

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

NORMAN GERSHMAN, <i>et. al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	C.A. No. 09C-10-051 CLS
GERALD S. BOOTH, <i>et. al.</i> ,	)	
	)	
Defendants.	)	
	)	
	)	

**ORDER**

AND NOW, TO WIT, this 24<sup>th</sup> day of August, 2012, **IT IS HEREBY**

**ORDERED** as follows:

**Introduction**

Before the Court is Defendant’s, Harry David Zutz Insurance Inc. (“Defendant Zutz”) and Defendant’s, Gerald S. Booth (“Defendant Booth”) Motion to Amend their Answers pursuant to Superior Court Civil Rule 15(a). Defendant Booth’s motion is **GRANTED** and Defendant Zutz’s motion is **GRANTED in part** and **DENIED in part**.

**Facts**

This case arises from a washing machine hose that burst inside of Plaintiffs’ beach house, causing extensive water damage. Plaintiffs contacted Defendant Zutz

for claim assistance related to the damage. According to the Complaint, Defendant Zutz informed Plaintiffs that it would “handle everything” in restoring the beach house as a result of the water damage.<sup>1</sup> Plaintiffs maintain that this communication created an oral contract. Defendant Zutz hired Defendant Booth to complete the restoration of Plaintiffs’ beach house. Among other claims alleged in the Complaint, Plaintiffs claim that Defendant Zutz breached this contract by failing to check Defendant Booth’s licensure or other credentials and for hiring Booth with knowledge that he was slow to complete jobs and did not meet deadlines.

Defendant Zutz filed a motion to dismiss the Complaint for failure to state a claim upon which relief can be granted. In its September 28, 2010 Order, the Court the motion was denied in part and granted in part. Specifically this Court denied the motion to dismiss as to the Statute of Frauds, Breach of Good Faith and Fair Dealing, the Consumer Contracts Act and the Consumer Fraud Act. Plaintiffs’ claim alleging a violation of the Home Solicitation Sales Act was granted.

On March 24, 2011, this Court entered default judgment against G.S. Booth & Associates, Inc. The Trial Scheduling Order in this case sets forth a deadline of

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<sup>1</sup> Compl. ¶16.

March 15, 2012 for filing motions to add or amend. Trial is scheduled for May 13, 2013.

### **Parties' Contentions**

#### *Zutz's Motion to Amend its Answer.*

On March 19, 2012, Defendant Zutz filed a motion to amend its Answer. Zutz requests leave to amend to add Crossclaims against Gerald Booth, both individually and as president of G.S. Booth & Associates, Inc., as well as G.S. Booth and Associates, Inc. Defendant Zutz claims that the information leading to the Crossclaims against Booth were revealed during discovery. Plaintiffs filed a "no opposition letter" to Defendant Zutz's motion to amend. Defendant Booth filed a response in opposition to Defendant Zutz's request. Booth requests that this Court deny the motion because Zutz alleges no factual basis to amend its answer and the Crossclaim is not timely filed pursuant to Super. Ct. Civ. R. 15.

#### *Booth's Motion to Amend his Answer.*

On April 9, 2012, Defendant Booth filed a motion to amend his Answer. Specifically, Booth seeks to amend his answer to include the answers filed by Gerald S. Booth and Associates, Inc. Based on a default judgment entered on March 24, 2011, Gerald S. Booth and Associates, Inc., is no longer a party to the litigation.

On April 23, 2012, Plaintiffs responded in opposition to Defendant Booth's request. Plaintiffs argue that the motion should be denied because the motion is untimely under the trial scheduling order and there is no manifest injustice justifying a departure from the pretrial order. Defendant Zutz did not respond to Defendant Booth's motion to amend its answer.

### **Discussion**

Superior Court Civil Rule 15(a) governs a motion to amend a party's pleading. Super. Ct. Civ. R. 15(a) states, in pertinent part:

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise, 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.<sup>2</sup>

Rule 15(a) is applied liberally to "encourage the disposition of litigation on its merits."<sup>3</sup> "Leave of court should be freely given unless there is evidence of undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies, prejudice, futility, or the like."<sup>4</sup>

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<sup>2</sup> Super. Ct. Civ. R. 15(a).

<sup>3</sup> *Delta Eta Corp. v. University of Delaware*, 2007 WL 4578278, at \*5 (Del. Super. Dec. 27, 2007) (quoting *Legatski v. Bethany Forest Assoc., Inc.*, 2005 WL 2249598, at \*1 (Del. Super. Sept. 15, 2005)).

<sup>4</sup> *Legatski*, 2005 WL 2249598, at \*1.

Here, there is no evidence of any of the above factors that would justify a denial of Zutz's and/or Booth's motions to amend. While both motions are untimely according to the Court's Trial Scheduling Order, it does not appear that any party would be prejudiced by giving the parties leave to file an Amended Answer. Trial is not scheduled until May 13, 2013, which gives the parties more than enough time to handle the issues raised in the Amended Answers.

Defendant Zutz seeks to bring Crossclaims against the "Booth Defendants" including G.S. Booth & Associates, Inc. in its Amended Complaint. However, G.S. Booth & Associates, Inc. is not a party to this case based on the default judgment entered by this Court on March 24, 2011. Thus, Defendant Zutz is granted leave to amend but not as to Booth and Associates, Inc., as they are no longer a Defendant in this case. Accordingly, Zutz and Booth are granted leave by this Court pursuant to Super. Ct. Civ. R. 15(a) to amend their answers.

### **Conclusion**

Based on the foregoing, Defendant Booth's motion is **GRANTED** and Defendant Zutz's motion is **GRANTED in part** and **DENIED in part**.

**IT IS SO ORDERED.**

/S/CALVIN L. SCOTT  
Judge Calvin L. Scott, Jr.