UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ACTS 17 APOLOGETICS, et al.,

Plaintiffs,

Case No. 11-cv-10700

v.

HONORABLE STEPHEN J. MURPHY, III

CITY OF DEARBORN, et al.,

Defendants.
_____/

ORDER GRANTING PLAINTIFF'S MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT (docket no. 63).

This is a Section 1983 civil rights action. Plaintiffs allege violations of their First, Fourth, and Fourteenth Amendment rights; a civil conspiracy to violate those rights; and various state law claims of defamation, assault, battery, and intentional infliction of emotional distress. On August 3, 2012, Plaintiffs moved for leave to file their Proposed Second Amended Complaint under Civil Rule 15. Plaintiffs seek to add the Arab-American Chamber of Commerce as a defendant. The Court, having reviewed the papers, concludes that a hearing is not necessary to resolve the motion. *See* E.D. Mich. LR 7.1(f)(2). For the reasons stated below, the Court will grant Plaintiffs' motion for leave to amend.

BACKGROUND

Plaintiffs are Acts 17 Apologetics, an organization that "seeks to convert Muslims to Christianity through discussion, debate, and dialogue;" and several of its members, Dr. Nabeel Quireshi, David Wood, Paul Rezkalla, and Joshua Hogg (collectively "Plaintiffs"). On June 18, 2010, Quiershi, Wood, and Rezkalla attended the Arab International Festival ("Festival") in Dearborn, Michigan, with the intent of engaging Muslim attendees in conversations about the relative merits of Christianity and Islam. First Amend. Compl., ECF

No. 54, at 5. The Festival was organized and run in part by the Arab-American Chamber of Commerce ("AACC"). While Quiershi, Wood, and Rezkalla were at the Festival, they were arrested by defendants City of Dearborn Police Department officers for violation of a "breach of the peace" ordinance. Plaintiffs were tried and acquitted in Michigan state court for this violation. *Id.* at 77. This lawsuit was then filed against the City of Dearborn, its mayor and police chief, several of its police officers, as well as two AACC officials (collectively "Defendants"), but not the AACC itself. *Id.* at 8-12. Plaintiffs now seek to add the AACC as a defendant.

DISCUSSION

Civil Rule 15(a) specifies the procedure for amending pleadings. After the time permitting amendments as a matter of course has expired, "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). The Sixth Circuit has stated that leave should ordinarily be freely allowed to permit the resolution of cases on the merits, rather than by technicalities. *See Fisher v. Roberts*, 125 F.3d 974, 977 (6th Cir. 1997). But a district court retains the discretion to deny leave for particular reasons, such as an undue delay in filing, a lack of notice and undue prejudice to the non-moving party, bad faith by the moving party, or when the amendment would be futile. *See Forman v. Davis*, 371 U.S. 178, 182 (1962); *Wade v. Knoxville Utilities Bd.,* 259 F.3d 452, 458-59 (6th Cir. 2001). Of these factors, "[n]otice and substantial prejudice to the opposing party are critical factors in determining whether an amendment should be granted." *Hageman v. Signal L. P. Gas, Inc.*, 486 F.2d 479, 484 (6th Cir. 1973). Overall, a court must find "at least some significant showing of prejudice to the opponent" if the court denies a motion to amend. *Ziegler v.*

Aukerman, 512 F.3d 777, 786 (6th Cir. 2008) (quoting *Moore v. City of Paducah*, 790 F.2d 557, 562 (6th Cir.1986)).

Defendants Fay Beydoun and Norma Haidous, the two AACC official defendants, filed a response to the instant motion. They argue the Proposed Second Amended Complaint was brought for a dilatory purposes, prejudices them, is a futile amendment, and is brought in bad faith. Defs. Resp., ECF No. 64, at 8.

I. Dilatory Purpose

Defendants assert this motion was brought for the purpose of delaying the case. But Plaintiffs filed this motion consistent with a stipulated scheduling order that specifically contemplated the addition of new parties. On May 6, 2012, after discussion with Plaintiffs and Defendants, the Court entered the stipulated scheduling order. Among other deadlines, the order specified a cut-off date of August 3, 2012 for the filing of motions "to amend the pleadings to add any additional parties or claims." Stip. Sched. Order, ECF No. 61. Plaintiffs timely filed the motion on that cut-off date.

Defendants point out Plaintiffs could have added the AACC at any time, and indeed, Plaintiffs admit the AACC was considered as a possible defendant long before the instant motion was filed. Although past cases have found prejudice against a defendant when the plaintiff was aware of the existence of an unjoined defendant's potential liability and held off adding them to the action, such cases also found prejudice only when the plaintiff sought to amend several months after the close of pleadings and discovery. *See, e.g.*, *Duggins v. Steak 'N Shake, Inc.*, 195 F.3d 828 (6th Cir. 1999). Here, Plaintiffs filed the motion consistent with the stipulated schedule, and discovery is not closed.

