

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION AT CLEVELAND**

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| JACQUELINE STOWERS, <i>et al.</i> , | : | |
| | : | CASE NO. 1:09 CV 264 |
| Plaintiffs, | : | |
| | : | JUDGE O'MALLEY |
| v. | : | |
| | : | |
| ROBERT J. BOGGS, Director, | : | |
| Ohio Department of Agriculture, <i>et al.</i> , | : | |
| | : | |
| Defendants. | : | |

**MEMORANDUM OF DEFENDANT ROBERT J. BOGGS,
DIRECTOR, OHIO DEPARTMENT OF AGRICULTURE,
IN OPPOSITION TO PLAINTIFFS' MOTION TO AMEND AND REMAND**

I. INTRODUCTION

In their Combined Motion to Amend and Motion to Remand (Doc. 6) ("the Motion"), Plaintiffs seek the following three items:

- (1) Leave to file a (second) amended complaint, deleting the federal claims contained in the current Amended Complaint;
- (2) Leave to add a new plaintiff to this action; and
- (3) An order remanding this matter to the Lorain County Common Pleas Court.

For the reasons set forth below, Defendant Robert J. Boggs, Director of the Ohio Department of Agriculture ("ODA") opposes Plaintiffs' attempt to add a new plaintiff and to seek remand of this matter to the state court from which it was removed. ODA does

not oppose Plaintiffs' deletion of federal claims from its Amended Complaint if Plaintiffs are uninterested in trying to advance such claims.

II. BACKGROUND

ODA's involvement in this matter began in September, 2008, when the Lorain County General Health District ("Health District") requested ODA's assistance in investigating whether John Stowers, Jacqueline Stowers, and/or Manna Storehouse, LLC (collectively referred to as "Manna Storehouse") were engaged in operating an unlicensed retail food establishment in violation of Ohio Rev. Code § 3717.21. Pursuant to its statutory obligation under Ohio Rev. Code § 3717.31 to provide such assistance, ODA assigned an enforcement agent, William Lesho ("Lesho"), to assist in the investigation.

Lesho's investigation revealed probable cause to believe that Manna Storehouse was in fact engaged in operating an unlicensed retail food establishment, which constitutes a misdemeanor criminal offense under Ohio Rev. Code § 3717.99. Accordingly, Lesho executed an affidavit setting forth his investigative findings to facilitate the issuance of a search warrant at the Manna Storehouse premises.

At the request of the Lorain County Prosecutor, the Lorain County Common Pleas Court issued the requested search warrant on November 26, 2008, specifying the premises to be searched and the items to be seized. On December 1, 2008, the Lorain County Sheriff secured the premises for the execution of the warrant, and ODA employees assisted local authorities in the search of the premises. ODA did not take possession of any Manna Storehouse property.

On December 17, 2008, Plaintiffs filed a complaint in Lorain County Common Pleas Court against both ODA and the Health District. (Doc. 1-2.) Plaintiffs then filed

an amended complaint against the same parties before any responsive pleadings had been filed in response to the original complaint. (Doc. 1-3.) Both the initial complaint and the subsequent amended complaint include federal causes of action against the Defendants under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, and various related state-law claims. Given the federal causes of action asserted, Defendants properly removed the case to this Court. (Doc. 1.)

Through the filing of the pending Motion, Plaintiffs now seek to defeat this Court's jurisdiction by deleting all federal causes of action in a second amended complaint. (Doc. 6-2.) Plaintiffs further seek to add a new individual plaintiff, despite that she lacks any legal standing. (*Id.*) For the reasons set forth below, this Court should retain jurisdiction of this matter on the basis of the pleadings as they existed at the time of removal, and should further deny Plaintiffs' attempt to add an inappropriate additional plaintiff.

III. ARGUMENT

A. ODA does not oppose the deletion of federal causes of action.

As noted above, the Motion seeks leave to file another amended complaint in this action, deleting all of the federal causes of action against ODA and the Health District. Although Plaintiffs offer no plausible explanation for doing so other than to try to defeat this Court's jurisdiction, ODA does not seek to force Plaintiffs to pursue legal claims that they have no desire to pursue. Accordingly, ODA does not object to the deletion of the federal causes of action through the filing of an amended complaint.

B. Proposed new plaintiff Cynthia Frantz lacks standing as a matter of law.

The Motion further seeks to add a new individual plaintiff, Cynthia Frantz ("Frantz"), who claims to be a member of the Manna Storehouse "co-op." As explained below, neither the Motion nor the proposed new amended complaint alleges any legal claim against ODA for which Frantz would have legal standing. Accordingly, this portion of the Motion is without merit and should be denied.

It is axiomatic that a plaintiff must have standing, and that it is the plaintiff's burden to demonstrate such standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). As the *Lujan* Court explains, standing to sue requires the plaintiff to establish three elements:

First, the plaintiff must have suffered an "injury in fact" -- an invasion of a legally protected interest which is (a) concrete and particularized ... and (b) "actual or imminent, not 'conjectural' or 'hypothetical'.... Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.".... Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id. at 560-561 (citations omitted). This burden is especially difficult to meet when "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*...." *Id.* at 562 (emphasis in original). Frantz cannot establish that she has any legally recognized claim against ODA that would come close to meeting this requirement.

In the Motion, Plaintiffs describe the basis for adding Frantz as a plaintiff as follows:

[Frantz] maintains that, under the Ohio Constitution, she may not be prohibited from voluntarily cooperating with other citizens of Ohio to purchase food, for personal consumption, from a source of her choice. Put another way, it is her position that the state of Ohio lacks the authority when juxtaposed with her constitutional rights, to dictate what food, if not demonstrably unsafe, she can acquire and consume.

Motion, p. 11.

None of this is remotely related to any claims actually asserted against ODA in the proposed second amended complaint. As noted above, this action complains of the execution of a search warrant that was issued by the Lorain County Common Pleas Court on the basis of probable cause to believe that Manna Storehouse was unlawfully operating an unlicensed retail food establishment. Nowhere in the pleadings do Plaintiffs even allege that ODA has ever ordered Frantz to do or refrain from doing anything whatever, including regulating what agreements Frantz may choose to enter into or what food she wishes to purchase or consume.

On the contrary, Plaintiffs advance the preposterous argument that ODA is "dictating" to Frantz what food she may consume, in violation of her rights under the Ohio Constitution, merely by assisting local authorities in enforcing Ohio's public health laws for the benefit of the consuming public. Frantz's lack of legal standing is apparent when one reviews the various provisions of the Ohio Constitution actually referred to in the proposed new amended complaint.

Plaintiffs' proposed amended complaint includes based variously on the following six sections of Article I of the Ohio Constitution:

Article I, Section 1

All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty,

acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.

Article I, Section 2

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly.

Article I, Section 14

The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized.

Article I, Section 16

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. [Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

Article I, Section 19

Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

Article I, Section 20

This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers, not herein delegated, remain with the people.

Despite the reference to the above varied provisions of the Ohio Constitution, all of the claims in the proposed amended complaint have a common denominator: they all complain of the execution of a search warrant against *Manna Storehouse*, not Frantz. On the basis of Plaintiffs' own allegations, Frantz's only connection to this case is that she claims to be a member of the Manna Storehouse "co-op," that she wishes to buy her food through the co-op, and that a small portion of the food seized by local authorities in the execution of the warrant belonged to members of the co-op.

Even if true, none of this creates legal standing for any claim against ODA. It has long been settled law in Ohio that nothing in Sections 1 or 2 of Article I of the Ohio Constitution in any way forbids the exercise of the state's police power in the public interest. *State v. Thompson*, 75 Ohio St.3d 558 (1996); *Benjamin v. City of Columbus*, 167 Ohio St. 103 (1957). Yet ODA's only involvement in this case was assisting local authorities in obtaining and executing a lawfully issued search warrant -- that is, exercising the state's lawful police power.

Indeed, all of Plaintiffs' claims alleging the improper procurement and execution of the search warrant are, as a matter of law, beyond any legal standing of Frantz. Under well-established law, a party challenging an "unreasonable" search or seizure *must have a recognized privacy interest in the premises being searched*. *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). Frantz, in contrast, does not even allege that she has such a possessory interest in the Manna Storehouse premises, or that she was present at the time of the search.

In similar fashion, Frantz's claim that Manna Storehouse property was taken "for a public purpose" without compensation, allegedly in violation of Article I, Section 19 of

the Ohio Constitution also fails as a matter of law. Plaintiffs make the common mistake of confusing property taken *for a public purpose* with property which is seized pursuant to the state's police power. Had state officials seized Plaintiffs' property to be served at a public picnic, for example, that would be a seizure for a public purpose.

