UNITED STATES DISTRICT COURT
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,

OPINION AND ORDER

v.

02-C-0657-C

WILLIAM ZAWISTOWSKI, JR.,

Defendant,

and

RURAL MUTUAL INSURANCE COMPANY,

Intervening Defendant.

This is a civil action brought by a group of non-residents of Wisconsin who own recreational property on Musky Bay of Lac Courte Oreilles in northern Wisconsin. Plaintiffs seek money damages and injunctive relief for harm allegedly caused by defendant William Zawistowski, Jr.'s use of fertilizer and insecticides in connection with his cranberry farming operation. All plaintiffs contend that defendant's use of fertilizer on his cranberry bog has caused phosphorus to be discharged into Musky Bay, which has in turn fed the growth of

aquatic plants and algae in the bay. Plaintiffs allege that the weed growth and algae blooms constitute a public and private nuisance that has caused their property values to decline and interfered with their ability to use and enjoy 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.

Defendant has moved for summary judgment on all of plaintiffs' nuisance claims arising from defendant's alleged pollution of Musky Bay. Intervening defendant Rural Mutual Insurance Company has joined the motion and adopts defendant Zawistowski's briefs in support of the motion.

Having reviewed the parties' summary judgment submissions, I am not convinced that each plaintiff has shown that his or her claims raise a sufficient amount in controversy for federal diversity jurisdiction. Although plaintiffs alleged in their complaint that their real estate had "greatly diminished in value" as a result of defendant's alleged pollution of Musky Bay, most of them denied that claim during discovery. Although it appears that plaintiffs are still maintaining that defendant's actions have deprived them of their ability to use and enjoy Musky Bay, it is unclear whether plaintiffs are seeking to invoke this court's diversity jurisdiction solely on the basis of that claim; even if they are, the existing record is inadequate to allow this court to infer that at the time the complaint was filed each plaintiff had a good faith basis for claiming $75,000 in damages solely for lost use and enjoyment.

Insofar as plaintiffs may be relying upon their claims for restoration costs and punitive damages to get over the jurisdictional threshhold, these claims appear to lack a good faith basis. Plaintiffs have not shown any right to recover dredging costs as a category of damages because they seek to restore Musky Bay to a condition that existed before they purchased waterfront property on Musky Bay. As for punitive damages, the allegations in the complaint are insufficient to support any finding of malice or intentional disregard on the part of defendant. The only relief discussed by the parties that might meet the amount in controversy threshold is an injunction ordering defendant to dredge Musky Bay. However, it is unclear whether plaintiffs are actually seeking this remedy or that it is a remedy this court could grant.

Because subject matter jurisdiction is a prerequisite to any determination on the merits, I am staying the summary judgment proceedings, striking the scheduling order and ordering each plaintiff to present evidence showing why this court has subject matter jurisdiction over his or her claims.

BACKGROUND

Lac Courte Oreilles is a 5,000 acre lake in Sawyer County, Wisconsin, that is navigable and flows eventually into the Mississippi River. Musky Bay is part of Lac Courte Oreilles. Musky Bay is eutrophic, meaning it has a high presence of algae and other aquatic plants, making it less enjoyable for humans who come into contact with the water. The total

amount of algal and seaweed growth is tied to the amount of phosphorus in the water. Musky Bay has enough phosphorus to support continued eutrophication for a long period of time even if no additional phosphorus were added.

Plaintiffs are all residents of states other than Wisconsin who own recreational properties on Musky Bay. Defendant is a cranberry farmer who operates two cranberry bogs on Musky Bay. One of defendant's cranberry bogs, located on the southeast side of the bay, was first used for cranberry farming by defendant's father in 1939 and has been operated as a cranberry bog continuously since that date. Defendant's other bog, located on the west side of the bay, has been operated continuously as a cranberry bog since the 1950's. Defendant Zawistowski relies upon water from Musky Bay in his cranberry operations, and has applied fertilizer containing phosphorus to his cranberry plants since the 1950's.

