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THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 1:10-CV-22236-ASG
District Ct. Judge: Alan S. Gold

Magistrate Judge: Chris M. McAliley

HOWARD ADELMAN and JUDITH SCLAWY-ADELMAN, as Co-Personal Representatives of THE ESTATE OF MICHAEL SCLAWY-ADELMAN,

Plaintiffs

vs.

BOY SCOUTS OF AMERICA, a foreign corporation, THE SOUTH FLORIDA COUNCIL, INC., BOY SCOUTS OF AMERICA, PLANTATION UNITED METHODIST CHURCH, HOWARD K. CROMPTON, individually, and ANDREW L. SCHMIDT, individually,

Defendants
_____/

PLANTATION UNITED METHODIST CHURCH'S MOTION FOR LEAVE TO AMEND AFFIRMATIVE DEFENSES TO PLAINTIFF'S AMENDED COMPLAINT AND INCORPORATED MEMORANDUM OF LAW

Defendant, PLANTATION UNITED METHODIST CHURCH, by and through the undersigned counsel, in accordance with the Federal Rules of Civil Procedure and Florida law, pursuant to Local Rules 7.1(a) and 15.1 of the United States District Court for the Southern District of Florida, Rule 15(a)(2) of the Federal Rules of Civil Procedure and the Order Establishing Pretrial Dates and Procedures, hereby moves for leave to amend its affirmative defenses to the Plaintiff's Amended Complaint, and in support thereof states as follows:

1. This is a wrongful death/negligence action stemming from an incident that occurred on May 9, 2009, when Michael Sclawy-Adelman allegedly died of a heat stroke while taking part in a hike through The Florida Trial in the Big Cypress National Park of the Florida Everglades.

2. Plaintiffs filed their Amended Complaint on August 3, 2010.

3. PLANTATION UNITED METHODIST CHURCH ("PUMC") filed its Answer and Affirmative Defenses to Plaintiffs' Amended Complaint on August 23, 2010.

4. PUMC pleaded as its third affirmative defense the following:

> Plaintiffs' damages herein were partially or totally caused by non-parties or persons over whom these Defendants had no dominion or control and, therefore, Defendants seek entitlement to the defenses and privileges set forth in Section 768.81(3) Florida Statutes, with respect to apportionment of fault principles. However, at this time, such non-parties or persons are unknown to these Defendants. Pursuant to Nash v. Wells Fargo Guard Service, Inc., 678 So.2d 1262 (Fla. 1996), these Defendants will seek amendment to identify such non-parties or persons as they become known and with due notice to Plaintiff.

5. PUMC now seeks leave to amend its affirmative defenses to specifically name a Fabre defendant, which may be contributorily negligent and at fault for some or all of Plaintiffs' alleged damages, to wit: the U.S. Department of the Interior National Park Service.

6. Because the Plaintiffs allege that using the park trail on May 9, 2009 was one of the ways Defendants were negligent, PUMC seeks only to revise its Third Affirmative Defense:

> Plaintiffs' damages herein were partially or totally caused by non-parties or persons over whom these Defendants had no dominion or control and, therefore, Defendants seek entitlement to the defenses and privileges set forth in Section 768.81(3) Florida Statutes, with respect to apportionment of fault principles. Specifically, Defendant affirmatively avers that any alleged damages were the result of negligence on the part of the U.S. Department of the Interior National Park Service (which processed a Backcountry Use Permit for the subject hike), and which was not under the care, custody or control of

> Defendant; and therefore, the Plaintiffs are unable to recover in whole or in part as against this Defendant. See Fabre v. Marin, 623 So.2d 1182 (Fla. 1993). Pursuant to Nash v. Wells Fargo Guard Service, Inc., 678 So.2d 1262 (Fla. 1996), this Defendant may seek amendment to identify other such non-parties or persons as they become known and with due notice to Plaintiff.

7. The U.S. Department of the Interior National Park Service processed a Backcountry Use Permit for the Troop to hike on the day in question. The Amended Complaint alleges that temperatures that day were around 100 degrees Fahrenheit. See Amended Complaint at ¶¶ 6-10. As the U.S. Department of the Interior National Park Service processes hiking permits for the subject trail, it is in the best position to determine if environmental factors on a given day pose a threat to hikers. The U.S. Department of the Interior National Park Service may be liable in whole or in part for permitting the group to hike on May 9, 2009 despite the alleged high temperatures. Therefore, The U.S. Department of the Interior National Park Service is an appropriate Fabre defendant.

