

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

JVIS-USA, LLC, a Michigan limited liability company and JVIS MANUFACTURING, LLC, a Michigan limited liability company, d/b/a, JVIS USA MANUFACTURING, LLC,

Plaintiffs,

vs.

Case No. 2013-2742-CB

NARTRON CORPORATION, n/k/a GEN X MICROSYSTEMS and a/k/a OLDNAR CORPORATION, a Michigan corporation and UUSI, LLC, d/b/a NARTRON, a Michigan limited liability company,

Defendants,

and

UUSI, LLC, d/b/a NARTON, a Michigan limited liability company,

Defendant/Counter and Third-Party Plaintiff

vs.

JVIS-USA, LLC, a Michigan limited liability company and JVIS MANUFACTURING, LLC, a Michigan limited liability company, d/b/a, JVIS USA MANUFACTURING, LLC

Counter-Defendants,

and

FUTABA CORPORATION OF AMERICA, a foreign corporation, THOMAS J. GRONSKI, RANDY GRIFFIN, and GINA TERRY,

Third-Party Defendants.

OPINION AND ORDER

Plaintiffs have filed a motion for leave to amend their complaint, affirmative defenses and witness list. Defendants have filed a response and request that the motion be denied.

I. Facts and Procedural History

Plaintiffs first filed a motion for leave to amend to obtain the relief it now seeks in November 2015. While the motion was set for a hearing in November 2015 it was not ultimately heard. On March 21, 2016, Plaintiffs filed their instant renewed motion for leave to amend. On March 25, 2016, Defendants filed their response and request that the motion be denied. On March 28, 2016, the Court held a hearing in connection with Plaintiffs' motion and took the matter under advisement.

II. 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).

III. Arguments and Analysis

In their motion, Plaintiffs seek to amend their complaint to add a claim for fraud, which in actuality comprises the following 3 fraud-based theories: (1) Silent Fraud, (2) Fraudulent Misrepresentation, and (3) Fraud in the Inducement. Further, Plaintiffs request leave to amend their affirmative defenses to add the same theories as well as duress and/or economic duress. In addition, Plaintiffs seek to amend their witness list to add an additional expert witness.

In its response, Defendants contend that Plaintiffs' request is untimely as it was originally made 2 ½ years after Plaintiffs filed their complaint in this matter (now almost 3 years), and only 2 weeks prior to the end of discovery (now 4 months after). In addition, Defendants assert that they will be prejudiced if the amendments are allowed because the discovery and summary disposition deadlines have passed. Further, Defendants aver that the proposed claim is futile as it is based on a mischaracterization of the deposition testimony it is based upon. Additionally, Defendants aver that Plaintiffs' request to add an a expert witness should be denied because they have not identified the requested expert and because they have not provided an explanation as to why they could not identify the need for this expert earlier, and where it has failed to show any cause for adding the witness and this late stage of the case.

The Court will first address Defendants' position that Plaintiffs' motion is untimely and prejudicial. Defendants' timeliness challenge is based on the fact that Plaintiffs have sought documents regarding Defendants' capacity to produce the PCBs in the needed quantities since the beginning of this case. Indeed, Plaintiffs have been seeking "capacity studies" or other evidence establishing that Defendants had the ability

to produce the PCBs at issue in the needed quantity since their first set of discovery requests in October 2013. (See Defendants' Exhibit B.) Moreover, Plaintiffs have had evidence since at least May 2014 that Defendants did not have the tooling necessary to meet Plaintiffs' demands unless it purchased additional tooling. Specifically, Defendants' principal, John Washeleski, testified in May 2014 that additional tooling would have been needed to meet Plaintiffs' quantity demands. (See Defendants' Exhibit C.)

