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7 UNITED STATES DISTRICT COURT
8 SOUTHERN DISTRICT OF CALIFORNIA
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10 BLUMENFELD DEVELOPMENT
11 GROUP, LTD. and BDG GOTHAM
12 RESIDENTIAL, LLC,

Plaintiffs,

13 v.

14 SADLERSTONE, LLC, dba
15 CONCRETE COLLABORATIVE,

16 Defendant.

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18 SADLERSTONE, LLC, dba CONCRETE
19 COLLABORATIVE,

20 Third-Party Plaintiff,

21 v.

22 STONE DIVERSIFIED, LLC; ZDG
23 CONSTRUCTION MANAGEMENT;
24 ZDG CONSTRUCTION
25 MANAGEMENT, LLC and ROES 1-25,

Third-Party Defendants.

Case No.: 21cv1117-WQH-MSB

ORDER

26 HAYES, Judge:

27 The matters before the Court are (1) the Motion for Leave to Amend the First
28 Amended Third-Party Complaint (“Motion for Leave to Amend”), filed by Third-Party

1 Plaintiff Sadlerstone, LLC, dba Concrete Collaborative (“Concrete Collaborative”) (ECF
2 No. 57); and (2) the Ex Parte Motion for Special Appearance for the Limited Purpose of
3 Filing an Opposition to the Motion for Leave to Amend (“Motion for Special
4 Appearance”), filed by B.I.G. Architecture D.P.C. (“BIG DPC”) (ECF No. 62).

5 **I. BACKGROUND**

6 On June 15, 2021, Plaintiffs Blumenfeld Development Group, Ltd. and BDG
7 Gotham Residential, LLC (“Plaintiffs”) initiated this action by filing a Complaint in this
8 Court against Concrete Collaborative. (ECF No. 1). On August 27, 2021, Plaintiffs filed a
9 First Amended Complaint (“FAC”) against Concrete Collaborative, which is the operative
10 pleading. (ECF No. 13). The FAC alleges that Concrete Collaborative sold “defective
11 concrete tiles to Plaintiffs for use in an eleven-story multi-unit residential building in New
12 York City, causing damages to Plaintiffs.” (*Id.* at 1-2). The FAC alleges claims for breach
13 of contract, breach of warranties, and negligence.

14 On September 23, 2021, Concrete Collaborative filed a Third-Party Complaint
15 against Bjarke Ingels Group NYC LLC (“BIG NYC”) and Stone Diversified LLC (“Stone
16 Diversified”). (ECF No. 16). The Third-Party Complaint alleges that Stone Diversified
17 “failed to adhere to the installation guidelines, thus causing any alleged defects, if any are
18 present.” (*Id.* at 7). The Third-Party Complaint alleges that BIG NYC “selected the subject
19 tile for the purpose it was ultimately used and has a professional duty to approve or reject
20 material as the licensed architect for the Project . . . [and] BIG [NYC] failed to reject the
21 material within a reasonable time thus violating its professional duty.” *Id.* The Third-Party
22 Complaint alleges claims for indemnity and negligence.

23 On November 12, 2021, BIG NYC filed a Motion to Dismiss the Third-Party
24 Complaint. (ECF No. 24). BIG NYC asserted, among other things, that it was “not a proper
25 party to this action, and it must be dismissed since . . . it did not work on the project at
26 issue.” *Id.* at 8. BIG NYC asserted that “B.I.G. Architecture D.P.C. (“BIG DPC”), a New
27 York Design Professional Corporation, provided architectural services on the Project.” *Id.*
28 The Motion to Dismiss explained the difference between BIG NYC and BIG DPC and

1 repeatedly stated that BIG NYC “did not complete work on the Project” and “BIG DPC
2 actually provided architectural services for The Project.” (*Id.* at 11; *see also id.* at 9, 12,
3 29). BIG NYC attached a Declaration of the General Counsel for Bjarke Ingels Group
4 explaining the relationship between BIG NYC and BIG DPC and reiterating that “BIG
5 NYC was not the architect for the project at issue,” and instead “BIG DPC provided
6 architectural services for The Project.” (Elbert Decl. ¶¶ 5-6, ECF No. 24-1; *see also id.* ¶¶
7 3-4).