Plaintiffs purchased their Musky Bay properties between 1976 and 2002. Charles LeVake and Anna Uhde do not own property on Musky Bay. From 1992-2000, the property values on Musky Bay roughly tripled.

Plaintiffs have alleged that phosphorus applied by defendant to his cranberry bogs is the primary source of phosphorus in Musky Bay. They contend that defendant's use of phosphorus has created a nuisance by causing seaweed and algae to proliferate in Musky Bay. In their complaint, plaintiffs seek damages for lost property values; loss of their ability to use and enjoy Musky Bay; the cost to clean up Musky Bay; abatement of the discharge

by defendant of phosphorus or other pollutants into Musky Bay; punitive damages; attorney fees; and any other legal or equitable relief this court deems proper.

In addition to the pollution claims, plaintiffs Martin LeVake, Madeleine LeVake, Charles LeVake and Anne Uhde seek damages and injunctive relief arising from an alleged incident in which they inhaled insecticide that they contend defendant had sprayed in a negligent and reckless manner. According to the complaint, on July 17, 1999, these plaintiffs were spending time at Martin and Madeleine LeVake's property on Musky Bay, next to defendant's cranberry farm. Shortly after retiring for the evening, they began to choke and had difficulty breathing, tightness in their chests and burning in their eyes that made it difficult to see. According to the complaint, plaintiffs heard noises coming from defendant's cranberry operation, so they called defendant and asked whether he was spraying something at the marsh; defendant responded rudely and hung up. Plaintiffs left the cabin, spent the night at a hotel and filed a report with the sheriff the next day.

The LeVake plaintiffs and plaintiff Uhde allege that they had inhaled a toxic insecticide that defendant was spraying on his cranberry bog and that none of them has returned to spend a night at the LeVake cabin for fear of additional insecticide exposure. Plaintiffs contend that defendant's spray of the insecticide constituted a private nuisance. As a remedy for this tort, these plaintiffs seek money damages for the loss of use and enjoyment of their cabin and an injunction "restraining Zawistowski from using pesticides in a manner that causes overspray or drift." (The first amended complaint included a claim

that the LeVake plaintiffs and plaintiff Uhde had suffered personal injuries as a result of defendant's negligent overspraying of pesticide. These plaintiffs dismissed their personal injury claims voluntarily on April 24, 2003.)

No plaintiff has alleged or requested a specific amount of damages for either the pollution claims or the claims related to the overspraying incident. During discovery, all the plaintiffs except Martin and Madeleine LeVake and Randy and Judy Swanson waived any claim for lost property value.

OPINION

This court has an independent obligation to satisfy itself that federal subject matter jurisdiction exists before proceeding to the merits of any case, even if the parties have not questioned the existence of jurisdiction. Smith v. American General Life and Acc. Ins., 337 F.3d 888, 892 (7th Cir. 2003); Fed. R. Civ. P. 12(h)(3). To invoke the federal courts' diversity jurisdiction, the parties must establish complete diversity of citizenship and that "the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs." 28 U.S.C. § 1332(a). Because plaintiffs originally sought federal court jurisdiction, the burden is on them to show that federal jurisdiction exists. Chase v. Shop n' Save Warehouse Foods, Inc., 110 F.3d 424, 427 (7th Cir. 1997).

This court's rules make clear that all facts necessary to sustain a party's position on a motion for summary judgment, including facts establishing jurisdiction, must be proposed

explicitly as findings of fact. Plaintiffs proposed as facts that plaintiffs are non-residents of Wisconsin and defendant is a resident of Wisconsin. However, apart from a conclusory allegation in their complaint, plaintiffs did not propose any facts to support the conclusion that the amount in controversy exceeds the jurisdictional threshold of $75,000.

