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

MARÍA ELENA MARTÍNEZ, Individually and as Personal Representative of the Estate of SANTOS ROQUE ROCHA, Plaintiff,	)	
v.	)	C.A. No. N10C-04-209 ASB
E.I. DUPONT DE NEMOURS AND CO., INC., Defendant.	)	

Submitted: September 18, 2012
Decided: September 21, 2012

UPON PLAINTIFF'S MOTION TO AMEND THE COMPLAINT
DENIED

On this 21st day of September, 2012, it appears to the Court that:

1. Plaintiff María Elena Martínez's filed a Motion for Leave to Amend the Complaint (the "Motion to Amend") on September 13, 2012. Martínez filed a complaint against E.I. DuPont de Nemours ("DuPont") on April 23, 2010 alleging her husband died as a result of exposure to asbestos while working for a DuPont subsidiary in Argentina. DuPont responded by filing its Motion to Dismiss on July 23, 2010. The Court ordered additional briefing on one of the issues raised in the Motion to Dismiss, specifically, whether Argentine law recognizes the theory of "direct participant liability"

by a parent company in the affairs of an indirect subsidiary. Briefing was provided to the Court over a year ago, on September 7, 2011.

2. In their briefs, the parties provided conflicting expert testimony regarding direct participant liability under Argentine law. Initially, the Court considered hiring an independent court-appointed expert, but after objection from Plaintiff's counsel regarding the Court's initial choice, the Court eventually decided to hold a hearing to take testimony from the parties' experts in order to assess the reliability of their differing opinions. A hearing was held on September 10, 2012. Written supplemental arguments are due on September 21, 2012.

3. Only three days after the hearing, while the Motion to Dismiss was pending, Plaintiff filed a Motion to Amend the Complaint to add causes of action for conspiracy and violation of an Argentine statute.[1] DuPont responded opposing Plaintiff's Motion to Amend.

[1] The Court also notes that Plaintiff's counsel scheduled the motion on a Special Master's routine asbestos motions calendar, apparently attempting to circumvent a decision by this Judge, who is intimately familiar with the procedural history of this case. Once this Court became aware of this Motion to Amend, it removed the Motion from the routine asbestos motions calendar because it already had under advisement a motion to dismiss the very complaint that Plaintiff seeks to amend. While Plaintiff's counsel objected by letter to the Court removing the Motion to Amend from the Special Master's calendar and insisted that he followed "normal" procedure, his action in filing the Motion to Amend only three days after a full day hearing on the Motion to Dismiss that same complaint was **abnormal** so as to render normal procedures unworkable.

4. Plaintiff moves to amend the complaint to "further clarify and elucidate the causes of action made against [DuPont.]"[2] The conspiracy count seeks to allege DuPont is liable for its actions in working with its indirect subsidiary, which employed Plaintiff. The Court heard the expert testimony on the theory of direct participant liability, a theory which Plaintiff alleged in the April 2010 complaint allows this Court to hold DuPont directly liable for the acts of its indirect subsidiary. The Court views the requested amendment to add a conspiracy count as an attempt to assert yet another alternative theory to direct participant liability, so as to provide a third basis to hold DuPont directly liable for the acts of its indirect subsidiary.

5. The second cause of action Plaintiff attempts to add in her Motion to Amend alleges a violation of the 1973 Foreign Investment Act of Argentina (hereinafter the "Act"). The Court heard testimony about the Act at the hearing on direct participant liability. DuPont's expert explained the Act and its history in Argentina as a part of the basis for his conclusion that Argentina does not recognize the theory of direct participant liability. The Act was repealed in 1976 because it allowed for parent corporations to be

[2] Pl.'s Mot. Am. 1. This is the only basis Plaintiff provides in support of the Motion to Amend. The Motion does not cite the applicable legal standard, Court Rule, or case law supporting the requested amendments.

held liable for the acts of subsidiaries (piercing the corporate veil), and it stymied foreign investment in Argentina. Plaintiff contends the Act was in effect during the time her husband worked for a DuPont subsidiary and she is now entitled to apply its provisions in this Court.

6. DuPont opposes the Motion to Amend because if this Court was to grant that Motion, it would suffer substantial prejudice as a result of another round of extensive briefing, another round of expert affidavits, and another hearing on Argentine law. This would cause DuPont to incur significant additional costs and greatly delay resolution of the pending Motion to Dismiss.

