IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

BRIAN KIRK,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 24-06023-CV-SJ-GAF**
	)	
CITY OF ST. JOSEPH, MISSOURI, et al.,	)	
	)	
Defendants.	)	

ORDER

Now before the Court are Defendants Josh Blevins and Steve Greiert's Motion to Dismiss and Motion to Strike (Doc. 12) and Plaintiff Brian Kirk's ("Plaintiff") second Motion for Leave to File an amended complaint (Doc. 28). The motions have been fully briefed or the time for briefing has expired. For the following reasons, Blevins and Greiert's Motion to Dismiss is GRANTED, and Plaintiff's second Motion for Leave to File an amended complaint is GRANTED in part and DENIED in part.[1]

DISCUSSION

I. MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

On January 25, 2024, Plaintiff filed his Petition in the Circuit Court of Buchanan County, Missouri. (Doc. 1-2). Plaintiff, a former member of the St. Joseph Public Library Board of Trustees (the "Library Board"), sued the City of St. Joseph, Missouri (the "City"), its Mayor,[2] and

[1] Also pending are Plaintiff's first Motion for Leave to File an amended complaint (Doc. 22), three unopposed motions for extensions of time (Docs. 15, 20, 21), and opposed motion for extension of time. (Doc. 26). Plaintiff withdrew his first Motion for Leave to File an amended complaint in his second motion for the same. (Doc. 28). As Plaintiff never filed the responses and reply for which he sought an extension, his motions for extensions of time are DENIED.
[2] Defendant John Josendale

its City Council members,[3] as well as two citizens of the City, Blevins and Greiert, after the Mayor rescinded Plaintiff's nomination to the Library Board and the City Council did not reappoint Plaintiff to the Library Board. (*Id.*). Plaintiff alleged he was removed from the Library Board due to his speech in support of the LGBTQ+ community, his religious speech, and his status as an openly gay pastor. (*Id.*). Plaintiff alleged Blevins's and Greiert's actions and public statements influenced the Mayor and the City Council members to remove Plaintiff from the Library Board such that they acted as an agent of the City. (*Id.* at ¶¶ 38, 41).

Plaintiff asserted five counts against the Defendants: Count I—Violation of the First Amendment and Equal Protection Clause of the Fourteenth Amendment under 42 U.S.C. § 1983; Count II—First and Fourteenth Amendment Retaliation under 42 U.S.C. § 1983; Count III—Conspiracy to Violate Constitutional Rights under 42 U.S.C. §§ 1983 and 1985; Count IV—Equal Protection; and Count V—Injunctive Relief. (*Id.* at ¶¶ 44-78). Counts I through III are brought against all Defendants. (*Id.* at ¶¶ 44-68). Count IV is brought against the City, its Mayor, and its City Council members (collectively, the "City Defendants"). (*Id.* at ¶¶ 69-75). The Petition does not specify against whom Count V is brought. (*Id.* at ¶¶ 76-78).

On February 15, 2024, the City Defendants removed the case to this Court and filed their answer. (Docs. 1, 2). On March 7, 2024, Blevins and Greiert appeared and filed their Motion to Dismiss for failure to state a claim. (Doc. 12). Plaintiff then filed three unopposed Motions for Extension of Time to file his response/opposition to Blevins and Greiert's Motion to Dismiss. (Docs. 15, 20, 21). However, instead of responding to or opposing the Motion to Dismiss, Plaintiff filed his first Motion for Leave to File an amended complaint on April 16, 2024. (Doc. 22). Blevins and Greiert opposed. (Doc. 23). The City Defendants took no position. (*See* Docket

[3] Defendants Marty Novak, Taylor Crouse, Andy Trout, Michael Grimm, Madison Davis, Kenton Randolph, Jeff Schomburg, and Randy Schulz

Sheet). Plaintiff then filed a Motion for Extension of Time to file his reply brief, which Blevins and Greiert also opposed. (Docs. 26, 27).

Subsequently, Plaintiff filed a second Motion for Leave to File an amended complaint, which also included a request to withdraw his first Motion for Leave to File an amended complaint. (Doc. 28). In the second proposed amended complaint, Plaintiff seeks leave to assert Counts I through IV against the City Defendants in their individual capacity. (Doc. 28, ¶ 1). Plaintiff also seeks leave to replace the claim for equitable relief in Count V with a count for defamation against Blevins and Greiert. (*Id.* at ¶ 4). Additionally, Plaintiff adds one factual allegation to paragraph 37. (*Compare* Doc. 1-2 *with* Doc. 28-1). All other allegations remain the same. (*Id.*). Blevins and Greiert opposed again. (Doc. 29). The City Defendants also opposed the second Motion for Leave to File. (Doc. 30). However, none of the defendants opposed Plaintiff's withdrawal of the equitable claims. (Docs. 23, 29, 30). Plaintiff filed his reply brief on July 9, 2024. (Doc. 31).

In his reply brief, Plaintiff did not respond to Blevins and Greiert's arguments that the proposed amendments are futile but does respond to their arguments concerning undue delay, bad faith, and failure to cure deficiencies. (Doc. 31). Plaintiff did not address the City Defendants' arguments concerning futility either. (*Id.*).

Plaintiff's failure to address Blevins and Greiert's futility arguments and the City Defendants' arguments constitutes a waiver of any argument against the defendants' positions. *See, e.g., Irvin v. Brown*, No. 4:22-CV-00256-DGK, 2023 WL 3853963, at *3 (W.D. Mo. June 6, 2023) (failure to respond to sovereign immunity defense in motion to dismiss waived any argument against sovereign immunity). It is true that "[t]he court should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). However, leave to amend need not be granted if "there exists undue delay, bad faith, repeated failure to cure deficiencies by amendments

previously allowed, undue prejudice to the non-moving party, or futility of the amendment." *Popoalii v. Corr. Med. Servs.*, 512 F.3d 488, 497 (8th Cir. 2008). An amendment is futile if it could not survive a motion to dismiss for failure to state a claim. *Munro v. Lucy Activewear, Inc.*, 899 F.3d 585, 589 (8th Cir. 2018).

Because Plaintiff has failed to counter the defendant's futility arguments, he waived any argument against them. Thus, the Court deems the amendments opposed by the defendants (i.e., adding a defamation claim against Blevins and Greiert and bringing claims against the City Defendants in their individual capacities) futile. Specifically, the Court agrees with Blevins and Greiert that they are not state actors for the reasons discussed further below, and therefore, the Court likely does not have jurisdiction over the proposed defamation claim. Further, the Court believes that the law cited by the City Defendants regarding legislative immunity supports that the claims brought against them, if brought in their individual capacities, would not survive a Rule 12(b)(6) motion. However, Plaintiff is permitted to withdraw the equitable claim and add the factual allegation in paragraph 37.

II. MOTION TO DISMISS

A. Should the Court rule the Motion to Dismiss?

As the Court has partially granted Plaintiff's Motion for Leave to Amend, the question becomes whether the Court should rule Blevins and Greiert's Motion to Dismiss. Generally, the filing of an amended complaint renders moot any pending motion to dismiss. *See Onyiah v. St. Cloud State Univ.*, 655 F. Supp. 2d 948, 958 (D. Minn. 2009) (citing *Pure Country, Inc. v. Sigma Chi Fraternity*, 312 F.3d 952, 956 (8th Cir. 2002)). However, courts have ruled motions to dismiss filed before an amendment where: (1) no new claims are advanced in the amended pleading; (2) the same arguments controlled both the original and amended complaints; and (3) the interests of

judicial efficiency favor consideration of the motion to dismiss at that time. *See Young v. Mercer Cnty. Comm'n*, 849 F.3d 728, 731 n.3 (8th Cir. 2017) (approving district court's procedure to allow amended complaint and treat motion to dismiss as one to dismiss the amended complaint); *Cartier v. Wells Fargo Bank, N.A.*, 547 F. App'x 800, 804 (8th Cir. 2013) (same); *Hayat v. Maine Heights, L.L.C.*, No. 21-cv-422 (ECT/KMM), 2021 WL 2379396, at *2 (D. Minn. June 10, 2021) (noting it makes more practical sense to construe a pending motion as one to dismiss the amended complaint when amendments are minor); *Syngenta Seeds, LLC v. Warner*, No. 20-cv-1428 (ECT/BRT), 2021 WL 679289, at *5 (D. Minn. Feb. 22, 2021) (same).

Blevins and Greiert filed their Motion to Dismiss before Plaintiff filed his two Motions for Leave to Amend. While the Court is granting Plaintiff leave to make some of the proposed amendments, none of the allowed amendments materially impact Counts I through III, the primary subjects of the Motion to Dismiss. Accordingly, the same arguments regarding dismissal control both the original and amended Counts I through III. As such, the first two factors weigh in favor of applying the Motion to Dismiss to the amended complaint.

The third factor also weighs in favor of ruling the Motion to Dismiss. First, Plaintiff has had ample opportunity to respond to Blevins and Greiert's arguments by either opposing the Motion to Dismiss directly, amending Counts I through III to address the deficiencies pointed out in the Motion to Dismiss, or responding to the futility arguments raised in response to both Motions for Leave to Amend. Plaintiff even had additional time to research and respond to Blevins and Greiert's arguments due to the unopposed motions for extension of time. Yet Plaintiff has not responded to the arguments.

Second, Blevins and Greiert raised immunity defenses. Generally, issues of immunity should be resolved "at the earliest possible stage in litigation" to limit expenses to persons immune from suit. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009).

Additionally, Blevins and Greiert argue Missouri's anti-SLAPP[4] statute requires the Court to expeditiously consider its "special" motion to dismiss because Plaintiff challenges their speech made in connection with a public meeting or hearing. (Doc. 13, pp. 11-12) (citing Mo. Rev. Stat. § 537.528.1). While the Court questions whether it is bound by the procedural mandates of Mo. Rev. Stat. § 537.528.1, the Court understands the policy considerations behind anti-SLAPP statutes and the importance of promptly resolving issues concerning speech made in connection with public participation. The Court believes these policy concerns further weigh in favor of ruling the Motion to Dismiss presently.

B. Should Counts I through III against Blevins and Greiert be dismissed?

Blevins and Greiert argue Plaintiff failed to state a claim against them in Counts I through III because (1) they are not state actors subject to suit under 42 U.S.C. § 1983; (2) even if they are considered state actors, they are entitled to legislative and/or qualified immunity; and (3) Missouri's anti-SLAPP law precludes Plaintiff's claims against them. (Doc 13). Again, Plaintiff has not responded to any of Blevins and Greiert's arguments. Similar to the waiver of arguments against the futility of his proposed amendments, Plaintiff's failure to address Blevins and Greiert's arguments for dismissal of Counts I through III constitute a waiver of any argument against their positions. *See Irvin*, 2023 WL 3853963, at *3. And Blevins and Greiert's argument that they are not state actors under §1983 is well taken.

[4] "SLAPP is an acronym for 'strategic lawsuit against public participation.'" *Nunes v. Lizza*, 476 F. Supp. 3d 824, 844 n.5 (N.D. Iowa 2020), *aff'd in part, rev'd in part on other grounds, and remanded by* 12 4th 890 (8th Cir. 2021).

When considering a motion to dismiss for failure to state a claim under Rule 12(b)(6), a court treats all well-pleaded facts as true and grants the non-moving party all reasonable inferences from the facts. *Richter v. Advance Auto Parts, Inc.*, 686 F.3d 847, 850 (8th Cir. 2012). However, courts are "not bound to accept as true a legal conclusion couched as a factual allegation" and such "labels and conclusions" or "formulaic recitation[s] of the elements of a cause of action will not do." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)) (internal quotation marks omitted). A Rule 12(b)(6) motion should be granted only if the non-moving party fails to plead facts sufficient to state a claim "that is plausible on its face." *Twombly*, 550 U.S. at 570. "A claim is facially plausible where the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Wilson v. Ark. Dep't of Human Servs.*, 850 F.3d 368, 371 (8th Cir. 2017) (quotation omitted).

Counts I through III, whether as pled in the original Petition or the proposed amended complaint, are brought pursuant to 42 U.S.C. § 1983. A § 1983 claim may only be brought against a person acting "under color of" state law. 42 U.S.C. § 1983. "The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *West v. Atkins*, 487 U.S. 42, 49 (1988) (quotation omitted). A private actor's conduct may be considered "state action" if said conduct is "fairly attributable" to the state. *Meier v. City of St. Louis, Mo.*, 78 F.4th 1052, 1058 (8th Cir. 2023) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 (1982)).

Both the original Petition and the proposed amended complaints contain no allegation that either Blevins or Greiert served in any governmental capacity. (Docs. 1-2, 22-1, 28-1). Plaintiff

identifies no power that Blevins and Greiert had or exercised "by virtue of state law" or under "the authority of state law." *West*, 487 U.S. at 49. Plaintiff does not claim Blevins's and Greiert's actions could be "fairly attributable" to the state or that their allegedly unlawful conduct had its "source in state authority." *Lugar*, 457 U.S. at 929, 939. And there is no allegation that the state delegated power to Blevins and Greiert. For these reasons, Plaintiff has failed to plead that Blevins and Greiert acted under the color of state law such that they could be liable for a violation of § 1983. Consequently, Plaintiff cannot maintain Counts I through III against Blevins and Greiert.

CONCLUSION

Plaintiff's proposed amendment to add individual-capacity claims against the City Defendants is futile. Plaintiff's claims against the City Defendants in their official capacities remain. Plaintiff cannot maintain his § 1983 claims against Blevins and Greiert, and therefore, the Court does not have jurisdiction over the proposed defamation claim. Plaintiff is permitted to amend paragraph 37 and delete the claim for equitable relief in Count V as proposed. For these reasons and the reasons stated *supra*, Blevins and Greiert's Motion to Dismiss is GRANTED and Plaintiff's second Motion for Leave to file amended complaint is GRANTED in part and DENIED in part. Plaintiff shall file his proposed amended complaint, which complies with this Order, within five days of this Order.

IT IS SO ORDERED.

s/ Gary A. Fenner
GARY A. FENNER, JUDGE
UNITED STATES DISTRICT COURT

DATED: August 21, 2024