

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

WILLIAM F. SHERLOCK, PATRICIA A. :	CIVIL ACTION
SHERLOCK :	
:	04-3438
v. :	
:	
ROBERT HERDELIN, 44 FINANCIAL :	
CORP. :	

MEMORANDUM AND ORDER

JOYNER, J.

September 11, 2006

Pending before the Court is Plaintiffs' Motion for Leave to Amend Amended Complaint and to Extend Time of the Second Amended Scheduling Order (Doc. No. 35), and Defendant 44 Financial Corporation's ("44 Financial") response thereto (Doc. No. 36). For the reasons outlined below, Plaintiffs' Motion to Amend is DENIED and its Motion to Extend Time of the Second Amended Scheduling Order is DENIED as MOOT.

Background

Plaintiffs filed their initial Complaint on July 21, 2004. They filed an Amended Complaint on October 6, 2004. On December 1, 2004, this Court dismissed Count IV of Plaintiffs' Amended Complaint alleging violations of New Jersey's Consumer Fraud Act and Licensed Lenders Act, and common law fraud (Doc. No. 13). Both defendants subsequently answered, and the deadline for discovery was set for April 20, 2005 (Doc. No. 20). Upon Plaintiffs' initiative, and agreement by the parties, the discovery deadline was stayed twice pending settlement

negotiations. No settlement agreement was reached, and this Court entered an Amended Scheduling Order on November 15, 2005 setting a January 30, 2006 discovery deadline (Doc. No. 25). On January 11, 2006, Plaintiffs changed attorneys and shortly thereafter filed a Motion for Extension of Time to Complete Discovery, which this Court granted. The deadline for discovery was extended until March 31, 2006 (Doc. No. 34). On May 1, 2006, one month after the deadline for completing discovery had passed, Plaintiffs filed this motion to amend their Amended Complaint to include claims of fraud, civil conspiracy and unjust enrichment (and extend the discovery deadlines). See Memorandum of Law in Support of Plaintiffs' Motion for Leave to Amend Complaint and to Extend Time of the Second Amended Scheduling Order ("Pl. Memo.") at 15, 21.

Discussion

1. Plaintiffs' Motion to Amend

Under Fed. R. Civ. P. 15(a), a plaintiff is entitled to amend her claim "once as a matter of course at any time before a responsive pleading is served . . . [o]therwise 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." While Rule 15(a) provides that leave to amend should be "freely given," the Court has the "discretion to deny this request if it is apparent from the record that (1) the

moving party has demonstrated undue delay, bad faith, or repeated failure to cure deficiencies by previous amendments, (2) the amendment would be futile, or (3) the amendment would prejudice the other party." Lake v. Arnold, 232 F.3d 360, 373 (3d Cir. 2000) (citing Foman v. Davis, 371 U.S. 178, 182 (U.S. 1962)).

The Court DENIES Plaintiffs' Motion to Amend. Plaintiffs have not adequately justified their delay in bringing claims of fraud and misrepresentation, civil conspiracy and unjust enrichment. They had access to, or knowledge of, all of the documentation necessary to bring these claims well before May 2006, if not at the time they filed their Amended Complaint. Moreover, to allow these claims now, more than two years after this litigation began, would undoubtedly prejudice Defendants who have complied in a timely manner with each of the Plaintiffs' discovery requests.

Essentially, plaintiffs are seeking to amend their complaint to include claims that this Court has already dismissed. Plaintiffs either re-allege the same facts as in their Amended Complaint to support these claims or allege facts that were in most instances known to them, but not included, at the time they filed the October 2004 Amended Complaint. Nevertheless, Plaintiffs' contend that they have only recently discovered the necessary facts to fully appreciate and ascertain the true nature of Defendants' conduct. There is absolutely no support for this

position.

First, Count IV of Plaintiffs' proposed Second Amended Complaint ("2nd Amend. Compl.", Pl. Memo, Ex. A) is a verbatim recitation of the Count that this Court already dismissed on December 1, 2004. Plaintiffs never filed a motion seeking reconsideration of that decision. In fact, when 44 Financial sought to question Plaintiff William Sherlock on the fraud claim in March 2006, Plaintiffs' new counsel, Debra Sherlock, objected to the question because the fraud count had been dismissed. See Defendant 44 Financial Corporation's Memorandum of Law in Opposition to Plaintiff's [sic] Motion for Leave to Amend Complaint and to Extend Time of Second Amended Scheduling Order("D. Memo.") at 11-12. The Court dismissed this claim approximately twenty-one months ago, and Plaintiffs offer no newly discovered facts to justify the Court reinstating it now.

