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

AMS CONSTRUCTION CO., et al.,	:	CIVIL ACTION
	:	
Plaintiffs,	:	NO. 04-CV-02097
	:	
v.	:	
	:	
RELIANCE INSURANCE CO., et al.,	:	
	:	
Defendants.	:	

MEMORANDUM AND ORDER

Stengel, J. July 12, 2006

This case arises from a dispute over certain provisions contained in a "Settlement, Release and Joint Prosecution Agreement" entered into between the parties (the "Joint Prosecution Agreement"). Presently before the Court is the Motion for Leave to File an Amended Complaint filed by AMS Construction Company, Inc. ("AMS") and Breckenridge Enterprises, Inc. (collectively "Plaintiffs"). I will deny Plaintiffs' motion because: (1) they have unduly delayed in seeking amendment; and (2) allowing amendment would prejudice defendant Reliance Insurance Company (In Liquidation) ("Reliance").

I. BACKGROUND[1]

Plaintiffs entered into the Joint Prosecution Agreement with Reliance on May 29, 2003. The Joint Prosecution Agreement governs the parties' rights and obligations

[1] I write for the parties, who are by now intimately familiar with the facts and procedural history of this case, and have therefore included only the background information that is relevant to the disposition of the present motion.

resulting from the prosecution of Breckenridge Enters., Inc. v. Phila. Life Ins. Co., a 2003 case filed in the United States District Court for the Northern District of Texas (the "Texas Action"). Paragraph 12 of the Joint Prosecution Agreement provides, *inter alia*, that the parties shall not sue or assert claims against one another arising out of the Texas Action (the "covenant not to sue").

On January 14, 2004, Reliance sent AMS an invoice for $3,212,331.31 in outstanding insurance deductibles allegedly owed by AMS to Reliance (the "Outstanding Deductibles"). Plaintiffs allege that Reliance breached the covenant not to sue contained in Paragraph 12 of the Joint Prosecution Agreement by billing AMS for the Outstanding Deductibles.

Plaintiffs initiated this lawsuit on May 14, 2004, and discovery closed on August 31, 2005. Reliance asserted a number of counterclaims seeking to recover the Outstanding Deductibles in its answer on July 12, 2004.[2] Plaintiffs filed the instant motion on April 13, 2006, seeking to add an additional breach of contract claim to the complaint for Reliance's alleged breach of the covenant not to sue (the "Proposed Claim"). Plaintiffs seek to add the Proposed Claim "to recover the costs and fees incurred by AMS in defense of Reliance's frivolous and baseless [counter]claims." In other words, Plaintiffs seek to recover the litigation costs attributable to Reliance's alleged breach of the covenant not to sue.

[2]Reliance's counterclaims were eventually dismissed by consent judgment.

II. LEGAL STANDARD

Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend a pleading "shall be freely given when justice so requires." FED. R. CIV. P. 15(a). Leave to amend, therefore, is generally granted unless the underlying circumstances of a particular case render amendment inappropriate. Arthur v. Maersk, Inc., 434 F.3d 196, 204 (3d Cir. 2006) (citing Foman v. Davis, 371 U.S. 178, 182 (1962)). The Supreme Court has held that the circumstances that may justify denial of leave to amend are "undue delay, bad faith or dilatory motive on the part of the [moving party], repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." Foman, 371 U.S. at 182.

The Third Circuit has repeatedly recognized that "prejudice to the non-moving party is the touchstone for the denial of an amendment." Arthur, 434 F.3d at 204 (citations omitted). Ultimately, however, the Third Circuit has left the decision of whether to grant or deny a motion for leave to amend within the sound discretion of the district court. Cureton v. Nat'l Collegiate Athletic Ass'n, 252 F.3d 267, 272 (3d Cir. 2001) (citations omitted).