7. Motions for Leave to Amend Pleadings are governed by Superior Court Rule 15. That Rule requires that leave to amend should be freely given when justice requires. Notwithstanding the Rule's intended liberal application, denial of a Motion to Amend is permitted when there is undue delay, bad faith, or dilatory motive by the movant.[3] "[J]ustice may not require leave to be given where the moving party has been inexcusably careless or where such motion is untimely."[4] Delay alone does not require denial of a motion to amend. However, if unnecessary delay is coupled with either improper motive or undue prejudice, denial of the motion is

[3] *E.g.*, *Hess v. Carmine*, 396 A.2d 173, 177 (Del. Super. 1978).
[4] *Marro v. Gomez*, 1996 WL 453311, at *5 (Del. Super. May 31, 1996).

warranted.[5] Where a movant has no valid explanation for his delay, and the facts upon which the proposed amendments are based were known long in advance of the motion, it is entirely proper for the Court, in its discretion, to deny the motion.[6]

8. The circumstances surrounding the timing of the filing of the instant Motion to Amend, and Plaintiff's inexcusable delay in filing it, demand that the Motion be denied. Plaintiff alleges no new facts giving rise to the claim for conspiracy and this Court concludes that Plaintiff should have brought that claim far earlier in this litigation.

9. Plaintiff's delay in filing the count that alleges a violation of the Act until after the hearing on the Motion to Dismiss, is also inexcusable. DuPont's expert, Professor Keith S. Rosen, specifically set forth the history and effect of the Act in his declaration, which was filed in this civil action over fifteen months ago, on June 7, 2011. Plaintiff has retained her own experts on Argentine law who could have provided the same history and effect of the Act before the original complaint was filed. Over two years ago, Plaintiff's counsel also represented that the complaint was "very carefully"

[5] *See Fisher v. United Tech. Corp.*, 1984 WL 8252, at *4 (Del. Ch. Oct. 10, 1984).
[6] *H&H Poultry Co., Inc. v. Whaley*, 408 A.2d 289, 291 (Del. 1979) (amendment not permitted three years after filing of the complaint where movant had knowledge of claim sought to be added long before filing the motion to amend).

drafted to allege "a theory that [Plaintiff] is comfortable [with]."[7] Plaintiff's delay in asserting causes of action which were available, and of which Plaintiff's counsel should have been aware, simply cannot be countenanced at this stage of the proceedings.

10. Delay alone does not end this inquiry. The Court must also consider whether the delay would cause undue prejudice. In this case, the parties have submitted over one hundred pages of substantive briefing regarding Defendant's Motion to Dismiss the original complaint. Now, with the finish line in sight, Plaintiff is attempting to move the goal posts. All briefing until now was based upon the allegations of the original complaint. To change Plaintiff's theories of liability at this juncture would require substantial additional briefing and would place a tremendous burden on this Court, after it has already spent an extensive amount of time preparing to decide DuPont's Motion.

11. Interestingly, the Court of Chancery's Rules deal with the exact situation that is currently before this Court. Unsurprisingly, Chancery's Rule does not allow an amendment to a pleading at this stage. Chancery Rule 15 provides that a party wishing to respond to a motion to dismiss by amending its pleading must file a motion to amend the pleading before the time in

[7] Hearing Transcript 79:10, 80:23-81:3, June 24, 2010 (attached to DuPont's Opposition to Plaintiff's Motion to Amend as Exhibit A).

which that party is required to file its answering brief in response to the motion to dismiss.[8] This rule effectively establishes that prejudice will result if a party attempts to amend a pleading after the parties have forged ahead in arguments on a motion to dismiss. The rule also eliminates the potential for unnecessary and/or duplicative work by the Court in preparing to decide a motion to dismiss on the original complaint and subsequently having to test the sufficiency of an entirely different complaint.

12. Although Superior Court Civil Rule 15 requires that leave be freely given to amend pleadings, it does not require DuPont and this Court to suffer the unfair, unjust, and prejudicial effects caused by Plaintiff's counsel's inexcusable delay in filing the Motion to Amend. For all of the foregoing reasons, Plaintiff's Motion to Amend is **DENIED** with prejudice.

IT IS SO ORDERED.

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PEGGY L. ABLEMAN, JUDGE

Original to Prothonotary
cc: Counsel via File & Serve

[8] Ct. Ch. R. 15(aaa) (emphasis added).