II. Prejudice to the Non Movant

Defendants also state that adding the AACC as another defendant would significantly prejudice them, stating they may need to "redepose" up to five parties. Even assuming this to be true, the Court finds that any prejudice is not significant enough to overcome the presumption in favor of liberal amendment. Generally, prejudice is found only after discovery and the pleadings have closed, and then typically only when the proposed amendment would represent a major change in the underlying case. *See, e.g.*, *Leary v. Daeschner*, 349 F.3d 888, 908 (6th Cir. 2003) (finding prejudice when amended complaint changed entire theory of action); *Gardner v. Wayne County*, 06-cv-10372, 2007 WL 2325065 (E.D. Mich. Aug. 15, 2007) (prejudice would result when plaintiff filed motion several months after the close of pleadings, dispositive motions, and discovery). Here, again, Plaintiffs filed their motion timely according to the scheduling order and discovery has not yet closed.[1] Likewise, as the specific defendants opposing the motion were previously sued in their official capacity as members of the AACC, they were likely aware of the possibility the organization itself might be named as a defendant.

III. Futility of Amendment

Defendants argue that adding the AACC as a defendant would be "futile." A court may refuse to grant leave to amend if the proposed amendment would be futile; that is, if the additional claim or defendant in the proposed amendment would not survive a Civil Rule 12(b)(6) motion to dismiss for failure to state a claim. *See Thiokol Corp. v. Dep't of Treasury*, 987 F.2d 376, 383 (6th Cir.1993). Such a motion to dismiss may be granted if the

[1]The Court will consider extensions to the discovery schedule should either party make a request.

allegations are not sufficient "to raise a right to relief above the speculative level," and to "state a claim for relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). In evaluating the motion, the Court presumes the truth of all well-pled factual assertions. *Bishop v. Lucent Techs.*, 520 F.3d 516, 519 (6th Cir. 2006). Although "a complaint need not contain 'detailed' factual allegations, its '[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true.'" *Ass'n of Cleveland Fire Fighters v. Cleveland, Ohio*, 502 F.3d 545, 548 (6th Cir. 2007) (quoting *Twombly*, 550 U.S. at 555). "A pleading that offers [only] 'labels and conclusions' or 'a formulaic recitation of the element of a cause of action will not do.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 555).

Defendants argue that the Proposed Second Amended Complaint would be futile because first, evidence already obtained through discovery tends to prove the AACC is not liable for the alleged claims; second, that under § 1983 caselaw, private actors such as the AACC cannot be held liable if the state actor actually takes the disputed action; and third, that regardless, Plaintiffs have not pled sufficiently detailed facts to support the claim and survive a Rule 12(b)(6) motion to dismiss. Defs. Resp., ECF No. 64, at 8.

(A) Weight of the Evidence

First, Defendants argue the weight of the evidence obtained through discovery so far does not support the addition of the AACC. In support of their argument, they include a great deal of deposition testimony and other evidence to demonstrate the lack of a relationship between the AACC and the City of Dearborn necessary to support liability. But at this stage, when the standard of review is that for a motion to dismiss, a court generally

will not consider substantive evidence as it would in a motion for summary judgment. *Amini v. Oberlin College*, 259 F.3d 493, 502 (6th Cir. 2001). At this point, a court is only to weigh the legal sufficiency of the claim.

(B) Private Actor Liability under § 1983 for State Action

Second, Defendants argue that § 1983 case law does not support a claim for state action if the private actors themselves have not actually taken the alleged action. Ordinarily, in § 1983 claims a plaintiff may only plead harm caused by state action. *See generally Flagg Brothers Inc. v. Brooks*, 436 U.S. 149 (1978). Defendants assert that even when a private party is held liable, such liability is found only when the private actor takes the unconstitutional actions, and the state is intertwined with the private party. *See, e.g.*, *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 726 (1961). Here, Defendants argue, because the state actor, the City of Dearborn Police, actually took the alleged unconstitutional actions, there can be no basis for private liability.[2]

Plaintiffs, in reply, cite *Dennis v. Sparks*, in which the U.S. Supreme Court held that even if a challenged action was actually taken by a state official, "private parties could [nevertheless] be found to be state actors if they were 'jointly engaged with state officials in the challenged action.'" *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 200 (1988) (White, J. dissenting) (quoting *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980)) (*see also Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)). The Court finds this to be an accurate summary of the legal standards supporting private party liability.