Second, Plaintiffs' allegations with respect to Count V (Fraud and Misrepresentation), Count VI (Civil Conspiracy) and Count VII (Unjust Enrichment) of the proposed 2nd Amend. Compl. are based principally on facts and documents that were known to (or readily available to) the Plaintiffs at the time of the filing of the Amended Complaint. Count V basically rehashes Count IV, although it contains somewhat more detailed factual allegations, namely that the Truth-in-Lending Statement and Good Faith Estimate contain forgeries of Plaintiffs' signatures and 44

Financial and Herdelin conspired to inflate the amount of the loan by purchasing several bankruptcy judgments against Plaintiffs for discounted sums. While this all may be true, this information was available at the time Plaintiffs filed their Amended Complaint. Indeed, Plaintiffs specifically reference in their Amended Complaint the Truth-in-Lending Statement and Good Faith Estimate that purportedly contain their forged signatures. See Amended Compl. ¶7. As for the assignments of the bankruptcy judgments in connection with Plaintiffs' loan transaction, it is uncontested that Plaintiffs were responsible for reporting this information to the Defendants. Compare Pl. Memo. at 7 with D. Memo. at 11. Plaintiffs also had the documentation in which Herdelin allegedly made false and fraudulent representations about some of the bankruptcy judgments. Plaintiffs do not identify any recently discovered facts that indicate Defendants 44 Financial and Herdelin conspired or acted in concert to inflate the amounts of any of the bankruptcy proceedings. In other words, Plaintiffs had access to, or knowledge of, all of the necessary documentation that could have possibly supported their claims of fraud and misrepresentation at the time they filed their Amended Complaint.

This same analysis applies to Plaintiffs' proposed civil conspiracy claim (Count VI). Plaintiffs claim that they did not learn about the purported conspiracy between 44 Financial and

Herdelin to inflate the amount of the Bridgeton Meat Judgment ("Bridgeton Judgment") until deposing each Defendant on March 30, 2006. See Pl. Memo. at 17 (Further, [Plaintiffs'] Counsel learned for the first time at Defendants [sic] depositions . . . that Defendants in a concerted plan increased the total amount due under the loan by inflating the amount[] of the Bridgeton Meat Judgment[.]"). This is simply not true.

Plaintiffs do not cite any specific deposition testimony that enlightened them as to the conspiracy between the Defendants. Rather, Plaintiffs make general statements that they learned of this conspiracy only as result of the depositions. The Court has reviewed Defendants' deposition testimony appended to Plaintiffs' motion (Pl. Memo., Ex. H, K, V, Z and AA) and concludes that none of the testimony even touches upon the issue of the Bridgeton Judgment. But Plaintiffs do cite in their motion correspondence from May 2003 as evidence that 44 Financial and Herdelin were in concert to inflate the amount of the Bridgeton Judgment. See Pl. Memo. at 7-8. Thus, Plaintiffs had access to, or knowledge of, all of the necessary documents to bring a civil conspiracy claim well before May 2006, if not at the time they filed their Amended Complaint.

Finally, in Count VII Plaintiffs allege that Defendant Herdelin unjustly benefitted from his purchase of the Bridgeton Judgment. Plaintiffs argue that they only determined this fact

as result of the Herdelin's March 30, 2006 deposition. See Pl. Memo at 17. Plaintiffs cite documents in their motion, however, dated May 10, 2003 and June 2, 2003, as the sources for their calculation. Therefore, again, Plaintiffs had access to all of the necessary documentation to make this claim well before May 2006.

Plaintiffs have failed to present any evidence suggesting that the discovery process provided them with information without which they could not have brought the fraud, civil conspiracy and unjust enrichment claims they now seek to add. Given the lack of justification for Plaintiffs' delay in raising these claims, and undeniable prejudice to Defendants to do so now, the Court DENIES Plaintiffs' Motion to Amend their Amended Complaint.

2. Motion to Extend Time of the Second Amended Scheduling Order

This Court ordered on September 5, 2006 that all discovery shall be completed by October 2, 2006. Therefore, Plaintiffs' Motion to Extend Time of the Second Amended Scheduling Order is DENIED as MOOT.¹

¹ To be clear: The Court shall not entertain any further requests from the Plaintiffs to extend discovery in this case. Plaintiffs represented to this Court in their January 17, 2006 Motion for Extension of Discovery Deadlines that they would "work diligently to ensure that the discovery will be completed in a timely manner." Plaintiff's [sic] Motion for Extension of Discovery Deadlines ("Pl. Jan. 17 Mot. for Ext.")(Doc. No. 20). Yet between January 17, 2006 and March 31, 2006 (the second amended discovery deadline), Plaintiffs neither requested a single document from the Defendants nor issued any subpoenas for the information outlined in their motion. Plaintiffs then waited

Conclusion

For the reasons set forth above, Plaintiffs' Motion to Amend is DENIED and its Motion to Extend Time of the Second Amended Scheduling Order is DENIED as MOOT.

for a month after the March 31, 2006 deadline expired before filing the present motion for another discovery extension. Because Plaintiffs have failed to conduct discovery in a diligent manner, or offer any justification for their claim that the information they seek was not previously discoverable, the Court will not extend the time for discovery beyond October 2, 2006.

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ORDER

AND NOW, this 11th day of September, 2006, upon consideration of Plaintiffs' Motion for Leave to Amend Amended Complaint and to Extend time of Second Amended Scheduling Order (Doc. No. 35), and Defendant 44 Financial Corporation's ("44 Financial") response thereto (Doc. No. 36), it is hereby ORDERED:

1. Plaintiffs' Motion for Leave to Amend the Amended Complaint is DENIED.
2. This Court ordered on September 5, 2006 that all discovery is to be completed by October 2, 2006. Plaintiffs' Motion to Extend Time of the Second Amended Scheduling Order is therefore DENIED as MOOT.

BY THE COURT:

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