

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

BAGTAG, LLC,

Plaintiff,

vs.

Case No. 2015-764-CB

DRENALINE PRODUCTS, LLC,
WRIST SKINS, LLC, JOEL BUCKLEY
and RANDAL W. HIGH,

Defendants.

FILED
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MACOMB COUNTY CIRCUIT COURT

OPINION AND ORDER

Defendants Drenaline Products, LLC (“Defendant Drenaline”) and Randal W. High (“Defendant High”) (Defendant Drenaline and Defendant High collectively as, “Movants”) have filed a motion for leave to amend its answer and affirmative defenses and to file a counterclaim. Plaintiff opposes the motion and requests that it be denied.

I. Procedural History

On March 6, 2015, Plaintiff filed its complaint in this matter. On April 28, 2015, Defendants filed their answer to the complaint and affirmative defenses. On June 1, 2016, Movants filed their instant motion for leave to file an amended answer and affirmative defense and to file a counter-claim. On July 11, 2016, Plaintiff filed its response in which it requests that Movants' motion be denied. On July 12, 2016, the Court held a hearing in connection with the motion. At the conclusion of the hearing, the Court took the matter under advisement and granted Plaintiff leave to file a supplemental response to the motion. On July 12, 2016, Plaintiff filed its supplemental response to the motion.

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

Plaintiff opposes Movants' proposed amendments because it contends that they are futile, and because the delay in seeking the amendment will cause it prejudice. The Court will first address Plaintiff's futility argument.

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). Plaintiff's sole futility argument is that the proposed counter-claim is futile in light of Exhibits 17 and 23 to its filed motion for summary disposition. As a preliminary matter, Plaintiff's motion for summary disposition does not include exhibits 17 and 23; rather, Plaintiff's motion

includes only exhibits A-D. Moreover, even if the exhibits did exist, the Court may not base its decision whether to grant leave on extrinsic evidence as it is required to decide a futility argument by viewing the face of the proposed pleadings alone. *McNees v Cedar Springs Stamping Co*, 184 Mich App at 103. Consequently, Plaintiff's futility argument is not properly supported.

Plaintiff's remaining arguments are that Movants unduly delayed in seeking to amend and that the delay will cause it prejudice. "Delay 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 NW2d 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, Plaintiff avers that it will be unable to defend Movants' proposed counterclaim because a year and a half has passed since the original complaint was filed, four months have elapsed since Movants' current counsel substituted in, and because discovery has closed. With respect to the time since the complaint was filed and Movants' current counsel was retained, Plaintiff has failed to present any evidence of bad faith. Moreover, any prejudice that may otherwise result from allowing leave to amend after discovery has been closed can be remedied by this court, if the need is shown, by reopening discovery for the limited purpose of allowing discovery into the new claims. Consequently, the Court is satisfied that Plaintiff has failed to establish delay, prejudice or bad faith warranting the denial of Movants' request. As a result, Movants' motion for leave to amend will be granted.

IV. Conclusion

Based upon the reasons set forth above, Movants' motion for leave to amend their answer and affirmative defenses, and to file a counterclaim, is GRANTED. Movants must file the amended answer, affirmative defenses and counterclaim 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: AUG 02 2018

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