UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHIGAN PARALYZED VETERANS OF AMERICA, et al.,

Plaintiffs,

v.

MICHIGAN DEPARTMENT OF TRANSPORTATION, et al.,

Defendants.
_____/

CIVIL ACTION NO. 15-cv-13046

DISTRICT JUDGE PAUL D. BORMAN

MAGISTRATE JUDGE MONA K. MAJZOUB

OPINION AND ORDER GRANTING PLAINTIFFS' MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT [22]

This matter comes before the Court on Plaintiffs Michigan Paralyzed Veterans of America (MPVA), Ann Arbor Center for Independent Living, Inc. (AACIL), Maurice L. Jordan, Michael Harris, Carolyn Grawi, James R. Briggs, Christopher Cooley, Claire Abraham, and Lloyd Shelton's Motion for Leave to File a Second Amended Complaint Pursuant to Federal Rule of Civil Procedure 15(a)(2).[1] (Docket no. 22.) Defendants Pittsfield Charter Township, Washtenaw County Road Commission (WCRC), Ypsilanti Charter Township, and Michigan Department of Transportation (MDOT), respectively, responded to Plaintiffs' Motion (docket nos. 25-27, 29), and Plaintiffs replied to Defendants' Responses (docket nos. 28, 30-32). The Motion has been referred to the undersigned for consideration. (Docket no. 23.) The Court has reviewed the pleadings and dispenses with oral argument pursuant to Eastern District of Michigan Local Rule 7.1(f)(2). The Court is now ready to rule pursuant to 28 U.S.C. § 636(b)(1)(A).

[1] Plaintiff Christopher Cooley has since withdrawn from this lawsuit due to deteriorating health. (Docket no. 38.)

I. BACKGROUND

Plaintiffs initiated this action against Defendants on August 27, 2015 pursuant to Title II of the Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973, alleging that Washtenaw County's public right-of-way is not fully accessible to pedestrians with disabilities as required by law. (Docket no. 1.) On September 11, 2015, before any Defendant had filed a responsive pleading, Plaintiffs filed an Amended Complaint, to which each Defendant has since filed an answer. (Docket nos. 3, 10, 15, 17-18.) The parties addressed any further amendments to the pleadings in their Proposed Joint Discovery Plan, filed on December 18, 2015. (Docket no. 20.) The Plan provides, in relevant part:

> Plaintiffs' Statement:
> Potential Additional Organizational Plaintiff and/or individual members of same:
> Plaintiff's Counsel has been contacted by a major disability rights group that has expressed an interest in joining the lawsuit as an Organizational Plaintiff, and/or some individual members join [sic]. Discussions are currently underway.
>
> Pittsfield Charter Township, Ypsilanti Charter Township, and Washtenaw County Road Commission object to Plaintiffs identifying any additional parties, particularly until such time as Plaintiffs identify precisely who the Plaintiffs are now. At paragraph 4 of the Amended Complaint Plaintiffs allege that they are "Veterans and other persons with disabilities throughout the County" and that they are individuals who work and live in the County, but not in Pittsfield or Ypsilanti Charter Townships. Plaintiffs allege (paragraph 19) that MPVA represents Veterans With Disabilities and "all citizens" with disabilities, Plaintiffs indicate that they may seek to join another "major disability rights group" and Defendants do not know what this means.
>
> MDOT will review any proposed amended pleadings and advise Plaintiffs whether it is able to stipulate to the amendments.

(*Id.* ¶ 4A.) The Plan also memorializes Plaintiffs' intent to circulate a proposed Second Amended Complaint to all counsel and advises that, absent the stipulation of all parties to allow Plaintiffs to file a Second Amended Complaint, Plaintiffs must file a motion for leave to amend

by January 22, 2016. (*Id*. ¶ 6.) This deadline was subsequently extended to January 29, 2016 by stipulation and order. (Docket no. 21.) Plaintiffs timely filed the instant Motion.

II. GOVERNING LAW

Federal Rule of Civil Procedure 15(a) provides that a "party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." Fed. R. Civ. P. 15(a)(1)(A)-(B). Otherwise, "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).

