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

KATHLEEN SEIFERT,)	
)	2:08-cv-0998-GEB-KJM
Plaintiff,)	
)	
v.)	<u>ORDER DENYING PLAINTIFF'S</u>
)	<u>MOTION TO AMEND*</u>
RICHARD K. WERNER,)	
)	
Defendant.)	
_____)	

Plaintiff moves for leave to amend her Complaint under Federal Rule of Civil Procedure ("Rule") 15(a)(2). Defendant opposes the motion. For the reasons stated below, the motion is DENIED.

I. Legal Standard

Rule 15(a)(2) prescribes that "[t]he court should freely give leave when justice so requires." "This [leave] policy is 'to be applied with extreme liberality.'" Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1051 (9th Cir. 2003) (citations omitted). "Four factors are commonly used to determine the propriety of a motion for leave to amend. These are: bad faith, undue delay, prejudice to the opposing party, and futility of amendment." DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987). "Delay alone is insufficient to justify denial of leave to amend; the party opposing amendment must also show that the

* This matter is deemed suitable for decision without oral argument. E.D. Cal. R. 230(g).

1 amendment sought is futile, in bad faith or will cause undue prejudice
2 to the opposing party." Jones v. Bates, 127 F.3d 839, 847 n.8 (9th Cir.
3 1997). "The party opposing amendment bears the burden of showing
4 prejudice." DCD Programs, 833 F.2d at 187.

5 **II. Factual and Procedural Background**

6 Plaintiff sues Defendant for legal malpractice. Defendant
7 previously represented Plaintiff in an action filed under the Federal
8 Tort Claims Act ("FTCA action"), from October 2, 2002 to March 10, 2006.
9 (Compl. 2:4-5.) Plaintiff and Defendant entered into a Contingency Fee
10 Contract (the "Contract") concerning the FTCA action which allowed
11 Defendant to charge Plaintiff up to forty percent of any recovery. (Mot.
12 to Amend Compl. ("Mot") Ex. 1.) The Contract required the parties to
13 arbitrate any dispute. Id. Ex. 3. The District Court entered an order in
14 the FTCA action on March 10, 2006, which allowed Defendant to withdraw
15 as Plaintiff's attorney due to counsel's disabling medical condition.
16 (Opp'n to Mot. to Amend Compl. ("Opp'n") 1:27-2:2.)

17 Plaintiff filed the instant legal malpractice action against
18 Defendant on May 7, 2008, following which the Magistrate Judge ordered
19 the parties to arbitration in an order filed September 21, 2009. (Order,
20 September 21, 2009, ECF No. 98.) Plaintiff alleges in her Complaint that
21 the parties contracted "to arbitrate any malpractice dispute." (Compl.
22 2:14-18.) "[O]n April 13, 2010, an arbitration hearing was held before
23 arbitrator [John] Ball on the statute of limitations issue." (Order,
24 June 4, 2010, ECF No. 112 at 2:20-21.) Following the hearing, Plaintiff
25 sought to have the Magistrate Judge "return [the] case from
26 arbitration." Id. 1:16-22. Plaintiff argued "the contingency fee
27 agreement is illegal under 28 U.S.C. § 2678 because it allows for more
28 than twenty-five percent of the award or settlement be paid to her

1 attorney as a contingency fee. Plaintiff contends that because the
2 contract is illegal, the arbitration clause is unenforceable." Id. 2:24-
3 3:1. The Magistrate Judge denied Plaintiff's motion to return the case
4 from arbitration stating:

5 Plaintiff has known since the very outset of this case
6 about the provisions of the fee contract. At every turn,
7 plaintiff has invoked arbitration and has already had a
8 hearing before the arbitrator on a potentially
dispositive issue. Under these circumstances, plaintiff
has forfeited any right to now contend the arbitration
clause is unenforceable.

9 (Order, June 4, 2010, ECF No. 112 at 3:22-25.) Plaintiff now seeks to
10 amend her Complaint to remove all references to arbitration and to add
11 a fraud claim, based on the illegal contingency fee. (Mot. Ex. 7; Reply
12 to Def.'s Opp'n ("Reply") 3:1-3.)

13 **III. Discussion**

14 Plaintiff argues that without leave to amend she will be
15 consigned to futile arbitration where any award will be void by law.
16 (Mot. 4:8-9.) Defendant responds Plaintiff should not be allowed to
17 amend her Complaint because of Plaintiff's bad faith, undue delay, the
18 futility of the amendment, and the prejudice Defendant will suffer if
19 amendment is allowed. (Opp'n 5:15-16.)

20 **Bad Faith and Undue Delay**

21 Defendant argues Plaintiff has given no reason for her delay
22 in seeking to amend her Complaint, which was filed over two and a half
23 years ago. (Opp'n 6:9-10.) Defendant also argues Plaintiff previously
24 agreed to the legality of the Contract and sought arbitration. Id. 6:10-
25 7:7. Defendant argues Plaintiff manifests bad faith by requesting
26 amendment now, after she acquiesced to the legality of the Contract. Id.
27 7:5-7. Defendant also argues Plaintiff unduly delayed by waiting over
28

1 two and a half years, and after the case was heard by the arbitrator, to
2 seek to amend her Complaint. Id. 7:11-15.