8 On December 6, 2021, Concrete Collaborative filed a Response in opposition to the
9 Motion to Dismiss. (ECF No. 31). Concrete Collaborative asserted in a footnote that
10 “project related communications” indicated that BIG NYC “performed work in connection
11 with this case” and “[t]he extent to which each BIG entity performed the specific work is
12 subject to discovery.” (*Id.* at 6 n.1). Concrete Collaborative did not otherwise address the
13 issue of whether BIG NYC or BIG DPC was the proper party.

14 On January 27, 2022, the Magistrate Judge issued the Scheduling Order. (ECF No.
15 37). The Scheduling Order required that “[a]ny motion to join other parties, to amend the
16 pleadings, or to file additional pleadings shall be filed by February 25, 2022.” (*Id.* at 1).
17 The Scheduling Order further required that “[a]ll fact discovery shall be completed by all
18 parties on or before August 18, 2022.” (*Id.* at 2).

19 On February 22, 2022, the Court issued an Order denying BIG NYC’s Motion to
20 Dismiss as untimely. (ECF No. 38 at 3).

21 On February 24, 2022, Concrete Collaborative filed a Joint Motion to File First
22 Amended Third-Party Complaint. (ECF No. 39). Concrete Collaborative sought to add
23 ZDG Construction Management and ZDG Construction Management, LLC (collectively,
24 “ZDG”) as Third-Party Defendants and continued to name BIG NYC as a Third-Party
25 Defendant. (*Id.* at 2).

26 On February 25, 2022, the Court granted the Joint Motion to File First Amended
27 Third-Party Complaint (ECF No. 40), and Concrete Collaborative filed the operative First
28 Amended Third-Party Complaint (ECF No. 41).

1 On March 11, 2022, BIG NYC filed a Motion to Dismiss, again asserting that BIG
2 NYC was the incorrect entity for Concrete Collaborative’s claims. (ECF No. 44 at 9 (“BIG
3 NYC, a New York corporation, did not provide any work on the Project. Rather, B.I.G.
4 Architecture D.P.C. (‘BIG DPC’), a New York Design Professional Corporation, provided
5 architectural services on the Project.”)).

6 On April 5, 2022, Concrete Collaborative and BIG NYC filed a Joint Motion to
7 Dismiss BIG NYC from the First Amended Third-Party Complaint. (ECF No. 48).

8 On April 7, 2022, the Court granted the Joint Motion to Dismiss, dismissed BIG
9 NYC, and denied BIG NYC’s Motion to Dismiss as moot. (ECF No. 49).

10 On May 11, 2022, Concrete Collaborate filed the pending Motion for Leave to
11 Amend. (ECF No. 57). Concrete Collaborate seeks leave to file a Second Amended Third-
12 Party Complaint adding BIG DPC and four additional third-party defendants: Premier Tile
13 (“Premier”), New York Stone, New York Stone Works LLC (“New York Stone Works”),
14 and Mario Trigazis. Concrete Collaborative asserts that Premier, New York Stone, New
15 York Stone Works, and Mario Trigazis were identified by Plaintiffs for the first time on
16 March 16, 2022, in response to an interrogatory. (*Id.* at 3). With respect to BIG DPC,
17 Concrete Collaborative asserts that “information from Concrete Collaborative indicates
18 that BIG DPC may have monitored and reviewed the progression of the tile installation
19 and acceptance, and ultimately had a significant role in ensuring the success of the Project
20 including the tile installation.” (*Id.* at 4). Concrete Collaborative asserts that, “although
21 BIG DPC’s existence may have been apparent earlier, Concrete Collaborative was
22 informed of the correct entity only after BIG NYC filed a motion to dismiss on November
23 12, 2021.” (*Id.* at 12). Concrete Collaborative’s counsel submits a declaration stating that,
24 on March 30, 2022, her “office subpoenaed BIG DPC to investigate the full scope of its
25 involvement in the process of accepting and installing the tiles; however, BIG DPC failed
26 to respond to that subpoena.” (Borisov Decl. ¶ 5, ECF No. 57-1).

