

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

KINGSBURG APPLE PACKERS, INC., et al.,)	Case No.: 1:09-cv-00901 AWI JLT
Plaintiffs,)	ORDER GRANTING PELTON’S MOTION FOR LEAVE TO AMEND ANSWER
v.)	(Doc. 265)
BALLANTINE PRODUCE CO., INC, et al.,)	ORDER GRANTING BANK OF THE WEST’S MOTION FOR LEAVE TO AMEND ANSWER
Defendants.)	(Doc. 269)
<hr/>		
AND RELATED CROSS-CLAIMS)	
<hr/>		

Third Party Defendants John D. Pelton and John D. Pelton & Associates, Inc. (collectively, “Pelton”) seeks to amend leave to amend the Answer filed to the Third Party Complaint, to add additional affirmative defenses. (Doc. 265). Likewise, Third Party Defendant Bank of the West (“the Bank”) seeks to amend its Answer to the Third Party Complaint to add affirmative defenses. (Doc. 269). Ballantine Produce Co., Inc. (“Ballantine”) has opposed both motions. (Docs. 273-76).

On March 5, 2012, the Court heard argument regarding the motions. For the following reasons, Pelton’s and the Bank’s motions to amend their answers are **GRANTED**.

I. BACKGROUND

On August 12, 2009, Ballantine, Virgil Rasmussen, David Albertson, Eric Albertson, Jerry DiBudo, and Babijuice Corporation of California filed a “Third Party Complaint” against Pelton and the Bank. (Doc. 97). In the Third Party Complaint, the parties raised claims for equitable

1 indemnity, contribution, and tort of another. *Id.* The Bank filed its Answer on September 11, 2009.
2 (Doc. 107), and Pelton filed an Answer on February 19, 2010 (Doc. 152).

3 In October 2010, after completing several sessions of mediation, Ballantine, Albertson, the
4 Bank and Pelton settled a related case in Fresno County Superior Court. (Doc. 265-2 at 2)
5 Ballantine and Albertson agreed to release The Bank and Pelton from all pending claims. *Id.* The
6 settlement agreement contained a release provision, pursuant to Cal. Civil Code § 1542 purporting
7 to release all claims “arising out of or related to the Action.” *Id.* at 11. Likewise, the agreement
8 indicated that any disputes relating to its enforcement would be resolved through binding
9 arbitration. *Id.* at 13.

10 In November 2011, DiBuduo and Pelton settled a different though related, action in Fresno
11 Superior Court. (Doc. 265-2 at 2) In this settlement, DiBuduo agreed to release all claims against
12 Pelton. *Id.* Pelton asserts that DiBuduo has expressed his intention to release all claims against the
13 Bank also. *Id.* at 3. This agreement too included a “mutual release” provision according to Cal.
14 Civil Code § 1542 and purported to “cover all Claims arising out of or related to the matters
15 described herein, whether known or unknown, suspected or unsuspected, or matured or contingent.”
16 *Id.* at 17.

17 The Bank and Pelton now seek to amend their Answers to add defenses that they claim had
18 not yet arisen at the time they were filed. The Bank’s proposed amended answer adds the doctrines
19 of estoppel, waiver and release”as defenses as well as alleging that the third parties are barred based
20 upon the Court’s determination of the good faith settlement. (Doc 269-2 at 33, 36) As to release,
21 the Bank seeks to allege that the third party claims are barred due to the settlement of a related
22 matter. *Id.* As to the second new defense, the Bank seeks to argue that the determination of the
23 good faith settlement between the Bank and Plaintiffs and Interveners, bars the third party claims.
24 *Id.*

25 Pelton seeks to add four defenses to his answer. (Doc. 265-2 at 26-27) Pelton seeks to allege
26 that the third parties are barred from asserting their claims based upon the doctrines of estoppel, res
27 judicata waiver and compromise and release. *Id.*