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[2] Plaintiffs claim Defendants' argument here is a "misrepresentation." If Plaintiffs have actual proof Defendants have engaged in misrepresentation, they should formally allege so rather than making offhanded references to it in their briefings. Otherwise, Plaintiffs should refrain from accusing Defendants of misconduct.

(C) Insufficient Particularity

Third, Defendants argue Plaintiffs do not plead their case with particularity sufficient to survive a motion to dismiss. A plaintiff can sufficiently allege a private party is liable for state action under § 1983 in two ways. First, a plaintiff may plead the existence of a civil conspiracy between the private and state actor to deprive the plaintiff of his civil rights. *See Memphis, Tennessee Area Local, Am. Postal Workers Union, AFL-CIO v. City of Memphis*, 361 F.3d 898, 905 (6th Cir. 2004). Second, a plaintiff may allege the private actor has engaged in conduct intertwined enough with state action for the action to be "fairly attributed" to the state, even in the absence of a direct civil conspiracy. *See Lansing v. City of Memphis*, 202 F.3d 821, 828 (6th Cir. 2000); *see also American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 40 (1999). The Court will address the standards for a civil conspiracy claim first.

"A civil conspiracy is an agreement between two or more persons to injure another person by unlawful action." *Smith v. Johnston*, 173 F.3d 430 (6th Cir. 1999) (quoting *Hooks v. Hooks*, 771 F.2d 935, 943-44 (6th Cir.1985)). To make a case for civil conspiracy, a plaintiff must allege "(1) a 'single plan' existed, (2) [the defendant] 'shared in the general conspiratorial objective' to deprive [the plaintiff] of his constitutional (or federal statutory) rights, and (3) 'an overt act was committed in furtherance of the conspiracy that caused injury' to [the plaintiff]. Express agreement among all the conspirators is not necessary to find the existence of a civil conspiracy [and] [e]ach conspirator need not have known all of the details of the illegal plan or all of the participants involved." *Bazzi v. City of Dearborn*, 658 F.3d 598, 602 (6th Cir. 2011) (quoting *Hooks*, 771 F.2d at 944).

When pleading civil conspiracy, a complaint must, in addition to meeting the regular

Twombly – Iqbal pleading standard, also plead allegations "with some degree of specificity," as "vague and conclusory allegations unsupported by material facts will be insufficient to state a claim under § 1983." *Gutierrez v. Lynch*, 826 F.2d 1534, 1538 (6th Cir.1987); *see also Tahfs v. Proctor*, 316 F.3d 584, 592 (6th Cir. 2003) (stating plaintiff needed to identify behavior, as opposed to mere outcomes, suggesting corruption). A plaintiff need not exclusively plead direct evidence to support a conspiracy claim; in fact, "[r]arely in a conspiracy case will there be direct evidence of an express agreement among all the conspirators to conspire[; thus,] circumstantial evidence may provide adequate proof of conspiracy." *Bazzi*, 658 F.3d at 606 (quoting *Weberg v. Franks*, 229 F.3d 514, 528 (6th Cir.2000)). But a plaintiff must at a minimum allege a conspiracy and a concerted plan. *Cross v. Henry Ford Health Sys.*, 10-cv-12379, 2010 WL 4680779 (E.D. Mich. Nov. 10, 2010) (holding plaintiff failed to allege a claim by failing to allege concerted actions and common goals).

After examining the Proposed Second Amended Complaint, the Court finds that Plaintiffs do properly allege a civil conspiracy among Defendants, including the AACC, to deprive Plaintiffs of their constitutional rights sufficient to survive a motion to dismiss.[3]

Count X of the Proposed Second Amended Complaint straightforwardly alleges that all Defendants, including the AACC, "acted jointly and conspired to violate Plaintiffs' rights protected by the . . . Constitution." Proposed Second Amend. Compl., ECF No. 63-1, ¶ 446. Plaintiffs' specific allegation is certainly one of a single plan shared across all Defendants; it also alleges that proposed defendant AACC also shared in the general conspiratorial objective. Plaintiffs also allege overt acts in furtherance of the conspiracy; namely, the

[3] The Court therefore will not discuss liability under the "symbiotic relationship" theory.

arrest of Qureshi, Wood, and Rezkalla on June 18, 2010; the detention of non-plaintiff (and Acts 17 member) Negeen Mayel on June 18, 2010; the seizure of several other members of Acts 17 on June 20, 2010; and the unequal enforcement of the literature distribution ban at the Festival. Any of these acts is a sufficient claim to satisfy the pleading requirement of an overt act.