27 On June 6, 2022, BIG DPC filed the Motion for Special Appearance. (ECF No. 62).
28 BIG DPC asserts that “Concrete Collaborative knew of its mistake when BIG NYC filed

1 its Motion to Dismiss and supporting documents on November 12, 2021, and it did not
2 attempt to amend its complaint to name the correct party until May 2022, long past the
3 February 25, 2022 deadline to amend the pleadings.” (ECF No. 62-1 at 13-14). BIG DPC
4 further asserts that it never received a subpoena from Concrete Collaborative and, “[a]s
5 shown on the subpoena attached to [Concrete Collaborative’s] motion, the proof of service
6 is left blank, indicating it was never served on BIG DPC.” (*Id.* at 16).

7 On June 7, 2022, Plaintiffs and ZDG filed an Opposition to the Motion for Leave to
8 Amend, contending that Concrete Collaborative was not diligent in filing its motion. (ECF
9 No. 63 at 3).

10 On June 9, 2022, Concrete Collaborative filed an Opposition to the Motion for
11 Special Appearance. (ECF No. 65).

12 On June 13, Concrete Collaborative filed a Reply in support of its Motion for Leave
13 to Amend. (ECF No. 67). Concrete Collaborative reiterates that its counsel learned about
14 BIG DPC’s involvement in the case from “Concrete Collaborative’s representative,” but
15 contends that “defense counsel for Concrete Collaborative cannot be expected to interview
16 any and all [Concrete Collaborative] employees and or representatives, of which [sic] are
17 not a direct contact.” (*Id.* at 5).

18 **II. DISCUSSION**

19 **A. Motion for Special Appearance**

20 BIG DPC filed the ex parte Motion for Special Appearance to oppose the Motion
21 for Leave to Amend. Civil Local Rule 83.3(f) provides that an attorney may make a special
22 appearance for a limited proceeding with the permission of the Court. *See* S.D. Cal. Civ.
23 L.R. 83.3(f)(4). Civil Local Rule 83.3(g) states in relevant part: “A motion for an order
24 must not be made ex parte unless it appears by affidavit or declaration ... that within a
25 reasonable time before the motion the party informed the opposing party or the opposing
26 party’s attorney when and where the motion would be made....” S.D. Cal. Civ. L.R.
27 83.3(g)(2).

1 On June 6, 2022, BIG DPC notified counsel for Concrete Collaborative of its intent
2 to file the Motion for Special Appearance. (ECF No. 62-1 at 2). BIG DPC then filed its
3 Motion on the same day. (ECF No. 62). On June 9, 2022, the Court issued an Order stating
4 that any response to BIG DPC’s motion shall be filed by June 17, 2022. (ECF No. 66). On
5 June 9, 2022 and June 13, 2022, Concrete Collaborative filed its replies to the oppositions
6 to its Motion for Leave to Amend. (ECF Nos. 65 & 67). The Court finds that Concrete
7 Collaborative received adequate notice and opportunity to respond to the arguments made
8 in the Motion for Special Appearance and in opposition to the Motion for Leave to Amend.
9 The Motion for Special Appearance is granted.

10 **B. Leave to Amend**

11 **1. Standard of Review**

12 “Once [a] district court ... file[s] a pretrial scheduling order pursuant to Federal Rule
13 of Civil Procedure 16 which establishe[s] a timetable for amending pleadings that rule’s
14 standards control[s].” *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-08 (9th
15 Cir. 1992). A party seeking to amend a pleading after the pleading-amendment date
16 specified in scheduling order must first show “good cause” for the amendment under Rule
17 16(b), then, if “good cause” is shown, the party must demonstrate that amendment was
18 proper under Federal Rule of Civil Procedure 15(a). *See id.* at 608.

19 “Unlike Rule 15(a)’s liberal amendment policy which focuses on the bad faith of the
20 party seeking to interpose an amendment and the prejudice to the opposing party, Rule
21 16(b)’s ‘good cause’ standard primarily considers the diligence of the party seeking the
22 amendment.” *Id.* at 609. “The district court may modify the pretrial schedule ‘if it cannot
23 reasonably be met despite the diligence of the party seeking the extension.’” *Id.* (quoting
24 Fed. R. Civ. P. 16 advisory committee’s notes (1983 amendment)). “While a court may
25 take into account any prejudice to the party opposing modification of the scheduling order,
26 ‘the focus of the [Rule 16(b)] inquiry is upon the moving party’s reasons for seeking
27 modification ... [i]f that party was not diligent, the inquiry should end.’” *In re W. States*
28

1 *Wholesale Nat. Gas Antitrust Litig.*, 715 F.3d 716, 737 (9th Cir. 2013) (quoting *Johnson*,
2 975 F.2d at 609), *aff'd sub nom. Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373 (2015).