In its motion, Plaintiffs contend that their motion was spurred by the October 2015 deposition testimony of Tony Elenbaas, Defendants' chief engineer. Specifically, Mr. Elenbaas testified that Defendants' did not have the production capability to meet the quantity demands. (See Plaintiffs' Exhibit 3.) However, this testimony is no more informative than the information Plaintiffs had on this issue for more than a year prior to the deposition. Based on the fact that Plaintiffs have been conducting discovery and questioning whether Defendants had the capacity to satisfy its quantity demands since the beginning of the case, and the fact that its request was originally made less than a month before the end of discovery when discovery has been ongoing for 2 ½ years, as well as Defendants' failure to ensure that their original motion for leave was heard, which ultimately lead to an additional four month delay, the Court is convinced that Plaintiffs unreasonably delayed in bringing the instant motion. However, "[d]elay in seeking amendment, without a finding of bad faith or prejudice caused by the delay, does not justify denial of a motion to amend. *Ben P. Fyke & Sons v. Gunter Co.*, 390 Mich. 649, 663-664; 213 N.W.2d 134 (1973). As a result, the Court must examine whether the proposed amendments will be prejudicial or were sought in bad faith.

“Prejudice” refers to a matter which would prevent a party from having a fair trial, or matter which he could not properly contest, e.g., when surprised. It does not refer to the effect on the result of the trial otherwise.’ *Fyke & Sons*, 390 Mich at 657. “The possible prejudice must stem from the fact that new allegations are offered late rather than in the original pleadings and not from the fact that the opponent may lose his case on the merits if the amendment is allowed. *Id.* at 658. The discretion invested in trial judges under the standard ‘leave shall be freely given when justice so requires’ is not boundless. This language imposes a limitation on the discretion of the court necessitating a finding that justice would not be served by an amendment to pleadings. *Id.* The allowance of an amendment is not an act of grace, but a right of a litigant who can show that an amendment will not work an injustice on the opposing party. *Id.* at 659.

In this case, Defendants concede that their ability to accommodate Plaintiffs’ quantity demands has been at issue throughout the case. (See Defendants’ Response, at pp. 5-7.) Moreover, it is clear that Plaintiffs have been conducting discovery on this issue since the beginning of this case based on its previous document requests and questions at the depositions, as is laid out in depth in pp. 5-7 of Defendants’ response. While Defendants contend that they will need additional discovery if the amendment is granted, and that they will be unable to conduct such discovery since the discovery deadline has passed, they have failed to specify what, if any, additional discovery they will need. Furthermore, the Court retains the ability to extend discovery and to limit such an extension. As a result, the Court is satisfied that Defendants have failed to

establish that they will suffer prejudice sufficient to prevent Plaintiffs from making their proposed amendments.

Defendants also challenge Plaintiffs' proposed claim on the basis of futility. 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). In this case, Defendants contend that Plaintiffs' fraud claim fails as a matter of law because they are based on the same conduct that gives rise to Plaintiffs' contractual claims.

An action arises in tort only where a duty separate and distinct from the contract exists. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 171; 809 NW2d 553 (2011). However, fraud in the inducement can be maintained in addition to a breach of contract claim where the plaintiff alleges that one party undermined the other's ability to negotiate fair terms and make an informed decision by engaging in fraudulent conduct. *Huron Tool and Engineering Co v Precision Consulting Services, Inc.*, 209 Mich App 365; 532 NW2d 541 (1995). In this case, Plaintiffs' proposed claim is based on its allegation that Defendants made misrepresentations and/or suppressed information in order to induce it into entering into the contractual relationship at the center of this case. Such allegations, if true, would state a viable fraud claim. Accordingly, JVIS' proposed claims are not futile on their face.

Finally, Defendants aver that Plaintiffs should not be allowed to add a witness because they have not identified any reason for failing to identify the need for the expert

or the identity of the expert before the September 1, 2015 deadline for submitting witness lists. Indeed, Plaintiffs have not set forth any reason for its failure to add the proposed expert to its witness list within the timeline set forth by this Court. For these reasons, the Court is convinced that Plaintiffs' request to add an additional expert witness must be denied.

IV. Conclusion

Based upon the reasons set forth above, Plaintiffs' motion for leave to file an amended complaint, affirmative defenses and witness list is GRANTED, IN PART and DENIED, IN PART. Specifically, Plaintiffs' request to amend their witness list is DENIED. The remainder of their motion is GRANTED. Plaintiffs' must file their amended complaint within 7 days of the date of this Opinion and Order.

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.

Date: APR 29 2016

Kathryn A. Viviano
Hon. Kathryn A. Viviano, Circuit Court Judge