III. DISCUSSION

A. Undue Delay

Delay alone is insufficient to justify denying a party's motion for leave to amend its pleading in the Third Circuit. Adams v. Gould, Inc., 739 F.2d 858, 868 (3d Cir. 1984). Undue delay, by contrast, is a sufficient basis for a district court's decision to deny leave to amend. See Foman, 371 U.S. at 182. Delay becomes "undue" when it places an "unwarranted burden on the court." Cureton, 252 F.3d at 273 (quoting Adams, 739 F.2d at 868). In particular, a district court may deny leave to amend a pleading where the moving party has: (1) failed to utilize previous opportunities to amend; and (2) has not offered any explanation for this failure. Id. ("[T]he question of undue delay requires that [courts] focus on the [moving party's] reasons for not amending sooner").

In this case, Plaintiffs filed the instant motion for leave to amend on April 13, 2006—nearly two years after filing the original complaint, and over seven months after the close of discovery. See Scheduling Order of July 6, 2005. AMS entered into the Joint Prosecution Agreement containing the covenant not to sue on May 29, 2003. Plaintiffs allege that Reliance sent them the invoices for the Outstanding Deductibles on January 14, 2004. Reliance asserted its counterclaims on July 12, 2004. At the latest, therefore, Plaintiffs had all of the information necessary to amend their complaint to include the

Proposed Claim on July 14, 2004. Notwithstanding this fact, Plaintiffs waited approximately 21 months to seek leave to amend their complaint and have not provided adequate explanation for their delay.

The Third Circuit has held that district courts may properly deny leave to amend a pleading for undue delay under circumstances similar to those presented in this case. See Lorenz v. CSX Corp., 1 F.3d 1406, 1414 (3d Cir. 1993). In Lorenz, the court held that denial was proper where: (1) the motion to amend was filed three years after the action was initiated and two years after the complaint had been amended for the second time; (2) all of the facts precipitating the proposed amendment were available (and most were known) to the plaintiff before she moved to amend; and (3) the plaintiff had numerous opportunities to correct the deficiencies in her complaint. Id.

Similarly, in Doltz v. Harris & Assocs., 280 F. Supp. 2d 377, 392 (E.D. Pa. 2003), the plaintiff filed a motion to amend his complaint 18 months after the start of litigation, two months after the end of the discovery period, and four days after the action was scheduled for the trial pool. Judge Baylson denied the motion to amend for undue delay because the plaintiff had failed to offer: (1) additional facts that were unavailable at the time he filed the original complaint; and (2) a sufficient explanation for his delay. Id. See also Tarkett, Inc. v. Congoleum Corp., 144 F.R.D. 289, 291 (E.D. Pa. 1992) (noting

that courts may deny leave to amend where the moving party offers no explanation for inordinate delay). Cf. Arthur, 434 F.3d at 204 (reversing denial of leave to amend because, *inter alia*, plaintiff provided an adequate explanation for delay).

The facts in this case are similar to those presented in Lorenz and Doltz. Plaintiffs waited approximately 21 months before seeking leave to amend the complaint. Furthermore, discovery has been closed since August 31, 2005. Finally, their motion to amend does not provide a sufficient explanation for this delay. Accordingly, I will deny the motion to amend on account of Plaintiffs' undue delay. This decision is fortified by the fact that Plaintiffs' proposed amendment would prejudice Reliance, as described below.

B. Prejudice to Reliance's Case

As an initial matter, I note that Reliance bears the burden of demonstrating that amendment will prejudice its case. The Pep Boys–Manny, Moe & Jack v. Safeco Corp., Civ. A. No. 04-5723, 2005 WL 3120265, at *2 (E.D. Pa. Nov. 21, 2005) (citing Bechtel v. Robinson, 886 F.2d 644, 652 (3d Cir. 1989)) ("The non-moving party has the burden of demonstrating . . . prejudice [when opposing a motion to amend]"). "The issue of prejudice requires [the Court to] 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)). A party is unduly prejudiced when amendment would result in

significant additional discovery, costs, or preparation to defend against new facts or legal theories. Cureton, 252 F.3d at 273. Accordingly, I will consider what hardships Plaintiffs' proposed amendment would cause to Reliance.

