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

MARTIN LeVAKE, MADELINE LeVAKE, CHARLES LeVAKE, ANNE UHDE, JOHN FAVELL, GERALD P. BLAKE, ROBERT ELLERBROOK, JAMES B. MILLER, JOAN L. MILLER, RANDY SWANSON, JUDY SWANSON, ALAN STEWART, BRANDON NOVAK, MARK D. AVERY, AND LOUIS THOMAS AUSTIN III,

Plaintiffs,

v.

WILLIAM ZAWISTOWSKI, a/k/a WILLIAM ZAWISTOWSKI, JR.,

Defendant,

and

RURAL MUTUAL INSURANCE COMPANY,

Intervening Defendant.

OPINION AND ORDER

02-C-0657-C

This is a diversity action for monetary and equitable relief brought by a group of non-Wisconsin residents who own recreational property on Musky Bay, a bay of Lac Courte Oreilles in northern Wisconsin. All plaintiffs contend that defendant William Zawistowski's practice of using phosphorous-containing fertilizer on his cranberry bogs has created a public and private nuisance by causing weeds and algae to proliferate on Musky Bay. In addition, plaintiffs Martin LeVake, Madeleine LeVake, Charles LeVake and Anne Uhde bring a

separate private nuisance claim against defendant for his alleged negligent and reckless use of an insecticide spray.

In an October 10, 2003, opinion and order, I questioned whether the court had jurisdiction to entertain the claims of any plaintiff. After reviewing each of the categories of relief sought by plaintiff, I concluded that there was insufficient evidence in the record to show that at the time the complaint was filed each plaintiff had a good faith basis for claiming that the amount in controversy was $75,000. Accordingly, I ordered plaintiffs to submit evidence showing proof to a reasonable probability that jurisdiction exists under 28 U.S.C. § 1332. In addition, with respect to their request for dredging, I asked plaintiffs to clarify whether they are seeking an injunction requiring defendant to perform the dredging or whether they simply want to recover damages in the amount it would cost for this undertaking.

Plaintiffs have now responded to the court's order. No plaintiff has propounded any evidence to show to a reasonable certainty that he or she could recover $75,000 in damages as a result of defendant's alleged pollution of Musky Bay. Furthermore, plaintiffs have failed to point to any legal authority that contradicts this court's conclusion that they cannot recover under a "restoration costs" theory of damages. Finally, plaintiffs concede that they did not intend to seek an injunction ordering defendant to dredge Musky Bay; in any event, even if they had, this court would not grant it. Accordingly, this case must be dismissed for lack of jurisdiction.

The facts and analysis set forth in my opinion and order of October 10, 2003 are incorporated herein by reference.

OPINION

A. Damages for Harm from Insecticide Spray, Lost Real Estate Value, Loss of Use and Enjoyment, Punitive Damages and Attorney Fees

No plaintiff has adduced evidence to show that he or she could reasonably expect to recover a jury award of at least $75,000 in damages for claims falling into these categories. Although plaintiffs assert their belief that the record presents sufficient evidence for the trier of fact to award "substantial relief" to them for their loss of use and enjoyment of Musky Bay, they have not adduced any evidence to support this assertion. Plaintiffs' unsupported belief as to what they could recover for lost use and enjoyment does not amount to the "competent evidence" they were asked to submit. As for the remaining categories, plaintiffs have not disputed this court's conclusion that their claims for lost real estate value, punitive damages and attorney fees were not worth a total of $75,000 when they filed the complaint. Plaintiffs Charles LeVake and Anne Uhde do not deny that they lack standing to bring a claim for damages for the alleged overspraying incident and plaintiffs Martin and Madeleine LeVake do not deny that their claims arising from this incident are worth less than $75,000. Accordingly, for the reasons stated in my opinion and order of October 10, 2003, I find that it was not reasonably certain at the time this lawsuit was filed that any plaintiff could recover at least $75,000 in actual damages, punitive damages and attorney fees.

