

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

NORTHEAST OHIO COALITION	:	
FOR THE HOMELESS, <i>et al.</i> ,	:	CASE NO. C2:06-0896
	:	
Plaintiffs,	:	JUDGE ALGENON MARBLEY
v.	:	
	:	MAGISTRATE TERENCE KEMP
JENNIFER BRUNNER, <i>et al.</i> ,	:	
	:	
Defendants.	:	

**INTERVENOR STATE OF OHIO’S MEMORANDUM IN OPPOSITION TO
PLAINTIFFS’ MOTION FOR LEAVE
TO FILE SUPPLEMENTAL COMPLAINT**

I. INTRODUCTION

Two years after filing their complaint, and only after this Court has already dismissed a portion of this case, Plaintiffs once again come before this Court with disruptive eleventh hour challenges to Ohio’s voting regulations. This time, Plaintiffs seek leave to file a supplemental complaint in order to add factual allegations to their existing claims and to add new claims that are duplicative of claims that have already been dismissed by this Court. This Court should deny the motion to supplement the complaint because it is not timely or well-taken under Civil Rule 15(d), particularly to the extent that Plaintiffs seek to assert new Counts 14, 15, and 16, which re-assert causes of action already dismissed.

First, to the extent that the Supplemental Complaint does not plead new facts that relate to its existing causes of action, but instead pleads facts that existed at the time that

the complaint was filed, the Supplemental Complaint is not within rule. Under Rule 15(d), a court may permit a supplemental complaint to be filed that “sets forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.” None of Plaintiffs’ allegations concerning State identification cards or birth certificates or the application of the voter id law to homeless persons set forth transactions or occurrences or events which happened after the Complaint was filed.

Second, the motion is not timely because it concerns claims that have existed for over two and a half years. The voter id statutes were effective on June 1, 2006, and Plaintiffs filed this action on October 24, 2006. And yet, Plaintiffs waited until after this Court dismissed Count 11 of their Complaint, which asserted that the voter id statute constituted a poll tax because it required certain voters to purchase state identification cards, to move for leave to amend its complaint to re-assert this precise claim, as well as others based on this same flawed factual premise. Accordingly, Plaintiffs have no valid excuse for waiting until after this Court has ruled to file this motion.

And the failure to file the motion on a timely basis has prejudiced the Defendants. Now that some of the claims originally asserted have been dismissed, Plaintiffs move for leave to supplement in order to reassert them. Granting leave in these circumstances prejudices the Defendants, who will now have to defend claims on which they have already succeeded, when Plaintiffs have already had every opportunity to assert facts and make legal arguments relevant to these pre-existing claims. The prejudice is doubled here because Plaintiffs use the Supplemental Complaint as a basis to seek a preliminary injunction designed to disrupt the administration of an imminent election. See *Purcell v.*

Gonzalez, 549 U.S. 1, 7 (2006) (“Faced with an application to enjoin operation of voter identification procedures just weeks before an election, the Court of Appeals was required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures. Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase.”)¹

Because Plaintiffs’ motion is not well-taken under Rule 15(d), and because it will prejudice the Defendants to this action, this Court should deny Plaintiffs’ motion for leave to file a supplemental complaint.

II. STATEMENT OF FACTS

Plaintiffs now challenge the voter id statutes as allegedly burdening the rights of the homeless. But before the General Assembly enacted the voter id statute, it expanded voters’ ability to cast absentee ballots, by allowing any voter to cast a ballot in this manner, as compared to prior law, which required the voter to have a reason as to why they were unable to vote at the polls. See Substitute House Bill 234 (effective January 27, 2006). Thus, while the NEOHC Plaintiffs assert that the voter id statute makes it more difficult for the homeless to vote, there is no doubt that absentee balloting makes it easier, by providing a wide window of time and a process by which no voter need obtain transportation to the polls in order to vote. Under current Ohio law, a homeless person

¹ In addition, as will be demonstrated in Defendant’s Memorandum in Opposition to Motion for Preliminary Injunction, the filing of a supplemental complaint would be futile because the allegedly new counts fail to state a claim upon which relief can be granted.

may use a shelter address as an address and may vote a regular ballot during absentee voting so long as they can provide the last four digits of a social security number.

Despite the fact that the challenged voter id statute took effect on June 1, 2006, Plaintiffs waited until October 24, 2006 to file a complaint and seek injunctive relief regarding the then-imminent 2006 election. That complaint challenged the voter id statutes on a number of different grounds. The following counts are relevant for purposes of this motion:

Count 11 – Plaintiffs asserted that Plaintiffs’ members “must purchase a state-identification card and/or birth certificate” in order to vote, and that the law was thus an unconstitutional poll tax;

Counts 5, 6, and 7- Plaintiffs asserted that the statutes violated due process, equal protection, and the Civil Rights Act of 1964 because voters with ssn but no other form of identification were allegedly not permitted to cast ballots on election day.

Complaint, at 41-44, 46-47.

After the 2006 election, Plaintiffs moved for their attorneys fees related to certain orders entered in 2006, and Defendants filed a motion to dismiss for lack of subject matter jurisdiction. On September 30, 2008, this Court granted the motion to dismiss in part. The Court dismissed Counts 1, 2, 5, 6, 7, and 11 of the Complaint for lack of subject matter jurisdiction. The Court stated:

Plaintiffs have demonstrated that they had members who had only Social Security numbers and, therefore, argued those members faced imminent and inevitable injury when they attempted to vote.

Defendants correctly point out, however, that under the Voter ID Law voters who had no form of required identification could cast a provisional ballot by providing the last four digits of their Social Security number. The Voter ID Law even permitted people who lacked other identification *and* could not produce their Social Security numbers to cast a provisional ballot. *A provisional ballot would be counted with the same weight as any other once the identity of the voter was verified. R.C. 3505.183.* Therefore,

Plaintiffs' members with only a Social Security number faced no risk of imminent injury of being denied the opportunity to cast their vote.

Decision, pp. 13-14 (emphasis added) (citations omitted). As a result, the Court concluded that Plaintiffs lacked standing to challenge these counts of the Complaint, which included an allegation that the voter id statutes were an unconstitutional poll tax because some persons would allegedly be required to obtain birth certificates and or state identification cards in order to vote a regular ballot.

Plaintiffs now seek leave to file a supplemental complaint. In the supplemental complaint, they seek to add a number of new factual assertions, including factual assertions that some of NEOHC's members must purchase a State ID card and/or a birth certificate to cast a regular ballot on election day, as well as factual assertions related to the counting of provisional ballots in 2006. They then include supplemental allegations to Count Twelve and Count Thirteen of the Complaint, as well as adding three new counts. Those counts are:

Count 14, which alleges that the voter id statutes violate the equal protection clause because they allegedly require some of NEOHC's members to purchase State identification cards and/or birth certificates in order to vote a regular ballot on Election Day;

Count 15, which alleges that the same facts violate the due process clause;

and Count 16, which alleges that the same facts constitute an unconstitutional poll tax.

Based on these allegations, Plaintiffs seek declaratory and injunctive relief that the voter id statutes are unconstitutional on their face and as applied, and for an order declaring that all Boards of Elections must apply uniform standards and procedures when counting provisional ballots.

III. LAW AND ARGUMENT

Civil Rule 15(d) provides that a court may, “upon reasonable notice and upon such terms as are just, permit a party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.” Justice does not always permit the filing of a supplemental complaint, however, and in considering whether to allow a plaintiff to file a supplemental complaint, the district court should consider the same factors relevant to a motion to amend a complaint: (1) undue delay in filing the motion; (2) lack of notice to adverse parties; (3) whether the movant is acting in bad faith, or with a dilatory motive; (4) failure to cure deficiencies by previous amendments; (5) the possibility of undue prejudice to adverse parties; and (6) whether the amendment is futile. See *Foman v. Davis*, 371 U.S. 178, 182 (1962). Where, as here, the motion is filed after a lengthy period of time, without adequate explanation for the delay, and attempts to re-assert theories of recovery that have already been ruled on by the Court to the prejudice of adverse parties, the Court properly denies a motion for leave to supplement the complaint.

A. The New Claims And Certain Allegations Set Forth In The Supplemental Complaint Do Not Present Supplemental Claims.

Plaintiffs argue that their motion for leave to supplement falls within the parameters of Civil Rule 15(d). To the contrary, that rule does not apply to many of the allegations that Plaintiffs seek to add to the complaint, does not permit the addition of their “new” claims, and does not permit the addition of new parties.

Civil Rule 15(d) permits amendment to set “forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.” Civile Rule 15(d) does not apply to the addition of new parties. Nor does it apply to the

many allegations (regarding the alleged effect of the voter id statute) that could have been made at the time that the original complaint was filed.

The Sixth Circuit has held that a motion for leave to amend a complaint is the appropriate means of raising additional claims for relief, and that a supplemental complaint is not. See *Michael v. Ghee*, 498 F.3d 372, 386 (6th Cir. 2007). Further, in that same decision, the Sixth Circuit indicated that an intervening judicial decision is also not a proper basis for filing a supplemental complaint. *Id.* (citing *United States v. Hicks*, 283 F.3d 380, 385-386).

Accordingly, the Proposed Supplemental Complaint, because it seeks to add new parties, to add numerous factual allegations that existed in 2006 and thus do not reflect new transactions or occurrences, and because it attempts to re-plead causes of action already dismissed, is not proper.

B. This Court Should Deny The Motion To Supplement On Grounds Of Undue Delay And Prejudice To Adverse Parties.

At any rate, the same test that governs the amendment of a complaint governs supplemental complaints, and thus the motion should be denied as untimely and prejudicial.

In this case, the Court should deny the motion to supplement on the grounds of undue delay in filing the motion and prejudice to adverse parties. Denial is appropriate where there is “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.” *Morse v. McWhorter*, 290 F.3d 795, 800 (6th Cir. 2002) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). Moreover, “in the post-judgment context,”

this Court “must also take into consideration the competing interest of protecting the ‘finality of judgments and the expeditious termination of litigation.’” Thus the Court “must be particularly mindful of . . . the movant's explanation for failing to seek leave to amend prior to the entry of judgment.” *Id.* (citations omitted).

By way of explanation for the timing of its motion, Plaintiffs assert that the Defendants sought extensions of time to answer and stays of proceedings and that the parties were engaging in settlement discussions. Plaintiff’s Reply Re: Motion for Expedited Discovery. However, Plaintiffs consented to each extension and joined in the motions to stay. Furthermore, the State of Ohio’s extensions of time to file its answer in no way prevented Plaintiff from proceeding with its case. And, lastly, these excuses fail to address why the Court should permit Plaintiffs to attempt to cure standing and re-assert claims that have been dismissed for lack of standing, and why Plaintiffs did not move to supplement or amend their complaint before this Court ruled.

As to Plaintiffs’ “supplemental” counts 14, 15, and 16, neither the law nor the facts have changed since 2006. Indeed, the complaint included a count that is indistinguishable from “New” Count 16. Thus, there have been no new events requiring additional investigation in order to develop a claim. Accordingly, the motion for leave to supplement should be denied on the basis of undue delay.

Not only have the Plaintiffs intentionally and unreasonably delayed in moving to supplement, they have done so to the prejudice to adverse parties. Courts are particularly likely to find prejudice to adverse parties where, as here, leave is sought to add new claims at a late stage of the proceedings, here after an identical claim has been dismissed. *See Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 807 (6th Cir. 2005) (court

properly denied leave to amend to include new claim of copyright infringement shortly before the discovery cut-off). Plaintiffs first challenged the voter id statutes two years ago, which was several months after they took effect. The Complaint included numerous allegations regarding the manner in which the voter id statutes allegedly burden NEOHC's homeless members. Nevertheless, Plaintiffs now seek to add new factual assertions regarding those burdens, as well as to re-cast legal arguments that this Court has already held that they do not have standing to pursue. That action is patently prejudicial to the adverse parties who would be affected by the resurrection of claims already dismissed.

Accordingly, this Court should deny the motion for leave to supplement on the basis that it is untimely and prejudices the rights of adverse parties.

IV. CONCLUSION

For all of the reasons set forth above, Plaintiffs' Revised Motion for Leave to File Supplemental Complaint should be denied because the Supplemental Complaint contains far more than allegations setting forth additional transactions and occurrences that have taken place since the Complaint was filed. Instead, the Supplemental Complaint improperly attempts to re-plead causes of action already dismissed by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of October, 2008, the foregoing Memo Contra Motion to Supplement was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Sharon A. Jennings

Sharon A. Jennings