IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-02875-MEH

PRIMA PARTNERS, LLC,

Plaintiff/Counter Defendant,

v.

STEPHEN L. WATERHOUSE,
LINDA L. WATERHOUSE

Defendants/Counter Claimants.

ORDER

Michael E. Hegarty, United States Magistrate Judge.

Defendants/Counter Claimants Stephen L. Waterhouse and Linda L. Waterhouse (collectively "the Waterhouses") seek to amend their counterclaims to add causes of action for outrageous conduct and prevailing party attorney fees. Because the Waterhouses withdrew their outrageous conduct claim in their reply brief, the Court denies the Waterhouses' motion without prejudice to the extent it seeks to add this claim. Regarding the claim for prevailing party attorney fees, the Court holds that the Waterhouses have not shown good cause for seeking an amendment of the Scheduling Order. Accordingly, the Waterhouses' motion to amend is denied in part and denied without prejudice in part.

BACKGROUND

On October 4, 2016, Plaintiff/Counter Defendant Prima Partners, LLC filed an Amended Complaint in state court. Am. Compl., ECF No. 5. Prima Partners claims that on July 11, 2016, it entered into a contract to buy and sell real estate with the Waterhouses. *Id.* Pursuant to the contract, Prima Partners agreed to purchase property located at 285 Forest Road, Unit A, Vail, Colorado

81657. *Id.* at ¶ 7; Ex. A to Second Am. Compl., ECF No. 20-2. The contract required the Waterhouses to disclose any known latent defects with the property. Am. Compl. ¶¶ 9–10. Immediately after taking possession of the unit, Prima Partners discovered numerous serious defects that the Waterhouses did not disclose. *Id.* at ¶ 18. Moreover, Prima Partners allegedly learned that the Waterhouses knew of these defects when they submitted their disclosures. *Id.* at ¶ 19.

On November 23, 2016, the Waterhouses removed the case to this Court. Notice of Removal, ECF No. 1. On December 5, 2016, the Waterhouses filed their original Answer and Counterclaims, which asserted a statutory claim for attorney fees arising out of frivolous litigation. ECF No. 11, at ¶¶ 39–41.

On January 11, 2017, the Court entered a Scheduling Order, which set March 17, 2017 as the deadline for joinder of parties and amendment of pleadings. ECF No. 19. On that deadline, Prima Partners filed a Motion to Amend Complaint. ECF No. 20. The Court granted the motion in so far as it sought to add a claim for exemplary damages and factual allegations regarding additional leaks Prima Partners recently discovered. Order on Prima Partners' Motion to Amend 10, ECF No. 34. However, the Court denied Prima Partners' request to add a theory of damages based on the failure of a Section 1031 exchange. *Id.* Prima Partners filed a Second Amended Complaint in accordance with the Court's order on April 25, 2017. ECF No. 35.

In response, the Waterhouses filed an Amended Answer on May 16, 2017. ECF No. 39. Contemporaneously, the Waterhouses submitted the present Motion for Joinder and Leave to Amend Counterclaims. ECF No. 38. The Waterhouses initially sought to add claims for outrageous conduct causing severe emotional distress and prevailing party attorney fees, which are provided for in the parties' contract to buy and sell real estate. *Id.* at 3; Am. Answer & Countercls. ¶¶ 96–106, ECF No. 39. As part of their outrageous conduct claim, the Waterhouses sought to join James Butterworth,

Prima Partners' sole owner, as a Counter Defendant. Am. Answer & Countercls. ¶¶ 99–106. However, in their reply brief, the Waterhouses withdrew their request to add the outrageous conduct claim. Reply 1–2, ECF No. 45. The Waterhouses did not withdraw their request to add a counterclaim for prevailing party attorney fees.