B. Restoration Costs vs. Injunctive Relief

In their second amended complaint, plaintiffs asserted a claim for damages for "the cost to clean up Musky Bay." Plaintiffs' proposed clean-up consists of dredging the bed of the bay. Acknowledging that the cost of such a project would exceed the jurisdictional minimum, I declined in the October 10 order to assume jurisdiction on this basis, finding that it was unclear from the record "whether plaintiffs are seeking an injunction requiring defendant to perform the dredging or whether they simply want to recover damages in the amount it would cost for this undertaking." Noting that there were problems with either type of claim, I requested plaintiffs to clarify this issue in their memorandum.

In their response, plaintiffs assert that at the time they filed their complaint, they were seeking an award of damages in the amount it would take to restore Musky Bay by dredging it. Plaintiffs maintain that they are entitled to recover such damages under Wisconsin's right-to-farm statute, Wis. Stat. § 823.08(b). Alternatively, they contend that they would be satisfied by an injunction ordering defendant to dredge the bay. I will address each of these arguments in turn.

1. Restoration costs

In the October 10, 2003 order, I questioned whether plaintiffs had any plausible legal basis for seeking damages in the amount it would cost to restore Musky Bay. First, I noted that the cost of the restoration that plaintiffs were proposing was vastly out of proportion

to any actual damages to each plaintiff's property, given that plaintiffs had no claim for lost real estate value and negligible claims for lost use and enjoyment. Second, I noted that no plaintiff had attempted to estimate the cost of restoring his or her property to the condition it was in at the time of purchase.

As defendant and intervening defendant point out, there is another reason why plaintiffs cannot recover the cost to restore Musky Bay: they do not own the bay. The state of Wisconsin owns the bed of the bay and holds it in trust for the benefit of the public as a whole. R.W. Docks & Slips v. State, 2001 WI 73, ¶¶ 18-19, 244 Wis. 2d 497, 508-09, 628 N.W.2d 781. Thus, the state, not plaintiffs, is the real party in interest in a claim to recover money for damage to the bay. Where a nuisance is both private and public, as alleged in this case, each plaintiff can recover only the damages that are particular to him or her. Mitchell Realty Co. v. City of West Allis, 184 Wis. 352, 371-73, 199 N.W. 390 (1924); Wis. Stat. § 823.01. Plaintiffs cannot recover damages for the cost of restoring property they do not own.

Plaintiffs suggest that the Wisconsin Legislature created an exception to these rules when it enacted Wis. Stat. § 823.08(b), which provides in relevant part:

> In an action in which an agricultural use or an agricultural practice is found to be a nuisance, the following conditions apply:
>
> . . .
>
> 3. If the court orders the defendant to take any action to mitigate the effects of the agricultural use or agricultural practice found to be a nuisance, the court may not order the defendant to take any action that substantially and adversely affects the economic viability of the agricultural use, unless the

> agricultural use or agricultural practice is a substantial threat to public health or safety.

According to plaintiffs, this statute indicates that the Wisconsin Legislature has given "explicit authority" to courts to impose potentially high costs upon a defendant whose agricultural practice constitutes a substantial threat to public health and safety. Furthermore, argue plaintiffs, if they can prove that defendant's agricultural practice is a substantial threat to public health and safety, then they can recover such sums even if they acquired their properties after defendant had already been conducting his agricultural practice.

Plaintiffs' argument completely misses the mark. The plain language of Wis. Stat. § 823.08(b)3. makes it clear that the statute applies to orders for injunctive relief, not damage awards. Contrary to plaintiffs' contention, Wis. Stat. § 823.08 narrows rather than expands the common law governing nuisance actions by limiting the circumstances under which an ongoing agricultural practice may be found to be a nuisance and the relief that can be ordered if a nuisance is found. Nothing in the statute supports plaintiffs' suggestion that their status as riparian owners allows them to recover the costs of restoring public lands.

Plaintiffs have offered no other arguments that might show "how the rules of law, applied to the facts of [their] case" could produce an award of costs to restore the bay. *Schlessinger v. Salimes*, 100 F.3d 519, 521 (7th Cir. 1996). Accordingly, for the reasons stated in the October 10, 2003 opinion and for the additional reasons stated herein, I find that plaintiffs cannot recover under a restoration costs theory of damages.

2. Injunction ordering defendant to dredge Musky Bay

According to plaintiffs' memorandum, at the time they filed their Second Amended Complaint, they did not intend to seek an injunction requiring defendant to dredge the bay. Plaintiffs assert that their prayer for relief for "the cost to clean up Musky Bay" was intended "to represent a pursuit of restoration costs to rehabilitate the environmentally damaged bay." Plt.'s Mem., dkt. #94, at 3. Nonetheless, plaintiffs indicate that they would be satisfied by an injunction ordering defendant to perform the dredging.

I am not willing to allow plaintiffs to amend their complaint constructively at this late juncture. Plaintiffs filed this lawsuit approximately one year ago and the deadline for amending the pleadings expired several months ago. As plaintiffs are aware from this court's order denying their last attempt to amend their complaint, leave to amend the pleadings after the deadline will be granted "only upon a showing of good cause for the late amendment and lack of prejudice to the parties." Pretrial Order, dkt. #7, at 2. Although defendant and intervening defendant probably would not suffer much prejudice from an amendment since they have addressed the issue of injunctive relief in their papers, I am unable to find that good cause exists for plaintiffs' failure to clearly request injunctive relief earlier. Plaintiffs have had ample time in which to develop their legal strategy and to postulate various theories of relief. The fact that this court may have rejected plaintiffs' chosen theory on legal grounds is not good cause to convert their claim for damages for cleaning up the bay to a request for equitable relief.

Furthermore, allowing plaintiffs to amend their complaint would be futile. Even though a request that defendant be ordered to dredge Musky Bay might save the complaint from dismissal for lack of jurisdiction under 28 U.S.C. § 1332, it is not a form of relief this court would grant. The proper forum for evaluating and authorizing the dredging of a lake bed is the state permitting process. The state's Department of Natural Resources is "the central unit of state government to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private." Wis. Stat. § 281.11. To carry out its charge, the department has developed a comprehensive program designed to protect the state's waterways. This program recognizes the importance of protecting public rights against any adverse effects from dredging. In spite of plaintiffs' weak assertions to the contrary, dredging is a drastic remedy with potential impacts including "turbidity, disturbance or destruction of aquatic organisms and habitat, release of contaminated materials, nutrients and other materials entrapped in the sediments and dissolved oxygen depletion." Waterway and Wetland Handbook, available on the world wide web at http://www.dnr.state.wi.us/org.water.fhp.handbook/.

Because of these potential effects and the public's interest in the state's waters, a proposed dredging project requires extensive study and evaluation before it can be ordered. For example, all projects must be reviewed under Wis. Stat. §§ 1.11 and 23.11(5) for compliance with the Wisconsin Environmental Policy Act. Wis. Admin. Code § NR 150.03(8)(f). Any dredging project for removal of 3,000 cubic yards or more is classified as

a "Type II action," § NR 150.03(8)(f), which requires an environmental assessment and issue identification at minimum. § NR 150.02(1)(c)1. Additional rules and procedures governing applications for dredging permits are set forth at pages 15-17 of defendant's brief in support of his motion for summary judgment and need not be repeated here. Suffice it to say that the Department of Natural Resources, not this court, is the body with both the authority and the expertise to conduct the evaluation necessary to determine whether Musky Bay should be dredged.

It is of no moment that Wisconsin's right-to-farm statute permits a court ordering a defendant to mitigate a nuisance to "[r]equest public agencies having expertise in agricultural matters to furnish the court with suggestions for practices suitable to mitigate the effects of the . . . the agricultural practice." § 823.08(3)(b)2.a. Requiring an agency to make "suggestions" is far different from the extensive evaluation and study that is demanded by the state's regulatory scheme concerning dredging permits. Furthermore, agencies receiving a request for suggestions under the right-to-farm statute are to "advise the court concerning the relevant provisions of the performance standards, prohibitions, conservation practices and technical standards under s. 281.16(3)." § 823.08(3)(c). However, Wis. Stat. § 281.16(3) and its corresponding administrative rules deal with pollution prevention, not lake bed restoration or dredging. Nothing in the right-to-farm statute suggests that the legislature intended it to replace the permitting process when the proposed form of abatement constitutes the dredging of a public lake bed.

