk's office staff is available.

(d) The clerk shall make a record of each viewing of the materials, or other access thereto, which shall include: the date, beginning and ending times, and place of the view or access; the name of each person who viewed the "Materials" or part of them; a list of the items viewed by such person(s); and the name of each other person present at any time during such viewing.

(e) The clerk or his designee shall be continuously present at all viewing or examinations of the "Materials" by any person.

(f) In addition, a party to this action may receive a copy of the Materials List to be prepared by the clerk, provided that such party shall have executed and delivered to the clerk the "Acknowledgment" form provided at subparagraph (a) above; if such party is not an individual, the Acknowledgment shall be signed by an officer of such party, who shall be personally responsible for performance of the provisions of the Acknowledgment and the court's order therein referenced.

4. No person other than the clerk, acting under the direction of the court, shall make any machine, photographic, or other copy, duplicate or replica of any item or any part of any item of the "Materials," provided, a paper printout of the contents of the computer disks may be created by the clerk, which printout shall be treated as part of the material subject to the order of court of September 9, 1993, and provisions hereof. Counsel, counsel's affiliates and counsel's experts may make notes relating to the material, which notes shall be subject to the provisions of this

order and the protective order entered September 9, 1993, to the same extent as the "Material." No tracings, drawings or verbatim copies of any document or other material shall be made.

Should counsel for a party deem it necessary that a copy of an item or items of the "Materials" be made for the purpose of further discovery or for use by an expert in preparation for expert testimony, such counsel may request such copy(ies) by appropriate motion to the court, which shall set forth the item or items requested to be copied, a statement of the basis upon which counsel contends that a copy of such item or items will lead to the discovery of admissible evidence or a statement of the nature of such experts' testimony and an explanation of why such copy is necessary, whichever may be applicable. Notice of such motion shall be given to each other party in the manner required by the local rules. Such motions shall be filed under seal and shall remain sealed until ordered otherwise. Responses to such motions shall be submitted to the undersigned magistrate judge within five working days of the service of the motions and shall address the propriety of keeping the motions and related filings sealed.

If leave is granted to copy any item or items of the Materials, counsel to whom leave is granted shall: (i) before the items are delivered to counsel, deliver to the clerk (and serve copies on all other parties) counsel's signed affirmation that he/she will protect such items against disclosure to any person other than those authorized by the order of the court granting leave to make copies; and (ii) protect the integrity of the item and any copies made; and (iii) prior to exhibiting a copy of any item to any such person, obtain from such person the written acknowledgment for compliance with the court's non-disclosure order of September 9, 1993, in the form prescribed at paragraph I.3(a) above, which shall be submitted to the clerk, and copies served on all other parties, within three days of the date such acknowledgment is executed, and prior to disclosure to such person.

5. No person shall write or mark upon any item of the "Materials" nor in any way alter or change any item. No item of the "Materials" shall be removed from the custody of the clerk. No other document, photo, video tape, film or other article shall be inserted in the "Materials" by any person.

The clerk is authorized to inspect any file, briefcase and/or items carried by counsel to or from the place of viewing, including notes and memoranda made while viewing, both before and after the viewing, and to deny access to any person carrying any item into the room in which the viewing will take place or to confiscate any item being removed if the viewing has taken place if the clerk has reasonable grounds to believe there will be or has been a violation of this provision or the order of September 9, 1993.

II. PROCEDURE FOR VIEWING

1. Initial Viewing. Plaintiff's motion having been granted, counsel for plaintiff shall have access to the "Materials" for the purpose of viewing and inspecting same on a date and at a time to be arranged with the clerk of the court, upon compliance with the provisions of this order. Plaintiff shall serve notice of the dates and time of the viewing and the place thereof as designated by the clerk, in accordance with the applicable rules for oral depositions. Counsel for any defendant shall be entitled to attend and view the materials, and shall notify the clerk of their intention to do so at least two days before the viewing.

(a) Within 30 days of the completion of the initial viewing, counsel for any viewing party shall serve upon counsel for other parties a Designation of each item of the "Materials," if any, identified according to the description in the Materials List, which the designating party proposes to offer in evidence at the trial of this action. The Designation shall include a detailed statement of the facts, including the name of any party to this action who is named, identified or photographed in the designated item, which the designating party contends are disclosed by each item of the "Materials" which are relied upon to demonstrate the relevance of that item, together with an explanation or argument of the basis for the claim of relevance. Such Designation shall be served by U.S. Mail addressed to other counsel, marked "Confidential, To Be Opened By Addressee Only," shall be filed under seal, and shall be subject to the non-disclosure provisions of the order of September 9, 1993.

(b) The other parties shall be allowed 10 days following service of the Designation and statement in which to serve preliminary objections and a supporting brief to any or all items identified as items which the designating party proposes to offer in evidence at trial. Such objections shall be limited to relevance matters of competence, foundation and other objections shall be reserved for later determination.

Subsequent Viewing. After the initial viewing by plaintiff's counsel and electing counsel for defendants and viewing of designated items of material as provided by paragraph 1 above, neither counsel nor counsel's affiliates shall be permitted further viewing except upon a showing of good cause, except that each party may have a further viewing of designated items for the benefit and use of counsel's experts or consultants. The court may impose a reasonable charge to compensate the clerk for the cost of supervision of such viewing. Repeat viewings by a person previously designated as a counsel's expert shall require a further

showing of good cause and shall be subject to imposition of a fee as above provided.

III. COOPERATION

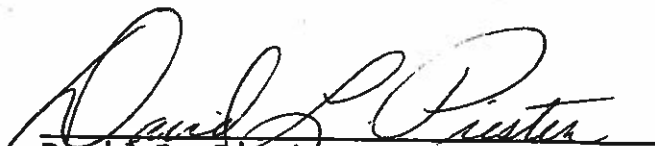
Counsel shall, consistent with the responsibility to represent their respective clients, cooperate to the end that the integrity of the materials shall be preserved, the opportunities for disclosure shall be reduced to a minimum, and unnecessary and undue burden and expense not be imposed upon the court, the clerk or counsel. Counsel shall refrain from frivolous designation of items as relevant, and from frivolous objections. All designations of items and objections to designations shall be signed by counsel and considered "other papers," as provided by Fed.R.Civ.P. Rule 11, and any party may move for sanctions under said rule if a designation or objection to an item is not well grounded in fact or warranted by existing law or a good-faith argument in accordance with Fed.R.Civ.P Rule 11.

IV. The following items shall be retained by the clerk, but need not be made a part of the court file, unless they become relevant to the resolution of a motion before the court:

- "certifications" under para. I.3.
- "acknowledgments" under para. I.3.(a)
- "notice" under para. I.3(b)
- "records" under para. I.3.(d)
- "affirmations" under para. I.4.(3)
- "acknowledgment" under para. I.4.(3)
- "plaintiff's notice" under para. II.1.
- "defendant's notice" under para. II.1.
- "designation" under para. II.(a)
- "objection" under para. II.(a)

Dated November 19, 1993.

BY THE COURT


David L. Piester
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

FILED 118
U. S. DISTRICT COURT
DISTRICT OF NEBRASKA

93 OCT -8 PM 12: 52

PAUL A. BONACCI,

Plaintiff,

vs.

THE CATHOLIC ARCHBISHOP OF
OMAHA, et al.,

Defendants.

)
)
)
)
)
)
)
)
)
)
)

CV 91-3037 NORBERT H. EBEL
CLERK *nmf*

MOTION TO DISMISS

COME NOW defendants Wadman, Bovasso and Hoch and move the Court for an order dismissing them from this lawsuit based upon their entitlement, as a matter of law, to qualified immunity.

ROBERT WADMAN, KENNETH BOVASSO,
and MICHAEL HOCH, Defendants,

By Wendy Hahn
WENDY E. HAHN, No. 17695
Assistant City Attorney
804 Omaha/Douglas Civic Center
1819 Farnam Street
Omaha, Nebraska 68183
Telephone: 402/444-5115

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing MOTION TO DISMISS was sent by regular United States mail, postage prepaid, on this 7th day of October, 1993, to:

John W. DeCamp
DeCamp Legal Services, P.C.
414 So. 11th Street
Lincoln, NE 68508

Lyle Koenig
Attorney at Law
147 N. 4th Street
P.O. Box 48
Hebron, NE 68370

FILED
U. S. DISTRICT COURT
DISTRICT OF NEBRASKA
93 SEP 29 AM 11:25 -115

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

PAUL A. BONACCI,)
)
 Plaintiff,)
)
 vs.)
)
 THE CATHOLIC ARCHBISHOP OF)
 OMAHA, et al.,)
)
 Defendants.)

