

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

-----  
BLACK EARTH MEAT MARKET, LLC,  
and KEMPER BARTLETT DURAND,

Plaintiffs,

v.

VILLAGE OF BLACK EARTH, PATRICK TROGE,  
PATRICK FREY, TED PRITCHETT, THOMAS PARRELL,  
JAMES COYLE, BETH MARTY and WALT MILLER,

Defendants.  
-----

ORDER

14-cv-674-bbc

On March 24, 2015, plaintiffs Black Earth Meat Market, LLC and Kemper Bartlett Durand filed a motion for leave to amend their complaint for a third time. Dkt. #45. Although defendants Village of Black Earth, Patrick Troge, Patrick Frey, Ted Pritchett, Thomas Parrell, James Coyle, Beth Marty and Walt Miller did not oppose plaintiffs' motion, I could not grant it because plaintiffs had not included a copy of their proposed amended complaint with their motion, making it impossible to analyze the motion under Fed. R. Civ. P. 15. Plaintiffs have now filed a renewed motion for leave to amend their complaint with the proposed amended complaint attached. Dkt. #48. Defendants do not oppose the motion.

Under Fed. R. Civ. P. 15, courts must give leave "freely" to parties to amend their pleadings, "when justice so requires," but parties are not entitled to such leave when "there

is undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, unfair prejudice to the defendants, or where the amendment would be futile.” Hukic v. Aurora Loan Services, 588 F.3d 420, 432 (7th Cir. 2009). Although defendants do not oppose plaintiffs’ motion, the court is permitted to consider these factors on its own.

I start by noting that although plaintiffs included their proposed amended complaint with this motion, the scope of their complaint is still difficult to understand. Plaintiffs say they wish to add “Wisconsin constitutional claims” for takings and inverse condemnation, under article 1, section 13 of the Wisconsin Constitution, and for denial of equal protection, procedural due process and substantive due process under article 1, section 1. They also wish to eliminate their defamation claim against defendants. Plaintiffs have no obligation to amend their pleadings as they relate to legal theories, Albiero v. City of Kankakee, 122 F.3d 417, 419 (7th Cir. 1997) (“Having specified the wrong done to him, a plaintiff may substitute one legal theory for another without altering the complaint.”); however, they do need to amend if they are adding or amending facts. Plaintiffs have not identified any facts they wish to add or to amend. On one hand, they say that the additional claims are the result of “preparing for initial discovery,” Plt.’s Mot., dkt. #45, at 2; on the other hand, they say their amendments are not prejudicial because discovery has yet to begin. Id. at 3.

In any event, the elimination of the defamation claim is not prejudicial to defendants or the court, so plaintiffs’ motion will be granted in that respect. However, most claims arising from the Wisconsin Constitution are not cognizable in this court. With respect to injunctive relief, the principles of sovereign immunity prohibit federal courts from enjoining

state officials under state law. This limitation applies not just to injunctions, but to declaratory relief as well. Benning v. Board of Regents of Regency Universities, 928 F.2d 775, 778 (7th Cir. 1991).

With respect to damages, few provisions of the state constitution provide a means for individuals to sue state officials for money damages. Jackson v. Gerl, 2008 WL 753919, \*6 (W.D. Wis. 2008). The exception to this rule is takings claims arising under article 1, section 13 of the Wisconsin Constitution. Individuals may receive damages as “just compensation” from the state for takings actions. W.H. Pugh Coal Co. v. State, 157 Wis. 2d 620, 634-35, 460 N.W.2d 787, 792-93 (1990) (holding that plaintiff could sue state for money damages arising from unconstitutional taking of property because article I, section 13 of the Wisconsin Constitution requires that state provide “just compensation” when property is taken). Therefore, plaintiffs will be granted leave to amend their complaint to add “Wisconsin constitutional claims” based on the takings clause.

However, plaintiffs’ remaining constitutional claims are not cognizable in this court. Plaintiffs cite Forseth v. Village of Sussex, 199 F.3d 363, 368 (7th Cir. 2000), for the proposition that they must pursue state constitutional claims before federal ones. Neither Forseth nor Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 193–94 (1985), the case on which the court relied in Forseth, are about the order in which claims are pursued, but about the requirement that the plaintiffs *exhaust* their state court remedies before federal courts may adjudicate their takings claims.

Because plaintiffs have no remedy in federal court for their remaining “Wisconsin constitutional claims,” it would be a waste of the court’s resources to allow plaintiffs to proceed on them. For this reason and because plaintiffs have already amended their complaint multiple times, they will not be permitted to add these claims to their amended complaint. Johnson v. Dossey, 515 F.3d 778, 780 (7th Cir. 2008) (court may deny motion for leave to amend “if it is clear that the proposed amended complaint is deficient and would not survive a motion to dismiss”).

#### ORDER

IT IS ORDERED that the motion for leave to file a third amended complaint by plaintiffs Black Earth Meat Market, LLC and Kemper Bartlett Durand, dkt. #48, is GRANTED with respect to plaintiffs’ motion to add takings and inverse condemnation claims under article 1, section 13 of the Wisconsin Constitution and to remove their defamation claim. The motion is DENIED with respect to the remaining proposed claims arising under the Wisconsin Constitution.

Entered this 15th day of June, 2015.

BY THE COURT:

/s/

---

BARBARA B. CRABB  
District Judge