EXHIBIT A

LEXSEE

KEVIN ARMANT VERSUS MICHAEL J. ASTRUE, COMMISSIONER OF SOCIAL SECURITY

CIVIL ACTION NO: 08-981 SECTION: "C"(2)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

2009 U.S. Dist. LEXIS 34472

April 21, 2009, Decided
April 22, 2009, Filed

CORE TERMS: request to reopen, amend, disability benefits, evidence submitted, substantial evidence, judicial review, criminal conduct, administrative record, new evidence, medical records, de novo, declaration, disability, insured, applicable law, constitutional right, false statements, material evidence, legal standards, equal protection, unfavorable, entitlement, proffered, revision, mandamus, futile

COUNSEL: [*1] Kevin Henry Armant, Plaintiff, Pro se, Marrero, LA.

For Social Security Administration, Michael J. Astrue, Commissioner, Defendant: Jason M. Bigelow, LEAD ATTORNEY, U. S. Attorney's Office (New Orleans), New Orleans, LA.

JUDGES: HELEN G. BERRIGAN, UNITED STATES DISTRICT JUDGE.

OPINION BY: HELEN G. BERRIGAN

OPINION

ORDER AND REASONS

The Court, after considering the petition, the record, the applicable law, the Magistrate Judge's Findings and Recommendation, and the plaintiff's objections to the Magistrate Judge's Report and Recommendation, hereby AFFIRMS IN PART AND REJECTS IN PART the Magistrate Judge's Findings and Recommendation for the following reasons. The Court also AFFIRMS the Magistrate Judge's Order denying plaintiff's motion to amend.

I. BACKGROUND

As summarized in the Magistrate Judge's Report and Recommendation:

> Plaintiff, Kevin H. Armant, proceeding pro se and in forma pauperis, seeks judicial review pursuant to Section 405(g) of the Social Security Act (the "Act") of an unfavorable decision of the Commissioner of the Social Security Administration (the "SSA"), dated January 20, 2006, denying plaintiff's claim for disability benefits ("DIB") under Title II of the Act. 42 U.S.C. §§ 405(g), 4232. Armant also [*2] brings a claim under 42 U.S.C. § 1983 that the Commissioner's denial of his request to reopen his application for DIB violated his constitutional right to due process. He further alleges that the Commissioner violated a criminal statute regarding the making of false statements. 18 U.S.C. § 1001. He asks the court to reverse the Commissioner's denial of his application and his request to reopen and to grant him

DIB. Record Doc. No. 1, Complaint. This matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b) and Local Rule 73.2E(B).

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> The following facts are established by the declaration under penalty of perjury of Patrick J. Herbst, Chief of Court Case Preparation and Review Branch IV of the Office of Appellate Operations, Of-

fice of Disability Adjudication and Review, SSA, attached as Exhibit A to defendant's motion to dismiss, and by copies of certain parts of the administrative record that are attached to Herbst's declaration as numbered exhibits. Defendant did not file the entire administrative record.

Armant was insured for DIB under the Act through December 31, 2001. On October 12, 2001, he filed an application for DIB. On March 28, 2003, an administrative [*3] law judge ("ALJ") denied his application, finding that plaintiff was not disabled at any time through the date of the decision and was not entitled to a period of DIB through the expiration date of his disability insured status. Defendant's Exh. 1. Armant did not appeal that decision.

On June 24, 2004, Armant protectively filed an application for DIB under Title II and for supplemental security income ("SSI") under Title XVI of the Act, alleging the same disability onset date of May 1, 1996 as he had alleged in his previous application for DIB only. Defendant's Exh. A, Herbst declaration P 3(d); Defendant's Exh. 6, at p. 1. . . .