In contrast, property which is seized, or even destroyed, pursuant to the state's police power is not subject to the principle of "eminent domain." This doctrine has been consistently followed by both the United States Supreme Court and the Ohio Supreme Court. *See, e.g., Miller v. Schoene*, 276 U.S. 272 (1928) (upholding the destruction of cedar trees without compensation); *State ex rel. Miller v. Anthony*, 72 Ohio St.3d 132 (1995); *Solly v. City of Toledo*, 7 Ohio St.2d 16 (1966). The property seized by local officials in this case, in furtherance of the search warrant, is therefore not subject to any requirement of compensation.

Finally, Plaintiffs do not cite any authority for the proposition that Article I, Section 20 of the Ohio Constitution creates any additional legal basis for any claim asserted by Frantz, and for good reason: no such authority exists.

For all of the foregoing reasons, Frantz, as a matter of law, has no legal standing to assert any claim contained in the proposed second amended complaint. Accordingly, Plaintiffs' Motion seeking to add Frantz as a new plaintiff should be denied.

C. This matter should remain in this Court for adjudication on the merits.

Plaintiffs' request to remand this matter to state court is also without merit and should be denied.

It is clear that where, as here, the plaintiff files the original action in state court, and the matter is then removed to federal court by the defendant(s), the federal court has

discretion to retain jurisdiction of the case on the basis of the pleadings at the time of removal, despite the subsequent deletion of the federal causes of action. *See, e.g., Eastman v. Marine Mechanical Corp.*, 438 F.3d 544, 551 (6th Cir. 2006); *see also Harper v. AutoAlliance Int'l, Inc.*, 392 F.3d 195, 210 (6th Cir. 2004); *Long v. Bando Mfg. of Am., Inc.*, 201 F.3d 754, 758 (6th Cir. 2000).

In this case, it is particularly appropriate that this Court retain this matter for final resolution on the merits. Although Plaintiffs accuse Defendants of "forum shopping" simply because Defendants lawfully removed to this Court a state court action alleging multiple federal causes of action, the circumstances of this case demonstrate that it is the Plaintiffs who are engaged in such forum shopping. Plaintiffs do not deny that their motivation for removing all federal causes of action from their complaint, after responsive pleadings have already been filed, is to try to defeat this Court's jurisdiction. It is entirely appropriate for the Court to take this factor into account in deciding whether to retain jurisdiction. As the United States Supreme Court noted in *Carnegie-Mellon Univ. v. Cohill*, "A district court can consider whether the plaintiff has engaged in any manipulative tactics when it decides whether to remand a case. If the plaintiff has attempted to manipulate the forum, the court should take this behavior into account in determining whether the balance of factors to be considered under the pendent jurisdiction doctrine support a remand in the case." 484 U.S. 343, 357 (1988) (cited with approval in *Rockwell Internatl. Corp. v. United States*, 549 U.S. 457, 473 n.6 (2007)).

Plaintiffs try to minimize this factor by emphasizing how superfluous their federal claims are. What Plaintiffs fail to acknowledge, however, is that it was them, not Defendants, who chose to pursue federal claims against Defendants in the first place.

Having made this choice, Plaintiffs cannot now complain that their action is being heard in a federal forum. This is especially true given that Plaintiffs are unable to present any compelling reason why this matter should not be heard in this Court given this Court's close proximity to the county in which this matter was initially filed.

IV. CONCLUSION

For all of the foregoing reasons, Plaintiffs' Motion to add Cynthia Frantz as a new plaintiff and to remand this matter to state court should be denied.

Respectfully submitted:

RICHARD CORDRAY
Ohio Attorney General

s/ William J. Cole
JOHN T. WILLIAMS (0024449)
WILLIAM J. COLE (0067778)
Assistant Attorneys General
Executive Agencies Section
30 East Broad Street, 26th Floor
Columbus, Ohio 43215
(614) 466-2980, Fax (866) 354-4086
Attorneys for Defendant Robert J. Boggs
Director, Ohio Department of Agriculture

CERTIFICATE OF SERVICE

I certify that on March 17, 2009, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of this Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

s/ William J. Cole
WILLIAM J. COLE