4:CV91-3037
MEMORANDUM AND ORDER ON
DEFENDANTS' MOTION
TO DISMISS CONSPIRACY CLAIM
PURSUANT TO 42 U.S.C. § 1985(3)

ROBERT H. EBEL
CLERK *gm*

Pursuant to Rules 8 and 12(b)(6) of the Federal Rules of Civil Procedure, defendants Omaha Police Department and Detectives Hoch and Bovasso have filed a motion to dismiss the § 1985(3) conspiracy claim against them. Filing 102. The defendants claim that the plaintiff's conspiracy claim is comprised merely of conclusional statements and fails to specify facts which show a meeting of minds between the alleged conspirators. The plaintiff asserts that he has alleged sufficient facts to withstand a motion to dismiss.

"[A] motion to dismiss a complaint should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief." Morton v. Becker, 793 F.2d 185, 187 (8th Cir. 1986). In resolving motions to dismiss, I "must take the well-pleaded allegations of the complaint as true, and construe the complaint, and the reasonable inferences arising therefrom, most favorably to the pleader." Id. Upon review of the record, the defendants' motion to dismiss shall be denied.

Rule 8(a) of the Federal Rules of Civil Procedure requires that a complaint include only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). The Supreme Court has declared that "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a 'short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47 (1957).¹

After reviewing the amended complaint, filing 4, I find that the plaintiff's allegation of conspiracy is sufficient to withstand

¹ Under Rule 9(b) greater particularity in pleading is required in all averments of fraud or mistake; however, conspiracy claims under § 1985 actions are not listed. Cf. Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 113 S.Ct. 1160, 1163 (1993)(refusing to adopt heightened pleading requirement for § 1983 claims against municipalities).

a motion to dismiss. Read together, counts four (deprivation of civil rights) and five (conspiracy to deprive civil rights) allege a conspiracy between the Omaha Police Department, including defendants Hoch and Bovasso, and several prominent homosexual members of the Omaha community of allowing prostitution for pay, contrary to law. According to the complaint, this conspiratorial policy enabled well-placed homosexuals to solicit young males for prostitution, to perform homosexual acts upon them, and to prevent the young males from leaving the prostitution circle by using police force and intimidation upon them.

The plaintiff has not alleged a so-called "meeting of the minds" between the Omaha Police Department, Detectives Hoch and Bovasso, and several prominent Omaha homosexuals. However, Bonacci was hardly in a position to adduce or allege firsthand knowledge of the requisite meeting of the minds. Bonacci has, however, alleged sufficient facts to give rise to an inference that such a meeting of the minds may have existed. Cf. White v. Walsh, 649 F.2d 560, 562 (8th Cir. 1981) (holding that district court erred by dismissing complaint alleging conspiracy against defendants because plaintiff not in a position to allege firsthand knowledge of the necessary meeting of the minds).

I further find that the Supreme Court's reasoning in the recently decided case of Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 113 S. Ct. 1160 (1993) is applicable to the instant case. Although Leatherman's holding--that federal courts cannot impose a heightened pleading requirement for claims of municipal liability--is limited on its face to section 1983 claims, the reasoning appears equally applicable to conspiracy claims under § 1985. It is very difficult, if not impossible, to reconcile a particularity requirement for conspiracy claims with Rule 8(a)'s allowance for general notice pleading. Accordingly, I must deny the defendants' motion to dismiss the conspiracy claim.

IT IS THEREFORE ORDERED that the defendants' motion to dismiss, filing 102, is denied.

Dated September 29, 1993.

BY THE COURT


United States Senior District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

*hook at
Aggrav*

4
3

PAUL A. BONACCI,)	
)	
Plaintiff,)	4:CV91
)	
v.)	MEMORA
)	
THE CATHOLIC ARCHBISHOP)	
OF OMAHA, et al.,)	
)	
Defendant.)	

Pending before the court are two motions to quash subpoenas issued to the defendants Hoch and Bovasso and the custodian of records of the Omaha Police Division requesting production of materials which have become known to the parties as the "Citron tapes." The materials, which include videotapes, photographs, magazines, computer disks and other materials, were seized by police officers during the execution of a search of Defendant Citron's residence. The materials were in the custody of the records division at the time the subpoenas were issued. They are now in the custody of this court, under seal.

After the motions to quash had been filed, I noted that the disposition of materials held by Nebraska law enforcement agencies is governed by state law. I stated:

Neb. Rev. Stat. § 29-818 requires that property seized in a search be "safely kept" by the officer seizing it, and that the court in which the criminal proceeding is pending has exclusive jurisdiction for the disposition of such property. The following statute, however, Neb. Rev. Stat. § 29-819 provides that:

Where seized property is no longer required as evidence in the prosecution of any complaint or information the court which has jurisdiction of such property may transfer the same to the jurisdiction of any other court, including courts of another state or federal courts, where it is shown to the satisfaction of the court that such property is required as evidence in any prosecution in such other court.

Filing 107 at 2.

Acting on these statutes, counsel for defendants Hoch, Bovasso and the City of Omaha prepared a motion and order for Douglas County District Judge Joseph S. Troia transferring all materials seized from defendant Citron which remained in the

custody of the city to this court. Judge Troia stated that the materials were no longer required as evidence for any matter before the state courts. The "Citron tapes" have now been transferred to this court and cataloged by the clerk.

Although my order of May 26, 1993 gave the deponents an opportunity to submit additional information about the people depicted in the materials and the relevance of the materials to the issues in this case, only supplemental briefs were submitted. I also found in that order that commercially-produced materials are not relevant, and there has been no challenge to that finding. However, after further consideration of the plaintiff's sealed affidavit, and the difficulty of distinguishing commercially-created materials from noncommercially-created materials, I conclude the better course for discovery purposes is to permit protected discovery of all the materials.

The motion to quash filed by Hoch, Bovasso and the City of Omaha is based on one argument: according to state law, the items must be kept by the police department until otherwise ordered by a court of competent jurisdiction. (Filing 99). This argument has been mooted by Judge Troia's order transferring the items to this court's jurisdiction. Therefore, I shall deny this motion to quash.

The motion to quash filed by defendant Citron makes three supporting arguments: (1) the items sought are beyond the scope of discovery permitted by the protective order in filing 79; (2) the items are privileged, and (3) production of the documents is "unreasonable and oppressive."¹

In filing 107 I indicated I would lift the limitation on discovery and allow "discovery on any subject permitted by Fed.R.Civ.P. 26"; however I failed to include an order to that effect. I shall now make that order. Once again, as in filing 107, the first argument in defendant Citron's motion to quash is unavailing.

Defendant Citron's second argument alleges the materials are

¹ The motion to quash states:

The requested production is unreasonable and oppressive because it is not reasonably calculated to lead to the discovery of admissible evidence, and is designed to place into the public domain documentation and information heretofore held confidential by the City of Omaha, and which will be embarrassing, humiliating, and oppressive to Mr. Citron if placed in the public domain.

Filing 100 at 2.

privileged. Defendant Citron filed three briefs supporting the motion to quash. He failed to argue privilege in any of those briefs. Local rule 7.1 provides that the failure to argue a claim in a brief may be grounds for treating the claim as abandoned. NELR 7.1(a)(1). I am unable to conceive of any possible privilege which may apply to the materials at issue in the motion to quash. Defendant Citron having failed to discuss this issue in any of the three briefs submitted on the motion to quash, I shall consider this claim abandoned.

Defendant Citron's final argument may be broken down into two parts. His brief alleges that the "items sought will be embarrassing and humiliating, and for that reason oppressive." Further, he claims the subpoenas seek material that is neither relevant nor calculated to lead to the discovery of admissible evidence. Thus, the two arguments raised for denying discovery are that: (1) the materials are not relevant and will not lead to admissible evidence; and (2) allowing discovery will be embarrassing and humiliating to defendant Citron and other individuals, whether or not parties to this action, who are depicted in the "Citron tapes."

Fed.R.Civ.P. 26 generally limits discovery to material which "is relevant to the subject matter involved in the pending action" or reasonably calculated to lead to the discovery of admissible evidence. Fed.R.Civ.P. 26(b). Rule 26 further provides that

for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense including any one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time and place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

Fed.R.Civ.P. 26(c) (emphasis added).

Responding to the first portion of the argument, plaintiff