Factors relevant to the determination of whether to permit an amendment include "the delay in filing, the lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of amendment." *Perkins v. Am. Elec. Power Fuel Supply, Inc.*, 246 F.3d 593, 605 (6th Cir. 2001). "Although Rule 15(a) indicates that leave to amend shall be freely granted, a party must act with due diligence if it intends to take advantage of the Rule's liberality." *U.S. v. Midwest Suspension and Brake*, 49 F.3d 1197, 1202 (6th Cir. 1995) (citation omitted). "Delay alone . . . does not justify the denial of leave to amend. Rather, the party opposing a motion to amend must make some significant showing of prejudice to prevail." *Sec. Ins. Co. of Hartford v. Kevin Tucker & Assoc., Inc.*, 64 F.3d 1001, 1009 (6th Cir. 1995). The decision whether to grant a motion to amend is within the sound discretion of the court. *Perkins*, 246 F.3d at 605.

III. ANALYSIS

Plaintiffs assert that the Court should grant them leave to file a Second Amended Complaint because: (1) Defendants have been on notice of Plaintiffs' intent to amend the complaint since the entry of the Joint Discovery Plan; (2) Defendants have ample time to conduct discovery on the proposed plaintiffs, as the discovery deadline is December 15, 2016, and the dispositive motion deadline is February 24, 2017; (3) the Second Amended Complaint proposes one additional organizational plaintiff, National Federation of the Blind of Michigan, Inc. (NFBMI), and seven additional individual Plaintiffs, Angie Carlson, Linda Evans, Zach Damon, Jason DeCamillis, Austin Sheperd, a minor, through his next friend Amy Sheperd, Larry Keeler, and Lu Ann Bullington, who have similar, if not identical, sight and/or mobility disabilities to those of the original plaintiffs and have suffered similar harm as have the original Plaintiffs through Defendants' lack of accessible sidewalks, curb cuts, pedestrian crossings, and bus stops; (4) judicial economy would be served by permitting the Second Amended Complaint to be filed, because if the instant Motion is denied, the proposed plaintiffs would be forced to file a separate, virtually identical lawsuit against the same Defendants; (5) Defendants would not be unduly prejudiced where the Second Amended Complaint does not add any additional defendants or causes of action, keeps each of the originally named plaintiffs, sets forth an identical statement of jurisdiction, reduces the geographic scope of the Amended Complaint's claims, and, like the Amended Complaint, does not seek monetary damages; and (6) Defendants would not be prejudiced where no discovery has been issued by any party. (*See* docket no. 22.)

Each Defendant has filed a separate response to Plaintiffs' Motion, in which they argue, separately and collectively, that Plaintiffs' Motion should be denied because Plaintiffs exercised delay and are acting in bad faith in proposing the Second Amended Complaint, Defendants

would suffer undue prejudice if the Motion is granted, and the proposed amendment is futile because the proposed plaintiffs lack standing. (Docket nos. 25-27, 29.)

A. Standing

Defendants Washtenaw County Road Commission and MDOT argue that Plaintiffs' proposed Second Amended Complaint is futile because its general, hypothetical, indeterminate, and conclusory allegations do not sufficiently show that the proposed plaintiffs have suffered an injury in fact. (Docket no. 26-1 at 7-8; docket no. 29 at 6-8.) Defendant WCRC further alleges that "Plaintiffs fail to allege with specificity the particular portions of facilities under the Road Commission's jurisdiction which fail, to the maximum extent possible, to be readily accessible to and usable by Plaintiffs." (Docket no. 26-1 at 8.) Defendant MDOT further alleges that the Second Amended Complaint "scantly" references the proposed plaintiffs and that the proposed plaintiffs do not identify a specific violation of the ADA that is remediable against Defendant MDOT. (Docket no. 29 at 7.)

Plaintiffs reply that the Second Amended Complaint would not be futile because it sufficiently pleads the standing of the proposed plaintiffs. (Docket no. 31 at 6-8; docket no. 32 at 6-7.) Plaintiffs expound that where Defendants WCRC and MDOT have admitted that the addition of the proposed plaintiffs adds nothing substantive to this matter and that the proposed plaintiffs seek the same relief as the original plaintiffs, Defendants WCRC and MDOT undoubtedly understand that the proposed plaintiffs "allege virtually identical factual and legal standing allegations as do current plaintiffs." (Docket no. 31 at 6; docket no. 32 at 6.) Plaintiffs further argue that all plaintiffs – original and proposed – have sufficiently pled specific examples of Defendants' violations of the ADA, both in the complaint and in the photographs attached to the complaint. (Docket no. 31 at 7-8; docket no. 32 at 7-9.)