In general, the amount in controversy is whatever is required to satisfy the plaintiff's demand in full on the date that the lawsuit begins. Hart v. Schering-Plough Corp., 253 F.3d 272, 272 (7th Cir. 2001). If it appears that a claim has been made in good faith, the court will defer to the sum claimed by the plaintiff in his complaint unless it appears to a legal certainty that plaintiff's claim is really for less than the jurisdictional amount. St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 289 (1938); Jones v. Knox Exploration Group, 2 F.3d 181, 183 (6th Cir. 1993) (apparent jurisdiction can disappear with factual revelations that required amount was not in controversy at commencement of action). Each plaintiff must meet the jurisdictional amount individually, unless several plaintiffs unite to enforce a single title or right in which they have a common and undivided interest. Zahn v. International Paper Co., 414 U.S. 291, 294 (1973). Plaintiffs whose claims do not satisfy the jurisdictional amount must be dismissed, even when other named plaintiffs state claims sufficient to invoke jurisdiction. Id.

When the basis for federal diversity jurisdiction is challenged, it is not enough to point to the theoretical availability of certain categories of damages. American Bankers Life Assur. of Fla. v. Evans, 319 F.3d 907, 909 (7th Cir. 2003). Rather, the party seeking to

invoke the court's jurisdiction must "show how the rules of law, applied to the facts of his case, could produce such an award." Schlessinger v. Salimes, 100 F.3d 519, 521 (7th Cir. 1996). Furthermore, the party must support its assertion regarding the amount in controversy with "competent proof," which is "proof to a reasonable probability that jurisdiction exists." Rexford Rand Corp. v. Ancel, 58 F.3d 1215, 1218 (7th Cir. 1995).

In their second amended complaint, all plaintiffs seek four categories of damages arising from defendant's alleged pollution of Musky Bay: lost property value; loss of use and enjoyment of Musky Bay; the cost to clean up Musky Bay; and punitive and exemplary damages under Wis. Stat. § 895.85. In addition, they seek "abatement of the discharge by [defendant] of phosphorus pollution and other chemical pollutants into Musky Bay." Finally, they seek attorney fees. In addition to these claims, the LeVake plaintiffs and plaintiff Uhde seek damages for their loss of use and enjoyment of the LeVake cabin as a result of the overspraying incident.

Neither the allegations in the complaint nor the evidence adduced by the parties in connection with the summary judgment motion is sufficient to establish that the value to each plaintiff of these claims is $75,000. I will address each of these categories separately, starting with the private nuisance claims brought by the LeVake plaintiffs and plaintiff Uhde.

A. Claims of the Levake Plaintiffs and Plaintiff Uhde for Loss of Use and Enjoyment Resulting from Overspray Incident

Plaintiffs acknowledged in their response to the motion for summary judgment that plaintiffs Charles LeVake and Anne Uhde do not own property on Musky Bay. Accordingly, these plaintiffs have no standing to bring any common law nuisance claim, either for the overspraying incident or the alleged pollution of Musky Bay. In any event, even assuming Charles LeVake and Uhde could join Martin and Madeleine LeVake in their claim for loss of use and enjoyment of the LeVake cabin as a result of defendant's overspraying, it appears that the value of this claim is far below the jurisdictional threshold. Plaintiffs do not contend that defendant has continued to spray insecticide on their property or claim that his use of insecticide constitutes an ongoing nuisance; they are seeking damages for a one-time invasion of their property. According to the complaint, the only time they were actually deprived of the use of their property as a result of defendant's overspraying was the night of July 17, 1999. This deprivation is certainly worth less than $75,000. Insofar as plaintiffs are contending that defendant's actions have constructively deprived them of the use of their cabin by making them afraid to return, this is an injury personal to the plaintiffs. However, plaintiffs have dismissed their personal injury claims. Without more information, I cannot find that the amount in controversy requirement is satisfied by the private nuisance claim.

B. Loss of Real Estate Value

Nearly all of the plaintiffs have disavowed any claim that the value of their property declined as a result of the nuisance allegedly caused by defendant. The only plaintiffs that have not made an express waiver of any claim for lost property value are Martin and Madeline LeVake and Randy and Judy Swanson. However, these plaintiffs have not presented any evidence to support a claim for lost property value. They concede that property values on Musky Bay tripled between 1992 and 2000. These facts suggest that plaintiffs' claims for lost property value were worth little, if anything, at the time they filed the complaint.