28 ///

1 **II. LEGAL STANDARDS**

2 Under Rule 15 of the Federal Rules of Civil Procedure, a party may amend a pleading once
3 as a matter of course within 21 days of service. “In all other cases, a party may amend its pleading
4 only with the opposing party’s written consent or the court’s leave.” Fed. R. Civ. P. 15(a)(2).
5 Although leave to amend should “freely given when justice so requires,” *id.*, granting or denying
6 leave to amend a complaint is in the discretion of the Court. *Swanson v. United States Forest*
7 *Service*, 87 F.3d 339, 343 (9th Cir. 1996). “In exercising this discretion, a court must be guided by
8 the underlying purpose of Rule 15 to facilitate decision on the merits, rather than on the pleadings or
9 technicalities.” *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981). Leave to amend a
10 pleading should not be granted where “amendment would cause prejudice to the opposing party, is
11 sought in bad faith, is futile, or creates undue delay.” *Madeja v. Olympic Packers*, 310 F.3d 628,
12 636 (9th Cir. 2002) (citing *Yakima Indian Nation v. Wash. Dep’t of Revenue*, 176 F.3d 1241, 1246
13 (9th Cir. 1999)).

14 **III. DISCUSSION AND ANALYSIS**

15 As an initial matter, the Bank and Pelton seek leave to amend pursuant to Rule 15. (Doc.
16 265-1 at 3; Doc. 269 at 3). However, Ballantine asserts the motions are governed by Rule 16, which
17 requires a showing of good cause for amendment. (Doc. 274 at 2; Doc. 276 at 2).

18 The Ninth Circuit explained that when a scheduling order has imposed a deadline for
19 pleading amendments, and a party seeks amendment after the deadline, good cause must be
20 demonstrated under Rule 16. *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000)
21 (citing *Johnson v. Mammoth Recreations*, 975 F.2d 604, 607-09 (9th Cir. 1992)); *see also* Fed. R.
22 Civ. P. 16(b)(4) (“A schedule may be modified only for good cause and with the judge’s consent.”).
23 However, when the scheduling order does not set a deadline for amendment, Rule 16’s good cause
24 standard does not apply. *See, e.g., Santa Clara Valley Water Dist. v. Olin Corp.*, 2009 U.S. Dist.
25 LEXIS 23816, at *12 (N.D. Cal. March 13, 2009) (“Because the court’s case scheduling orders
26 imposed no deadline for amending the pleadings, [the party] is *not* required to show good cause for
27 its desire to amend”). In this case, the Court entered its Scheduling Order on September 23, 2012,
28 but did not set forth a pleading amendment deadline. (*See* Doc. 226). Because a deadline was not

1 set forth in the scheduling order, the standards of Rule 15 govern the motions, and the good cause
2 requirement by Rule 16 is inapplicable.

3 Under Rule 15(a), there are several factors a court may consider in deciding whether to grant
4 leave to amend a pleading: (1) whether there have been prior amendments, (2) undue delay, (3) bad
5 faith, (4) futility of amendment, and (5) prejudice to the opposing party. *Foman v. Davis*, 371 U.S.
6 178, 182 (1962); *Loehr v. Ventura County Cmty. Coll. Dist.*, 743 F.2d 1310, 1319 (9th Cir. 1984).
7 These factors are not of equal weight; prejudice has long been held to be the most crucial factor in
8 determining whether to grant leave to amend. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d
9 1048, 1052 (9th Cir. 2003) (“As this circuit and others have held, it is the consideration of prejudice
10 to the opposing party that carries the greatest weight”); *Jackson v. Bank of Hawaii*, 902 F.2d 1385,
11 1387 (9th Cir. 1990); *Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir. 1973).

12 **A. Prior amendments**

13 The Court’s discretion to deny an amendment is “particularly broad” where a pleading has
14 been amended previously. *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990); *Fidelity*
15 *Fin. Corp. v. Fed. Home Loan Bank*, 79 F.3d 1432, 1438 (9th Cir. 1986). The Bank and Pelton
16 have not previously amended their answers in this action. Therefore, this factor does not weigh
17 against amendment.

