

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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TIMOTHY LOUIS HERMANN, HERMANN FAMILY,  
KAREN ELAINE, JACOB, JEWELL, JOY,  
BLACKBERRY COMMUNITY FARM/BLACKBERRY HILLS  
FARM and BLACKBERRY HILLS FARM TRUST,

Plaintiffs,

OPINION AND ORDER

v.

10-cv-600-wmc

DUNN COUNTY SHERIFF'S DEPARTMENT,  
DENNIS P. SMITH, MICHAEL TIETZ,  
MARSHALL MULTHAUF, BRAD LEACH,  
RUSSELL WADDELL, IRVINGTON GARAGE,  
MARVYN DOANE, BRAD DOANE and JOHN QUILLING,

Defendants.

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On October 13, 2010, plaintiffs Timothy Louis Hermann, Hermann Family, Karen Elaine, Jacob, Jewell, Joy, Blackberry Community Farm/Blackberry Hills Farm and Blackberry Hills Farm Trust (collectively, "Hermann") filed a complaint *pro se* and paid the filing fee. On December 8, 2010, defendants Dunn County Sheriff's Department, Brad Leach, Marshall Multhauf, Dennis P. Smith, Michael Tietz and Russell Waddell (collectively, "Dunn County") filed a motion to dismiss Hermann's complaint for failure to state a claim for relief (dkt. #20). On March 9, 2011, defendants Brad Doane, Marvyn Doane, John Quilling and Irvington Garage (collectively, "Doane") filed a motion for summary judgment, in which they join the Dunn County defendants' motion to dismiss or, in the alternative, seek a judgment requiring they be indemnified by those defendants (dkt. #53).

Also pending are Hermann's motions (1) to "disqualify alleged agents" (dkt. #22), (2) to strike defendants' brief in support of their motion to dismiss (dkt. #34), (3) for

preliminary injunction (dkt. # 51), and (4) for sanctions (dkt. # 69). For the reasons that follow, Hermann's motions will be denied, the defendants' motions to dismiss will be granted, and Doane's motion for indemnification will be denied as moot.

## **I. Hermann's Motions**

First, Hermann moves to disqualify defendants' lawyers until "proof of legal standing is provided." (Dkt. #22.) Hermann maintains that the lawyers have to have "legal standing" to act as defendants' agents. Hermann is mistaking an attorney in fact from one at law. The first authorizes the attorney to act as a principal's legal agent (i.e., step in a principal's shoes to bind them to a contract or other legal obligation) for limited or all purposes; the latter authorizes the attorney to act as principal's legal representative or lawyer (i.e., to speak on the principal's behalf). While the two are not mutually exclusive (for example, an attorney at law might also act as attorney in fact, where granted that authority by a principal) the role of defendants' lawyers before this court requires only their legal representation. On the contrary, defendants' lawyers have filed the required notice of appearance, which is sufficient to support their representation of defendants in this case.

Second, Hermann moves to strike defendants' brief in support of their motion to dismiss Hermann's complaint, claiming again that defendants' counsel does not have legal standing and that counsel committed perjury. (Dkt. #34.) The first objection has already been addressed. As to the second, Hermann does not submit any evidence that counsel committed perjury.<sup>1</sup>

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<sup>1</sup>The affidavit Hermann submits in support of this motion is not evidence of any perjury committed by defendants' attorney. Rather, it has to do with the Dunn County

Third, Hermann moves for injunctive relief. On February 16, 2011, the court denied his first motion for injunctive relief, which sought to enjoin the enforcement of allegedly fraudulent tax claims and warrants, for failure to comply with this court's procedures on motions for injunctive relief. (Dkt. #48.) On March 3rd, Hermann filed a second motion for injunctive relief. (Dkt. #51.) This motion suffers the same defect in that it also fails to comply with this court's procedures, but it has a more fundamental defect: the injunctive relief that Hermann requests is to quash a bench warrant issued in Dunn County on December 28, 2010, more than two months after Hermann filed this complaint. As a result, the injunctive relief he seeks is outside the issues raised in his complaint.<sup>2</sup>

Finally, Hermann moves for sanctions contending that the Doane defendants could not file a motion for summary judgment. On this, too, Hermann is mistaken. Defendants properly filed their motion for summary judgment on plaintiffs' claim against them.

## **II. Defendants' Motion to Dismiss**

### **FACTS<sup>3</sup>**

Plaintiffs reside in Otter Creek Township, Dunn County, Wisconsin. Plaintiff Blackberry Community Farm/Blackberry Hills Farm and related Trust are both doing

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Sheriff Department's failure to initially provide to Hermann a video of the September 2010 incident. That video has now been made available to Hermann.

<sup>2</sup>Since the court is granting defendants' motions to dismiss all other claims, it is also unwilling to entertain any late-filed motion to amend to add a claim challenging this bench warrant.

<sup>3</sup>For the purposes of deciding this motion, the facts alleged in Hermann's complaint and attachments are taken as true.

business in these names for Hermann as established by contract and common law. Defendant Dunn County Sheriff's Department is in the County of Dunn, State of Wisconsin. Defendants Dennis P. Smith is the Dunn County Sheriff and Michael Tietz, Marshall Multhauf, Brad Leach and Russell Waddell are Dunn County deputy sheriffs. Defendant Irvington Garage is owned by defendant Marvyn Doane. Defendants Brad Doane and John Quilling are employed as tow truck drivers by Irvington Garage.

On September 14, 2010, sheriff deputies and tow truck drivers Brad Doane and John Quilling took three automobiles from Hermann's farm: a 1999 Chevy Silverado Pickup, a 1997 Chevy Ventura Van and a 1998 VW Jetta car. Defendant Waddell presented a "false and fraudulent" execution to debtor Timothy L. Hermann, DBA Blackberry Hills Farms. There was no certified copy of a judgment of a court of record and the seal was missing. Sheriff Smith also failed to sign in the place provided on that document.

Hermann attached a copy of the "Execution Against Property on Delinquent Tax Warrants" to his complaint. That warrant shows that plaintiff Timothy L. Hermann owed back state taxes in the amount of \$16,075.99. The warrant listed three vehicles to be seized to satisfy the debt. The form states that exemptions from executions are not applicable under Wisconsin Statutes. On its face, the document states that it was issued from and under the seal of the court and is signed by a deputy clerk. On the last page of the warrant is a blank place for the sheriff to sign after listing the property recovered.

When defendants were going to seize the last farm conveyance, the Chevy Van, plaintiff Timothy Hermann claimed a lawful exemption. Defendant Multhauf failed to

provide the exemption, Hermann then bumped into Multhauf and Waddell wrongfully arrested Hermann for obstructing.

A trampoline, farm tools and property, which were in the vehicles, were also taken. These items were returned on October 1st, when Hermann went to collect them from the sheriff's department.

## OPINION

Defendants move to dismiss Hermann's complaint under Fed. R. Civ. P. 12(b)(6). Dismissal pursuant to Rule 12(b)(6) is proper "when the allegations in a complaint," taken as true, "could not raise a claim of entitlement to relief." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007). To survive a motion to dismiss, a complaint must contain sufficient factual matter to state a claim for relief that is plausible on its face. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (U.S. 2009). In deciding a motion to dismiss, a court must construe all of plaintiff's factual allegations as true and draw all reasonable inferences in plaintiff's favor. *Savory v. Lyons*, 469 F.3d 667, 670 (7th Cir. 2006).

### **A. Liability of Dunn County Sheriff's Department**

First, defendant Dunn County Sheriff's Department moves to dismiss the complaint against it because it is not a legal entity separate from the county government. As such, the Sheriff's Department would appear not to be a legal entity that can be served. *Whiting v. Marathon County Sheriff's Dep't.*, 382 F.3d 700, 704 (7th Cir. 2004). To the extent that Hermann now seeks to sue Dunn County, he has not alleged facts that support such a claim. To establish liability of the county under 42 U.S.C. § 1983, a plaintiff must allege that a constitutional violation resulted from a municipal policy, custom or practice. *Monell v. Dep't*

*of Social Servs.*, 436 U.S. 658, 694 (1978). Hermann has not alleged that his rights were violated pursuant to any municipal policy, custom or practice. The Dunn County Sheriff's Department's motion to dismiss will, therefore, be granted.

## **B. Liability of individual defendants**

The individual defendants also move to dismiss the complaint against them. The gist of Hermann's claim against the individual defendants is that they came on to his property and executed a warrant to take his vehicles unlawfully. As an initial matter, Hermann did not allege that defendants Michael Tietz and Brad Leach committed any acts, therefore, claims against these two defendants will be dismissed.

In his complaint, Hermann alleges that defendant Sheriff Smith failed to sign in the place provided for his signature but it is undisputed that the form only calls for his signature *after* the property is seized, not before. This allegation does not support an inference that Smith violated Hermann's Constitutional rights or state law. Additionally, it appears from the face of the document that Smith was not required to sign the document until after the property was actually recovered. Sheriff Smith's motion to dismiss will, therefore, be granted.

Hermann also alleges that defendant Multhauf failed to grant him an exemption to the execution against property. This claim fails because the execution warrant attached to Hermann's complaint specifically stated that "Exemptions from Execution" are not applicable. Since it is not obvious or well settled that such an instruction should not be enforced by a private club, Hermann has not alleged facts that support an inference that defendant

Multhauf violated state or federal law by failing to grant him an exemption. Multhauf's motion to dismiss will be granted.

Next, Herman alleges that defendant Waddell violated Hermann's constitutional rights by presenting the execution against property to him on September 14, 2010. Although Hermann attempts to attack the legality of the execution document itself, his complaints about the document, like much of his other complaints, all relate to form rather than substance.<sup>4</sup> Hermann owed delinquent taxes and the clerk of court issued a warrant to the Sheriff of Dunn County to seize three vehicles to satisfy that debt. None of Hermann's allegations support an inference that the execution of this warrant by defendant Waddell violated his rights under the Constitution or state law.

Because the seizure of the vehicles was not unconstitutional, the participation of defendants Irvington Garage, Marvyn Doane, Brad Doane and John Quilling in the seizure cannot support Hermann's constitutional claims. Thus, these defendants' motion to dismiss will also be granted.

Finally, although Hermann alleged that Waddell falsely arrested him, he does not oppose Waddell's motion to dismiss these claims. To state a Fourth Amendment false arrest claim under 42 U.S.C. § 1983, Hermann must allege facts from which an inference may be

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<sup>4</sup>Hermann claims that the Execution Against Property (1) did not have a seal of the court on it, (2) was signed by a deputy clerk and not the clerk of court, (3) the Sheriff had not signed the document, and (4) the name on the document was Timothy L. Herman rather than Timothy Louis Herman. However, the document stated that it was issued under the seal of the Court, and a deputy clerk signed for the clerk. Also, it appears from the face of the form that the sheriff need not sign the document until the property has been seized to satisfy the taxes and Hermann was correctly identified on the document. None of these allegations, therefore, support a claim for violation of state law, let alone a Constitutional violation.

drawn that probable cause for his arrest was lacking. *Williams v. Rodriguez*, 509 F.3d 392, 398-99 (7th Cir. 2007). Hermann alleges no facts that support an inference that he was arrested without probable cause. On the contrary, he concedes bumping into Multhauf, an act which could, under the circumstances, reasonably have been seen by Waddell as probable cause to arrest Herman for obstructing.

Hermann also alleges that Waddell failed to inventory the personal property in each vehicle, but the mere failure to make a list of personal property taken (or even to lose it) does not give rise to a federal constitutional claim. *Waubanasum v. Shawano County*, 416 F.3d 658, 670 (7<sup>th</sup> Cir. 2005) (negligence or other violation of state law does not rise to the level of a federal constitutional claim). Therefore, defendant Waddell's motion to dismiss will be granted on this claim as well.<sup>5</sup>

### **C. Remaining Constitutional claims**

In his complaint, Hermann also contends that he was deprived of his property without due process. The due process clause imposes procedural limitations on a state's power to deprive its citizens of property. *See Jones v. Flowers*, 547 U.S. 220, 226-239 (2006). But the United States Supreme Court has held that 42 U.S.C. § 1983 cannot be used as a vehicle to challenge state taxes when an adequate remedy exists under state law. *National Private Truck Council v. Oklahoma Tax Comm'n*, 515 U.S. 582 (1995). Wisconsin affords an adequate

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<sup>5</sup>To the extent a failure to inventory departs from state practice and procedure, law or constitutional right of which this court is unaware, Hermann's remedy is in state, not federal, court as discussed below.



remedy for challenging state taxes, Wis. Stat. § 71.88.<sup>6</sup> Therefore, any Fourteenth Amendment due process claim that Hermann is pursuing must be dismissed.

Plaintiff also claims that his Eighth Amendment and Thirteenth Amendment rights were violated. Hermann cannot pursue an Eighth Amendment claim of cruel and unusual punishment because that amendment applies only to those individuals convicted of a crime. *Whitley v. Albers*, 475 U.S. 312, 321 (1986). Similarly, Hermann has not alleged how the defendants violated the Thirteenth Amendment that abolished slavery, except perhaps that wholly prosaic way unrecognized by the Constitution. Therefore, plaintiff's Eighth and Thirteenth Amendment claims will also be dismissed.

#### **D. State Law Claims**

Because the court has found that defendants are entitled to summary judgment on plaintiffs' federal claims, "the well-established law of this circuit" favors the dismissal without prejudice of any "state supplemental claims whenever all federal claims have been dismissed prior to trial." *Groce v. Eli Lilly & Co.*, 193 F.3d 496, 501 (7th Cir. 1999); *see also* 28 U.S.C. § 1367(c)(3) ("The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if the district court has dismissed all claims over which it has original jurisdiction.").

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<sup>6</sup>At page 3 of their opposition brief, Hermann argues that the Wisconsin Statutes do not require payment of taxes. This is an argument, however, that he could and should have raised in challenging the tax assessment in the state court.

### **E. Right to Trial by Jury**

In his opposition brief, Hermann argues that granting defendants' motions to dismiss will deprive him of his Seventh Amendment right to a jury trial. On this, he is again incorrect. Granting a motion to dismiss does *not* violate an individual's right to a jury trial, but rather preserves scarce judicial resources, and a jury's time where but one outcome is legally supportive. See *United States v. Stangland*, 242 F. 2d 843, 848 (7th Cir. 1957).

### **III. Doane Defendants' Motion for Summary Judgment**

Because Hermann's claims will be dismissed, defendants Irvington Garage, Marvyn Doane, Brad Doane and John Quilling's motion for summary judgment on its indemnification claim against the Dunn County Sheriff's Department will be denied as moot, and defendant's cross-claim will be dismissed.

### **ORDER**

IT IS ORDERED that:

1. Hermann's motion to disqualify defendants' lawyers (dkt. #22) is DENIED.
2. Hermann's motion to strike defendants' brief in support of their motion to dismiss (dkt. #34) is DENIED.
3. Hermann's motion for injunctive relief (dkt. #51) is DENIED.
4. Hermann's motion for sanctions (dkt. # 69) is DENIED.
5. The motion of defendants Dunn County Sheriff's Department, Dennis P. Smith, Michael Tietz, Marshall Multhauf, Brad Leach and Russell Waddell to dismiss plaintiffs' complaint (dkt. # 20) is GRANTED.
6. The motion of defendants Irvington Garage, Marvyn Doane, Brad Doane and John Quilling to dismiss plaintiffs' complaint (dkt. # 53) is GRANTED.

7. The motion defendants Irvington Garage, Marvyn Doane, Brad Doane and John Quilling for summary judgment on their cross-claim for indemnification against the Dunn County defendants (dkt. #53) is DENIED as moot and the cross claim is DISMISSED.

8. The clerk of court is directly to enter judgment in favor of defendants and close this case.

Entered this 26th day of September, 2011.

BY THE COURT:

/s/

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WILLIAM M. CONLEY

District Judge