Courts in this district have held that a party who is forced to engage in additional discovery due to a motion to amend suffers sufficient hardship to constitute undue prejudice. See, e.g., Kuhn v. Phila. Elec. Co., 85 F.R.D. 86, 88 (E.D. Pa. 1979) (denying leave to amend when discovery had already been completed and amendment would require additional discovery). A defendant may also be prejudiced by being required to defend against new facts or legal theories. See Tarkett, 144 F.R.D. at 291.

Here, granting Plaintiffs' motion to amend would force Reliance to engage in additional discovery with respect to Plaintiffs' new claim. Until now, all discovery taken between the parties relating to attorneys' fees and costs was limited to the litigation costs of jointly prosecuting the Texas Action. By contrast, allowing the addition of the Proposed Claim would require discovery regarding the fees and costs associated with defending Reliance's counterclaims in the present action. The discovery deadline is long passed and the proposed amendment would require Reliance to incur additional costs. For instance, Reliance will presumably need to: (1) conduct additional discovery with regard to whether Plaintiffs mitigated their damages; (2) determine what portion of Plaintiffs' fees and costs are attributable to defending Reliance's counterclaims, as

opposed to those incurred in prosecuting its own claims; and (3) hire an expert to determine whether Plaintiffs' attorneys fees were reasonable. This is a substantial amount of additional discovery and the associated costs would unduly prejudice Reliance.

Other cases in the Third Circuit have found that the need for additional discovery due to amendment does not prejudice the non-moving party without more. In Dole v. Arco Chem. Co., 921 F.2d 484, 488 (3d Cir. 1990), the Third Circuit held that the party opposing amendment had not demonstrated sufficient prejudice to deny a motion to amend. In particular, the Dole court noted that the need to redraft a motion for summary judgment, along with the possible need for additional discovery, did not create undue prejudice sufficient to justify the district court's denial of leave to amend. Id. Similarly, in Amquip Corp. v. Admiral Ins. Co., 231 F.R.D. 197, 200-01 (E.D. Pa. 2005), the court granted leave to amend despite finding that the moving party had delayed in seeking amendment. Judge Savage reasoned that any prejudice to the non-moving party as a result of the delay could be remedied by allowing additional discovery. Id.

The instant case is distinguishable from those described above. This case differs from the situation presented in the Dole case because in that case the Third Circuit attributed special significance to the fact that the non-moving party had failed to articulate why additional discovery would impair that party's ability to present its case. Here,

Reliance has articulated that the need for additional discovery would burden its ability to defend in this litigation by increasing its costs. Specifically, Reliance alleges that:

> [B]efore [the Proposed Claim] can be decided, Reliance would be required to conduct discovery on a host of new issues, such as: [1] Why did AMS not seek to dispose of Reliance's claims at an earlier stage in this litigation; [2] [W]hat steps, if any, did AMS take to mitigate its alleged damages; [3] [W]hat portion, if any, of AMS'[s] fees and costs are attributable to its defense against Reliance's counter claims, as opposed to fees and costs attributable to the prosecution of AMS'[s][;] and[] [4] [W]hether such "defense-related" fees and costs were reasonable and necessary.

Mem. of Reliance in Opp. to Pls.' Mot. for Leave to File an Am. Compl. at 16.

This case is also factually distinguishable from the situation presented in Amquip. In Amquip, the defendant filed its motion to amend before the close of discovery. Here, Plaintiff filed the current motion over seven months after discovery closed. Forcing a party to reopen discovery after it has been preparing its defense for over seven months is significantly different from extending an approaching deadline to allow the parties to conduct additional discovery. Accordingly, I find that this case is distinguishable from the cases granting leave to amend cited above. Thus, I will also deny Plaintiffs' motion because allowing amendment would prejudice Reliance.[3]

IV. CONCLUSION

For the reasons described above, I will deny Plaintiffs' motion on the bases of undue delay and prejudice. An appropriate Order follows.

[3] I need not consider Reliance's futility argument in light of the above analyses.

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v.	:	
	:	
RELIANCE INSURANCE CO., et al.,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 12th day of July, 2006, upon consideration of Plaintiffs' Motion for Leave to File an Amended Complaint (Docket No. 72) and Defendants' response thereto, it is hereby **ORDERED** that the motion is **DENIED**.

BY THE COURT:

/s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, J.