3 **2. Motion to Add BIG DPC**

4 The Scheduling Order states that “[a]ny motion to join other parties [or] to amend
5 the pleadings ... shall be filed by February 25, 2022.” (ECF No. 37 at 1). Concrete
6 Collaborative asserts that, “although BIG DPC’s existence may have been apparent earlier,
7 Concrete Collaborative was informed of the correct entity only after BIG NYC filed a
8 motion to dismiss on November 12, 2021.” (ECF No. 57 at 12). Despite being informed
9 that BIG DPC was the correct entity on November 21, 2021—three months before the
10 February 25, 2022 deadline for adding parties—Concrete Collaborative waited until May
11 11, 2022 to file its motion for leave to add BIG DPC as a party.

12 Concrete Collaborative’s counsel concedes that her client knew that BIG DPC rather
13 than BIG NYC was the proper party, and the only reason offered for the delay in speaking
14 with her client is that the Concrete Collaborative representative with this information “was
15 not a direct contact.” (ECF No. 67 at 5). Concrete Collaborative offers no additional
16 information about this representative or explanation for the delay in interviewing the
17 representative. Concrete Collaborative also relies upon a subpoena addressed to BIG DPC
18 and dated March 30, 2022. (ECF No. 57-3). However, this was over four months after
19 Concrete Collaborative concedes it was informed that BIG DPC was the proper party and
20 over a month after the deadline for adding parties. Moreover, the proof of service on the
21 subpoena is blank (*see id.* at 6), and BIG DPC submits a declaration stating that “BIG DPC
22 has never been served with a subpoena in this matter.” (Elbert Decl. ¶ 12, ECF No. 62-1).
23 There is evidence that Concrete Collaborative’s counsel notified BIG NYC’s counsel by
24 email that a subpoena would be issued to BIG DPC (*see* ECF No. 62-1 at 44; ECF No. 67-
25 1 at 4), but BIG NYC’s counsel responded that “[w]e are not authorized to accept service
26 of the subpoena.” (ECF No. 62-1 at 53).

27 The Court finds that Concrete Collaborative has failed to demonstrate that it was
28 diligent in moving to add BIG DPC six months after being informed of BIG DPC’s identity

1 and two and a half months after the deadline for adding parties. Accordingly, Concrete
2 Collaborative has failed to demonstrate good cause to add BIG DPC pursuant to Rule 16(b).
3 *See Johnson*, 975 F.2d at 609 (“If [the moving] party was not diligent, the inquiry should
4 end.”). The Motion for Leave to Amend is denied as to the request to add BIG DPC.

5 **3. Motion to Add Premier, New York Stone, New York Stone Works, and**
6 **Mario Trigazis**

7 Concrete Collaborative contends that “Plaintiffs affirmatively concealed the
8 identities of the additional tile installers [i.e., Premier, New York Stone, New York Stone
9 Works, and Mario Trigazis] until recently.” (ECF No. 67 at 2). Concrete Collaborative
10 produces evidence that Plaintiffs failed to identify the names of these tile installers in their
11 initial disclosures or in Plaintiffs’ January 2022 response to Concrete Collaborative’s
12 request for “[a]ny and all documents, including photos and videos, which reference, relate
13 to or refer tile, between any party or nonparty with regard to the project which is the subject
14 of Plaintiffs’ Complaint in this action.” (Ford Decl. ¶¶ 3, 5, ECF No. 67-1). Plaintiffs first
15 identified the tile installers to Concrete Collaborative in discovery responses dated March
16 16, 2022. (*Id.* ¶ 4).

