

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

THE PEP BOYS -	:	
MANNY, MOE & JACK	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION
	:	No. 04-CV-5723
SAFECO CORPORATION d/b/a	:	
SAFECO LIFE INSURANCE COMPANY	:	
Defendant.	:	

MEMORANDUM AND ORDER

JOYNER, J.

November 21, 2005

Presently before this court is Plaintiff's Motion for Leave to File Amended Complaint, and Defendant's Response thereto. For the reasons set forth below the Plaintiff's Motion is **GRANTED**. The scheduling order of July 26, 2005 is extended to grant the Defendant an additional forty-five days of discovery.

Background

On December 9, 2004, the Plaintiff, The Pep Boys - Manny, Moe, & Jack ("Pep Boys"), filed a complaint against the Defendant, Safeco Corporation, d/b/a Safeco Life Insurance Company ("Safeco"), alleging claims for breach of contract and equitable estoppel¹ in relation to an "Excess Loss" Insurance Policy, issued by Safeco to Pep Boys. (Pl.'s Mot. Amnd., December 9, 2004). On September 27, 2005, the Plaintiff filed the instant motion seeking to amend its original complaint to add a claim

¹Count II of the Plaintiff's original complaint was dismissed by Order of this Court dated May 16, 2005.

alleging bad faith on the part of the Defendant in violation of 42 Pa. Cons. Stat. §8371 in light of alleged "newly discovered facts" obtained during the discovery process. (Pl.'s Mot. Amen., September 27, 2005). Based upon these "facts" the Plaintiff asserts the Defendant has discriminated against Plaintiff by allowing a similarly situated policy holder (ETS) to be recompensed for claims under its "Excess Loss" policy while denying the Plaintiff compensation for its claims. Id. at ¶ 2, 3. Discovery was scheduled to be completed on September 30, 2005. Defendant contends that the Plaintiff's motion should be dismissed because it will cause undue delay in these proceedings and prejudice to the Defendant. (Def.'s Reply, September 29, 2005). Defendant asserts it will require additional discovery to investigate the new claim, which will in turn prolong these proceedings. Id. at ¶ 16-19. Defendant also contends that the motion is futile and will not survive a motion to dismiss and has been brought in bad faith by the Plaintiff. Id. at ¶ 10-16. Defendant asserts that the Plaintiff and ETS were not similarly situated and that Plaintiff has not been discriminated against. Id. Defendant further asserts that the Plaintiff has brought this new claim to gain additional leverage in settlement negotiations. Id. at ¶ 19.

Discussion

I. Standard for Leave to Amend

Rule 15(a) of the Federal Rules of Civil Procedure states:

"A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served...Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

Fed. R. Civ. P. 15(a). While decisions on motions to amend are within the sound discretion of the district court, Massarsky v. General Motors Corp., 706 F.2d 111 (3d Cir. 1983), the trend has been to apply the rule liberally. Philadelphia's Church of Our Savior v. Concord Twp., 2004 U.S. Dist. LEXIS 1941 (E.D. Pa. 2004).

The United States Supreme Court case, Foman v. Davis, 371 U.S. 178 (U.S. 1962), set forth the factors to be considered when ruling on a Rule 15(a) motion to amend. Foman states:

In the absence of any apparent or declared reason -- such as 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 allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be "freely given."

Id. at 182. The Court of Appeals for the Third Circuit has

interpreted these factors to mean that prejudice to the non-moving party is the "touchstone of denial" of an amendment by which all the other factors are to be evaluated. Id. Further, in the absence of substantial or undue prejudice, denial instead must be based on bad faith or dilatory motives, truly undue or unexplained delay, repeated failures to cure the deficiency by amendments previously allowed, or futility of amendment. Lorenz v. CSX Corp., 1 F.3d 1406, 1413 (3d Cir. 1993). The non-moving party has the burden of demonstrating such prejudice, it must show that it has been "unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the...amendments been timely." Delaware Trust Co. v. Lal, 1997 U.S. Dist. LEXIS 6890 (E.D. Pa. 1997) at *5-6. See Bechtel v. Robinson, 886 F.2d 644, 652 (3d Cir. 1989), Kiser v. General Electric Corp., 831 F.2d 423, 427-28 (3d Cir. 1987).