8. Defendants will be severely prejudiced if the U.S. Department of the Interior National Park Service is not named as a Fabre defendant.

9. This request is made in good faith and does not prejudice the Plaintiffs in this matter.

10. In accordance with Local Rule 15.1 and 7.1, Federal Rule 15 and this Court's Order Establishing Pretrial Dates and Procedures, this Defendant has conferred with Plaintiff's counsel in an attempt to resolve this issue without court involvement, but was unable to resolve the issue.

MEMORANDUM OF LAW

Federal Rule of Civil Procedure 15 states in pertinent part: "[A] party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." F.R.C.P. 15(a)(2) (emphasis added).

The decision whether to grant leave to amend is committed to the sound discretion of the trial court. Best Canvas Products & Supplies, Inc. v. Ploof Truck Lines, Inc., 713 F.2d 618 (11th Cir.1983). However, " '[d]iscretion' may be a misleading term, for rule 15(a) severely restricts the judge's freedom, directing that leave to amend 'shall be freely given when justice so requires.' " Dussouy v. Gulf Coast Investment Corp., 660 F.2d 594, 597 (5th Cir.1981). This policy of Rule 15(a) in liberally permitting amendments to facilitate determination of claims on the merits circumscribes the exercise of the trial court's discretion; thus, "[u]nless there is a substantial reason to deny leave to amend, the discretion of the district court is not broad enough to permit denial." Id. at 598; Espey v. Wainwright, 734 F.2d 748, 759 (11th Cir. 1994).

Unless there is undue delay, bad faith, futility, a dilatory motive or prejudice to the opposing party, "the leave sought should, as the rules require, be 'freely given.'" Allapattah Services, Inc. v. Exxon Corp., 61 F.Supp.2d 1326, 1333 (S.D.Fla. 1999) (internal citations omitted).

In the case sub judice there is no reason to deny Defendants' Motion for Leave to Amend their Affirmative Defenses to add the U.S. Department of the Interior National Park Service as a Fabre defendant, which may be contributorily negligent. See F.R.C.P. 8(c); see also Tomlinson v. Landers, Slip Copy, 2009 WL 1456449 (M.D.Fla.) (granting leave to amend affirmative defenses to add specifically named Fabre defendants); Kay's Custom Drapes, Inc. v. Garrote, 920 So.2d 1168 (Fla. 3d DCA 2006) (holding that the trial court abused its discretion by denying defendant's motion for leave to amend to assert a Fabre defense).

Because the Plaintiffs alleged that use of the park trail on May 9, 2009 was an act of negligence, defendants have a good faith belief that the U.S. Department of the Interior National Park Service may be liable in part or in whole for Plaintiffs' alleged damages in this case for permitting the Troop to hike on the day in question. Plaintiff claims that conducting a hike in 100 degree Fahrenheit weather was a proximate cause of the death of Michael Sclawy-Adelman. The U.S. Department of the Interior National Park Service first processed the permit that gave the group permission to conduct the hike. As the U.S. Department of the Interior National Park Service processes hiking permits for the subject trail, it is in the best position to determine if environmental factors on a given day pose a threat to hikers. Therefore, processing the permit may be a negligent action that contributed to Plaintiffs' damages.

Moreover, Defendants have already asserted that third parties not under the control or custody of the Defendants may be liable for Plaintiffs' alleged damages. Thus, it can certainly be argued that Defendants are not even asserting a "new" affirmative defense; rather, Defendants are clarifying an existing one. As the third party contributory negligence defense has already been asserted (and as Plaintiff is already aware of the permit processed by the U.S. Department of the Interior National Park Service for the hike on the day in question) there is no prejudice to permitting this requested amendment. Conversely, Defendants would be prejudiced if leave to amend in this case was denied, since generally, " . . . when a party fails to raise an affirmative defense in the pleadings, that party waives its right to raise the issue at trial." Hassan v. U.S. Postal Service, 842 F.2d 260 (11th Cir. 1988).

WHEREFORE, Defendant, Plantation United Methodist Church, respectfully requests that this Honorable Court GRANT the attached proposed Order granting leave for Defendants to

file the attached proposed pleading (Exhibit A), and deem the same filed as of the date of the Court's Order, and for such other relief as this Court deems necessary and just.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was faxed and mailed this 3rd day of December, 2010 to: ALL COUNSEL OF RECORD.

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