3 Plaintiff responds she can raise the illegality of the
4 Contract at any time because “[a] provision in a contract void as
5 against public policy can be raised at any time.” (Reply 4:18-26,
6 quoting Klein v. Asgrow Seed Co., 246 Cal. App. 2d 87, 101 (1966).)
7 Plaintiff also argues the matter has not been heard on the merits by the
8 arbitrator. (Reply 5:1-2.)

9 “[L]ate amendments to assert new theories are not reviewed
10 favorably when the facts and the theory have been known to the party
11 seeking amendment since the inception of the cause of action.” Acri v.
12 International Assoc. of Machinists & Aerospace Workers, 781 F.2d 1393,
13 1398 (9th Cir. 1986). Plaintiff waited until after an arbitrator heard
14 and took under submission a statute of limitations matter, which the
15 parties agreed to arbitrate, before she attempted to amend her
16 Complaint. The terms of the Contract were known to Plaintiff since she
17 filed this legal malpractice action, which is evidenced by her Complaint
18 and the portions of the Contract attached thereto. Plaintiff has unduly
19 delayed in waiting over two years to amend her Complaint to add
20 allegations about which she knew or should have known when she drafted
21 her Complaint.

22 Plaintiff’s “delay of nearly two years, while not alone enough
23 to support denial, is nevertheless relevant. The new claims set forth in
24 the amended complaint would . . . greatly alter[] the nature of the
25 litigation and would . . . require[] defendant[] to . . . undertake[],
26 at a late hour, an entirely new course of defense . . . [Although], this
27 factor is not fatal to amendment, . . . it enters into the balance.”
28 Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir.

1 1990) (citations omitted). The delay factor weighs against granting
2 leave to amend.

3 **Prejudice to the Defendant**

4 Defendant also argues he will be prejudiced if Plaintiff is
5 allowed to litigate an issue she expressly conceded in her Complaint.
6 (Opp'n 7:22-23.) Plaintiff does not address this argument.

7 Throughout the course of the litigation, Plaintiff conceded to
8 and relied on the legality of the Contract.

9 In the complaint, filed May 7, 2008, plaintiff asserted
10 the action was subject to arbitration and attached the
11 fee agreement containing the arbitration clause as an
12 exhibit. In a status report filed December 3, 2008,
13 counsel for plaintiff, Kenneth Pratt, stated he had full
14 authority from plaintiff to make all stipulations and
15 admissions and confirmed that the matter was subject to
16 arbitration. At the hearing on defendant's motion to
17 dismiss and status conference, held on December 10, 2008,
18 plaintiff's counsel again confirmed that the matter was
19 subject to arbitration and by order filed January 23,
20 2009, the court confirmed the parties' agreement that the
21 matter was subject to arbitration, ordered the federal
22 action stayed, and ordered the action to arbitration.

23 (Order, June 4, 2010, ECF No. 112 at 2:10-18.) Plaintiff consistently
24 sought to arbitrate this matter; the parties agreed the action was
25 subject to arbitration, selected an arbitrator, and commenced
26 arbitration. "Clearly the party opposing the amendment [will be]
27 prejudiced by permitting the [Plaintiff] now to litigate an issue [she]
28 had expressly conceded [over two] years ago." Howey v. U.S., 481 F.2d
1187, 1191 (9th Cir. 1973) (explaining the Ninth Circuit's holding in
Komie v. Buehler Corp., 449 F.2d 644 (9th Cir. 1971)).

Since Plaintiff unduly delayed and Defendant would be
prejudiced if Plaintiff was allowed to amend her Complaint, it is
evident that the balance of the factors do not favor granting Plaintiff
leave to amend, and there is no need to address whether amendment would
be futile.

1 **IV. Conclusion**

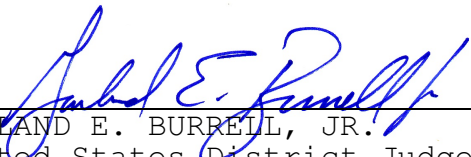
2 For the stated reasons, Plaintiff's motion for leave to file
3 an amended complaint is DENIED.

4 The Complaint remains the operative pleading and therefore,
5 this action is ordered back to arbitration. The parties previously
6 selected John Ball as a neutral arbitrator and they are ordered to
7 proceed to arbitration in accordance with the Contract. The parties
8 shall advise the Court when arbitration is completed.

9 This action is STAYED. No responsive pleadings need be filed
10 in the federal court action; rather, they will be filed in the
11 arbitration.

12 The Clerk of Court shall serve a courtesy copy of this order
13 on the arbitrator, John Ball at the following address: 4401 Crestwood
14 Way, Sacramento, CA 95822.

15 Dated: October 13, 2010

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19 GARLAND E. BURRELL, JR.
20 United States District Judge
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