To establish standing, a plaintiff must show that (1) he has suffered an injury in fact; (2) there is a causal connection between the injury and the defendant's conduct; and (3) the requested relief will likely redress the alleged injury. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992). For an organization to establish standing, it must show, among other things, that at least one of its members would have standing to sue. *See Fednav, Ltd. v. Chester,* 547 F.3d 607, 615 (6th Cir. 2008). The burden to establish standing increases at each successive stage of the litigation:

> At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim. In response to a summary judgment motion, however, the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts . . . , which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be supported adequately by the evidence adduced at trial.

Lujan, at 561 (citations and internal quotation marks omitted).

Here, in the proposed Second Amended Complaint, Plaintiffs make somewhat specific allegations with regard to some, but not all, of the original and proposed plaintiffs. For example, Plaintiffs allege that Plaintiff Briggs attempted to cross a roundabout at the intersection of State Street and Ellsworth Road within the borders of Defendant Pittsfield Charter Township, and he found that it was not readily accessible to and usable by him. (Docket no. 22-2 ¶¶ 93, 99; *see also* ¶ 75 (Plaintiff Carlson), ¶ 92 (Plaintiffs Grawi and Cooley); ¶ 158 (Plaintiff Jordan); ¶ 168 (Plaintiff Harris); ¶ 175 (Plaintiff Sheperd); and ¶ 181 (Plaintiff Shelton).) As Defendants point out, Plaintiffs also make more generalized allegations with regard to "each Plaintiff" in the Second Amended Complaint. (Docket no. 29 at 7-8.) For instance, Plaintiffs allege that "[e]ach of the named Plaintiffs has recently used or attempted to use one or more of the 'services, programs, activities or facilities' at issue in this lawsuit, but has found them to be not readily

accessible to and usable by Plaintiff," and "[e]ach Plaintiff continues to suffer from Defendants' failure to make streets, roads and highways, street level transit stops, sidewalks or other street level pedestrian walkways readily accessible to and usable by Plaintiffs, and will benefit from the relief sought here." (Docket no. 22-1 ¶¶ 19.G, 22.) The Court finds that under *Lujan*, the factual allegations cited above, and others, are sufficient to establish the standing of the proposed individual plaintiffs at this stage of the litigation. And where proposed individual plaintiffs Keeler and Sheperd are allegedly members of proposed organizational plaintiff NFBMI (*see* docket no. 22-1 ¶ 19.B), NFBMI has also established standing to sue. Defendants' argument with regard to the futility of Plaintiffs' proposed Second Amended Complaint fails.

B. Delay

Defendants assert that Plaintiffs have exercised undue delay in seeking to add the proposed plaintiffs, as they knew that additional plaintiffs could be identified and that additional allegations could be made from the start of this matter. (Docket no. 25 at 10.) In reply, Plaintiffs assert that they were not dilatory in moving to add the proposed plaintiffs, as they did not learn of proposed plaintiff NFBMI's interest in this lawsuit until December 8, 2015, and NFBMI underwent an internal approval process before it formally asked to join the lawsuit in early January 2016. (Docket no. 28 ¶¶ 19, 23.) Plaintiffs further explain through the declaration of their attorney, J. Mark Finnegan, that each new proposed individual plaintiff first learned of and expressed interest in joining the lawsuit in December 2015 or January 2016. (Docket no. 28-6 ¶ 23.) The Court finds Plaintiffs' explanation with regard to the proposed plaintiffs to be satisfactory. With regard to the additional factual allegations, while some could have been pled at the outset, the Court does not find that Plaintiffs exercised inexcusable delay, where Plaintiffs proposed the additional allegations by the amendment deadline and over ten months before the

discovery deadline, and where discovery had not yet been conducted. Defendants' assertion of delay is not well taken.