The mere passage of time alone is not sufficient to warrant denial of an amendment. A delay in time becomes "undue" when it places an unwarranted burden on the court and becomes prejudicial by placing an "unfair" burden on the non-moving party. Adams v. Gould, Inc., 739 F.2d 858, 868. Prejudice under Rule 15 means "undue difficulty in prosecuting [or defending] a lawsuit as a result of change in tactics or theories on the part of the other party." Deakyne v. Commissioners of Lewes, 416 F.2d 290, 300 (3d Cir. 1969). A motion to amend is futile where it fails to cure the

deficiencies of the original complaint and/or would not survive a motion to dismiss. Jablonski v. Pan American World Airways, Inc., 863 F.2d 289, 292 (3d Cir. 1988). However, a determination of futility does not rest upon a court's discussion of the merits of a proposed claim but rather on substantive and procedural considerations. UMLIC VP L.L.C. v. Belardo, 2003 U.S. Dist. LEXIS 24526 (D.V.I. 2003). See also, Merrill Lynch Business Fin. Servs. v. Plesco, Inc., 859 F. Supp. 818, 825 (E.D. Pa. 1994).

II. Analysis of Plaintiff's Motion

A. Undue Delay

There has not been an "undue" delay in bringing the present motion to amend Plaintiff's complaint. The Third circuit has stated that "ordinarily delay alone is not a basis to deny a motion to amend." Wausau Underwriters Ins. Co. v. Shisler, 190 F.R.D. 341, 343 (E.D. Pa. 1999). In Adams, 739 F.2d 858 (3d Cir. 1984), The Third Circuit found that in order to determine undue delay, one has to look at the motives for the moving party not filing sooner (bad faith), as well as the effect on the defendant (prejudice). Id. at 868. The Plaintiff has not exercised bad faith in waiting to file this proposed amendment. While the Defendant contends the Plaintiff was apprised of the alleged "newly discovered facts" prior to filing its complaint, this court finds that the Plaintiff did not become fully apprised of the pertinent details upon which to base its claims until the

discovery process. Even unexcused delay without a showing of undue prejudice to the Defendant or undue burden upon the court, does not constitute an undue delay. Cornell & Co. v. Occupational Safety & Health Review Com., 573 F.2d 820, 823 (3d Cir. 1978). The Defendant maintains that it is unfairly prejudiced by the closing of the discovery period. This court disagrees. It is within the power of this court to extend the discovery period to allow the Defendant time to properly investigate this additional claim. Wausau Underwriters, 190 F.R.D. 341, 344.

B. Bad Faith

It is not clear that the Plaintiff has filed this proposed amendment in bad faith. From the face of the motion, it would appear that the Plaintiff has a good faith belief in the "newly discovered facts", upon which Plaintiff bases this additional claim against the Defendant. Merrill Lynch Business Fin. Servs. v. Plesco, Inc., 859 F. Supp. 818, 825 (E.D. Pa. 1994). Should it be found later that this is not the case the plaintiff is not without remedy. See Feldman v. Trust Co. Bank, 1993 U.S. Dist. LEXIS 14059 (E.D. Pa. 1993), at *3.

C. Undue Prejudice

The Defendant suffers no undue prejudice from allowing the proposed amendment. As mentioned previously, the non-moving party has the burden of showing that "it has been unfairly disadvantaged or deprived of the opportunity to present facts or

evidence which it would have offered had the...amendments been timely." Delaware Trust Co., 1997 U.S. Dist. LEXIS 6890 (E.D. Pa. 1997)at *5-6. It has already been said that the Defendant will be allowed an extended discovery period to investigate this new claim. The fact that the Plaintiff has filed this motion on the eve of the discovery deadline does not unduly burden this court and the Defendant is not prejudiced. See Hairston-Lash v. R.J.E. Telecom, Inc., 2000 U.S. Dist. LEXIS 15697 (E.D. Pa. 2000). At *8. The Defendant is in possession of the facts the Plaintiff seeks to add to its complaint. Whatever other preparation the Defendant will require is minimal. See Heyl & Patterson International, Inc. v. F. D. Rich Housing, Inc., 663 F.2d 419, 426 (3d Cir. 1981).