C. Loss of Use and Enjoyment of Musky Bay

Similarly, the record suggests that the value of each plaintiff's loss of use and enjoyment claim is far less than $75,000. Damages for loss of use and enjoyment includes both loss of use, generally measured by the fair rental value of unimproved land, Krcmar v. Wisconsin River Power Co., 270 Wis. 640, 644, 72 N.W.2d 328, 330 (1955) (proper measure of damages for seepage-damaged acreage was fair rental value of land), and loss of enjoyment, measured as inconvenience, annoyance and discomfort. Krueger v. Mitchell, 106 Wis.2d 450, 458-60, 317 N.W.2d 155, 159-60 (Ct. App. 1982). Plaintiffs have testified that because of the weeds and algae, they are unable to use and enjoy the bay for recreational purposes such as boating, swimming and fishing. Thus, plaintiffs appear to be seeking

damages for freedom from discomfort and annoyance while enjoying their rights as riparian owners, as opposed to seeking damages for a total loss of use of their property.

Plaintiffs' loss of use claims are dubious in light of evidence they adduced in response to defendant's motion for summary judgment. In particular, plaintiffs' proposed findings of fact indicate that Musky Bay was eutrophic before 1940 and that the aquatic plant life reached its present density in the 1970s, before any of the plaintiffs owned property on Musky Bay. See Plts.' PFF, dkt. #78, ¶ 27. One of plaintiffs' experts testified that Musky Bay was in need of restoration by 1980 and perhaps by 1970. Plts.'s Response to Deft.'s PFF, dkt. # 77, ¶ 30. Thus, according to plaintiffs' own evidence, Musky Bay was already weedy when they acquired their properties. This is not to say that the bay's condition could not have worsened after each plaintiff bought his property, but it tends to cut against the likelihood that any plaintiff could recover $75,000 for loss of use and enjoyment of the bay. Furthermore, in spite of their complaints about the condition of the bay, every plaintiff except for Martin and Madeleine LeVake and Brandon Novak testified that his or her property has lived up to his or her expectations. In light of this evidence, I am not willing to assume that each plaintiff believed in good faith at the time he filed his complaint that he could recover $75,000 solely for loss of his ability to use and enjoy Musky Bay. Rather, plaintiffs will have to adduce competent evidence that the value of this claim meets the jurisdictional threshold.

D. Restoration Costs

Next, plaintiffs ask for damages in the amount it would cost to restore Musky Bay. In accordance with the Restatement (Second) of Torts § 929 (1977), Wisconsin has adopted the rule that in "appropriate cases," restoration damages may be recovered for harm to land. See Threlfall v. Town of Muscoda, 190 Wis.2d 121, 135-37, 527 N.W.2d 367, 372-73 (Ct. App. 1994). That section of the Restatement provides in relevant part:

> (1) If one is entitled to a judgment for harm to land resulting from a past invasion and not amounting to a total destruction of value, the damages include compensation for (a) the difference between the value of the land before the harm and the value after the harm, or at [the landowner's] election in an appropriate case, the cost of restoration that has been or may be reasonably incurred.

In Threlfall, 190 Wis. 2d at 133-137, 527 N.W. 2d at 372-373, the court found that it was appropriate to award damages to plaintiffs in the amount of the cost of restoring trees that the defendant had removed wrongfully from plaintiffs' property. The court observed that although the town's removal of the trees had actually increased the market value of plaintiffs' land, the plaintiffs testified that they viewed the roadside trees and shrubs as aesthetic additions to their land. The court concluded that limiting the plaintiffs' recovery to diminished market value only would leave the plaintiffs without a remedy for the town's damage to their right to beautify their land according to their own tastes. Id. at 136, 527 N.W. 2d at 373.