In sum, even assuming plaintiffs could show that defendant is discharging levels of phosphorous into Musky Bay that pose a substantial threat to health and human safety, it would be inappropriate for this court to serve as the initial forum for deciding whether defendant should be ordered to mitigate the nuisance by dredging the bay. That determination requires intensive factfinding and policymaking that is within the peculiar expertise of the Department of Natural Resources. The department is best suited to considering the potential effects that dredging would have on the bay and its surrounding habitat, the interests of other property owners on the bay and other parts of Lac Courte Oreilles who are not parties to this lawsuit and the interest of the general public. For these reasons, this court would decline to grant plaintiffs' request for an injunction ordering defendant to dredge Musky Bay. See State v. Dairyland Power Co-op., 52 Wis.2d 45, 56, 187 N.W.2d 878, 883 (1971) (if issue presented to court "involves exclusively factual issues within the peculiar expertise" of state agency, court should decline jurisdiction and refer matter to agency). Therefore, even if plaintiffs could show good cause for failing to include a request for this form of equitable relief in their complaint, the amendment would be denied as futile.

C. Request for Abatement of Discharge of Phosphorous

In the October 10, 2003 opinion and order, I noted that plaintiffs appeared to be seeking an injunction prohibiting defendant from discharging phosphorous into Musky Bay.

However, I noted that there was no evidence in the record of how much such an injunction would cost to defendant; further, it appeared that such an order would afford hollow relief to plaintiffs unless it was paired with an injunction ordering defendant to dredge the bay.

In their response, plaintiffs concede that an injunction ordering defendant to "end his agricultural practice of dumping environmentally destructive amounts of phosphorous into the bay" would not redress the harm they claim unless the bay is also dredged. See Plt.'s Mem., dkt. #94, at 15. It appears that plaintiffs do not seek this type of injunction for its own sake, but only in tandem with their claim for "restorative action" to clean up the bay. Thus, this claim fails along with their claim for restoration costs or an injunction requiring defendant to dredge Musky Bay.

Furthermore, plaintiffs have adduced no evidence regarding what their proposed injunction would cost defendant. Plaintiffs say simply that "perhaps Defendant Zawistowski is in the best position to inform the Court as to whether the injunction Plaintiffs seek implicates a cost to him of at least $75,000." Plt.'s Mem., at 12. However, it is plaintiffs, not defendant, who bear the burden of putting forth facts sufficient to establish jurisdiction. Moreover, plaintiffs have not identified what constitutes an "acceptable level" of phosphorous discharge or what practice they would like defendant to take to reduce the discharge from his bogs to this level. As a result, this court lacks any evidence from which to find that the cost to defendant of complying with plaintiffs' proposed injunction would be $75,000.

D. Conclusion

As this court made clear in the October 10 order, it was plaintiffs' burden to show to a reasonable certainty that federal jurisdiction exists. Plaintiffs have not presented any competent evidence to meet that burden or shown how the rules of law would support an award sufficient to meet the amount-in-controversy requirement under 28 U.S.C. § 1332(a). Although defendant would prefer to have this court dismiss plaintiffs' claims on the merits rather than for lack of jurisdiction, it is beyond dispute that "[a] court lacks discretion to consider the merits of a case over which it is without jurisdiction." Belleville Catering Co. v. Champaign Market Place, L.L.C., 2003 WL 22836971, *2 (7th Cir. 2003) (quoting Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 379 (1981)). Therefore, plaintiffs' complaint must be dismissed for lack of jurisdiction.

ORDER

IT IS ORDERED that the case of plaintiffs Martin LeVake, Madeline LeVake, Charles LeVake, Anne Uhde, John Favell, Gerald P. Blake, Robert Ellerbrook, James B. Miller, Joan L. Miller, Randy Swanson, Judy Swanson, Alan Stewart, Brandon Novak, Mark

D. Avery, and Louis Thomas Austin III is DISMISSED in its entirety for lack of subject matter jurisdiction.

Entered this 11th day of December, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge