

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

PRUCO LIFE INSURANCE
COMPANY, an Arizona Corporation,

Plaintiff,

v.

CALIFORNIA ENERGY
DEVELOPMENT, INC., a dissolved
California Corporation, TIMOTHY
BRYSON, an individual, MICKEY
NICHOLSON, an individual, JOHN J.
WALSH, an individual, EDWARD
SPOONER, trustee of the LIVING
TRUST OF EDWARD SPOONER, LIFE
ADVANCE, LLC, a Nevada corporation,
DOES 1-10,,

Defendants.

Case No.: 18cv2280 DMS (AHG)

**ORDER GRANTING MICKEY
NICHOLSON AND JASON
VOELKER'S MOTION FOR LEAVE
TO FILE A JOINT AMENDED
ANSWER AND COMPLAINT**

AND ALL RELATED CROSS CLAIMS
AND THIRD PARTY CLAIMS.

1 This case comes before the Court on Mickey Nicholson and Jason Voelker’s
2 motion for leave to file a Joint Amended Answer and Complaint.¹ Life Advance, LLC
3 filed an opposition to the motion, and Nicholson and Voelker filed a reply. For the
4 reasons discussed below, the motion is granted.

5 **I.**

6 **BACKGROUND**

7 This case involves a dispute over the ownership and beneficiary of an insurance
8 policy issued by Pruco Life Insurance Company on the life of James D. Roberts. Since
9 the filing of the case, Mr. Roberts has died, and Pruco has submitted the proceeds of the
10 policy (\$1,001,086.53) into the Registry of the Court.

11 Three parties remain in the case, Life Advance, LLC, Mickey Nicholson and Jason
12 Voelker, and all claim to have an interest in the policy proceeds. Life Advance currently
13 has pending claims for declaratory relief and interference with contract against Nicholson
14 and Voelker, and Nicholson and Voelker currently have pending claims against Life
15 Advance for declaratory relief, conversion, negligence, inducing breach of contract,
16 intentional interference with prospective economic advantage and negligent interference
17 with prospective economic advantage.

18 **II.**

19 **DISCUSSION**

20 In the present motion, Nicholson and Voelker, who are both proceeding pro se,
21 request leave to file a joint amended answer and complaint against Life Advance to add
22 claims for rescission, constructive trust and equitable lien.² Federal Rule of Civil
23 Procedure 15 provides that leave to amend a party’s pleading “shall be freely given when
24 _____

25
26 ¹ Life Advance’s motions for summary judgment against Nicholson and Voelker on its
27 cross- and third-party claims is also pending before the Court. The Court will address those
28 motions in a separate order.

² It appears Nicholson and Voelker have already filed the proposed amendment, (see ECF
No. 100), but without the Court’s permission.

1 justice so requires.” Fed. R. Civ. P. 15(a). In accordance with this Rule, the Supreme
2 Court has stated,

3 in the absence of any apparent or declared reason -- such as undue delay, bad
4 faith or dilatory motive on the part of the movant, repeated failure to cure
5 deficiencies by amendments previously allowed, undue prejudice to the
6 opposing party by virtue of allowance of the amendment, futility of
7 amendment, etc. -- the leave sought should, as the rules require, be “freely
8 given.”

9 Foman v. Davis, 371 U.S. 178, 182 (1962). Of these factors, the Ninth Circuit has stated
10 “it is the consideration of prejudice to the opposing party that carries the greatest weight.”
11 Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003). The party
12 opposing the amendment bears the burden of showing prejudice. DCD Programs, Ltd. v.
13 Leighton, 833 F.2d 183, 186-87 (9th Cir. 1987). Absent prejudice, or a strong showing
14 of any of the remaining Foman factors, there exists a presumption under Rule 15(a) in
15 favor of granting leave to amend. Eminence Capital, 316 F.3d at 1052.

16 Here, Life Advance does not argue it would be prejudiced if leave to amend is
17 granted. Instead, it argues Nicholson and Voelker unduly delayed in filing the present
18 motion and are acting in bad faith, and that the proposed amendments are futile.³

19 “Undue delay” may be found in two circumstances. The first occurs when a
20 proposed amendment would cause an “undue delay” in the litigation. Stambanis v. Tbwa
21 Worldwide, Inc., No. 219CV3962ODWJEMX, 2020 WL 4060171, at *2 (C.D. Cal. July
22 20, 2020) (quoting Jackson v. Bank of Hawaii, 902 F.3d 1385, 1387 (9th Cir. 1990)). The

23
24 ³ Life Advance also argues the present motion was untimely filed and fails to comply with
25 Civil Local Rule 15.1(b). Life Advance is correct that the motion is untimely as the
26 deadline to file motions to amend the pleadings was May 31, 2020, but the present motion
27 was not filed until June 1, 2020. Life Advance is also correct that the motion fails to
28 comply with Civil Local Rule 15.1(b). Given Nicholson and Voelker’s pro se status, and
that the motion was filed only one day after the deadline, the Court declines to deny the
motion on these bases. Nicholson and Voelker are reminded, however, of their obligation
to comply with Court deadlines and the Local Rules notwithstanding their pro se status.

