IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

WINDHOVER, INC. AND JACQUELINE GRAY,	)	
Plaintiffs,	)	Cause No. 07-cv-881 ERW
v.	)	
CITY OF VALLEY PARK, MISSOURI,	)	
Defendant.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT

Plaintiffs Windhover, Inc. and Jacqueline Gray respectfully submit this memorandum in support of their Motion for Leave to File Second Amended Complaint. Plaintiffs seek leave to amend their Amended Petition initially filed in state court to: (1) conform it to federal pleading standards; (2) conform it to the fact that Plaintiffs have voluntarily dismissed their causes of action relating to Valley Park Ordinance No. 1721, which has been effectively repealed; (3) conform it to the fact that Valley Park Ordinance No. 1722 has purportedly been replaced by Valley Park Ordinance No. 1736; and (4) assert a claim under the Missouri Sunshine Law. The grant of leave to amend should not in any way delay these proceedings or prejudice the Defendant.

BACKGROUND

On March 14, 2007, Plaintiff Jacqueline Gray initiated this action by filing a Petition for Declaratory and Injunctive Relief in the Circuit Court for St. Louis County seeking an order enjoining the enforcement Valley Park Ordinance No. 1721 and Valley Park Ordinance No.

1722. Those Ordinances were successors to Ordinance No. 1708 and Ordinance No. 1715, which, on March 12, 2007, were permanently enjoined by Circuit Court Judge Barbara W. Wallace in the case captioned *Reynolds, et al., v. City of Valley Park, et al.*, Cause No. 06-CC-3802.

Ordinance No. 1721 and Ordinance No. 1722 had been enacted on February 14, 2007, and they purported to repeal and replace Ordinance No. 1708 and Ordinance No. 1715. Ordinance No. 1721 sought to regulate immigration by prohibiting the rental of dwellings to aliens unlawfully present in the United States.

Ordinance No. 1722, entitled "An Ordinance Repealing Ordinance No. 1715 Relating to Illegal Immigration Within the City of Valley Park, MO, and Enacting a New Ordinance in Lieu Thereof Relating to the Employment of Illegal Aliens Within the City of Valley Park, Mo.[,]" seeks to regulate immigration matters, and provides that "[i]t is unlawful for any business entity to recruit, hire for employment, or continue to employ, or to permit, dispatch, or instruct any person who is an unlawful worker to perform work in whole or in part in the City." (Ord. No. 1722, Docket No. 31-7, Section Four, A.)

On February 14, 2007, the City of Valley Park further enacted Ordinance No. 1724, entitled "An Ordinance Amending Bill 1867, Proposed Ordinance 1722, Pertaining to the Employment of Illegal Aliens by Adding Language to Section Seven Thereof Clarifying the Effective Date," which purported to amend Ordinance No. 1722 so that it would not become effective until "the termination of any restraining orders or injunctions which [were then] in force in Cause No. 06-CC-3802[.]" (Docket No. 31-9.)

On March 14, 2007, following issuance of the permanent injunction in Cause No. 06-CC-3802, Windhover and Gray filed their Petition for Declaratory and Injunctive Relief in the

Circuit Court for St. Louis County, seeking to enjoin the enforcement of Ordinance No. 1721 and Ordinance No. 1722. Though it was Plaintiffs' position that Ordinance No. 1722 was not effective under its own terms unless and until the permanent injunction in Cause No. 06-CC-3802 was terminated, they included claims relating to Ordinance No. 1722 in their Petition for the contingency that Defendant might disagree with that position or the injunction in Cause No. 06-CC-3802 was somehow terminated while this case was pending. On April 12, 2007, Plaintiffs filed an Amended Petition for Declaratory and Injunctive Relief to join Windhover as a Plaintiff and add additional causes of action.

On May 1, 2007, Defendant removed the case to this Court. Plaintiffs' motion for remand was denied. Subsequent to removal, the parties completed briefing on Plaintiffs' Motion for Preliminary Injunction, and, on August 8, 2007, the Court granted Plaintiffs' motion to consolidate the preliminary injunction hearing with a trial on the merits, which the Plaintiffs suggested should occur in October 2007.

On July 16, 2007, prior to the Court's August 8, 2007 Order granting Plaintiffs' motion to consolidate the hearings, Defendant had enacted Ordinance No. 1735, which repealed certain disputed provisions from Ordinance No. 1721. On August 9, 2007, this Court granted the parties' stipulation for voluntary dismissal of Plaintiffs' claims relating to Ordinance No. 1721.

The removal of Ordinance No. 1721 from the case raised the question of whether there remained a case or controversy. The only remaining ordinance, Ordinance No. 1722, was, in Plaintiffs' view, not currently effective and may never have become effective unless and until the permanent injunction in Cause No. 06-CC-3802 was reversed by the Missouri Court of Appeals or Missouri Supreme Court. Accordingly, Plaintiffs sought once and for all to resolve the matter so that the resources of the Court and the parties would not be wasted litigating the validity of an

ordinance that was not currently effective and may never become effective. On August 9, 2007, Plaintiffs filed their Motion for Declaration That Valley Park Ordinance No. 1722 Is Inoperative.

Though Plaintiffs had three weeks earlier raised with the Defendant the issue of whether Ordinance No. 1722 was currently ineffective and this case therefore moot, the Defendant responded to Plaintiffs' Motion for Declaration by convening an emergency meeting of the Valley Park Board of Aldermen on that same day, August 9, 2007, and ostensibly enacting Ordinance No. 1736, which purported to amend Ordinance No. 1722 to make it effective immediately. Ordinance No. 1736 also "restated" Ordinance No. 1722 to try to resolve the confusion the Defendant had created by circulating at least three different versions of Ordinance No. 1722 that appeared on their face to have been signed by the Mayor on the same day. On August 20, 2007, Defendant purportedly re-enacted Ordinance No. 1736.