D. Futility of Amendment

The proposed amendment is not futile. For purposes of determining whether the new claim asserted in the proposed amended complaint would survive a motion to dismiss, the court is concerned solely with the sufficiency of the pleading, not with evidence or source of its factual allegations. Merrill Lynch Business Fin. Servs. v. Plesco, Inc., 859 F. Supp. 818, 825 (E.D. Pa. 1994). The Defendant makes an extensive argument on the merits of Plaintiff's proposed claim, asserting that it will not survive a 12(b)(6) motion to dismiss. At this stage in the proceedings this court is only concerned with, as Rule 12(b)(6)

prescribes, whether a party should be allowed to offer evidence at trial in support of its claim. A motion to amend a complaint is only futile "where no set of facts can be proved under the amendment to the complaint that would constitute a valid and sufficient" claim. Pension Fund for Hosp. & Health Care Emples.- Phila. & Vicinity Dist. 1199C Training & Upgrading Fund v. North Phila. Health Sys., 1999 U.S. Dist. LEXIS 5563 (E.D. Pa. 1999) citing Miller v. Rykoff-Sexton, Inc., 845 F.2d 209 (9th Cir. 1988). The amended complaint would not survive a motion to dismiss only if it were certain that no relief could be granted under any set of facts that could be proved. DiCicco v. Willow Grove Bank, 308 F. Supp. 2d 528, 534 (E.D. Pa. 2004) citing Markowitz v. Northeast Land Co., 906 F.2d 100 (3d Cir. 1990).

In the instant case, it appears that the Plaintiff has a legitimate purpose in proposing an amendment. Bad faith claims brought under 42 Pa. Const. Stat. §8371 are generally predicated on an insurer's failure to pay the proceeds of an insurance policy. Slater v. Liberty Mut. Ins. Co., 1999 U.S. Dist. LEXIS 3753 (E.D. Pa. 1999). As is known, Defendant's failure to pay Plaintiff under the policy Defendant issued to Plaintiff was the impetus for this suit. It is also not certain that relief could not be granted under this additional claim. Accordingly, the Plaintiff's motion to file an amended complaint is **GRANTED**.

An order follows.

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THE PEP BOYS - :
MANNY, MOE & JACK :
Plaintiff, :
 :
v. : CIVIL ACTION
 : No. 04-CV-5723
SAFECO CORPORATION d/b/a :
SAFECO LIFE INSURANCE COMPANY :
Defendant. :

ORDER

AND NOW, this 21st day of November, 2005, upon consideration of Plaintiff The Pep Boys', Motion to File Amended Complaint, and Defendant's response thereto (Document Nos. 31-32-21), it is hereby ORDERED that the Motion is GRANTED. The Scheduling Order of July 26, 2005 is hereby extended to allow an additional forty-five days of discovery for Defendant Safeco. All other dates are likewise adjusted to include the 45 days.

BY THE COURT:

s/J. Curtis Joyner
J. CURTIS JOYNER, J.

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THE PEP BOYS-MANNY, MOE & JACK : CIVIL ACTION
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vs. :
: NO. 04-CV-5723
SAFECO CORPORATION, d/b/a :
SAFECO LIFE INSURANCE COMPANY :

ORDER

AND NOW, this 21st day of November, 2005, upon consideration of the Parties' Letter Requests for Leave to File Replies to the parties' cross Motions for Summary Judgment, it is hereby ORDERED that the Requests are GRANTED and the parties are given leave to file their Replies to the Responses to the pending Summary Judgment Motions by November 30, 2005.

BY THE COURT:

s/J. Curtis Joyner
J. CURTIS JOYNER, J.