Prima Partners opposes the Waterhouses' motion to amend on the basis that an amendment is improper pursuant to Federal Rules of Civil Procedure 15(a) and 16(b). Prima Partners' Resp. to Mot. to Amend, ECF No. 41. Specifically, Prima Partners contends the claim for prevailing party attorney fees is untimely. *Id.* at 2–4. Although the Waterhouses argue a separate claim for attorney fees is unnecessary under Colorado law, they claim that adding it out of "an abundance of caution" will not prejudice Prima Partners. Mot. to Amend 5.

ANALYSIS

Because the Waterhouses withdrew their proposed outrageous conduct claim, *see* Reply 1–2, the Court must analyze only whether an amendment is proper to add a cause of action for prevailing party attorney fees. The Court will first analyze whether the Waterhouses show good cause for an amendment of the Scheduling Order to add this claim. Because the Court does not find good cause, the Court need not determine whether an amendment is proper pursuant to Rule 15(a).

This Court set March 17, 2017 as the deadline for joinder of parties and amendment of pleadings. Scheduling Order 10, ECF No. 19. The Court has not extended this deadline.[1]

[1] On March 17, 2017, the Waterhouses filed a Motion to Amend the Scheduling Order. ECF No. 21. The Waterhouses sought to extend the deadline for joinder of parties and amendment of pleadings to give them time to depose individuals and determine whether to add them as parties to this case. *Id.* at ¶ 32. The Court denied the Waterhouses' motion without prejudice. ECF No. 24. Until the Waterhouses conducted the depositions, "the Court [could not] . . . determine whether Defendants have obtained new information through discovery that constitutes good cause for amendment of the Scheduling Order." ECF No. 24. The Waterhouses did not file a subsequent motion to amend the Scheduling Order, and the present motion does not contend that an amendment is proper because of information learned during the depositions.

Therefore, granting the Waterhouses' motion would necessitate an amendment of the Scheduling Order under Rule 16(b), which requires that the Waterhouses show good cause. Fed. R. Civ. P. 16(b)(4); *Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1205 n.4 (10th Cir. 2006) ("This Circuit adopted a similar interpretation of Rule 16(b)'s 'good cause' requirement in the context of counterclaims asserted after the scheduling order deadline." (citing *SIL-FLO, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1518–19 (10th Cir. 1990))).

In order to show good cause under Rule 16(b)(4), the Waterhouses "must provide an adequate explanation for any delay" in meeting the Scheduling Order's deadline. *Minter*, 451 F.3d at 1205 n.4. If the Waterhouses "knew of the underlying conduct but simply failed to raise [the] claims," good cause does not exist. *Gorsuch, Ltd., B.C. v. Wells Fargo Nat. Bank Ass'n*, 771 F.3d 1230, 1240 (10th Cir. 2014). "Rule 16 erects a more stringent standard [than Rule 15(a)], requiring some persuasive reason as to why the amendment could not have been effected within the time frame established by the court." *Colo. Visionary Acad. v. Medtronic, Inc.*, 194 F.R.D. 684, 687 (D. Colo. 2000).

However, rigid adherence to the Scheduling Order is not advisable. *SIL-FLO, Inc.*, 917 F.2d at 1519. A failure to seek amendment within the deadline may be excused due to oversight, inadvertence, or excusable neglect. *Id.* Additionally, "[t]he fact that a party first learns through discovery of information which may lead to amendment of deadlines set forth in the Scheduling Order constitutes good cause." *Riggs v. Johnson*, No. 09-cv-01226-WYD-KLM, 2010 WL 1957110, at *3 (D. Colo. Apr. 27, 2010), *adopted by* 2010 WL 1957099 (D. Colo. May 17, 2010).