18 **B. Undue delay**

19 By itself, undue delay is insufficient to prevent the Court from granting leave to amend
20 pleadings. *Howey*, 482 F.2d at 1191; *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir.
21 1986). However, in combination with other factors, delay may be sufficient to deny amendment.
22 *See Hurn v. Ret. Fund Trust of Plumbing*, 648 F.2d 1252, 1254 (9th Cir. 1981) (finding a delay of
23 two years, “while not alone enough to support denial, is nevertheless relevant”). Evaluating undue
24 delay, the Court considers “whether the moving party knew or should have known the facts and
25 theories raised by the amendment in the original pleading.” *Jackson*, 902 F.2d at 1388; *see also*
26 *Eminence Capital*, 316 F.3d at 1052. In addition, the Court should examine whether “permitting an
27 amendment would . . . produce an undue delay in the litigation.” *Id.* at 1387.

28

1 Here, Pelton and the Bank assert that the defenses they seek to add, had not yet arisen when
2 their answers were filed, but rather arose after the parties entered in a settlement agreement with
3 Ballantine on October 16, 2010. (Doc. 265-1 at 4; Doc. 265-1 at 4). On the other hand, Ballantine
4 argues “there is no reasonable explanation” why Pelton waited “more than 15 months to file the
5 present motion after the Settlement agreement giving rise to the proposed amendment occurred . . .”
6 (Doc. 276 at 2), and that the Bank failed to demonstrate due diligence in bringing its motion (Doc.
7 274 at 4). In reply, the Bank explained that it, mistakenly, believed the matter had been dismissed
8 after the settlement conference based upon an inquiry with the Court.¹ (Doc. 279 at 2). However,
9 “when out of an abundance of caution, counsel checked a second time . . . it was discovered that this
10 matter was still pending.” *Id.* at 2.

11 Significantly, as the Bank and Pelton note, the affirmative defenses had not yet arisen when
12 their answers were filed, and the parties could not have “known the facts and theories raised by the
13 amendment.” *See Jackson*, 902 F.2d at 1388. Rather, the affirmative defenses of res judicata,
14 waiver, estoppel and compromise and release (Doc. 265-1 at 6; Doc. 269-2, Exh. 4) arose after the
15 original answers were filed.² Therefore, this factor does not weigh against amendment.

16 **C. Bad faith**

17 In opposing the motions, Ballantine does not allege Pelton or the Bank have acted in bad
18 faith. (*See* Doc. 274; Doc. 276). Further, review of the information presented by the parties does
19 not demonstrate the Bank or Pelton seek leave to amend their answers in bad faith. Therefore, this
20 factor does not weigh against amendment.

21 **D. Futility of amendment**

22 “Futility of amendment can, by itself, justify the denial of a motion for leave to amend.”
23 *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995); *see also Miller v. Rykoff-Sexton*, 845 F.2d
24 209, 214 (9th Cir. 1988) (“A motion for leave to amend may be denied if it appears to be futile or

25
26 ¹ The Bank was dismissed as a defendant in the underlying action on September 29, 2011. (Doc. 261).

27 ² On the other hand, as to the defenses of estoppel and waiver, the Bank had already included these as defenses in
28 their original answer. Their amendment seeks to add additional factual detail related to these pre-existing defenses. (Doc.
269-1 at 33)

1 legally insufficient”). A motion for leave to amend is futile if it can be defeated on a motion for
2 summary judgment. *Gabrielson v. Montgomery Ward & Co.*, 785 F.2d 762, 766 (9th Cir. 1986).

3 The Bank argues the proposed amendments are not futile, but rather “the added affirmative
4 defenses are likely to be case dispositive if an arbitrator, or the Court, determines the prior settlement
5 agreement and release and the Court’s prior order determining that the settlement between the Bank
6 and the Plaintiffs and Intervenors was in good fath have released or barred all claims . . .” (Doc.
7 269-1 at 5). Likewise, Pelton asserts that the affirmative defenses may be dispositive if the
8 settlement agreements and releases have released all claims. (Doc. 265-1 at 5). Thus, the Bank and
9 Pelton argue that if the claims are barred, Ballantine is estopped from pursuing the action. Doc. 265-
10 1 at 5; Doc. 269-1 at 5). Because it does not appear amendment to the answers is futile, or that the
11 amendments could be defeated on a dispositive motion, this factor does not weigh against
12 amendment.

