

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

MICHAEL DEMIL, an individual,

Plaintiff/Counter-Defendant,

HENRI JAMES DEMIL, and individual, SARAH
MAE DEMIL, an individual, HANNAH RENE
DEMIL, an individual and SAVANNAH LYNN
DEMIL, an individual

Plaintiffs,

vs.

Case No. 2012-889-CK

RMD HOLDINGS, LTD, a Michigan corporation
And ROBERT E. DEMIL, an individual,

Defendants/Counter-Plaintiffs.

OPINION AND ORDER

Defendants/Counter-Plaintiffs (“Defendants”) have filed a motion for leave to file an amended counter-complaint. Plaintiff/Counter-Defendant (“Plaintiff”) has filed a response and request that the motion be denied.

In the interests of judicial economy the factual and procedural statements set forth in the Court’s August 11, 2014 Opinion and Order are herein incorporated.

Standard of Review

MCR 2.118(A)(2) provides that leave to amend a pleading shall be freely given when justice so requires. A motion to amend ordinarily should be granted, unless one of the following particularized reasons exists: (1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue

prejudice to the opposing party by virtue of allowance of the amendment, and (5) futility of amendment. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 239-240; 615 NW2d 241 (2000). Delay alone does not justify denying a motion to amend, but a court may deny a motion to amend if the delay was in bad faith or if the opposing party suffered actual prejudice as a result. *Franchino v Franchino*, 263 Mich App 172, 191; 687 NW2d 620 (2004).

Arguments and Analysis

In their motion, Defendants seek to leave to add additional allegations to their breach of fiduciary duty claim against Plaintiff. Specifically, Defendants seek to add an allegation that Plaintiff has breached his fiduciary duty as a director/officer of RMD by his wrongful involvement with a competitor of RMD, Fenton Excavating & Construction, Inc. (“Fenton”), since October 2013.

In their response to Defendants’ motion, Plaintiff contends that the motion should be denied as the amendment would be futile.

While a trial court should freely grant leave to amend when justice so requires, leave should be denied where amending the complaint would be futile. *Jenks v Brown*, 219 Mich App 415, 420; 557 NW2d 114 (1996). An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face. *McNees v Cedar Springs Stamping Co*, 184 Mich App 101, 103; 457 NW2d 68 (1990).

Defendants’ proposed amendment seeks to add claims based on Plaintiff’s allegedly wrongful appropriation of corporate opportunities. Defendants’ proposed claims would be maintained pursuant to certain fiduciary duties owed by corporate officers and directors as laid out by the Michigan Court of Appeals in *Production Finishing Corp v Shields*, 158 Mich App 479, 485-486; 405 NW2d 171 (1987). However, in his response Plaintiff contends that the

amendment is futile because it is based on his activities after he was removed as a director/officer of RMD by Defendant Robert E. Demil on March 1, 2013. While Defendants appear to concede that Plaintiff was removed as a director/officer in March 2013, they assert that they seek to maintain their proposed claims in the alternative in the event that Plaintiff is ultimately found to have remained a director/officer after March 1, 2013. Specifically, Defendants maintain that the amendment is necessary in light of Plaintiff's testimony that he remains a director/officer of RMD. The testimony in question consists of Plaintiff's statements that in his opinion Defendant Robert E. Demil could not unilaterally remove him as a director under RMD's governing documents. (*See* M. Demil May 16, 2013 Deposition Transcript.)

In this case, Plaintiff has maintained that Defendant Robert Demil's decision to remove him as a director/officer was improper. However, it is undisputed that Defendant has been the sole director of RMD since March 1, 2013. While Defendant's actions could ultimately be found to be improper the fact remains that Plaintiff has not served as a director/officer of RMD during the period of time in which the events forming the basis for Defendants' proposed amended claims took place. Consequently, the Court is convinced that M. Demil has not owed RMD a fiduciary duty as a director/officer since at least March 1, 2013. Accordingly, Defendants' proposed claims are futile and Defendants' motion must be denied.

Conclusion

Based upon the reasons set forth above, Defendants' motion for leave to file an amended counter-complaint is DENIED. This *Opinion and Order* does not resolve the last claim and does not close the case. See MCR 2.602(A)(3).

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: December 26, 2014

JCF/sr

Cc: *via e-mail only*

Benjamin J. Aloia, Attorney at Law, aloia@aloiaandassociates.com

Edward J. Hood, Attorney at Law, ehood@clarkhill.com

Theresa Lloyd, Attorney at Law, tlloyd@plunkettcooney.com

Rogue Tyson, Attorney at Law, rtyson@nationwidecos.com