STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

MACHINISTS LOCAL LODGE 1061, et al.,
Plaintiffs,

vs.

STATE OF WISCONSIN et al.,
Defendants

Case No. 2015CV000628

ORDER DENYING MOTION TO DISMISS

On March 9, 2015, Wisconsin enacted 2015 Wisconsin Act 1. (Compl. at ¶ 14). The new law, known as the "right to work" law, places a variety of restrictions on labor organizations in Wisconsin, including prohibitions on assessing dues, fees, or charges of any kind on non-union members and on negotiating union security clauses in collective bargaining contracts, among other things. Wis. Stat. § 111.04(3)(a)(4); § 111.06(1)(c). Plaintiffs are two labor organizations, International Association of Machinists Local Lodge 1061 and United Steelworkers District 2, and one federation of labor organizations, Wisconsin State AFL-CIO. (Compl. at ¶¶ 2-4). According to their complaint, the law (hereinafter "Act 1") effects an unconstitutional taking of Plaintiffs' property without just compensation in violation of Article I § 13 of the Wisconsin Constitution by "prohibiting the unions from charging nonmembers who refuse to pay for representation services which unions continue to be obligated to provide" by law. (Compl. at ¶ 23).

Defendants the State of Wisconsin, Governor Scott Walker, Attorney General Brad Schimel, Wisconsin Employment Relations Commission chair James R. Scott (hereinafter the "State") now move to dismiss the complaint for failure to state a claim upon which relief can be

granted under Wis. Stat. § 802.06(2). In sum, the State argues the Plaintiffs lack standing to bring suit, their claim is non-justiciable, their requested relief is unavailable, and that they have failed to sufficiently plead the elements of a takings claim. (Def.'s Br. at 2-3). For the reasons discussed below, the Motion is denied.

Standard of Review

A motion to dismiss for failure to state a claim tests the legal sufficiency of a complaint. *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 19, 356 Wis. 2d 665, 676, 849 N.W.2d 693, 698, quoting *John Doe 1 v. Archdiocese of Milwaukee*, 2007 WI 95, ¶ 12, 303 Wis.2d 34, 734 N.W.2d 827. The court, in considering a motion to dismiss, accepts as true all well-pleaded facts in the complaint, but not conclusions of law. *Id.* It "construe[s] the pleadings liberally in order to do substantial justice between the parties." *Eberle v. Dane Cnty. Bd. of Adjustment*, 227 Wis. 2d 609, 595 N.W.2d 730, 736 (1999) (internal quotations omitted). Dismissal is appropriate only where the court is certain there are no circumstances under which plaintiffs can recover. *Id.*

Analysis

I. Standing

The State first challenges Plaintiffs' standing to file this lawsuit, raising a number of issues relating to Plaintiffs' alleged injury.[1] (Def.'s Br. at 10). As a threshold matter, standing in Wisconsin is construed broadly in favor of access to the courts. *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶ 38, 327 Wis. 2d 572, 592, 786 N.W.2d 177, 188. It is considered "a matter of judicial policy rather than a jurisdictional prerequisite." *Id.* In *Foley-Ciccantelli v. Bishop's*

[1] One of the State's objections to standing is that, at the time of the complaint, Plaintiffs had not entered into any post-Act 1 contracts. (Def.'s Br. at 12). Plaintiffs have since entered into at least one post-Act 1contract and have averred so by affidavit (Winklbauer Supp. Aff. at ¶ 1), a proof outside the scope of examination in a motion to dismiss. However, in consideration of judicial efficiency and the desire to avoid needless delay in resolving this case, the Court will not dismiss the case merely for Plaintiffs to refile a complaint containing the post-Act 1 contract facts. On this particular objection to standing, the State's argument has been rendered moot and the Court will not discuss it.

Grove Condo. Ass'n, Inc., 2011 WI 36, 333 Wis. 2d 402, 797 N.W.2d 789, the Wisconsin Supreme Court undertook its most exhaustive review of standing to date. The court concluded that the "basic thrust" of all standing cases is "(1) whether the party whose standing is challenged has a personal interest in the controversy, ... (2) whether the interest of the party whose standing is challenged will be injured, that is, adversely affected, and (3) whether judicial policy calls for protecting the interest of the party whose standing is challenged." *Id.* at ¶ 5. Analyzing standing cases specifically involving a constitutional challenge to legislation, the court described the appropriate initial inquiry as "whether the plaintiff himself has suffered some *threatened* or actual injury resulting from the putatively illegal action." *Id.* at ¶ 46, quoting *State ex rel. First National Bank of Wisconsin Rapids v. M & I Peoples Bank of Coloma*, 95 Wis.2d 303, 308, 290 N.W.2d 321 (1980) (emphasis added).

Plaintiffs here have sufficiently established their personal interest in Act 1, the threatened injury it imposes, and the adverse effect its enforcement has on them. Furthermore, to the extent the State argues Plaintiffs have a higher burden to establish standing because the collective bargaining contracts hinge on the choices of third parties (here, employers), the Court finds Plaintiffs have met this burden also. They have "adduce[d] facts showing that those [third party] choices have been or will be made in such manner as to produce causation and permit redressability of injury" as the State asserts is required by *Lujan v. Defenders of Wildlife et al.*— namely, the Winklbauer Supplemental Affidavit detailing Plaintiffs' post-Act 1 collective bargaining contracts, which do not contain a union security clause. 504. U.S. 555, 112 S.Ct. 2130 (1992).

II. Ripeness

The State contends that Plaintiffs' claims are not ripe for adjudication because the alleged injury is contingent and uncertain. (Def.'s Br. at 16). This argument overlaps with the State's standing argument. To begin, ripeness in declaratory judgment actions is different than ripeness in other contexts. *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 43, 309 Wis. 2d 365, 386, 749 N.W.2d 211, 222. The policy behind allowing declaratory judgment is "to enable controversies of a justiciable nature to be brought before the courts... prior to the time that a wrong has been threatened or committed." *Id.* at ¶ 28, citing *Lister v. Bd. of Regents of Univ. of Wis. Sys.*, 72 Wis.2d at 307, 240 N.W.2d 610. A plaintiff, therefore, need not suffer actual injury before availing herself of declaratory judgment. *Id.* at ¶ 43. There is considerable case law declaring constitutional challenges to statutes or ordinances to be justiciable prior to harm. *See, for example, Milwaukee Dist. Council 48 v. Milwaukee Cnty.*, 2001 WI 65, 244 Wis. 2d 333, 627 N.W.2d 866 (holding justiciable a public employee union's constitutional challenge to the county's pension procedures before individual members of union were denied pension benefits). In light of these principles, the Court finds Plaintiffs' claims are ripe for adjudication.

III. Sufficiency of pleadings to support a takings claim

Next, the State argues Plaintiffs have not properly asserted any of the four elements of a takings claim under Art. I § 13. (Def.'s Br. at 17). To prevail on a takings claim, a plaintiff must show (1) she has a legally protected property interest, (2) the government has taken that interest, (3) the taking was for public use, and (4) the taking occurred without just compensation. *Wis. Retired Teachers Ass'n v. Employee Trust Funds Bd.*, 207 Wis.2d 1, 18-24, 558 N.W.2d 83 (1997). The Court considers each in turn.

A. Sufficiency of the alleged "legally protected property interest"

Plaintiffs claim a legally protected property interest in their "collective bargaining agreements, ...money, tangible property used in the representation of employees, and the services of their members and agents for the purposes of contract negotiation, administration, enforcement and grievance processing and arbitration." (Compl. at ¶ 22). The State argues that these are future, contingent interests not protected under takings law. (Def.'s Br. at 18-20). To survive dismissal, however, a plaintiff must only "allege facts that plausibly suggest they are entitled to relief." *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 31, 356 Wis. 2d 665, 680, 849 N.W.2d 693, 701. In Wisconsin, a property interest is one in which the party has a "legitimate claim of entitlement," not merely an "abstract need or desire or a unilateral expectation." *Wis. Med. Soc'y, Inc. v. Morgan*, 2010 WI 94, ¶ 42, 328 Wis. 2d 469, 493, 787 N.W.2d 22, 34 (internal quotation marks omitted). This court believes Plaintiffs have sufficiently alleged they have a plausible claim of entitlement to property for the purposes of surviving the State's motion to dismiss.

B. Sufficiency of the alleged "taking" by the State

Next, the State argues the complaint is insufficient because Plaintiffs allege that only future, contingent interests have been taken. (Def.'s Br. at 19). Plaintiffs, in turn, claim that the "taking" diminishes their investment-backed expectations under a *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), regulatory takings theory. (Pl.'s Br. at 15). They support that claim with factual allegations that Act 1 forces them to deplete their accumulated reserves in order to provide services to non-members, thus interfering with their right to realize investment earnings. (Pl.'s Br. at 16-17). This element of the claim, again, is plausible on its face.

C. Sufficiency of the alleged "public use" of the property

Plaintiffs claim the Act effected an unconstitutional taking of their property for the "public purpose [of] making the business climate in the State more favorable by eliminating the power of labor organizations to collect fair share fees for nonmembers." (Compl. at ¶ 25). The State argues that "public purpose" and "public use" under Art. I § 13 are not synonymous, with a public use demanding the higher burden that "the public's use and occupation must be direct." (Def.'s Br. at 22, quoting *David Jeffrey Co. v. City of Milwaukee*, 267 Wis. 559, 577, 66 N.W.2d 362 (1954)). However, the courts have used public use and public purpose interchangeably throughout the history of Wisconsin takings law. *See, for example, Falkner v. N. States Power Co.*, 75 Wis. 2d 116, 125, 248 N.W.2d 885, 891 (1977); *Wis. Retired Teachers Ass'n,*, 207 Wis.2d 1, 10 (1997). Furthermore, the State's reliance on *Town of Beloit v. County of Rock*, 2003 WI 8, 259 Wis.2d 37, 657 Wis.2d 344, is misplaced. In that non-takings case, the court discussed "public use" within the context of the public purpose doctrine, a separate constitutional doctrine governing appropriations. *Id.* at ¶ 28. The distinction made there is irrelevant to this takings claim. The complaint here is sufficient to survive this challenge.

D. Sufficiency of the alleged non-payment of "just compensation"

The State relies on dicta in a recent Seventh Circuit case, *Sweeney v. Pence*, 767 F.3d 654 (2014), to argue that Plaintiffs have not sufficiently alleged the absence of just compensation because unions receive just compensation through their exclusive bargaining right. The proposition that winning an election is sufficient compensation and that all the subsequent work must be done for free does not make any more sense than the proposition that there is a free lunch. This Court is not bound by dicta in *Sweeney v. Pence* and, as such, we will not dismiss a Plaintiff's action based solely on non-binding authority. Plaintiffs claim that they have not

received compensation from the State following its enactment of Act 1; that is sufficient on a motion to dismiss.

In sum, Plaintiffs have adequately pleaded the four elements necessary for an Art I. § 13 takings claim.

IV. Availability of declaratory relief, injunctive relief, and attorney fees

Finally, the State argues that Plaintiffs' requests for declaratory relief, injunctive relief, and attorney fees cannot stand for two reasons. First, they maintain that, while the State normally does not enjoy sovereign immunity in takings cases, it does here because Plaintiffs have not requested "just compensation" in the form of money. (Def. Reply Br. at 6). This contention is unsupported by the case law. Wisconsin has long acknowledged that its sovereign immunity does not extend to takings claims, regardless of the relief requested. *See Wis. Retired Teachers Ass'n,* 207 Wis. 2d 1, 28-29, *Wis. Med. Soc'y, Inc. v. Morgan*, 2010 WI 94, ¶ 35, 328 Wis. 2d 469, 787 N.W.2d 22. The State fails to identify a case where this distinction has been entertained and the Court thus concludes it is a distinction without effect.

Second, the State argues that declaratory and injunctive relief may not be granted in takings cases. This argument, too, is soundly rejected by Wisconsin takings law. Plaintiffs have asserted a regulatory takings claim. (Pl.'s Br. at 15). Wisconsin has explicitly recognized the appropriateness of injunctive relief in regulatory takings cases. *See Wis. Retired Teachers Ass'n,* 207 Wis. 2d 1, 40 (ordering the circuit court, on remand, to "declare invalid and enjoin future implementation" of an act held to be an unconstitutional taking); *Wis. Med. Soc'y*, 2010 WI 94, ¶ 106 (ordering the circuit court to permanently enjoin the State from complying with the act that constituted a taking). While the State argues that declaratory and injunctive relief in these

previous takings cases was predicated on first awarding monetary "just compensation," this Court sees no support for that theory in the text of the opinions.

V. Summary judgment

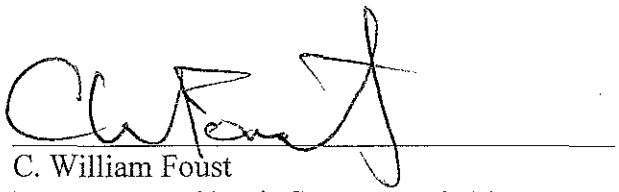
Defendants object to Plaintiffs' Motion for Summary Judgment as premature. They point out that they have not even answered the Complaint yet. "We consider that a motion for summary judgment is premature when the court had pending before it a demurrer and the party against whom the motion is made is not in default in serving his complaint or answer." *Kennedy-Ingalls Corp. v. Meissner*, 8 Wis. 2d 126, 133, 98 N.W.2d 386, 389-90 (1959). See also *Schmitt v. Osborne*, 80 Wis. 2d 19, 25, 257 N.W.2d 844, 847 (1977). Wis. Stat. 802.06(2)(b) addresses the conversion of a motion to dismiss into a motion for summary judgment when matters outside the pleadings are presented. That is in the context of a motion to dismiss made by the defendants. I agree that summary judgment is premature in this case at this point. Defendants must be allowed to answer.

Conclusion

For the reasons stated about, the Motion for Dismiss is denied. Defendants will have 30 days from the date of this decision to submit any evidentiary materials they care to provide in response to the Plaintiffs' summary judgment materials. If Plaintiffs choose to stand on the brief already submitted on August 31, they should notify the court and the Defendants.

IT IS HEREBY ORDERED THAT the Motion to Dismiss is denied.

Dated this 9th day of November, 2015.



C. William Foust
Dane County Circuit Court Branch 14

Attorney Frederick Perillo
Attorney Daniel P. Lennington
Attorney Brian McGrath