**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MICHIGAN**
**SOUTHERN DIVISION**

AFSCME Council 25, and its Affiliated Locals,

Plaintiffs,

Case No. 15-cv-13288
Hon. Judith E. Levy
Mag. Judge R. Steven Whalen

v.

Charter County of Wayne and Warren Evans,

Defendants.

_____/

**ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO AMEND THE COMPLAINT [27]**

Plaintiffs, unions impacted by actions that defendant Wayne County and its Chief Administrative Officer, Warren Evans, took under Michigan's Emergency Manager law, 2012 Mich. Pub. Acts 436, sued on September 16, 2015, seeking to enjoin those actions as unconstitutional and in violation of federal law. (Dkt. 1.) Plaintiffs filed a motion for a temporary restraining order on September 17, 2015. (Dkt. 2.) Plaintiffs amended their complaint as of right on September 21, 2015, pursuant to Fed. R. Civ. 15(a)(1). (Dkt. 9.)

On October 8, 2015, plaintiffs filed a motion for leave to amend their complaint a second time, pursuant to Fed. R. Civ. P. 15(a)(2). (Dkt. 27.) On October 16, 2015, the Court granted defendants' motion to dismiss the first amended complaint. (Dkt. 30.)

Defendants filed their response to the motion for leave to amend on October 15, 2015, (Dkt. 29), and plaintiffs filed their reply on October 28, 2015. (Dkt. 33.)

Plaintiffs' original complaint contained three enumerated counts: 1) violation of First Amendment rights to petition the government and redress grievances; 2) unconstitutional deprivation of property interest without due process; and 3) federal preemption under the bankruptcy code. (*See* Dkt. 9.) It also contained an unenumerated count alleging violation of the Contract Clause of the United States Constitution. (Id. at 6.) The Court dismissed all of these claims as pleaded with prejudice in its October 16, 2015. (*See* Dkt. 30.) Plaintiffs' proposed amended complaint contains the above-referenced counts, along with a new fourth enumerated count alleging violation of their First Amendment right to freedom of speech. (Dkt. 27 at 21.)

Under Fed. R. Civ. P. 15(a)(2), "[t]he court should freely give leave [to amend a complaint] when justice so requires" when, as here, plaintiffs have already amended their pleadings once as a matter of course. "A motion to amend a complaint should be denied if the amendment is brought in bad faith, for dilatory purposes, results in undue delay or prejudice to the opposing party, or would be futile." *Crawford v. Roane,* 53 F.3d 750, 753 (6th Cir. 1995).

A proposed amendment to a complaint is futile and must be denied if the amendment could not survive a Fed. R. Civ. P. 12(b)(6) motion to dismiss. *Rose v. Hartford Underwriters Ins. Co.*, 203 F.3d 417, 420 (6th Cir. 2000). This standard does not foreclose the filing – or grant – of a properly filed motion to dismiss in response to an amended complaint. Instead, the Court's task is to determine whether, from the face of the amended complaint, it appears that the "proposed claim [would] be able to withstand a motion to dismiss[.]" *Thiokol Corp. v. Dept. of Treasury, State of Mich., Revenue Div.*, 987 F.2d 376, 383 (6th Cir. 1993).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that

is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A plausible claim need not contain "detailed factual allegations," but it must contain more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action[.]" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Reviewing the amended complaint under this standard, the Court denies the motion to amend as to Count I (right to petition and assembly) and Count III (bankruptcy preemption), and the unenumerated Contracts Clause claim.

The Court dismissed plaintiffs' First Amendment petition and assembly claim because it failed to allege "*any* specific manner in which Act 436 impairs their rights to assemble or to petition the government[.]" (Dkt. 30 at 9.) Further, plaintiffs did not allege acts by defendants that could be construed as violations of either of those rights guaranteed by the First Amendment. In their amended complaint, plaintiffs have not pleaded any additional allegations concerning the violation of their First Amendment rights. Instead, plaintiffs have inserted a set of allegations that Evans is not permitted to exercise

certain power under Act 436, and that Act 436 is "facially unconstitutional." (Dkt. 27 at 11-14.)