1 second arises when the moving party unduly delayed in requesting the amendment. *Id.*

2 Here, Life Advance does not argue that Nicholson and Voelker’s proposed
3 amendment would unduly delay the litigation. However, if the amendment were allowed,
4 delay would be likely. Under the current scheduling order, all fact discovery must be
5 completed by September 14, 2020, and it is unclear whether the parties could meet that
6 deadline. Extending that deadline could also necessitate an extension of all other dates,
7 and delay the ultimate resolution of this case, which has now been pending in this Court
8 for nearly two years.⁴ Accordingly, granting the present motion could cause an undue
9 delay in the litigation.

10 That delay is particularly undue here, where Nicholson and Voelker fail to explain
11 exactly when they learned of the facts underlying their proposed amendment. Although
12 Nicholson submitted a Declaration in which he states repeatedly that he has “now learned”
13 or “recently learned” of certain facts, (see Decl. of Mickey Nicholson in Supp. of Mot.
14 ¶¶16, 24), he failed to provide any specifics as to when he became aware of the
15 information underlying his proposed amendments. Nicholson also fails to explain why
16 he could not have discovered these facts earlier. Thus, the undue delay factor weighs
17 against allowing the amendment. Because undue delay, alone, “is insufficient to justify
18 denying a motion to amend[,]” *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708,
19 712–13 (9th Cir. 2001) (quoting *Bowles v. Reade*, 198 F.3d 752, 758 (9th Cir.1999)), the
20 Court proceeds to the other factors.

21 The next factor is bad faith, and here, Life Advance argues that Nicholson and
22 Voelker have thus far failed to provide any evidence to support their claims, which is
23 evidence of bad faith. However, the Court disagrees. Nicholson and Voelker have
24 provided evidence in the form of their own sworn testimony. Contrary to Life Advance’s
25

26
27 ⁴ It bears mention that the filing of this case was not the beginning of the dispute over the
28 subject Policy. That dispute began nearly two years before the filing of this case, thus
creating a further delay.

1 suggestion, there is no evidence of bad faith on the part of Nicholson or Voelker.
2 Accordingly, this factor weighs in favor of allowing the amendment.

3 The final factor at issue here, and the focus of Life Advance’s opposition, is futility.
4 Specifically, Life Advance argues there is no merit to the claims proposed in the
5 amendment, therefore the motion should be denied. “A proposed amendment is futile if
6 it could be defeated by a motion to dismiss or if plaintiff cannot prevail on the merits.”
7 *Cooper v. Premera Blue Cross*, No. C06-1466RSL, 2008 WL 324264, at *1 (W.D. Wash.
8 Feb. 5, 2008).

9 The first claim in Nicholson and Voelker’s proposed amendment is rescission. (See
10 ECF No. 152 ¶¶114-18.) Unfortunately, Nicholson and Voelker do not identify which
11 transaction(s) they are seeking to rescind. Regardless, they do not appear to be parties to
12 any of the alleged transactions concerning the chain of title for the Policy. Absent party
13 status, they have no right to rescind any of the alleged transactions. *Schauer v. Mandarin*
14 *Gems of Cal., Inc.*, 125 Cal. App. 4th 949, 959, 23 Cal. Rptr. 3d 233, 240 (2005) (stating
15 rescission rights limited to contracting parties).

16 The next claim in the proposed amendment is for a constructive trust. To prevail
17 on this claim, Nicholson and Voelker must satisfy the following three conditions: “(1)
18 the existence of a res (property or some interest in property); (2) the right of a complaining
19 party to that res; and (3) some wrongful acquisition or detention of the res by another
20 party who is not entitled to it.” *Communist Party v. 522 Valencia, Inc.*, 35 Cal. App. 4th
21 980, 990, 41 Cal. Rptr. 2d 618 (1995) (citations omitted). Life Advance argues there is
22 no evidence that it wrongfully acquired the Policy, which dooms this claim. However,
23 Nicholson and Voelker have alleged, and have maintained throughout this case, that Life
24 Advance is not the rightful owner or beneficiary of the Policy, and that it acquired the
25 Policy through wrongful means. Whether the evidence bears that out remains to be seen,
26 but based on the facts alleged, this proposed amendment is not futile.

27 The same can be said for the proposed claim for an equitable lien, which the Court
28 has already held may be a meritorious defense to certain of the claims in this case. (See

1 ECF No. 100) (granting John Walsh’s motion to set aside default). Thus, although the
2 rescission claim appears to be futile, Life Advance has not shown that the other two claims
3 in the proposed amendment meet that definition. Accordingly, this factor also weighs in
4 favor of allowing the amendment.

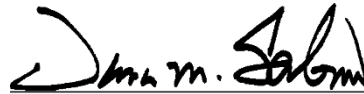
5 **III.**

6 **CONCLUSION AND ORDER**

7 Although Nicholson and Voelker delayed filing the present motion and there is a
8 possibility that allowing the proposed amendment will delay the case, undue delay, alone,
9 is not enough to deny the present motion. Because the other factors weigh in favor of
10 allowing the amendment, the Court grants the present motion for leave to amend.
11 Nicholson and Voelker’s Joint Amended Answer and Cross-Claims filed at ECF No. 152
12 is hereby accepted for filing.

13 **IT IS SO ORDERED.**

14 Dated: July 29, 2020

15 
16 Hon. Dana M. Sabraw
17 United States District Judge
18
19
20
21
22
23
24
25
26
27
28