In spite of the fact that restoration costs are available to plaintiffs in theory, I am highly skeptical that this constitutes an "appropriate case" for such an award. It is notable

that courts in Wisconsin and other states have limited the availability of restoration damages to cases in which the injured party shows that restoration is reasonable or "practicable." Bill's Distributing, Ltd. v. Cormican, 2002 WI App 156, n. 5, 256 Wis. 2d 142, 647 N.W. 2d 908 (quoting Threlfall, 190 Wis. 2d at 121, 136 n. 11, 527 N.W.2d 367); accord Puerto Rico v. The SS Zoe Colocotroni, 628 F.2d 652, 675 (1st Cir. 1980) ("There may be circumstances where direct restoration of the affected area is either physically impossible or so disproportionately expensive that it would not be reasonable to undertake such a remedy"); Maloof v. United States, 242 F. Supp. 175, 183 (D. Md. 1965) (applicable measure of damages is "the *reasonable* cost of restoring the property as nearly as *reasonably* possible to its [original] condition") (emphasis in original); Trinity Church v. John Hancock Mut. Life Ins. Co., 399 Mass. 43, 50, 502 N.E.2d 532, 536 (1987) ("Not only must the cost of replacement or reconstruction be reasonable, the replacement or reconstruction itself must be reasonably necessary in light of the damage inflicted by a particular defendant."); Heninger v. Dunn, 101 Cal.App.3d 858, 162 Cal. Rptr. 104, 107-08 (1980) (court must consider reasonableness of restoration costs in relation to damage inflicted upon land); Rector, Wardens and Vestry of St. Christopher's Episcopal Church v. C.S. McCrossan, Inc., 306 Minn. 143, 235 N.W.2d 609 (1975) (same). The parties appear to agree that the only feasible method of restoring Musky Bay would be to dredge it, a course of action that would cost millions of dollars. A multi-million dollar dredging project is wildly out of proportion

to any real damages for lost property value or lost use and enjoyment of Musky Bay suffered by each plaintiff.

Apart from the excessive costs of restoring the bay, plaintiffs' request for restoration costs is problematic for other reasons. Plaintiffs acquired their properties on Musky Bay at different times, some only recently, and they contend that the bay has deteriorated gradually. In a case such as this in which the intrusion on plaintiffs' property interests is alleged to be ongoing and cumulative, it would be practically impossible to determine with any specificity the cost to restore the bay to that point on the continuum when plaintiff X bought his or her property. No plaintiff has even tried to estimate the cost of restoring his or her property to the condition it was in at the time of purchase. Rather, the "restoration" that plaintiffs appear to be seeking is a one-size-fits-all remedy of restoring the bay to some pristine, pre-eutrophic condition that existed, if ever, before plaintiffs purchased their properties. However, Wisconsin law limits damages in a nuisance action to those injuries that are peculiar to the plaintiff. Mitchell Realty Co. v. City of West Allis, 184 Wis. 352, 371-73, 199 N.W. 390 (1924); Wis. Stat. § 823.01. I am aware of no theory under which a plaintiff can recover costs for restoring his property to a condition better than it was when he bought it. For all these reasons, there is no basis on which to conclude that a Wisconsin court would allow any of the plaintiffs to proceed on a restoration costs theory of damages.

E. Punitive Damages

When available, punitive damages must be considered in the amount-in-controversy calculation. See Bell v. Preferred Life Assurance Society, 320 U.S. 238, 240 (1943); Sharp Electric Corp. v. Copy Plus, Inc., 939 F.2d 513, 515 (7th Cir. 1991). When a plaintiff relies on punitive damages to satisfy the amount-in-controversy requirement, the first question the court must ask is whether punitive damages are recoverable under state law. If so, subject matter jurisdiction exists unless it appears beyond a legal certainty that the plaintiff could not recover the jurisdictional amount. Del Vecchio v. Conseco, Inc., 230 F.3d 974, 978 (7th Cir. 2000).

Wisconsin law authorizes punitive damages when a defendant acts "maliciously" or "in an intentional disregard" of a plaintiff's rights. See Wis. Stat. Ann. § 895.85(3). With respect to plaintiffs' nuisance claims, there is no allegation in the complaint or evidence in the record to suggest that in applying fertilizer to his cranberry bogs, defendant acted maliciously or in intentional disregard of any rights of any plaintiff. Furthermore, because plaintiffs have conceded that applying fertilizer containing phosphorus is a standard agricultural practice for cranberry producers in Wisconsin and is necessary for cranberry production, it appears to a legal certainty that no plaintiff could recover $75,000 in punitive damages.