Plaintiff avers in his complaint that he mailed a brief to the Commissioner on June 8, 2004, which was allegedly received on June 11, 2004, "requesting the readjudicating of my Oct. 2001 claim and submission of new and material evidence." He states that he submitted more evidence to the Commissioner on June 22, 2004 in support of his request to reopen the March 28, 2003 decision, which had denied his October 2001 application for DIB. In his complaint and his memorandum in opposition to the motion to dismiss, Armant argues that the Commissioner never adjudicated [*4] the "over 20 pieces of 'new and substantial material medical evidence'" that he submitted in June 2004.

Plaintiff's second DIB application was denied on August 27, 2004. Defendant's Exh. 4. On September 13, 2004, he requested a hearing before an ALJ. Defendant's Exh. 5. On December 21, 2005, his attorney filed a written request to reopen the March 28, 2003 decision, based on allegedly new and material evidence that was submitted with the request. Defendant's Exh. 6, at p. 1 of ALJ's decision.

After a hearing, the ALJ issued a decision unfavorable to plaintiff on January 20, 2006. Defendant's Exh. 6. The ALJ held that Armant was not eligible for SSI. He further held that, because Armant was last insured for DIB in December 2001, the only way for plaintiff to receive DIB was for the ALJ to set aside the prior, unappealed decision. However, the ALJ found that the evidence submitted with plaintiff's December 21, 2005 request to reopen was neither new nor material. Therefore, the ALJ held that the March 28, 2003 decision would not be reopened. He denied plaintiff's June 24, 2004 application for DIB based on res judicata.

. . .

None of the evidence filed by the Commissioner with the court specifically [*5] mentions that plaintiff submitted any new evidence in June 2004. Because the entire record was not filed, the court cannot determine exactly what exhibits were in the administrative record. The written denial of plaintiff's application dated August 27, 2004 says that it relied on three sets of medical records from George Murphy, M.D., K.E. Vogel, M.D., and the VA Hospital, which were received in July and August 2004. Defendant's Exh. 4, at p. 1. Plaintiff attached to his complaint a "List of Material Evidence Submitted to the SSA Supporting the Plaintiff's Claim for Disability Benefits," which includes medical records from Drs. Murphy and Vogel and the VA Hospital dated before August 2004. These might be the same records from those medical sources that plaintiff submitted in June 2004. See Record Doc. No. 1-3, "List of Material Evidence Submitted to the SSA Supporting the Plaintiff's Claim for Disability Benefits," at P 3 (Dr. Murphy); PP 7, 16 (Dr. Vogel); PP 1, 5, 8, 10-12, 14, 18, 20 (Veterans' Affairs).

The ALJ's January 20, 2006 decision states that plaintiff's attorney submitted two exhibits with his December 2005 written request to reopen the March 28, 2003 decision. Defendant's [*6] Exh. 6 at

> p. 1 (citing "a VA rating decision dated July 14, 2005 (Ex. B16F) along with a VA past medication list [Ex. B15F]"). The ALJ states that he reviewed "the existing medical records," and he specifically mentions a mental health review in November 2002 and a physical examination report dated December 2001. It is not clear whether those two reports were among those listed in plaintiff's "List of Material Evidence Submitted to the SSA Supporting the Plaintiff's Claim for Disability Benefits." See Record Doc. No. 1-3, at P 8, "1999-2002 Veteran Affairs Medical Centers Progress Notes - Dr. Brailey Ph.D."; P 9 "Dec. 2001 Social Security Administration Evaluation" by "state agency examiner;" P 10 "2001 Veterans' Affairs Medical Center from Dr. Dennard."

(Rec. Doc. 20 at 1-5)(emphasis added.)