Here, the Court holds that good cause does not exist for an amendment of the Scheduling Order's deadline for joinder of parties and amendment of pleadings. Critically, the Waterhouses knew of the conduct giving rise to their proposed counterclaim at the time they filed their original

answer and counterclaim. The claim for prevailing party attorney fees is based solely on a provision in the parties' contract to buy and sell real estate. Am. Answer & Countercls. ¶ 109 ("Pursuant to Section 22 of the Contract, the Court 'shall award to the prevailing party all reasonable costs and expenses, including attorney fees.'"). Therefore, the Waterhouses likely knew of their ability to seek attorney fees in any subsequent litigation at the time they entered into the contract. At the latest, the Waterhouses learned of the provision when Prima Partners filed its original Complaint seeking attorney fees based on the same contractual clause. *See* Compl. ¶¶ 39–42, ECF No. 4. Therefore, the Waterhouses "knew of the underlying conduct but simply failed to raise [the] claims." *Gorsuch, Ltd., B.C.*, 771 F.3d at 1240. Moreover, because the Waterhouses have not provided any reason, let alone a persuasive one, "as to why the amendment could not have been effected within the time frame established by the court," good cause does not exist. *Colo. Visionary Acad.*, 194 F.R.D. at 687. Accordingly, the Court denies the Waterhouses' motion to amend to the extent it seeks to add a claim for prevailing party attorney fees.

The Court notes that the Waterhouses are not likely to suffer prejudice because of the denial of their motion. As the Waterhouses acknowledge in their motion and reply brief, Colorado law likely does not require a party to state a separate claim for attorney fees when seeking the fees as a result of a contractual provision. *See Coe v. Crady Davis Corp.*, 60 P.3d 794, 795 (Colo. App. 2002) (holding that the defendant, who did not assert a counterclaim for attorney fees, did not waive its right to recover fees under the contract, because the "[d]efendant plainly requested attorney fees in its answer . . . ."). Because the Waterhouses plainly assert a request for prevailing party attorney fees in their answer, ECF No. 39, at 17, their failure to assert a separate claim for fees likely does not prohibit them from seeking fees in the event they successfully litigate this case.

Lastly, Prima Partners requests its fees in defending the Waterhouses' motion pursuant to

Colo. Rev. Stat. § 13-17-101. Prima Partners' Resp. to Mot. to Amend 6. Section 13-17-101 gives a trial court discretion to award attorney fees "if it is determined that the bringing or defense of an action has been 'substantially frivolous, substantially groundless, or substantially vexatious.'" *Double Oak Constr., LLC v. Cornerstone Dev. Intern., LLC*, 97 P.3d 140, 150 (Colo. App. 2003) (quoting *Bunnett v. Smallwood*, 793 P.2d 157, 162 (Colo. 1990)). " A claim or defense is frivolous if the proponent can present no rational argument based on the evidence or the law to support it." *Id.* at 151. Here, the Court does not find that the Waterhouses could present no rational argument in favor of their outrageous conduct claim. Indeed, Prima Partners implicitly concedes as much by failing to file a motion to dismiss the Waterhouses' counterclaim for attorney fees based on frivolous litigation. If the Waterhouses could not present any rational argument in favor of the notion that Prima Partners' lawsuit lacks substantial justification, it would be reasonable to assume that Prima Partners would seek to dismiss the Waterhouses' first claim for relief, which also requires that Prima Partners' claims lack substantial justification. Accordingly, the Court refuses to award Prima Partners its fees in defending this motion.

CONCLUSION

In sum, because the Waterhouses withdrew their request to plead an outrageous conduct claim, the Court denies their motion without prejudice to the extent it seeks to include such a claim. Additionally, the Court does not find good cause for an extension of the deadline for joinder of parties and amendment of pleadings. Because the Waterhouses have failed to show good cause, the Court need not analyze whether amendment of the counterclaims is proper pursuant to Rule 15(a). Accordingly, the Waterhouses' Motion for Joinder and Leave to File Amended Answer and Counterclaim [filed May 16, 2017; ECF No. 38] is **denied in part and denied without prejudice in part**. The Court strikes the second and third claims from the Waterhouses' Amended Answer and

Counterclaims.

Dated at Denver, Colorado, this 25th day of July, 2017.

BY THE COURT:

Michael E. Hegarty
United States Magistrate Judge