

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

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| <p>MEMBER WILLIAMS, <i>et al.</i>,</p> <p style="text-align: center;">Plaintiffs,</p> <p>vs.</p> <p>KISLING, NESTICO & REDICK, LLC, <i>et al.</i>,</p> <p style="text-align: center;">Defendants.</p> | <p>Case No. 2016-CV-09-3928</p> <p>Judge James A. Brogan</p> <p>DEFENDANT MINAS FLOROS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE FOURTH AMENDED COMPLAINT</p> |
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Now comes Defendant Minas Floros ("Floros"), by and through counsel, submits his brief in opposition to Plaintiffs' Motion for Leave to File Fourth Amended Complaint. This Court should deny Plaintiffs' motion for leave because: 1) it is in bad faith, untimely, futile, and unduly prejudicial to defendants; and 2) it raises new claims that are time barred.

MEMORANDUM IN SUPPORT

A. Plaintiffs' motion for leave is in bad faith, untimely, futile, and unduly prejudicial to defendants.

Two years after originally filing their complaint, Plaintiffs want to file a fourth amended complaint, which adds Monique Norris ("Norris") as an additional class representative to the three existing classes.¹ Plaintiffs also want to add additional fraud and breach of fiduciary claims against Dr. Sam Ghoubril M.D. (Dr. Ghoubril), for which Norris will be the only class representative. Plaintiffs allege that they did not become aware of Norris' claims until November of 2017. *See* Proposed Fourth Amended Complaint, ¶¶ 178, 250. Plaintiffs previously amended

¹ In their motion for leave, Plaintiffs have also requested to dismiss Naomi Wright's claims. Floros has no objection to this, but requests that the dismissal be journalized in a court entry.

their complaint in October of 2017, where they added new claims and parties, which included Floros.

While Civ.R. 15(A) generally allows for liberal amendment of a complaint, a motion for leave to amend must be made in a timely manner. *See Brown v. FirstEnergy Corp.*, 9th Dist. Summit No. 22123, 159 Ohio App. 3d 696, 2005-Ohio-712, 825 N.E.2d 206, ¶6. A motion for leave should be denied if there is a showing of "bad faith, undue delay or undue prejudice to the opposing party." *Hoover v. Sumlin*, 12 Ohio St.3d 1, 465 N.E.2d 377 (1984). "A party seeking leave to amend a pleading is required to do so in good faith, therefore there must be at least a prima facie showing that the movant can marshal support for the new matters sought to be pleaded, and that the amendment is not simply a delaying tactic or one which would cause prejudice to the defendant." *Glazer v. Chase Home Fin. L.L.C.*, 8th Dist. Cuyahoga Nos. 99875, 99736, 2013-Ohio-5589, ¶98; *see also Lottridge v. Gahanna-Creekside Invests., LLC*, 2015-Ohio-2168, 36 N.E.3d 744 (10th Dist.)(holding that the trial court properly denied a motion for leave to file a fourth amended complaint where the plaintiff sought to add new defendants two years after filing the complaint).

Plaintiffs' motion to amend should be denied because it is in bad faith, untimely, futile, and unduly prejudicial to defendants. Since filing their complaint in September of 2016, the parties have engaged in a substantial amount of briefing. This includes motions to dismiss, motions to strike class allegations, motions on the pleadings, motions for protective orders, and motions to compel. The parties have also engaged in a substantial amount of discovery, which includes numerous sets of interrogatories, request for admissions, and request for production of documents, as well as depositions of class representatives and their witnesses. Plaintiffs now

want to repeat this process with their fourth amended complaint, which seeks to add a new plaintiff, a new defendant, and new separate claims involving the new parties only.

Rather than explain why they waited so long to seek leave, Plaintiffs improperly blame their delay on defendants and the court. *See* PLs' Motion for Leave, pg. 4. Plaintiffs, however, have no one to blame but themselves. Indeed, Plaintiffs admit that they have been aware of Norris' claims since at least November of 2017. *See* Proposed Fourth Amended Complaint, ¶¶ 178, 250. Even assuming this is true, this means that Plaintiffs sat on Norris' claims for at least ten months while this litigation was pending. Plaintiffs are now without good cause for filing now.

The addition of Norris as a class representative is also pointless. As Plaintiffs admit in their motion for leave, the new claims against Dr. Ghoubrial only involve Norris, and do not currently involve the other named parties. Likewise, Plaintiffs already have class representatives for the pending class claims.

This Court should also reject Plaintiffs' reliance on federal district cases, which are both distinguishable and contrary to their position. For instance, in *Perdue v. Morgan*, S.D.Ohio No. 1:13-cv-878, 2014 U.S. Dist. LEXIS 138575 (July 7, 2014) , the court denied the motion for leave where the party sought to add new parties and unrelated claims, which is what Plaintiff is trying to do here with the new and unrelated claims against Dr. Ghoubrial. In *Mick v. Level Propane Gases, Inc.*, 203 F.R.D. 324 (S.D.Ohio 2001), the court previously granted class certification, and the plaintiffs were merely seeking to add additional class representatives with identical fact patterns and claims. In this case, the issue of class certification is still pending and needs to be decided.

