

**IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO**

MEMBER WILLIAMS, et al.,)	Case No. CV-2016-09-3928
)	
Plaintiffs,)	Judge James Brogan
)	
v.)	<u>Defendant Sam Ghoubrial, M.D.'s Brief</u>
)	<u>in Opposition to Plaintiff's Motion to</u>
KISLING, NESTICO & REDICK, LLC,)	<u>Amend the Complaint to Conform to the</u>
et al.,)	<u>Evidence</u>
)	
Defendants.)	
)	

Now comes Defendant Sam Ghoubrial, M.D. ("Dr. Ghoubrial"), by and through counsel, and hereby respectfully requests this Honorable Court issue an Order denying Plaintiffs' Motion to Amend the Complaint to Conform to the Evidence ("Plaintiffs' Motion to Amend"), which is essentially Plaintiffs' motion for leave to file a sixth amended Complaint.

I. STATEMENT OF THE CASE PERTINENT TO THIS BRIEF

Plaintiffs' Motion to Amend seeks to add five new Defendants as well as new claims against the existing Defendants, such as Dr. Ghoubrial, and to change the identities of the purported classes.

The present matter was originally filed on September 16, 2016. In the nearly three years since the original Complaint was filed, Plaintiffs have amended the complaint five times. The parties have conducted extensive discovery, completed class discovery, attended numerous court hearings and conferences, as well as filed numerous motions and briefs on a multitude of issues.

The aforementioned activity resulted in Plaintiffs filing their motion for class certification on May 15, 2019. However, after the years spent litigating this matter, Plaintiffs abandoned their effort to certify the classes alleged against Dr. Ghoubrial in their Fifth Amended Complaint, the operative

complaint at the time of Plaintiffs' motion for class certification was filed. Plaintiffs now seek to amend their Complaint for a sixth time, after already having filed for class certification. Plaintiffs simply cannot be permitted to ignore the Civil Rules and the prior Orders of this Court and proceed in any fashion they see fit.

On May 23, 2019, Plaintiffs filed a motion seeking leave to file their Sixth Amended Complaint pursuant to Ohio Civil Rule 15(A) and (B). The proposed Sixth Amended Complaint seeks to warrant the certification of new classes never disclosed prior to Plaintiffs' motion for class certification. Notably, the newly identified classes are significantly broader than the putative classes alleged in the operative complaint. The Sixth Amended Complaint also alleges facts and legal theories never before advanced. The Sixth Amended complaint alleges conspiracy and RICO allegations which include the existing Defendants as well as a group of healthcare providers never before mentioned.

Plaintiffs' Motion to Amend alleges:

- (1) Their motion to amend will not impede the Court's decision on class certification;
- (2) Defendants will suffer no undue prejudice from the proposed Amended Complaint;
- (3) Little to no discovery is necessary for the new party Defendants; and
- (4) The new Defendants can proceed on a separate track from the existing parties.

Dr. Ghoubril asserts each of the aforementioned allegations is without merit.

II. LAW AND ARGUMENT

Plaintiffs' Motion to Amend fails to set forth any legal precedent supporting the new allegations against Dr. Ghoubril.

A. Civ. R. 15(B) is inapplicable and thus prevents Plaintiffs from adding new claims against Dr. Ghoubril

Ohio Rule of Civil Procedure 15(B) provides:

When issues not raised by the pleadings **are tried** by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and raise these issues may be made upon motion of any party at any time, even after judgment. Failure to amend as provided herein does not affect the result **of the trial** of these issues. If evidence is objected to **at the trial** on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his actions or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Ohio courts have repeatedly held that Civ. R. 15(B) has no application in matters that have not proceeded to trial. *Thomas v. Reserves Network*, 9th Dist. Lorain No. 10CA009886, 2011-Ohio-5857, ¶ 8; *Merrill Lynch Mtge. Lending, Inc. v. 1867 West Market, LLC*, 9th Dist. No. 23443, 2007-Ohio-2198, at ¶ 11; *Suriano v. NAACP*, 7th Dist. No. 05 JE 30, 2006-Ohio-6131, at ¶ 2. “Civ. R. 15(B) deals with amending the complaint to conform to the **evidence at trial**. There has been no trial in this case, and the use of Civ. R. 15(B) was inappropriate.” *Merrill Lynch supra*, quoting *Suriano*. (emphasis added).

Plaintiffs’ Motion to Amend either demonstrates Plaintiffs’ misapplied reliance on Civ. R. 15(B), or Plaintiffs’ intentional misrepresentation regarding the applicability of Civ. R. 15(B) to the present case. Plaintiffs claim their counsel has “elicited facts and evidence aimed at the existence of and Defendants’ collective participation in a scheme that necessarily constitutes a violation of the

OCPA,” and that such amounts to Defendants’, including Dr. Ghoubrial, implied consent to the new, untimely claims. (See, Plaintiffs’ Motion to Amend, p. 8).

However, Plaintiffs appear to recognize Civ. R. 15(B) is not applicable; thus, explaining Plaintiffs’ misrepresentation of the Ninth District Court of Appeals holding in *Standen v. Smith*, 9th Dist. Lorain No. 01CA007886, 2002-Ohio-760, ¶ 11. Plaintiffs’ Motion to Amend claims *Standen v. Smith*, supports their claim for leave to amend.

“A party cannot stand by silently while evidence” pertaining to an unpleaded issue is gathered for admission at trial, **“and then claim later that no relief can be granted because the matter was not pleaded.”**

(Plaintiffs’ Motion to Amend, p. 8), citing *Standen v. Smith*, 9th Dist. Lorain No. 01CA007886, 2002-Ohio-760, ¶ 11. (emphasis added).

Notably, but unfortunately not surprisingly, Plaintiffs’ Motion to Amend breaks up one sentence in the Court’s opinion in *Standen v. Smith* into two separate quotations. See, *Standen v. Smith*, ¶ 11. The actual language in *Standen v. Smith*, provides:

A party cannot stand by silently while **evidence is being admitted** and then claim later that no relief can be granted because the matter was not pleaded. The claim for implied consent is even stronger should the objecting party **introduce evidence on the matter at trial.**

Standen v. Smith, 9th Dist. Lorain No. 01CA007886, 2002-Ohio-760, ¶ 11.

It is clear that intentionally Plaintiffs broke the *Standen v. Smith* sentence into two quotes to add “pertaining to an unpleaded issue is gathered for admission at trial” to falsely imply that the holding is applicable to the present case. (Plaintiffs’ Motion to Amend, p. 8). However, *Standen v. Smith*, involved Civ. R. 15(B)’s applicability to evidence that is **actually admitted at trial**, not evidence being gathered for the potential admission at trial years in the future. *Standen v. Smith* does

not support Plaintiffs' Motion to Amend, but rather supports Dr. Ghoubrial's position – Civ. R. 15(B) only applies when a trial has occurred.

Plaintiffs' sole basis for their motion to amend adding new claims against Dr. Ghoubrial is pursuant to Civ. R. 15(B). (See, Plaintiff's Motion to Amend, p. 5-21). However, under Ohio law Civ. R. 15(B) is wholly inapplicable when the matter has not yet proceeded to trial; therefore, Plaintiffs have no basis for requesting leave from the Court to amend their Complaint for the sixth time to add claims against Dr. Ghoubrial.

B. Even if Civ. R. 15(B) was Applicable, Plaintiff's Motion to Amend Should be Denied as it is Untimely, Would Substantially Delay Resolution, and Unduly Prejudice Dr. Ghoubrial

In determining what constitutes prejudice, courts consider whether the assertion of the new claim or defense would require the opposing party to expend significant resources to conduct discovery and prepare for trial or endure other significant delays in the resolution. *Hendricks v. Wessell*, Case No. 2:11-cv-399, 2012 WL 390567, *2 (S.D. Ohio Feb. 7, 2012). Other factors the Court must take into account are whether there has been a repeated failure to cure deficiencies in the pleading, whether the amendment would be futile, and whether matters contained in the amended complaint could have been previously advanced. *Id.*

1. Plaintiff's Motion to Amend is Untimely

Motions requesting leave to file an amended complaint more than two years after the filing of the original complaint are routinely denied as untimely. *Lipchak v. Chevington Woods Civil Ass'n*, 5th Dist. Fairfield No. 14-CA-40, 2015-Ohio-263, ¶ 46; *Enyart v. Karnes*, Case No. 2:09-cv-687, 2011 WL 4367352, * 3 (S.D. Ohio Sept. 19, 2011) (denying motion to amend as three amended complaints had already been filed and the matter was pending for more than two years).

Plaintiffs seek leave to amend their Complaint after filing their motion for certification. Such is contrary to the Ohio Rules of Civil Procedure, and will cause a substantial delay in resolving this matter. Ohio courts do not permit plaintiffs to add new class definitions, claims, and allegations in a motion for class certification that were not properly pled in the operative complaint. *Glazer v. Chase Home Fin., LLC*, 2017 U.S. Dist. LEXIS 49339, at *7 (N.D. Ohio Mar. 31, 2017) (striking the class allegations in an amended complaint because it was filed without leave, as well as striking the class certification motion because it was based on the improperly filed amended complaint). The Court is bound to class definitions provided in the operative complaint and cannot consider certification beyond the scope of this operative pleading.

In the present case, Plaintiffs filed their motion for certification prior to their motion to file a Sixth Amended Complaint. The proposed Sixth Amended Complaint drastically alters the identification of the purported classes and sets forth allegations only mentioned for the first time in Plaintiffs' motion for certification. This backward pleading process conducted by Plaintiffs would significantly delay resolution as the parties would be required to conduct substantial additional discovery. As such, Plaintiffs motion seeking leave for a sixth amended complaint must be denied as untimely.

2. Plaintiffs' Motion to Amend Severely Prejudices Dr. Ghoubrial

At a bare minimum, due process requires parties have a right to conduct pre-certification discovery on all claims asserted. *Bar told v. Glendale Fed. Bank*, 81 Cal. App. 4th 816, 827 (2000) ("due process requires 'an opportunity to conduct discovery on class action issues before . . . documents in support of or in opposition to the motion must be filed . . .").

Plaintiffs' Fifth Amended Complaint alleged the following purported classes against Dr. Ghoubrial:

- D. All current and former KNR clients who had fees for medical equipment manufactured or distributed by Tritec deducted from their KNR settlement proceeds.
- E. All current and former KNR clients who had fees for injections from Dr. Ghoumbrial or his employees deducted from their KNR settlement proceeds.

However, Plaintiff's proposed Sixth Amended Complaint identifies a class far beyond the allegations in the Fifth Amended Complaint. Plaintiffs' Sixth Amended Complaint identifies a class against Dr. Ghoumbrial consisting of the following:

- A. All former KNR clients who were respectively and fraudulently charged exorbitantly inflated prices for medical treatment and equipment provided by KNR's "preferred" healthcare providers pursuant to a price-gouging scheme by which the clients were pressured into waiving insurance benefits that would have otherwise protected them

Plaintiffs' Sixth Amended Complaint details that the purported class encompasses "all current or former KNR clients who had deducted from their settlement fees paid to Defendant Ghoumbrial's personal-injury clinic for trigger-point injections, TENS units, back braces, kenalog, or office visits." (See, Sixth Amended Complaint, ¶ 157).

Plaintiffs have inexcusably sought to broaden the class against Dr. Ghoumbrial to add patients that essentially received any and all medical services and equipment provided by Clearwater Physician Providers. This new, much broader class identification will require the parties be subjected to new discovery requests and additional depositions. Further, Dr. Ghoumbrial has prepared to defend against the above-referenced two purported classes, and now almost three years into litigation would have to defend against a much broader class without adequate notice. The prejudice and additional delay is even more notable when the Court factors in that five (5) additional parties will need to conduct discovery and be subjected to written discovery requests as well as depositions.

Plaintiffs' Sixth Amended Complaint alleges Dr. Ghoubril conspired with five (5) new-party Defendants never previously addressed in this litigation. Plaintiffs now allege Dr. Ghoubril conspired with the newly identified Defendants to take advantage of Plaintiffs and induce them into receiving fraudulent healthcare from Dr. Ghoubril. (See, Sixth Amended Complaint, ¶ 89). In addition, Plaintiffs allege Dr. Ghoubril conspired with the aforementioned newly identified Chiropractor Defendants to engage in "corrupt activity" under R.C. 2923(I) by engaging in telecommunications, mail, and wire fraud. (Id., ¶ 90). Lastly, Plaintiffs claim the new Defendants "assisted or encouraged Plaintiffs to receive fraudulent treatment from Ghoubril with knowledge that his conduct, and the charges for it, were fraudulent . . ." (Id., ¶ 168).

Permitting Plaintiffs' untimely Sixth Amended Complaint would deprive Dr. Ghoubril, as well as all other Defendants, of due process as they were not afforded the opportunity to conduct relevant discovery concerning the newly alleged conspiracy involving five (5) untimely identified Defendants.

It cannot rationally be argued that the addition of 5 new party Defendants and additional claims against the existing Defendants will not cause a substantial delay and undue prejudice Defendants. All Defendants are entitled to conduct discovery on the appropriateness of the newly defined classes and all new claims Plaintiffs allege. Certainly, Dr. Ghoubril is entitled to conduct discovery concerning the allegations that he knowingly conspired with the newly identified Defendants. Therefore, Plaintiffs' Motion to Amend should be denied.

III. CONCLUSION

Plaintiffs filed a motion for leave to amend their complaint for the sixth time after they already filed their motion for class certification. Plaintiffs' Motion to Amend is untimely, will cause a substantial delay and undue prejudice as extensive discovery will be needed to evaluate the new

purported class definitions, claims, and Defendants' conduct and/or liability. Further, as it relates to Dr. Ghoumbrial, Plaintiffs have failed to set forth any viable legal reason as to why such additional claims and purported classes are warranted. Civ. R. 15(B) is not applicable to cases that have not yet progressed to trial, and Plaintiffs' only alleged legal support for the additional claims and/or purported classes against Dr. Ghoumbrial was pursuant to Civ. R. 15(B).

Accordingly, the Court should deny Plaintiffs' Motion to Amend the Complaint to Conform to the Evidence.

Respectfully submitted,

/s/ Bradley J. Barmen

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing was filed electronically with the Court and sent via email to the below parties on the 17th day of June 2017. The parties, through counsel, may also access this document through the Court's electronic docket system.

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