II. LEGAL STANDARD AND ANALYSIS

1. Magistrate Judge's Finding and Recommendation

This Court reviews the Report and Recommendation of the Magistrate Judge de novo. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. Pro. 72(b). However, the function of this court on judicial review under 42 U.S.C. § 405(g) is limited to determining whether there is "substantial evidence" in the record, as a whole, to support the [*7] final decision of the Commissioner as trier of fact, and whether the Commissioner applied the appropriate legal standards in evaluating the evidence. *See* 42 U.S.C. § 405(g); *Brown v. Apfel*, 192 F.3d 492, 496 (5th Cir. 1999); *Martinez v. Chater*, 64 F.3d 172, 173 (5th Cir. 1995); *Carrier v. Sullivan*, 944 F.2d 243, 245 (5th Cir. 1991). If the Commissioner's findings are supported by substantial evidence they must be affirmed. *Martinez*, 64 F.3d at 173. "Substantial evidence" is that which is relevant and sufficient for a reasonable mind to accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971). It is more than a scintilla, but may be less than a preponderance. *Spellman v. Shalala*, 1 F.3d 357, 360 (5th Cir. 1993).

A district court may not try the issues de novo, reweigh the evidence, or substitute its own judgment for that of the Commissioner. *Ripley v. Chater*, 67 F.3d 552, 555 (5th Cir. 1995); *Spellman*, 1 F.3d at 360. The Commissioner is entitled to make any finding that is supported by substantial evidence, regardless of whether other conclusions are also permissible. *See Arkansas v. Oklahoma*, 503 U.S. 91, 113, 112 S.Ct. 1046, 117 L.Ed.2d 239 (1992). [*8] However, the district court must scrutinize the record in its entirety to determine the reasonableness of the decision reached and whether substantial evidence exists to support it. *Anthony v. Sullivan*, 954 F.2d 289, 295 (5th Cir. 1992).

Ordinarily, a decision not to reopen a claim is within the discretion of the Commissioner, and not subject to judicial review. *Califano v. Sanders*, 430 U.S. 99, 107-08, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977); *Colon v. Sec'y of HHS*, 877 F.2d 148, 152 (1st Cir. 1989). Where the denial of a request to reopen is challenged on constitutional grounds, however, the availability of judicial review is presumed. *Sanders*, 430 U.S. at 109.

In this matter, it is simply impossible to tell - based on the record available to this Court - whether or not the evidence provided by plaintiff in June 2004 or December 2005 was ever considered. Although true that "exhaustive point-by-point discussion" is not required, where the record is devoid of information as to what material was considered, "we, as a reviewing court, simply cannot tell whether her decision is based on substantial evidence or not." *Audler v. Astrue*, 501 F.3d 446, 448 (5th Cir. 2007)(*citing Cook v. Heckler*, 783 F.2d 1168, 1172 (4th Cir. 1986)).

More [*9] importantly, and even if the whole record had been submitted to this Court and the record showed that the 20 pieces of new evidence were submitted, the ALJ's decision still failed to identify whether or not the June 2004 and December 2005 evidence was immaterial. When a request for hearing is denied, the ALJ must a) list and describe the new evidence submitted and b) give a statement as "why any new evidence is not material and does not warrant revision of the final determination or decision made on the prior application." HALLEX I-2-4-40 (L), (M). "Failure to adhere to [an agency's own] regulations can constitute a denial of due process of law." *Arzanipour v. I.N.S.*, 866 F.2d 743, 746 (5th Cir. 1989).

The Court declines plaintiff's request to grant him entitlement to Title II Social Security Disability Benefits. Rather, the Court finds that in this instance, the proper measure is to remand this matter to the Social Security Administration for consideration of the additional evidence proffered by plaintiff to determine whether or not it is material and whether or not it warrants revision of the ALJ's decision. *See* 42 U.S.C. § 405(g); *see also Gray v. Barnhart*, 2004 U.S. Dist. LEXIS 2432, 2004 WL 332430 (D.Del. 2/5/2004) [*10] (*citing Moore v. Commissioner of the Social Security Administration*, 278 F.3d 920, 926 (9th Cir. 2002); *Hummel v. Heckler*, 736 F.2d 91, 93 (3rd Cir. 1984)).