13 **E. Prejudice to the opposing party**

14 The most critical factor in determining whether to grant leave to amend is prejudice to the
15 opposing party. *Eminence Capital*, 316 F.3d at 1052 (“Prejudice is the touchstone of the inquiry
16 under rule 15(a)”) (internal quotes omitted). The burden of showing prejudice is on the party
17 opposing an amendment. *DCD Programs*, 833 F.2d at 187; *Beeck v. Aquaslide ‘N’ Dive Corp.*, 562
18 F.2d 537, 540 (9th Cir. 1977). Prejudice must be substantial to justify denial of leave to amend.
19 *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990). There is a
20 presumption under Rule 15(a) in favor of granting leave to amend where prejudice is not shown.
21 *Eminence Capital*, 316 F.3d at 1052.

22 Ballantine argues prejudice would result if the motions to amend are granted. (Doc. 274 at
23 4; Doc. 276 at 4-5). According to Ballantine,

24 In the present case it is anticipated if the amendment is allowed, Bank will proceed to
25 file a Motion for Summary Judgment/Summary Adjudication of the new added
26 affirmative defense that the Settlement Agreement in the State Action included the
27 claims remaining in this Federal case even though there is no reference to any of the
remaining Federal claims in the Settlement Agreement. This will require Ballantine to
have the opportunity to perform discovery on this new affirmative defense.

28 (Doc. 274 at 4; Doc. 276 at 4). At the hearing, Ballantine clarified that discovery would be needed to

1 determine the intentions of the parties upon the making of the settlement agreement.

2 Notably, just before the instant motion was filed, the Court held a status conference on another
3 issue. (Doc. 263) At that time, the Court learned that the Bank and Pelton intended to file the current
4 motions and the Court and counsel discussed how the case should proceed. Though not inviting
5 motions for summary judgment or conceding that one should be filed, counsel for Ballantine agreed that
6 the pretrial and trial dates should be vacated to allow the filing of dispositive motions. (Doc. 268) As
7 a result, the Court vacated all pending dates including the pretrial conference and the trial. *Id.* Thus,
8 there is no pressure of impending dates that would prevent the discovery that Ballantine seeks.

9 On the other hand, herewith, the Court issues an order granting the motion to remand the matter
10 to arbitration to determine whether this federal court action was encompassed in the settlement of a
11 related state court action. The Court anticipates that in that process, the rules of the arbitration may
12 permit discovery into the very issues that Ballantine believes would be necessary to address the newly
13 added defenses.³ Therefore, because Ballantine has not met its burden to demonstrate prejudice if leave
14 to amend the answers is granted, this factor does not weigh against amendment.

15 **IV. CONCLUSION AND ORDER**

16 Based upon the foregoing, the factors set forth by the Ninth Circuit weigh in favor of
17 allowing Pelton and the Bank to amend their answers and assert additional affirmative defenses.
18 *See Madeja*, 310 F.3d at 636. Notably, Ballantine failed to demonstrate the amendment would
19 cause undue prejudice. Therefore, the Court is acting within its discretion in granting the motions
20 to amend. *See Swanson*, 87 F.3d at 343.

21 Accordingly, **IT IS HEREBY ORDERED:**

- 22 1. Pelton's motion to file an amended answer (Doc. 265) is **GRANTED**; and
23 2. Bank of the West's motion to file an amended answer (Doc. 269) is **GRANTED**.

24 IT IS SO ORDERED.

25 Dated: March 5, 2012

26 /s/ Jennifer L. Thurston
27 UNITED STATES MAGISTRATE JUDGE

28 ³If the rules of the arbitration do not allow it and if this action is not resolved in arbitration, the Court will permit limited discovery on the newly added defenses.