

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNIVERSAL COMPUTER	:	
CONSULTING, INC., et al.,	:	
Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	
	:	
PITCAIRN ENTERPRISES, INC.,	:	No. 03-2398
et al.,	:	
Defendants.	:	

MEMORANDUM AND ORDER

Schiller, J.

May 18, 2005

Plaintiffs Universal Computer Consulting, Inc. and Universal Computer Maintenance, Inc. bring this action against Defendants Kean Company, Kean Pitcairn, Kris Pitcairn, Pitcairn Enterprises, Inc. (“PE”), and 1862 Lincoln Highway Associates, L.P. (“1862 Associates”) for fraudulent conduct in connection with an asset sale. The Complaint currently contains two counts: (1) equitable fraud; and (2) violation of the Uniform Fraudulent Transfers Act.¹ Plaintiffs now move for leave to amend the Complaint to add five new counts and an additional defendant. Because Plaintiffs have unduly delayed seeking amendment, and because allowing amendment at this late stage would substantially prejudice Defendants, Plaintiffs’ motion is denied.

I. BACKGROUND

This case arises from an asset sale allegedly designed to frustrate Plaintiffs’ attempt to collect on a judgment. Plaintiffs are Texas corporations that design and install inventory and spare parts

¹ On February 23, 2004, the Court dismissed Plaintiffs’ claims for unjust enrichment and tortious interference with contract. (Mem. & Order of Feb. 23, 2004 at 12-16 [hereinafter “Feb. 23 Order”].)

control systems, including hardware and software, for car dealers. (*See* Feb. 23 Order at 3.) In 1989, Plaintiffs entered into a series of computer services contracts with PE, a Pennsylvania corporation doing business as “Pitcairn Motorcars.” (*Id.*) Kean Pitcairn is currently the president and sole shareholder of PE; prior to 2002, Kris Pitcairn, Kean Pitcairn’s wife, owned 80% of PE. (Compl. ¶¶ 10-11; Ans. of Defs. Kean Co., Kean Pitcairn, Kris Pitcairn & PE [hereinafter “PE’s Ans.”] ¶¶ 10-11.)

In 2000, pursuant to a contractual provision requiring arbitration of the parties’ disputes, Plaintiffs commenced an American Arbitration Association arbitration against PE in Houston, Texas for various breaches of the computer services contracts. (Feb. 23 Order at 3-4.) In August 2001, the arbitration panel issued an opinion and award in favor of Plaintiffs. (*Id.* at 4.) On April 16, 2002, the United States District Court for the Southern District of Texas confirmed that award and entered a judgment in favor of Plaintiffs and against PE. (*Id.* at 5.)

Thereafter, PE prepared and circulated a bid package for the sale of its assets. (Compl. ¶ 43; PE’s Ans. ¶ 46.) On August 5, 2002, PE sold substantially all of its assets to non-party R&S Imports, Ltd. (“Buyer”) for a total price of \$8.322 million. (Compl. ¶¶ 45, 50, 48 [sic]; PE’s Ans. ¶¶ 48, 52, 54.) Plaintiffs, despite the arbitration award and judgment in their favor, did not receive any of the \$8.322 million purchase price. Instead, a portion of this money was distributed to Torrance Pitcairn, Kean Pitcairn’s brother, and to 1862 Associates, a company in which Kean Pitcairn is alleged to have a partnership interest. (Feb. 23 Order at 6-7.) Plaintiffs also allege that, at the asset sale, Buyer and PE entered into a real estate sublease, under which PE had the right to receive a \$43,000.00 payment. (*Id.* at 7.) Plaintiffs contend that PE assigned this right to Kean Company, a corporation wholly owned by Kean and Kris Pitcairn, without receiving any

consideration for the assignment. (*Id.*) Finally, Plaintiffs aver that, since the asset sale, Kean Pitcairn has transferred \$700,000.00 to his personal trust and to Kris Pitcairn, even though neither is a secured creditor of PE. (*Id.* at 6.)

On August 31, 2002, Plaintiffs transferred the federal district court's judgment to the Court of Common Pleas for Bucks County and filed a writ of execution. (*Id.* at 5.) Though the parties dispute the precise value of the judgment recorded on that date, they agree that the judgment is valued at over \$500,000.00. (Compl. ¶ 9; PE's Ans. ¶ 9.) On November 27, 2002, Plaintiffs filed a petition for supplemental relief in aid of execution in the Court of Common Pleas, which was denied on December 23, 2002. (Feb. 23 Order at 5.) On March 4, 2003, Plaintiffs filed a motion to correct judgment, a petition for hearing on all pending motions, and a motion to modify the December 23, 2003 Order, all of which were denied on March 19, 2003. (*Id.*) On April 21, 2003, Plaintiffs commenced the instant action, seeking a constructive trust upon the unsecured proceeds of PE's asset sale, as well as punitive damages.

II. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 15(a), leave to amend a complaint shall be freely given when justice so requires. FED. R. CIV. P. 15(a) (2005). Nevertheless, amendment may be inappropriate where the underlying circumstances show "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, [or] futility of the amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962). The Third Circuit has emphasized that, of these considerations, prejudice to the non-moving party is the touchstone for the denial of

an amendment. *Bechtel v. Robinson*, 886 F.2d 644, 652 (3d Cir. 1989). Moreover, “the moving party bears the burden of proof in explaining the reasons for delay in seeking leave to amend.” *Tarkett v. Congoleum Corp.*, 144 F.R.D. 289, 290 (E.D. Pa. 1992) (citing *Cresswell v. Sullivan & Cromwell*, 922 F.2d 60, 70 (2d Cir. 1990)). Ultimately, a motion for leave to amend a complaint is addressed to the sound discretion of the district court. *See, e.g., Howze v. Jones & Laughlin Steel Corp.*, 750 F.2d 1208, 1212 (3d Cir. 1984).

III. DISCUSSION

Plaintiffs filed their motion for leave to amend on September 29, 2004, over seventeen months after the commencement of this action and just two days before the close of discovery. (*See* Scheduling Order of May 20, 2004 (setting discovery deadline of Oct. 1, 2004).) The motion proposes: (1) adding a count against Defendants PE, Kean Pitcairn, Kris Pitcairn, and Kean Company for breach of fiduciary duty; (2) adding a count against Defendant Kean Pitcairn based on the “participation doctrine”; (3) dismissing the primary liability claims against Defendant 1862 Associates; (4) adding three counts against Defendant 1862 Associates for secondary liability (i.e., conspiracy, aiding and abetting, and equitable subordination); and (5) adding Torrance Pitcairn, Kean Pitcairn’s brother, as a defendant on the new secondary liability claims. (Pls.’ Mot. at 1-2.)

Plaintiffs assert that their proposed amendments should be allowed because they are based on newly discovered evidence. Specifically, Plaintiffs claim to have recently learned that PE was insolvent from 2000-2002 and that, during this time, Torrance Pitcairn, 1862 Associates, and Kean Pitcairn loaned money to PE. (Pls.’ Mem. of Law in Supp. of Mot. at 6.) These loan transactions, according to Plaintiffs, actually deepened PE’s insolvency and were intended to prolong PE’s life

and frustrate Plaintiffs' attempt to collect on their judgment. (*Id.*) The record, however, belies Plaintiffs' argument that this evidence is newly discovered. Furthermore, at this late stage in the proceedings, Plaintiffs' amendments would substantially prejudice the existing Defendants and the proposed new defendant. Therefore, Plaintiffs' motion is denied.

A. Undue Delay

“Although passage of time alone will not support denial of leave to amend, undue delay by a movant in seeking leave to amend will support such a denial.” *Tarkett*, 144 F.R.D. at 291 (*citing Foman*, 371 U.S. at 182). In general, the question of undue delay requires the court to focus on the movant's reasons for not amending sooner. *Cureton v. Nat'l Collegiate Athletic Ass'n*, 252 F.3d 267, 273 (3d Cir. 2001). Delay may become undue when a movant has failed to amend despite previous opportunities to do so. *See, e.g., Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 654-55 (3d Cir. 1998) (rejecting proposed second amended complaint when plaintiffs were repleading facts that could have been pled earlier).

Plaintiffs contend that they have not unduly delayed in moving to amend the Complaint because they only recently learned of the facts upon which the proposed amendments are based. Plaintiffs purportedly uncovered this evidence after July 1, 2004 via third-party subpoenas and through a review of PE's business records. (Ltr. from Pls. to Ct. of Oct. 11, 2004 Memorializing Arguments on Mot. at 5 [hereinafter “Pls.’ Ltr.”].) It is undisputed, however, that in April of 2002, counsel for PE sent Plaintiffs PE's 2000 and 2001 financial statements. (*Id.* at 13; *see also* Rep. of Defs. Kean Co., Kean Pitcairn, Kris Pitcairn & PE [hereinafter “PE's Resp.”] Ex. 1 (Ltr. from McNeas Law Firm to Pls. of Apr. 24, 2002 Enclosing PE's Fin. Stmts).) According to Plaintiffs, those statements show that PE's current assets exceeded its current liabilities; that PE had a seven-

figure negative net worth at the beginning of 2000; that PE lost millions of dollars over those two years, despite being lent \$3 million by insiders; and that at the end of 2001, PE was still operating on bank overdrafts. (Pls.' Ltr. at 6-7.) Plaintiffs, therefore, possessed evidence of PE's insolvency and the loan transactions in question for as long as a year before the Complaint was originally filed. Mr. Wiles, counsel of record for Plaintiffs, protests that he did not see and was not aware of the 2000 and 2001 financial statements until July 2004. (Aff. of James Wiles ¶ 4.) Nonetheless, Mr. Wiles concedes that these documents were sent to his co-counsel, Mr. Allen, in April of 2002. (Pls.' Ltr. at 13.) Mr. Wiles thus had ample opportunity to obtain and review the documents well before July 2004, and his failure to do so does not serve as an adequate justification for delay. *See, e.g., L.D. Schreiber Cheese Co. v. Clearfield Cheese Co.*, 495 F. Supp. 313, 316 (W.D. Pa. 1980) (denying leave to amend where movant did not act in bad faith, but nevertheless delayed over two and a half years in bringing motion).

Accordingly, the Court finds that Plaintiffs have unduly delayed in seeking amendment, which alone warrants denial of their motion. The Court's decision is fortified, however, by the fact that the proposed amendments would result in substantial prejudice.

B. Substantial Prejudice

Leave to amend may also be denied if amendment would result in substantial or undue prejudice to the non-moving party. *Cureton*, 252 F.3d at 273; *see also Bechtel*, 886 F.2d at 652 (describing prejudice to non-moving party as "the touchstone" for denial of amendment). "The issue of prejudice requires that we focus on the hardship to the defendants if the amendment were permitted." *Cureton*, 252 F.3d at 273 (citing *Adams v. Gould Inc.*, 739 F.2d 858, 868 (3d Cir. 1984)). For instance, a defendant who is put to added expense and forced to engage in additional

discovery suffers hardship. *See, e.g., Kuhn v. Phila. Elec. Co.*, 85 F.R.D. 86, 88 (E.D. Pa. 1979) (denying leave to amend where discovery had already been completed and amendment would have necessitated additional discovery). A defendant may also be burdened by being required to defend itself against new facts or legal theories. *See, e.g., Tarkett*, 144 F.R.D. at 291 (denying leave to amend where proposed amendment raised entirely new issues of law that would have required new defenses).

In this case, Plaintiffs' proposed amendments would result in substantial prejudice to the existing Defendants. Plaintiffs are seeking to dramatically alter the Complaint at the eleventh hour by adding over one hundred new paragraphs, five new counts, and a new defendant. (Pls.' Mot. Ex. A (Proposed Am. Compl.)) As the discovery deadline has long passed, these amendments would force Defendants to incur additional costs by revisiting the discovery process with respect to Plaintiffs' new claims. For instance, were amendment permitted, Defendants would have to retain an expert to determine PE's solvency during the pertinent time period. (PE's Resp. at 11-12; Pls.' Ltr. at 13-14.) Further prejudice would result from the fact that all five new counts are based on new facts and legal theories that Defendants have not yet had an opportunity to defend against. Granting leave to amend at this late juncture would force Defendants to investigate these claims, respond to them, and decide whether to seek dismissal of any or all of them. This is especially burdensome here, where Defendants have already filed and partially succeeded on one motion to dismiss. (*See* Feb. 23 Order (granting in part and denying in part Defendants' motion to dismiss the Complaint).)

Furthermore, if leave to amend were granted, the prejudice to the proposed new defendant, Torrance Pitcairn, would be overwhelming. Plaintiffs insist that Torrance Pitcairn would not be prejudiced because he "has already been deposed, has already produced his documents and has trial

counsel in place.” (Pls.’ Mot. at 2.) But Plaintiffs ignore the crucial fact that Torrance Pitcairn’s “participation” to this point has been as a non-party. It would be extremely prejudicial to expect him to file dispositive motions and/or proceed to trial at any time in the near future. Even more significantly, he has not had a chance to participate in the discovery process as a named defendant and it is simply too late for him to conduct meaningful discovery.

Accordingly, Plaintiffs’ motion is denied because Plaintiffs have unduly delayed in seeking amendment and because amendment would cause substantial prejudice.

IV. CONCLUSION

For the reasons stated above, Plaintiffs’ motion for leave to amend is denied. An appropriate Order follows.

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PITCAIRN ENTERPRISES, INC.,	:	No. 03-2398
et al.,	:	
Defendants.	:	

ORDER

AND NOW, this 18th day of **May, 2005**, upon consideration of Plaintiffs' Motion for Leave to Serve an Amended Complaint Adding Certain Claims, Dropping Certain Claims, and Adding an Additional Party, all responses thereto and replies thereon, and for the foregoing reasons, it is hereby **ORDERED** that:

1. Plaintiffs' Motion (Document No. 37) is **DENIED**.
2. The Scheduling Order of May 20, 2004 is **VACATED** and replaced by this Court's Scheduling Order of May 18, 2005.

BY THE COURT:

Berle M. Schiller, J.