Plaintiff also claims that the ALJ and the Appeals Council made false statements in their opinions and alleges criminal conduct in violation of 18 U.S.C. § 1001. Based on a review of the record, the Court agrees with the Magistrate Judge's finding that this allegation fails to state a claim upon which relief can be granted. Therefore, the Court affirms the Magistrate Judge's Findings and Recommendations as to the plaintiff's allegation of criminal conduct and this claim shall be dismissed with prejudice.

2. Magistrate Judge Order Denying Motion to Amend

In an abundance of caution, the Court also addresses the Magistrate Judge's Order denying plaintiff's motion to amend his complaint. Plaintiff seeks to amend his complaint to allege to "add a claim for a writ of mandamus and a Section 1983 claim that the Commissioner's decision violated plaintiff's constitutional right to equal protection based on his (unspecified) race." (Rec. Doc. 20 at 26). Plaintiff objected to the Magistrate Judge's Order denying his motion to amend in his Objections [*11] to the Magistrate Judge's Findings and Recommendation. (Rec. Doc. 21.) Accordingly, the Court construes plaintiff's objections as a Motion to Appeal the Magistrate Judge's Order.

A district court may only reverse a Magistrate Judge's ruling where the court finds the ruling to be "clearly erroneous or contrary to law." Fed. R. Civ. Pro. 72(a); *Castillo v. Frank*, 70 F.3d 382 (5th Cir. 1995). "This highly deferential standard requires the court to affirm the decision of the Magistrate Judge unless 'on the entire evidence [the court] is left with a definite and firm conviction that a mistake has been committed.'" *Benoit v. Nintendo of American*, 2001 U.S. Dist. LEXIS 20148, 2001 WL 1524510, *1 (E.D. La. 2001) (*citing United States v. United States Gypsum Co.*, 333 U.S. 364, 68 S. Ct. 525, 92 L. Ed. 746 (1948)). A motion to review is appropriate when a Magistrate Judge has obviously misapprehended a party's position, the facts, or the applicable law, or when the party produces new evidence that could not have been obtained through the exercise of due diligence." *Gaffney v. U.S. Dep't of Energy*, 2000 U.S. Dist. LEXIS 10881, 2000 WL 1036221, *2 (E.D. La. 2000). [1]

1 The Court notes that the plaintiff's amendment would be futile even under the more rigorous de novo standard of review, [*12] based on a full review of the record in this case.

The Court agrees with the Magistrate Judge's assessment that allowing an amendment would be futile. The plaintiff has not shown a clear right of entitlement to Title II Social Security Disability Benefits and therefore mandamus is not appropriate. Nor has plaintiff alleged sufficient facts to state a colorable claim of equal protection. Therefore, the Court affirms the Magistrate Judge's Order denying plaintiff's motion to amend his complaint.

II. CONCLUSION

IT IS ORDERED that this matter is hereby REMANDED to the Social Security Administration for a consideration of the additional evidence proffered by Kevin Armant.

IT IS FURTHER ORDERED that the Court hereby APPROVES the Magistrate Judge's Findings and Recommendation as to plaintiff's allegation of criminal conduct and ADOPTS those findings only as part of its opinion in this matter.

IT IS FURTHER ORDERED that the Magistrate Judge's Order denying plaintiff's motion to amend is AFFIRMED.

New Orleans, Louisiana, this 21st day of April, 2009.

/s/ Helen G. Berrigan

HELEN G. BERRIGAN

UNITED STATES DISTRICT JUDGE

United States District Court, E.D. Louisiana.
Evelina BARNES
v.
UNIVERSAL OGDEN SERVICES, INC.
No. Civ.A. 98-2591.

June 28, 1999.

DUVAL, J.

*1 Before the Court is an Objection to Magistrate's Findings on Defendant's Motion to Compel and for Sanctions filed by plaintiff Evelina Barnes ("Barnes"). For the reasons that follow, the Court affirms the Magistrate Judge's Order.

This matter is set for a pretrial conference on July 9, 1999 with trial to commence on July 26, 1999. Thus, the discovery deadline is June 26, 1999.

Defendants Universal Ogden Services, Inc. ("Universal") propounded its First Set of Interrogatories and Request for Production of Document to Barnes on January 29, 1999. Plaintiff did not respond by the March 4, 1999 deadline. On February 10, 1999, Universal filed a Notice of Deposition seeking to depose Barnes on April 7, 1999. Thus, in order for the deposition to be meaningful and complete, Universal sought to insure that all discovery would be answered by the time the deposition occurred. On March 30, 1999, by correspondence, Universal wrote to Barnes to remind her that neither discovery responses had been produced nor had Universal been told when to expect such responses. Universal informed plaintiff that if responses were not received by April 5, 1999, a Motion to Compel would be filed.

Indeed, as no responses were received by Universal, a Motion to Compel was filed asking the Court to order Barnes to answer Universal's written discovery request, including Interrogatories and Requests for Production of Documents, and to produce to Universal all responsive materials in Barnes' possession prior to the April 7, 1999 deposition. At this point in time, plaintiff was one month late under the rules to respond.

Magistrate Judge Jay Wilkinson held a telephone conference on April 6, 1999 at 10:30 a.m. in an attempt to resolve this dispute. Plaintiff was ordered at that time to:

provide defendant with all written discovery responses and responsive documents that are currently available no later than April 6, 1999 at 5:00 p.m. for use in the deposition of plaintiff scheduled to begin tomorrow. Plaintiff must provide defendant with complete responses to all outstanding written discovery, together with all responsive documents, no later than April 16, 1999. Although plaintiff's deposition will begin tomorrow, it will be adjourned without being completed, due to plaintiff's failure to provide timely written discovery responses to date, and will be continued on a mutually convenient date to be selected by counsel after plaintiff's complete written discovery response and document production are provided to defendant.

(Doc.11) (emphasis added). Barnes failed to comply with this order. A smattering of documents were delivered, and no written discovery responses were provided prior to Barnes' deposition.

During the deposition, Barnes stated that she had a tape recording of a conversation that she claims to have had with a Universal dispatcher. Universal attempted to depose Barnes about the contents of the tape, and Barnes' counsel terminated the the deposition. The tape had never been produced.

*2 On April 15, 1999, a second Motion to Compel was filed seeking production of the tapes and sanctions for plaintiff's failure to comply with the first order by failing to disclose the existence of and to produce the tape regarding her work-related conversations.

Not until April 16, 1999, were Barnes' Written Responses to Defendant's First Discovery Request served on Universal. No documents or other items were produced. Her responses did not even discuss

the existence of the tape mentioned by her in her deposition. Indeed, the response to a specific requests for existing tapes of tape recording, a stock response of"Plaintiff has produced all such documents via courier by Alanna Arnole, Esquire to Defendant's office on April 6, 1999, prior to Plaintiff's deposition." Indeed, no tape had been produced at thattime.

Barnes contends that the tape had been misplaced and was not found until April 22, 1999, and that the tape was to be copied and mailed to Universal's counsel by Friday, April 23, 1999 or Monday April 26, 1999. Barnes contended that the production of the tape should moot the motion to compel with which opinion Universal did not agree. Indeed, the tape was not actually received until April 28, 1999.

Universal filed a supplemental memorandum on April 23, 1999, opining to the Court that (1) plaintiff had failed to address in her response to the Request for Production of Documents whether there was only the one tape extant and whether she had in her possession a notebook to which she had alluded in her deposition. Thus, the discovery responses were still not complete.

The magistrate judge granted the second motion to compel ordering:

No later than May 17, 1999, plaintiff must provide defendant with written responses to defendant's requests for production of documents that clearly state that plaintiff has now produced all requested materials or that no other requested materials are in her possession, custody or control and must produce all responsive materials for defendant's inspection and related activities. Because plaintiff's delay necessitated the filing of a motion to compel, plaintiff must pay defendant $200.00. Fed.R. Civ. P. 37(a)(4)(A).