F. Attorney Fees

Even assuming plaintiffs could recover an award of attorney fees, such fees cannot be counted toward the amount in controversy unless they had already been incurred at the time the complaint was filed. Gardynski- Leschuck v. Ford Motor Co., 142 F.3d 955, 958-59 (7th Cir. 1998). Plaintiffs' complaint contains no allegation that each of them owed their lawyer $75,000 in fees before the complaint was filed.

G. Injunctive Relief

Plaintiffs seek "abatement of the discharge by [defendant] of phosphorus pollution and other chemical pollutants into Musky Bay." Abatement is a form of relief available in nuisance actions. Hoffman v. Wisconsin Electric Power Co., 2003 WI 64, ¶ 23, 262 Wis.2d 264, 664 N.W.2d 55. The Court of Appeals for the Seventh Circuit has held that the value of injunctive relief meets the jurisdictional threshold if either the benefit to plaintiff exceeds $75,000 or the cost to defendant of complying with such injunction exceeds $75,000. In re Brand Name Prescription Drugs, 123 F.3d 599, 609-610 (7th Cir. 1997).

The record is unclear as to what action plaintiffs would like defendant to take to abate the nuisance. It appears that plaintiffs may be seeking an injunction prohibiting defendant from discharging phosphorus into Musky Bay. However, such an injunction would have little value to plaintiffs, as they concede that the current phosphorus load of Musky Bay is sufficient to support algal and seaweed growth for the foreseeable future. An order enjoining

defendant from discharging any phosphorus into Musky Bay would not redress the harm of which plaintiffs complain. As for the cost to defendant of complying with such an injunction, this court can reasonably conclude that it will cost him *something*, but there is no estimate of this cost in the complaint or record, nor any facts to support a finding that the cost to defendant would be at least $75,000.

The only other form of abatement discussed by the parties is dredging. However, it is unclear 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. If plaintiffs seek the former, then the amount in controversy requirement is met, as the parties agree that the dredging could cost defendant up to $4 million. However, as plaintiffs surely recognize, there are various factors militating against the issuance of such an injunction. In addition to being astronomically expensive, dredging has the potential to severely damage the bay and lake ecosystems as well as the ecosystem of an adjacent wetland. As a result, the dredging would affect third parties who are not parties to this action, including other property owners on Musky Bay and other parts of Lac Courte Oreilles, members of the public who enjoy the lake and its habitat for recreational purposes and the state of Wisconsin, which holds the bed of the state's navigable waters in trust for public use. Furthermore, an injunction ordering defendant to dredge the bay would be impractical. Defendant's ability to comply with such an injunction depends upon his ability to obtain numerous permits from the Wisconsin Department of Natural Resources, and the

department's ability to issue those permits are constrained by rules and procedures prescribed by state law. Indeed, if ordering defendant to dredge the bed of the bay is the form of abatement plaintiffs seek, then it raises the question whether the Department of Natural Resources is a party that must be joined under Fed. R. Civ. P. 19(a).

In light of the various problems with an injunction ordering defendant to dredge the bay and the failure of plaintiffs to join the department as a party in this lawsuit, I decline to read their ill-defined request for abatement as a request that defendant be ordered to dredge the bay. Plaintiffs should clarify this issue in their response to this order.

H. Conclusion

In sum, the existing record suggests that the amount in controversy as to each plaintiff was less than $75,000 at the time the complaint was filed. Accordingly, it is necessary to stay the summary judgment proceedings in order to decide the question whether this court has subject matter jurisdiction to decide the merits of the claims of any plaintiff.

ORDER

IT IS ORDERED that:

1. Plaintiffs have until November 10, 2003, to submit to the court evidence, along with a supporting memorandum, that shows to a reasonable probability that jurisdiction exists under 28 U.S.C. § 1332 as to each plaintiff. Defendant and intervening

defendant shall file a response to plaintiffs' submission no later than November 24, 2003.

2. All dates set forth on the scheduling order are STRICKEN until further order of the court.

Dated this 10th day of October, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge