

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

ESTATE OF A.K.W.N. and
TINA MARIE ARZT,

Plaintiffs,

OPINION AND ORDER

12-cv-871-bbc

v.

WOOD COUNTY DEPARTMENT OF
HUMAN SERVICES, JENNY DELO,
KELLY BRAGG, CRAIG RASMUSSEN, A.B.,
CITY OF WISCONSIN RAPIDS, WISCONSIN
RAPIDS POLICE DEPARTMENT, C.D.,
WISCONSIN COUNTY MUTUAL
INSURANCE CORP. and LEAGUE OF
WISCONSIN MUNICIPALITIES MUTUAL
INSURANCE,

Defendants.

In this civil action, plaintiffs Estate of A.K.W.N. and Tina Marie Arzt contend that several municipalities, municipal insurers and municipal employees violated 42 U.S.C. § 1983 and state laws by failing to prevent A.K.W.N., a juvenile, from committing suicide. Defendants Wisconsin Rapids Police Department and City of Wisconsin Rapids have filed a motion to dismiss the complaint as to the police department and the unknown defendant C.D. Dkt. #22. In addition, defendant League of Wisconsin Municipalities Mutual Insurance has filed a partial motion to dismiss plaintiffs' "claim" that the City of Wisconsin Rapids waived the statutory cap on damages for tort claims. Dkt. #32.

I will grant the motion to dismiss the complaint as to defendant Wisconsin Rapids Police Department because it is not a suable entity under Wisconsin law. However, I will deny the motion to dismiss the complaint as to C.D. because defendants lack standing to raise that issue. I will deny the motion to dismiss part of plaintiffs' damages claim because the issue is not properly raised in a motion to dismiss.

OPINION

I. Motion to Dismiss Wisconsin Rapids Police Department and C.D.

Under Federal Rule of Civil Procedure 17(b), state law determines whether a particular entity has the capacity to be sued. In Wisconsin, a governmental unit has the capacity to be sued if the legislature has given it this capacity expressly by statute, Art. IV, sec. 27 of the Wisconsin Constitution, or if it is an independent body politic and the cause of action brings into question its statutory authority or obligations. Majerus v. Milwaukee County, 39 Wis. 2d 311, 314-15, 159 N.W.2d 86 (1968); Racine Fire and Police Commission v. Stanfield, 70 Wis. 2d 395, 401-02, 234 N.W.2d 307 (1975).

As this court and others have recognized, Wisconsin municipalities have the power to sue and be sued, Wis. Stat. § 62.25, but individual agencies and departments do not. Barlass v. Carpenter, 10-CV-454, 2010 WL 3521589 (W.D. Wis. Sept. 7, 2010) (dismissing City of Janesville Police Department); Lawrence v. Lewandowski, No. 08-C-108, 2009 WL 2950611, *7 (E.D. Wis. Sept. 9, 2009) (dismissing City of Wauwatosa Police Department). See also Sow v. Fortville Police Dept., 636 F.3d 293, 300 (7th Cir. 2011) (Indiana Police

Department not suable entity); Chan v. Wodnicki, 123 F.3d 1005, 1007 (7th Cir. 1997) (Chicago Police Department not suable entity). Nothing in the Wisconsin statutes discussing police departments mentions a power to be sued. Wis. Stat. § 62.13.

Plaintiffs argue that in Racine Fire and Police Commission, 70 Wis. 2d at 402, the Wisconsin Supreme Court held that the Racine Fire and Police Commission could sue on its own behalf. The commission, which had broad statutory authority to discipline and dismiss patrolmen, filed a civil action to enjoin four probationary patrolmen from seeking to arbitrate their termination. Id. at 389-99. The Wisconsin Supreme Court concluded that the commission had implied authority to sue to enjoin the arbitration because the suit “[brought] into question the scope of [the commission’s] statutory powers and duties” to discipline and dismiss patrolmen. Id. at 402. The court explained that an entity has the implied authority to sue or be sued “only where the capacity to sue or be sued is necessary to carry out an express power or to perform an express duty, or where the action arises out of the performance of statutory powers or obligations.” Id. at 402. See also Flood v. Board of Education, 69 Wis. 2d 184, 191, 230 N.W.2d 711, 716 (1974) (board’s authority to enter into contracts made it amenable to suit for breach of contract).