These additional allegations are insufficient to establish a violation of the First Amendment's rights to petition the government and assemble, and would not survive a motion to dismiss. To the extent the amended count alleges something new, it is a violation of due process as guaranteed by the Fourteenth Amendment, not violation of rights guaranteed by the First Amendment. The remainder of the amended count is identical to the count already dismissed. For this reason, it would not survive a motion to dismiss.

The Court dismissed plaintiffs' Contract Clause claim because it alleged only that non-defendant the Michigan state legislature violated the Contract Clause, and, furthermore, because plaintiff failed to allege any fact supporting such a claim. (Dkt. 30 at 10 n.1.) In their amended complaint, plaintiffs again allege that the Michigan state legislature violated the Contract Clause by passing Act 436. (Dkt. 27 at 14-15.) Plaintiffs then allege that M.C.L. § 141.1552(1)(ee) was used by Evans to invalidate contracts, and that the section is "facially invalid . . . and a direct and facial Legislative assault upon the contracts which were in

effect and terminated on September 21, 2015 by Defendant Evans, as the Chief Administrative Officer." (Dkt. 27 at 15.) Further, plaintiffs allege that Act 436 does not permit "the County Executive to impose non-economic terms of employment upon Plaintiffs." (Id.)

"A Contract Clause claim must be based on a legislative act because the clause's prohibition 'is aimed at the legislative power of the state, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals.'" *City of Pontiac Retired Employees Ass'n v. Schimmel*, 751 F.3d 427, 431 (6th Cir. 2014) (citing *New Orleans Water-Works Co. v. La. Sugar Ref. Co.*, 125 U.S. 18, 30 (1888)).

Plaintiffs do not allege that Evans or Wayne County were acting in a legislative capacity, or that their acts were "legislative in character and effect." *City of Pontiac Retired Employees Ass'n*, 751 F.3d at 431. Instead, plaintiffs allege a legislative act – the passage of Act 436 by the Michigan state legislature – and a series of acts taken by an executive officer pursuant to that statute. Despite the additional allegations in this claim, plaintiffs have again argued that a non-party to this case,

the Michigan state legislature, violated the Contracts Clause. Accordingly, this claim would not survive a motion to dismiss.

Plaintiffs have reasserted their claim that the federal Bankruptcy Code preempts Act 436 without amendment. (Dkt. 27 at 20-21.) For the reasons set forth in the Court's October 16, 2015 order, this claim would not survive a motion to dismiss. (Dkt. 30 at 14-15.)

Plaintiffs have amended Count II to allege that they were deprived of certain property rights without due process of law. These property rights include duty disability pension, five years of retirement vesting, grievance arbitration, Act 312 arbitration, and the right to prohibit the restructuring of the pension system. (Dkt. 27 at 17-20.)

"To establish a procedural due process claim pursuant to § 1983, plaintiffs must establish three elements: (1) that they have a life, liberty, or property interest protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution, (2) that they were deprived of this protected interest within the meaning of the Due Process Clause, and (3) that the state did not afford them adequate procedural rights prior to depriving them of their protected interest." *Hahn v. Star Bank*, 190 F.3d 708, 716 (6th Cir. 1999).

"Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). "A contract, such as a collective bargaining agreement, may create a property interest." *Leary v. Daeschner*, 228 F.3d 729, 741 (6th Cir. 2000).

As the Court set forth in its prior opinion, procedural rights are not property interests. (Dkt. 30 at 13.) Accordingly, plaintiffs cannot claim that their rights to arbitration constituted property rights. Plaintiffs may, however, allege that their rights to pensions and vested retirement benefits, as well as their rights to representation on the governing public employee pension board are property rights, and that the rights to arbitration are procedural rights owed before plaintiffs are deprived of their property rights.

Defendants incorporate their arguments from their motion to dismiss in support of their contention that plaintiffs have failed to state a claim for violation of their due process rights. (Dkt. 29 at 14; Dkt. 16

at 26-33.) However, as defendants noted in their first motion, "Plaintiff[s] fail[ed] to adequately plead the specific contractual rights and entitlements that they allege will be deprived" in their first amended complaint. (Dkt. 16 at 27.) Defendants made no arguments as to the validity of the specific property rights plaintiffs now assert they were deprived of without due process. Accordingly, the Court cannot rely on those arguments as grounds to find that the amended due process claim would be futile.

Plaintiffs' amended due process claim, at this juncture, appears to be able to survive a motion to dismiss.

Plaintiffs assert a new count in their amended complaint: retaliation for exercise of their free speech rights as guaranteed by the First Amendment. Plaintiffs allege that, after filing this lawsuit on September 16, 2015, defendants on September 21, 2015 unilaterally revoked a series of proposals and made unusual and punitive provisions that were not imposed on any other union with which defendants were negotiating. (Dkt. 27 at 22.)

A plaintiff asserting a retaliation claim must establish the following: 1) the plaintiff has engaged in conduct protected by the

Constitution or by statute; 2) the defendant took an adverse action against the plaintiff; and 3) the adverse action was taken, at least in part, because of the protected conduct. *Thaddeus-X v. Blatter*, 175 F.3d 378, 386-87 (6th Cir. 1999). The right of access to courts has been held to rest on a variety of constitutional grounds, including the First Amendment Petition Clause. *See Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002) (collecting cases establishing the right of access to courts under the Privileges and Immunities Clause, and the First, Fifth, and Fourteenth Amendments to the United States Constitution).

Plaintiffs have plausibly pleaded the elements of a retaliation claim. Their lawsuit is conduct that is protected by the Constitution, the defendants' alleged imposition of unjust terms is an adverse action, and plaintiffs have alleged that the defendants' imposition was taken because of their lawsuit.

In response, defendants argue that they do not dispute the facts as pleaded, and argue that the claim would not survive a motion for summary judgment under Fed. R. Civ. P. 56. In doing so, defendants establish the plausibility of this claim. Defendants say that plaintiffs "took the risk and pushed the envelope, choosing to resist and

eventually to litigate rather than agree to terms." (Dkt. 29 at 13.) Further, defendants argue that the imposition of the adverse terms is "the result of [plaintiffs'] own actions[.]" (Id.)[1]

Because defendants do not dispute the facts as plaintiffs have pled them, and because those facts sufficiently and plausibly plead a claim for relief, the Court grants plaintiffs leave to amend their complaint to include their retaliation claim.

For the reasons set forth above, it is hereby ordered that:

Plaintiffs' motion for leave to amend their complaint (Dkt. 27) is GRANTED as to Count II's claims that the deprivation of property rights consisting of pension rights, vested retirement rights, and pension board representation have been deprived without due process, and Count IV's claim that plaintiffs were unconstitutionally retaliated against for filing this lawsuit;

Plaintiffs' motion for leave to amend their complaint is DENIED as to all other claims; and

[1] Defendants fashion this section as a motion for summary judgment, which is procedurally inappropriate at this stage for two reasons. First, the Rule 15 standard requires the Court to determine whether a claim could survive a motion to dismiss under Rule 12(b)(6), not a motion for summary judgment under Rule 56. Second, defendants cannot seek summary judgment before a complaint has been filed on the docket.

Plaintiffs are given until **December 11, 2015** to file an amended complaint asserting only those counts outlined above, without any further amendment to the language or allegations in the complaint.

IT IS SO ORDERED.

Dated: December 4, 2015
Ann Arbor, Michigan

s/Judith E. Levy
JUDITH E. LEVY
United States District Judge

**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on December 4, 2015.

s/Felicia M. Moses
FELICIA M. MOSES
Case Manager