Meanwhile, on August 16, 2007, certain plaintiffs in Cause No. 06-CC-3802 filed a Motion for Order to Show Cause and Contempt on the premise that Ordinance No. 1722, putatively made immediately effective by Ordinance No. 1736, falls within the scope of the permanent injunction in that case. The Motion for Order to Show Cause seeks an order specifically enjoining the enforcement of Ordinance No. 1722 as purportedly amended by Ordinance No. 1736. On August 20, 2007, Plaintiffs Windhover and Gray joined that Motion. A hearing before Judge Wallace is scheduled for September 20, 2007.[1]

[1] The Defendant has repeatedly accused the Plaintiffs of trying to "delay" this case. Defendant is absolutely correct. If Ordinance No. 1722 is not currently effective, or is permanently enjoined by the Missouri state court, then Plaintiffs see no reason to waste this Court's or their own resources by plunging ahead with this case in federal court. Indeed, that would not be responsible. Nevertheless, it is the Plaintiffs who pushed the discovery schedule forward, and Plaintiffs have done nothing to retard the schedule they proposed in their Motion to Consolidate or the schedule that this Court adopted in its August 15, 2007 Order. (Docket No. 62.) This case is moving forward according to the prescribed schedule. But that schedule should not preclude the Court or the Plaintiffs from holding the Defendant's feet to the fire regarding the legitimacy

Plaintiffs now seek to amend their Amended Petition to conform to and address the events that have occurred subsequent to the filing of their Amended Petition in state court on April 12, 2007.

ARGUMENT

Amendments to pleadings are governed by Rule 15(a) of the Federal Rules of Civil Procedure, which provides:

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . . Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Fed. R. Civ. P. 15(a). The Rule has been liberally interpreted, and leave to amend pleadings should be liberally granted. *Foman v. Davis,* 371 U.S. 178, 182 (1962)); *Buder v. Merrill Lynch, Pierce, Finner & Smith, Inc.,* 644 F.2d 690, 694 (8th Cir. 1981).

The following four factors are commonly used to determine the propriety of a motion for leave to amend under Rule 15(a): bad faith, undue delay, prejudice, and futility. *Becker v. Univ. of Nebraska,* 191 F.3d 904, 907-08 (8th Cir. 1999); *Foman*, 371 U.S. at 182. The Eighth Circuit has noted that, in most cases, delay alone is not sufficient to deny leave to amend, but prejudice to the non-movant must also be shown. *Bell v. Allstate Life Ins. Co.,* 160 F.3d 452, 454 (8th Cir. 1998).

The Plaintiffs' Motion for Leave to File Second Amended Complaint should be granted because it will not have been filed with undue delay or in bad faith, will not prejudice the Defendant and will not be futile.

First, there is no undue delay or bad faith. Plaintiffs are seeking to amend their First Amended Petition promptly after learning of Defendant's August 9, 2007 attempt to enact

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of its actions, or from pursuing avenues to dispose of this matter under state law if that will ultimately conserve party and judicial resources.

Ordinance No. 1736, which purports to amend Ordinance No. 1722, and promptly after receiving confirmation that the Defendant purported to properly enact Ordinance No. 1736 on August 20, 2007.

Second, the Defendant will not be prejudiced because: (1) discovery in this matter has only recently commenced, with responses to written discovery requests due on September 14, 2007, and fact-discovery to be closed by October 12, 2007; (2) the Second Amended Complaint will not alter either the scope or timing of discovery; and (3) the Second Amended Complaint will not in any way delay resolution of this matter.

Finally, amending the Amended Petition will not be futile. The only substantive new claim in the Second Amended Complaint is the Sunshine Law claim. That claim would be futile only if it did not satisfy the standards of Fed. R. Civ. P. 12(b)(6). Under that standard, the claim would be futile only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Ricciuti v. New York City Transit Auth.*, 941 F.2d 119, 123 (2d Cir. 1991) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

Count VI of the Second Amended Complaint alleges facts that are sufficient to state a claim under the Missouri Sunshine Law. It alleges that the special meeting of the Valley Park Board of Alderman held on August 9, 2007 was not preceded by at least 24-hours notice, as is presumptively required under Mo. R. Stat. § 610.020(2). (Second Amended Complaint ¶ 45.) It further alleges that there was no good cause for failing to provide the required notice. (*Id.*) It alleges, therefore, that, pursuant to Mo. R. Stat. § 610.027(5), this Court is authorized to void any action taken by the Valley Park Board of Aldermen on August 9, 2007. (*Id.*)

The Second Amended Complaint further alleges that the Board of Aldermen's violation of section 610.020(2) was knowing and purposeful, and therefore that this Court is authorized

under Mo. R. Stat. § 610.027(3) and (4) to impose a civil penalty of up to $5,000 plus costs and reasonable attorneys fees. (Second Amended Complaint ¶ 46.) Those allegations are more than sufficient to state a claim under the Missouri Sunshine Law.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court enter an order granting Plaintiffs leave to file their Second Amended Complaint.

Respectfully submitted,

/s/ Daniel J. Hurtado

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served on Defendant's counsel of record, listed below, by operation of the Court's ECF/CM system on August 27, 2007.

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