In this case, the Wisconsin Rapids Police Department is not a separate entity but a subdivision of the municipality. Moreover, plaintiffs have not explained why the capacity to be sued in tort is necessary to any power held by the Wisconsin Rapids Police Department or how plaintiffs’ cause of action arises from the performance of one of the department’s statutory powers. Plaintiffs argue that it is inefficient to require them to sue the city for the

actions of its departments but even if that is true, it is irrelevant to whether the Wisconsin legislature intended police departments to have the power to sue or be sued. Racine, 70 Wis. 2d at 399 (agency has only those powers “which are, by necessity, to be implied from the four corners of the statute under which it operates”); Wisconsin Patients Compensation Fund v. Wisconsin Health Care Liability Insurance Plan, 200 Wis. 2d 599, 611, 547 N.W.2d 578 (1996) (same).

Defendants also seek to dismiss defendant C.D., whom plaintiffs identify in their caption as law enforcement officers and supervisors for defendant City of Wisconsin Rapids Police Department. The Court of Appeals for the Seventh Circuit has observed that “it is pointless to include lists of anonymous defendants in federal court; this type of placeholder does not open the door to relation back under Fed. R. Civ. P. 15, nor can it otherwise help the plaintiff.” Wudtke v. Davel, 128 F.3d 1057, 1060 (7th Cir.1997). Nevertheless, this court’s practice is to allow plaintiffs to proceed against anonymous defendants as placeholders until the plaintiff can identify them and file a motion to amend the complaint to substitute the party. In any case, defendants do not identify any legal interest they have in removing the unknown defendants from the complaint.

II. Motion to Dismiss Part of Plaintiff’s Damages Claim

Defendant League of Wisconsin Municipalities Mutual Insurance has filed a motion under Fed. R. Civ. P. 12(b)(6), seeking to dismiss plaintiffs’ “claim” that the City of Wisconsin Rapids waived the \$50,000 limit on damages for tort claims against

municipalities. Wis. Stat. § 893.80(3). Rule 12(b)(6) lists seven defenses that may be raised by motion, and defendant's motion is not among them. A party may file a motion to dismiss for "failure to state a claim upon which relief may be granted," but defendant is not arguing that plaintiffs are entitled to no relief, only that their relief is limited to \$50,000. Rule 12(b)(6) does not authorize the court to rule on specific issues.

Alternatively, I might treat this defendant's motion as a motion for judgment on the pleadings under Rule 12(c). In fact, the motion is more properly raised under Rule 12(c) because defendant is raising a partial affirmative defense. However, unlike Rule 56 which expressly authorizes motions for judgment on "each claim or defense—or the part of each claim or defense—on which summary judgment is sought," the text of Rule 12(c) does not authorize judgment on a specific issue. Because defendant's statutory defense limiting plaintiffs' relief is not properly raised in a motion to dismiss, I will deny defendant's motion. Of course, I express no opinion about the merits of plaintiffs' allegation that the city waived the statutory cap on damages.

ORDER

IT IS ORDERED that

1. The motion to dismiss, dkt. # 22, brought by defendants Wisconsin Rapids Police Department and City of Wisconsin Rapids is GRANTED IN PART. The complaint is DISMISSED as to defendant Wisconsin Rapids Police Department. The motion is DENIED in all other respects.

2. The motion to dismiss, dkt. # 32, brought by defendant League of Wisconsin Municipalities Mutual Insurance is DENIED.

Entered this 31st day of May, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge