IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Maria Muniz-Muniz, et al.,

Plaintiffs,

-vs-

United States Border Patrol,
Customs and Border Protection,
Department of Homeland Security, et al.,

Defendants.

Case No. 3:09 CV 2865

O R D E R

JUDGE JACK ZOUHARY

Pending before this Court is Plaintiffs' Motion for Leave to File Third Amended Complaint (Doc. 155). Defendants responded (Docs. 158), and Plaintiffs replied (Doc. 159). The Federal Defendants ("Defendants") assert three arguments for denying Plaintiffs' leave to amend:

1. First, Defendants contend this Court lacks subject matter jurisdiction to consider Plaintiffs' Federal Tort Claims Act ("FTCA") because Plaintiffs did not exhaust those claims until more than two years *after* they filed this suit. As the Supreme Court recognized, the FTCA requires plaintiffs to exhaust administrative remedies prior to instituting a lawsuit. *See McNeil v. United States*, 508 U.S. 106, 107 (1993) (citing 28 U.S.C. § 2675); *Harris v. Cleveland*, 7 F. App'x 452, 459 (6th Cir. 2001). The Sixth Circuit clarified that exhaustion does not occur by merely filing an action with the relevant agency. Rather, a claim is exhausted and ripe for federal court review when the agency takes action on the claim -- *i.e.,* deny or sustain the claim. *See Harris*, 7 F. App'x at 459. Further, the denial of an administrative claim is statutorily presumed if six months pass without action on a properly filed administrative claim. *Id.* at 458 (citing Section 2675(a)).

According to Defendants, Plaintiffs filed this suit before they filed their administrative claims with the Department of Homeland Security ("DHS") and, more importantly, before DHS denied their claims. Specifically, Defendants assert Plaintiffs FTCA claims were not ripe when they filed suit in December 2009 because DHS did not deny the claims until April 2012 (Doc. 158 at 3). Defendants, however, rely on the wrong date for purposes of exhaustion. As the Sixth Circuit emphasized, district courts have subject matter jurisdiction to hear FTCA claims which are "ripe when the complaint was filed." *Harris*, 7 F. App'x at 459. Here, Plaintiffs did not seek to add FTCA claims until they moved for leave to file a Third Amended Complaint on May, 21, 2012 -- the relevant date for ripeness purposes. Because DHS denied their administrative claims in April 2012, Plaintiffs' claims are properly exhausted and ripe for review.

2. Defendants next urge this Court to deny Plaintiffs' request to amend because adding the FTCA claims will delay the resolution of this case and result in undue prejudice. Under Federal Civil Rule 15(a)(2), a party may amend a complaint at this late stage of the case only after obtaining leave of court. Although the Rule provides that courts "should freely give leave when justice so requires," leave may be denied for several reasons, including undue delay, bad faith, futility of the proposed new claim, or undue prejudice to the opposite party. *See Forman v. Davis*, 371 U.S. 178, 182 (1962); *Seals v. Gen. Motors Corp*, 546 F.3d 766, 770 (6th Cir. 2008); *Duggins v. Steak & Shake, Inc.*, 195 F.3d 828, 834 (6th Cir. 1999). While the Rule does not establish a deadline for the filing of a motion to amend, "[n]otice and substantial prejudice to the opposing party are critical factors in determining whether an amendment should be granted." *Wade v. Knoxville Utilities Bd.*, 259 F.3d 452, 458–459 (6th Cir. 2001).

Moreover, while delay alone does not justify the denial of a motion brought pursuant to Rule 15(a), *Security Ins. Co. of Hartford v. Kevin Tucker & Assocs.*, 64 F.3d 1001, 1009 (6th Cir. 1995), a party seeking to amend should "act with due diligence if it wants to take advantage of the Rule's liberality." *Parry v. Mohawk Motors of Mich., Inc.*, 236 F.3d 299, 306 (6th Cir. 2000). This Court has great discretion " in determining whether justice requires that [an] amendment be allowed." *Greenberg v. Life Ins. Co. of Virginia*, 177 F.3d 507 (6th Cir. 1999) (citation omitted).

This Court finds that requiring Defendants to defend against a new theory of liability at this stage in the litigation would result in delay and unfair prejudice. The parties in this case have conducted extensive discovery on Plaintiffs' original claims -- filed well over two years ago. This case has a firm trial date in November 2012. This Court believes additional needed discovery will result in significant delay. Plaintiffs' proposed amendments, while arising "out of the same common operative facts" as their original allegations, are substantively different from their original racial profiling claims. Indeed, adding new claims for alleged personal injuries to this suit will necessarily require discovery into matters not previously relevant. Exposing Defendants to new discovery, as well as forcing them to prepare new defenses for claims "quite different" from those before this Court, would result in significant prejudice. *See Duggins*, 195 F.3d at 834.

3. Defendants finally argue that a Third Amended Complaint will complicate the trial in this matter. As support, Defendants essentially repeat the same arguments from above, emphasizing that alleged incidents of personal injuries in this civil rights suit would complicate resolution because the new claims are "largely distinct" from what needs to be shown to demonstrate racial profiling, and further would result in "trials within a trial" -- specifically, individual personal injury trials within a trial on racial profiling (Doc. 158 at 4). Defendants' argument is persuasive. Litigating constitutional

issues alongside tort claims of five individuals would complicate issues at trial. These individualized, non-constitutional tort claims are more appropriately brought in a separate action.

IT IS SO ORDERED.

s/ *Jack Zouhary*
JACK ZOUHARY
U. S. DISTRICT JUDGE

June 15, 2012