In *Spizzirri v. C.I.L. Inc.*, N.D.Ill. No. 94 C 1479, 1994 U.S. Dist. LEXIS 11719 (Aug. 18, 1994), the plaintiff was seeking to file a second amended complaint to add new class representatives after the previous class representative requested to be removed because she was receiving threatening phone calls. The plaintiff sought the amendment within two months of filing the original complaint. Unlike in *Spizzirri*, it has been two years since Plaintiffs filed their original complaint. And Plaintiffs are not dismissing Naomi Wrights' claim because she cannot be a party class representative. Rather, Plaintiffs claim that they are dismissing Wright because her claims fail to meet Civ. R. 23's numerosity requirement. Likewise, the current class claims already have named representatives, so there is no reason to add another party at this stage.

Therefore, this Court should deny Plaintiffs' motion for leave because it is in bad faith, untimely, futile, and unduly prejudicial to defendants.

B. Plaintiffs' motion for leave raises new and unrelated claims that are time barred.

Ohio courts have denied a motion for leave to amend a complaint where the moving party seeks to add time-barred claims. *Thornton v. Hardiman, Buchanan, Howland & Trivers*, 8th Dist. Cuyahoga No. 83400, 2005-Ohio-1969; *Porter v. Probst*, 2014-Ohio-3789, 18 N.E.3d 824 (7th Dist.); *Yates v. Hassell*, 10th Dist. Franklin No. 11AP-588, 2012-Ohio-328, ¶ 11 ("The general rule is that a person may not be brought into a civil action as a new party defendant when the cause of action as to him is barred by the statute of limitations.").

A claim for breach of fiduciary duty is subject to the four-year statute of limitations in R.C. 2305.09. *Cleveland Indus. Square, Inc. v. Dzina*, 8th Dist. Cuyahoga Nos. 85336, 85337, 85422, 85423, 85441, 2006-Ohio-1095, ¶ 45. "A cause of action for breach of fiduciary duty arises when the act or commission constituting the breach of fiduciary duty occurred. The discovery rule does not toll the statute of limitations for a breach of fiduciary duty claim." *Id.*,

citing *Helman v. EPL Prolong, Inc.*, 139 Ohio App.3d 231, 249, 2000 Ohio 2593, 743 N.E.2d 484 (7th Dist.2000).

The statute of limitations for fraud claim is also four years, but subject to the discovery rule. Under the discovery rule, "[a] cause of action for fraud or conversion accrues either when the fraud is discovered, or [when] in the exercise of reasonable diligence, the fraud should have been discovered." *Cundall v. U.S. Bank*, 122 Ohio St.3d 188, 2009-Ohio-2523, ¶ 29, 909 N.E.2d 1244. In "determining whether the exercise of reasonable diligence should have discovered a case of fraud, the relevant inquiry is whether the facts known would lead a fair and prudent man, using ordinary care and thoughtfulness, to make further inquiry." *Id.* The statute of limitations will start running under the discovery rule when there is constructive knowledge of the facts; actual knowledge of the facts and their legal significance is not necessary. *Id.* at ¶ 30.

In their proposed fourth amended complaint, Norris' breach of fiduciary and fraud claims arise out a settlement agreement signed with KNR on May 25, 2014, and prior services that defendants provide in relation to an auto accident from July of 2013. *See* Proposed Fourth Amended Complaint, Ex. D. This is over four years ago, which means that the claims are time barred under R.C. 2305.09.

Plaintiffs will likely argue that Norris was not aware of the breach of fiduciary duty or fraudulent acts until November of 2017, as alleged in the complaint. *See* Proposed Amended Complaint ¶¶ 178, 250. As to the breach of fiduciary duty claims, the discovery rule does not toll the statute of limitations. Rather, the statute of limitations begins once the breach occurs or the fiduciary relationship ends, which in this case would be on or before May 25, 2014.

As for Norris' new fraud claims, Plaintiffs rely on information that was available to the public for over four years. This includes Dr. Ghoubril's deposition testimony, which Plaintiffs

admit was public record on August 18, 2014, when it was filed in *Debbie Andrews vs. Russell Allen Stevic*, Summit County Court, CV-2013-08-4148, and a medical study dating back to 2011. See Proposed Amended Complaint ¶¶ 81, 83. This means that Norris had constructive knowledge of the facts she relies on for her fraud claims for over four years.

This Court, therefore, should deny Plaintiffs' motion for leave, since the new claims alleged by Norris are time barred.

CONCLUSION

Plaintiffs have no valid explanation for not amending their complaint earlier, as they admit to having knowledge of the potential new claims since November of 2017. With substantial motion practice and discovery already completed, there is no reason to further delay this case, especially on the class-certification issue.

Plaintiffs' fourth amended complaint is also futile and unnecessary. Norris does not add any new facts or allegations to the current class action claims. And Plaintiffs admit that the new claims against Dr. Ghoumbrial do not currently involve any of the other parties. Norris' claims are also time-barred and would not survive a motion to dismiss.

Accordingly, Floros requests that this Court deny Plaintiffs Motion for Leave to File a Fourth Amended Complaint because it is in bad faith, untimely, futile, unduly prejudicial to defendants, and raises new claims that are time barred.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Defendant Floros' Brief in Opposition to Plaintiffs' Motion for Leave to File a Fourth Amended Complaint was served electronically on this 13th day of September, 2018. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ Shaun H. Kedir
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