17 Plaintiffs contend that Concrete Collaborative was not diligent due to the delay
18 between the date it learned the names of the tile installers—March 16, 2022—and the date
19 it moved for leave to amend to add them as parties—May 11, 2022. (ECF No. 63 at 8).
20 However, a delay of less than two months is considerably less than the seven-month delay
21 at issue in *Johnson*. *See Johnson*, 975 F.2d at 606-07. Concrete Collaborative requested
22 discovery from Plaintiffs prior to the deadline for adding parties that Concrete
23 Collaborative reasonably expected would have resulted in Plaintiffs identifying all tile
24 installers. The fact that Plaintiffs did not reveal the names of all tile installers until March
25 2022—after the deadline for adding parties—is sufficient to demonstrate good cause
26 pursuant to Rule 16(b) for the May 11, 2022 motion to add Premier, New York Stone, New
27 York Stone Works, and Mario Trigazis.

1 The Court next considers whether Concrete Collaborative has shown that adding
2 Premier, New York Stone, New York Stone Works, and Mario Trigazis is proper under
3 Rule 15(a). *See Johnson*, 975 F.2d at 608. Rule 15 mandates that leave to amend “be freely
4 given when justice so requires.” Fed. R. Civ. P. 15(a). “This policy is to be applied with
5 extreme liberality.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir.
6 2003) (per curiam) (quotation omitted). The Supreme Court has identified several factors
7 district courts should consider when deciding whether to grant leave to amend: “undue
8 delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure
9 deficiencies by amendments previously allowed, undue prejudice to the opposing party by
10 virtue of allowance of the amendment, [and] futility of amendment.” *Foman v. Davis*, 371
11 U.S. 178, 182 (1962). “Not all of the [*Foman*] factors merit equal weight. As this circuit
12 and others have held, it is the consideration of prejudice to the opposing party that carries
13 the greatest weight.” *Eminence Capital*, 316 F.3d at 1052. “The party opposing amendment
14 bears the burden of showing prejudice.” *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183,
15 187 (9th Cir. 1987). “Absent prejudice, or a strong showing of any of the remaining *Foman*
16 factors, there exists a *presumption* under Rule 15(a) in favor of granting leave to amend.”
17 *Eminence Capital*, 316 F.3d at 1052.

18 Plaintiffs contend that “the delay necessarily resulting from adding new parties
19 would delay the adjudication of this case and be prejudicial to Plaintiffs and ZDG” and
20 “amendment is futile since this Court likely does not have personal jurisdiction over the
21 proposed new parties.” (ECF No. 63 at 9). The Scheduling Order provides that fact
22 discovery shall be completed by August 18, 2022, and expert discovery shall be completed
23 by November 21, 2022. (ECF No. 37 at 2-3). It is likely that the addition of new parties
24 will result in a motion to extend these deadlines and delay the ultimate resolution of the
25 case. Concrete Collaborative filed an Ex Parte Motion for an Order Continuing Case
26 Deadlines on August 1, 2022 (ECF No. 72), which remains pending. However, the Court
27 finds that this delay is not sufficient to overcome Rule 15(a)’s presumption in favor of
28 granting leave to amend. *See Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074,

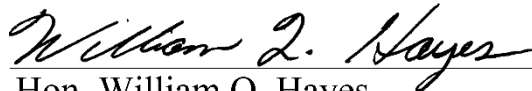
1 1079 (9th Cir. 1990) (stating that a “delay of nearly two years” was “not alone enough to
2 support denial” of leave to amend under Rule 15(a)). The Court defers consideration of
3 whether the Court has personal jurisdiction over the new parties until they enter
4 appearances and properly raise the issue in a motion. The Motion for Leave to Amend is
5 granted as to the request to add Premier, New York Stone, New York Stone Works, and
6 Mario Trigazis.

7 **III. CONCLUSION**

8 IT IS HEREBY ORDERED that the Motion for Leave to Amend is denied as to the
9 request to add BIG DPC and granted as to the request to add Premier, New York Stone,
10 New York Stone Works, and Mario Trigazis. (ECF No. 57). No later than ten (10) days
11 from the date this Order is filed, Concrete Collaborative shall file the Second Amended
12 Third-Party Complaint attached to the Motion for Leave to Amend (ECF No. 57-4), except
13 that BIG DPC shall be removed as a party.

14 IT IS FURTHER ORDERED that the Motion for Special Appearance is granted.
15 (ECF No. 62).

16 Dated: August 8, 2022

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18 Hon. William Q. Hayes
19 United States District Court
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