C. Bad Faith and Undue Prejudice

Defendants also assert that Plaintiffs acted in bad faith when, in seeking concurrence, they "disingenuously minimized" the changes to the Amended Complaint, by stating that the Second Amended Complaint "merely adds a few additional Plaintiffs, and limits the geographical boundaries of the walks, bus stops and road intersections challenged, and removes some inadvertent typos regarding class action status and damages. Everything else remains unchanged." (Docket no. 25 at 10 (citing docket no. 25-1 at 4).) Instead, Defendants exclaim, the Second Amended Complaint is substantially different than the Amended Complaint, in that it adds more than 100 new paragraphs, deletes more than 40 paragraphs, considerably alters other paragraphs, and expands the 39-page Amended Complaint to an 81-page Second Amended Complaint. (Docket no. 26-1 at 6; docket no. 27 at 14.) Defendant MDOT also points out that the Second Amended Complaint recasts some of Defendants' answers to the Amended Complaint as factual allegations. (Docket no. 29 at 7 n.2.)

Defendants argue that Plaintiffs' Motion should be denied because they expended significant resources in answering the Amended Complaint, as well as in conducting research, performing background work, and exchanging initial disclosures related to the Amended Complaint, and that they would suffer undue prejudice if the Court grants the instant Motion because all of the work that they previously performed would be rendered meaningless. (Docket no. 27 at 14.) Defendants expound that they would suffer further prejudice in that they would be required to expend significant additional resources in responding to the Second Amended

Complaint and conducting discovery with regard to the proposed additional plaintiffs. (Docket no. 26-1 at 8; docket no. 27 at 14; docket no. 29 at 8.)

Defendants argue, in the alternative, that if the Court grants the instant Motion, it should only do so on the condition that Plaintiffs pay the costs and attorney's fees that they incurred in analyzing the Complaint and the Amended Complaint, answering the Amended Complaint, comparing the Amended Complaint to the proposed Second Amended Complaint, and responding to the instant Motion. (Docket no. 25 at 11-12; docket no. 26-1 at 9-10; docket no. 27 at 15-16; docket no. 29 at 9.) Additionally, Defendant Ypsilanti Charter Township asserts that if the instant Motion is granted, Plaintiffs should be required to provide Defendants with a line-by-line comparison of the Amended Complaint and Second Amended Complaint. (Docket no. 27 at 15.)

Plaintiffs counter that Defendants have failed to provide one example of how the Second Amended Complaint is substantially different than the Amended Complaint and that they have failed to show undue prejudice. (Docket no. 28 at 5; docket no. 30 at 5-7.) Plaintiffs admit that the Second Amended Complaint contains additional pages that name and identify the proposed plaintiffs and set forth additional factual allegations, but Plaintiffs claim that Defendant "MDOT [and presumably the other defendants] can live with this minor inconvenience." (Docket no. 32 at 9.) Plaintiffs also point out that Defendants Ypsilanti Charter Township and WCRC have since included the names of the proposed plaintiffs in their initial disclosures as persons who may have information relevant to the case. Plaintiffs argue that by listing the proposed plaintiffs in their initial disclosures, Defendants plan to conduct discovery of the proposed plaintiffs regardless of whether they are added to this lawsuit. (Docket no. 30 at 7; docket no. 31 at 9-10.) Lastly, Plaintiffs argue that Defendants' requests for the costs and attorney's fees are unjustified

and unsupported, and that by making such requests, Defendants are acting like "bullies" and are "ganging up with [each other] to try to scare people with disabilities and their advocates from seeking redress against Defendants' illegal discrimination." (Docket no. 28 at 5-6; docket no. 30 at 8; docket no. 31 at 10-11; docket no. 32 at 10-11.)

Here, Defendants' assertion of surprise at the difference in length and content between Plaintiffs' proposed Second Amended Complaint and the Amended Complaint is warranted, especially where Plaintiffs asserted that the proposed amendment "merely" added a few plaintiffs, limited the geographic scope, and removed a few inadvertent typos. Nevertheless, "[t]here is no bright-line rule providing that the length of a complaint, in and of itself, is a basis for . . . denying a motion to amend." *Grubbs v. Sheakley Grp., Inc.*, No. 1:13-cv-246, 2014 WL 202041, at *6 (S.D. Ohio Jan. 17, 2014), *report and recommendation adopted*, No. 1:13cv246, 2014 WL 934535 (S.D. Ohio Mar. 10, 2014). "Though [Federal Rule of Civil Procedure] 8 provides that a complaint must contain 'a short and plain statement of the claim showing that the pleader is entitled to relief,' it does not prohibit further allegations elaborating on the claims." *Id*. (quoting Fed. R. Civ. P. 8(a)(2)). Indeed, courts in this circuit have been reluctant to dismiss, strike, or deny a motion for leave to amend a complaint on this basis where the complaint is not confusing, incomprehensible, frivolous, or "full of rambling irrelevancies." *See id*. (motion to amend) (citing *City of Pontiac Gen. Employees' Ret. Sys. v. Stryker Corp.*, No. 1:10-CV-520, 2011 WL 2650717, at *7 (W.D. Mich. July 6, 2011) (denying motion to dismiss complaint, in part "[b]ecause verbosity or length is not by itself a basis for dismissing a complaint based on rule 8(a)") (citation omitted)); *see also In re: Regions Morgan Keegan Sec., Derivative v. Morgan Asset Mgmt., Inc.*, No. 08-2260, 2010 WL 11441471, at *2 (W.D. Tenn. Jan. 4, 2010) (motion to strike). The Court acknowledges that Plaintiffs' proposed Second Amended

Complaint is long-winded and repetitive in parts, and it could be more concise. Nevertheless, it clearly, consistently, and sufficiently puts Defendants on notice of Plaintiffs' claims. The Court will not deny Plaintiffs' Motion for Leave to Amend on the basis of length.

The Court also acknowledges Defendants' assertions that they have already expended significant resources related to the Amended Complaint, but the Court is not persuaded that all of that work would be rendered meaningless if the Court grants Plaintiffs' Motion. Notably, the proposed Second Amended Complaint is substantively similar to the Amended Complaint in that the nature and the basis of Plaintiffs' claims remain the same. Furthermore, many of the factual allegations set forth in the Second Amended Complaint are identical to those in the Amended Complaint; the proposed plaintiffs are similar to the original plaintiffs in that they all have vision- and/or mobility-related disabilities, and they have allegedly suffered the same injuries at the hands of Defendants; and some of the proposed factual allegations limit, rather than expand, the scope of Plaintiffs' claims. Indeed, Defendants will have to expend additional resources in answering the Second Amended Complaint, but such a requirement does not constitute an undue burden where some of the work that Defendants conducted in answering the Amended Complaint will likely prove useful, and where this matter is in its early stages, i.e., little to no discovery has taken place, discovery remains open, and a trial date has not yet been set by the court. Moreover, although the addition of the eight proposed plaintiffs to this matter will require Defendants to engage in additional discovery, "the adverse party's burden of undertaking discovery, standing alone, does not suffice to warrant denial of a motion to amend a pleading," *United States v. Marsten Apartments, Inc.*, 175 F.R.D. 257, 264 (E.D. Mich. 1997) (citations omitted), and it does not warrant such a denial in this matter.

Finally, while the Court finds Plaintiffs' counsel's attitude with regard to the number of additional factual allegations ("[Defendants] can live with the minor inconvenience") to be unprofessional, the Court does not find that Plaintiffs' actions in proposing the Second Amended Complaint rise to the level of bad faith. For the reasons stated above, the Court will grant Plaintiffs' Motion for Leave to File a Second Amended Complaint. The Court will also deny Defendants' request for the costs and attorney's fees that they expended in relation to the Amended Complaint, as the circumstances of this matter do not warrant such a sanction. The Court will, however, order Plaintiffs to provide Defendants with a line-by-line comparison of the Amended Complaint and the Second Amended Complaint, which will serve to reduce any prejudice Defendants may suffer in answering the Second Amended Complaint.

IT IS THEREFORE ORDERED that Plaintiffs' Motion for Leave to File a Second Amended Complaint [22] is **GRANTED**. Plaintiffs will file the Second Amended Complaint with the Court, as proposed, within fourteen (14) days of this Opinion and Order. Plaintiffs will also provide Defendants with a line-by-line comparison of the Amended Complaint and the Second Amended Complaint within fourteen (14) days.

NOTICE TO THE PARTIES

Pursuant to Federal Rule of Civil Procedure 72(a), the parties have a period of fourteen days from the date of this Order within which to file any written appeal to the District Judge as may be permissible under 28 U.S.C. § 636(b)(1).

Dated: September 22, 2016

s/ Mona K. Majzoub
MONA K. MAJZOUB
UNITED STATES MAGISTRATE JUDGE

PROOF OF SERVICE

I hereby certify that a copy of this Order was served upon counsel of record on this date.

Dated: September 22, 2016

s/ Lisa C. Bartlett
Case Manager