The final question then is if Plaintiffs have alleged sufficient facts for there to be at least a plausible claim such a conspiracy existed. Here, Plaintiffs set forth the following factual allegations:

First, Plaintiffs allege a close relationship between the AACC and the City defendants, as evidenced by multiple meetings between AACC officials and the City of Dearborn during Festival planning stages, including joint creation of the Festival's rules and regulations, cooperation to enforce the rules and regulations of the Festival, and city input and approval into the policies (such as the literature restrictions) Plaintiffs claim deprived them of their constitutional rights. Proposed Second Amend. Compl., at ¶¶ 39, 69, 73. Plaintiffs also point to the fact the AACC and the City of Dearborn were aware of the Plaintiffs' previous actions at the 2009 Festival. *Id.* at 38. *See Hartman v. Moore*, 547 U.S. 250, 256 (2006) (retaliation for exercise of First Amendment rights is a violation of § 1983).

Plaintiffs point to the alleged statement of AACC official and defendant Haidous, "referring to Plaintiffs Qureshi, Wood, Rezkalla, and Ms. Mayel, [stating], 'We need to do whatever it takes to get rid of them,' or words to that effect." *Id.* at ¶ 168. This statement was allegedly repeated by "Festival workers, volunteers, and security personnel . . . into their security radios." *Id.* at ¶ 169.

Next, Plaintiffs point to the alleged reporting of these statements and Plaintiffs'

concern over its implications to defendant Mrowka as a City police officer, and Mrowka's subsequent decision to ignore the complaint. *Id.* at ¶ 172.

This behavior is followed by the alleged statement of AACC worker Williams to plaintiff Qureshi, "You don't have to worry about me messing with him, you have to worry about me messing with you, all right." *Id.* at ¶ 184. Plaintiffs next allege Williams shortly thereafter spoke with defendant police officers and reporting, falsely Plaintiffs allege, that he (Williams) was threatened by certain plaintiffs.[4] Shortly thereafter, Mayel was detained by defendant police officers, and plaintiffs Qureshi, Wood, and Rezkalla were arrested. Proposed Second Amend. Compl., at ¶¶ 209, 214, 226.

Assuming the allegations are true, and taking all the facts in the light most favorable to Plaintiffs, the Court finds this sets forth allegations sufficient to at least make a claim for civil conspiracy between the AACC and defendant state actors to, if not arrest Qureshi, Wood, and Rezkalla on a pretextual charge, at least act to deny Plaintiffs their constitutional rights at the Festival. This is enough to survive a motion to dismiss. *See also Bazzi*, 658 F.3d 598 (Court found allegations of civil conspiracy between civilian and police officer were sufficiently pled, based on circumstantial evidence such as fact of meetings and possibility police officer was aware his conduct was not justified); *compare generally Lansing*, 202 F.3d 821 (no finding of a "nexus" between state actor police officer and

[4] The Court notes its prior finding in its opinion and order denying Defendants' Rule 12(c) motion for judgment on the pleadings on February 7, 2012. The Court found that under *Darrah v. City of Oak Park*, 255 F.3d 301 (6th Cir. 2001), this Court could permissibly examine the defendant police officers' actions and justifications for arresting Plaintiffs. The Court also concluded that it was permissible to infer that the police officers knew Williams' complaint was a pretext and not valid. This elevated the claim enough to survive the Rule 12(c) challenge, for which the standard is identical for a 12(b)(6) motion. Op. and Order, ECF No. 52, at 13.

private entity when the private entity only utilized public police service remedies to injure the plaintiff, in the absence of any allegation the police officer was aware of the pretext of the request). The Court, of course, does not conclude that this relationship actually exists, but merely that Plaintiffs' Proposed Second Amended Complaint alleges a cognizable cause of action sufficient to survive a motion to dismiss, and therefore the proposed amendment is not futile.

IV. Bad Faith

Defendants finally argue this motion was brought in bad faith, considering as a whole, they assert, it is dilatory, will knowingly result in prejudice, and is knowingly futile considering the weight of the evidence. Given the factors the Court discussed above, where the motion was timely, will not result in significant prejudice, and states a cognizable claim, the Court finds the motion was not brought in bad faith. Therefore, the Court will grant the motion and permit leave to file the Second Amended Complaint.

ORDER

WHEREFORE, it is hereby **ORDERED** that Plaintiffs' motion for leave to file a second amended complaint (docket no. 63) is **GRANTED**.

SO ORDERED.

s/Stephen J. Murphy, III
STEPHEN J. MURPHY, III
United States District Judge

Dated: November 27, 2012

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on November 27, 2012, by electronic and/or ordinary mail.

Carol Cohron
Case Manager