(Doc. 20).

Pursuant to L.R. 74.1, a district court reviews a magistrate judge's order upon motion by a party. When reviewing a nondispositive order, such as this, the Court may modify or set aside any portion of the order found to be clearly erroneous or contrary to law. Fed.R.Civ.P. 72(a); *Jacobs v. Northern King Shipping Co., Ltd.*, 1998 WL 19638 (E.D.La. Jan. 16, 1998)*citing* *Philips Medical Sys. v. Bruetman*, 982 F.2d 211, 214 (7th Cir.1992). Having reviewed the pleadings, memoranda and the relevant facts, the Court cannot find any error in Magistrate Judge Wilkinson's order. There was a pattern of late responses and dilatory tactics which necessitated and fully supports the sanction rendered under Fed. R. 37(a)(4)(A). Counsel's actions required the filing of a second motion and as such the Court finds that the the assessment of $200 constitutes the "reasonable expenses incurred in making the motion" as provided under the rule. Accordingly,

*3 IT IS ORDERED that the objection is OVERRULED and the motion is DENIED.

E.D.La.,1999.
Barnes v. Universal Ogden Services, Inc.
Not Reported in F.Supp.2d, 1999 WL 438475 (E.D.La.)

END OF DOCUMENT

LEXSEE 2007 U.S. DIST. LEXIS 28236

CHRISTOPHER BUCKENBERGER v. WALTER REED, ET AL.

CIVIL ACTION NO. 06-7393 SECTION "F"

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

2007 U.S. Dist. LEXIS 28236

April 17, 2007, Decided
April 17, 2007, Filed

SUBSEQUENT HISTORY: Claim dismissed by, in part *Buckenberger v. Reed, 2007 U.S. Dist. LEXIS 36888 (E.D. La., May 18, 2007)*

COUNSEL: [*1] Christopher Buckenberger, Plaintiff, Pro se, Covington, LA.

JUDGES: MARTIN L. C. FELDMAN, UNITED STATES DISTRICT JUDGE.

OPINION BY: MARTIN L. C. FELDMAN

OPINION

ORDER AND REASONS

Introduction

On September 26, 2006, the petitioner, Christopher Buckenburger, filed this civil-rights complaint (the *Reed* case) against several defendants pursuant to *42 U.S.C. § 1983*, alleging, among other things, police brutality, malicious prosecution, and violations of the *Fourth Amendment to the U.S. Constitution.* [1] He filed a second *§ 1983* civil-rights complaint (the *Strain* case), which was allotted to Judge Lance Africk, who dismissed the *Strain* case with prejudice on October 19, 2006.

1 Under the prison mailbox rule, see *Houston v. Lack, 487 U.S. 266, 270-72, 108 S. Ct. 2379, 101 L. Ed. 2d 245 (1988)*, Buckenberger filed the complaint on September 26, 2006. The clerk processed the complaint on October 11, 2006.

The petitioner, a state pretrial detainee, claims that 1) he never received an order of the magistrate judge [*2] and, consequently, was not apprised of a deadline contained therein; 2) the magistrate judge erred in refusing service on the defendants in this case; 3) the magistrate judge improperly denied his request for copies of court-filed documents; 4) the magistrate judge improperly refused to consolidate this *§ 1983* case with the *Strain* case he was prosecuting; and 5) the magistrate judge improperly dismissed the *Strain* case after refusing consolidation. For his first claim, the petitioner appears to request that the magistrate judge's order be reopened so that he may be granted an extension from the time of the elapsed deadline; for his other claims, he appears to request that the magistrate judge's determinations be reversed. [2]

2 Buckenberger's prayers for relief, like his objections in general, are not a model of clarity. Nevertheless, the Court is satisfied that this is the relief sought by Buckenberger.

I.

A. Review of a Magistrate Judge's Rulings on Nondispositive Matters

28 U.S.C. § 636(b)(1)(A) [*3] provides that a district judge may designate a magistrate judge to hear and determine certain pretrial matters pending before the court. A district judge may modify or set aside any portion of the magistrate judge's order on a nondispositive matter "where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." *§ 636(b)(1)(A). Federal Rule of Civil Procedure 72(a)* provides that a party has ten days to object after being served with a copy of the magistrate judge's order.

B. Reopening an Order

Federal Rule of Civil Procedure 60(b) provides that "[o]n motion and upon such terms as are just, the court may relieve a party . . . from final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment." A *Rule 60* motion must be made within a "reasonable time," no later than one year after the judgment was entered. *Fed. R. Civ. P. 60(b)*. In determining whether a *Rule 60* motion should be granted, [*4] a court must balance the benefits of finality and the demands of justice. *See Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 402 (5th Cir. Unit A Jan. 1981)*. While the decision to grant or withhold relief under *Rule 60(b)* lies within the sound discretion of the trial court, *Helsing v. CSX Transp., Inc., 396 F.3d 632, 638 (5th Cir. 2005)*, "the desirability of orderliness and predictability in the judicial process speaks for caution in reopening judgments." *Fackelman v. Bell, 564 F.2d 734, 736 (5th Cir. 1977)*.

II.

A.

Construing Buckenberger's petition liberally, [3] the Court has determined that his first claim seeks relief under to *Rule 60(b)* from a magistrate judge's order because he did not receive the order and was, therefore, unaware of the deadline contained in the order. [4] Magistrate Judge Knowles, on November 13, 2006, granted Buckenberger's motion to file a memorandum to further present facts in his *§ 1983* case; the magistrate judge set a December 22, 2006 deadline. [5] Buckenberger claims he never received the order.

3 *See Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)*.

[*5]

4 The Court does not treat Buckenberger's motion as one to reconsider the order because more than 10 days have passed since the magistrate judge issued his order. Consequently, any motion to reconsider would be untimely. *See Fed. R. Civ. P. 59(e)*.

5 This was the second extension offered to Buckenberger to amend his complaint. *See* Dkt. Nos. 17, 18.

Aside from the bare assertion of nonreceipt, Buckenberger points to a submission he sent the Court to substantiate his claim. On November 13, 2006, the Court received from Buckenberger a motion for copies of court documents, which the magistrate judge denied on November 20, 2006. [6] Buckenberger maintains that the magistrate judge misinterpreted his motion as one requesting multiple court documents relating to his *§ 1983* case. Buckenberger now claims he was simply inquiring into the status of his request for an extension to amend his complaint and was requesting a copy of any order relating thereto. [7] Although the timing of the motions [8] lends some credence to Buckenberger's post hoc explanation, [*6] the plain language of his proposed order, which he attached to his motion for copies, is clearly inconsistent with his claim. Buckenberger's proposed order reads in part: "Court further orders Office of Clerk to furnish plaintiff 1 copy of *all* submissions except initial 7393 [presumably, the complaint]." Buckenberger clearly was not inquiring into whether the magistrate judge had ruled on his motion for an extension. [9]

6 In Buckenberger's petition, he erroneously maintains that the magistrate judge denied his motion for copies on January 18, 2007, but Buckenberger never moved in this case for copies in December 2006 or January 2007.

7 Buckenberger erroneously claims that he sought a copy of a Report and Recommendation. It appears, rather, that Buckenberger is referring to the magistrate judge's grant-of-extension order.

8 The magistrate judge granted the motion to extend deadlines to amend the complaint on November 13, 2006, and the Court received Buckenberger's motion for copies the same day (which was later denied by the magistrate judge on November 20, 2006).

9 Moreover, Buckenberger has previously sought copies of documents, see Dkt. Nos. 13, 14, further undermining his claim that this request should not be interpreted based on its plain language.

[*7] But even if the Court were to believe Buckenberger's rather implausible explanation of events, he suffered no prejudice as a result of his alleged nonreceipt of the magistrate judge's order. The magistrate judge established a December 22, 2006 deadline for the amended complaint and, quite coincidentally, Buckenberger filed a 36-page memorandum on December 22, 2006 extensively detailing his relatively simple case. Then, on December 28, 2006 (after the deadline), the Court also allowed Buckenberger to file a six-page supplemental memorandum. Thus, Buckenberger has had an adequate opportunity to present his claims, and he has taken advantage of this opportunity. [10]

10 In addition to the two memoranda Buckenberger filed in December 2006, Buckenberger filed an affidavit, two notices (one with exhibits), and two requests in January 2007. *See* Dkt. Nos. 27-31.

Because the Court finds Buckenberger was not mistaken or surprised pursuant to *Rule 60(b)* and because there is no other reason justifying relief from the [*8] operation of the order, this claim must fail.

B.

Buckenberger's remaining claims challenge the propriety of decisions by the magistrate judge and are properly guided by *Federal Rule of Civil Procedure 72*.

Buckenberger challenges the magistrate judge's March 7, 2007 denial of his request for service on the defendants. Buckenberger, however, prematurely objected to the magistrate judge's order. He filed his objection on February 22, 2007, and the clerk processed it on March 2, 2007--five days before the magistrate judge decided the issue. The plain language of *Rule 72(a)* states that "[w]ithin 10 days *after* being served a copy of the magistrate judge's order, a party may serve and *file objections* to the order . . . ." (emphasis added). Buckenberger has not objected to the magistrate judge's order within ten days after being served with the order; because the ten-day period has now expired, any objection Buckenberger may now make would be untimely. [11] *See Fed. R. Civ. P. 72(a)*.

> 11 This is not a situation where equitable tolling of *Rule 72(a)*'s ten-day window is appropriate. There are no factors indicating that Buckenberger was the victim of an inequitable misfortune or a fundamental miscarriage of justice; rather, Buckenberger *chose* to object to a magistrate judge's order that had not yet issued. *See Gregg v. Linder, No. Civ.A. 02-1429, 2004 U.S. Dist. LEXIS 3518, 2004 WL 421966, at *4 (E.D. La. Mar. 8, 2004)* (Vance, J.) (unpublished) ("The Court has been able to find one circumstance only during which the ten-day period does not begin to run upon entry of the magistrate judge's ruling [on a nondispositive matter]. [That circumstance is a] motion to reconsider a magistrate judge's ruling, filed with the magistrate judge . . . ."). Although the Court has discretion to allow more time to a party to object to a magistrate judge's ruling, "'the *mechanism* by which that discretion is to be invoked and exercised'" is subject to *Federal Rule of Civil Procedure 6(b)(2)*, requiring a party to request an extension and to demonstrate excusable neglect. *Id.* (quoting *Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 895-96, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990)*). Buckenberger has made no demonstration of excusable neglect.

[*9] But even if this Court were to consider Buckenberger's objection, it would find the claim meritless. The magistrate judge's order correctly noted as follows:

> Plaintiff . . . filed with this Court *two* motions asking that he be allowed to file a written memorandum in support of his claims prior to the issuance of a Report and Recommendation in this matter. Those motions were granted. Plaintiff filed his memorandum on December 22, 2006. In addition, he has continued to bombard the Court with additional documents, including supplemental memoranda and notices on December 28, 2006, and January 9, 17, and 24, 2007 . . . . [T]he screening of this case has been delayed due to the extensions requested *by plaintiff*, as well as *his* continued supplemental filings for this Court's consideration. [12]

> 12 Order, Mag. J. Knowles, Mar. 6, 2007, Dkt. No. 32 (emphasis in original).

The magistrate judge's finding of facts and his conclusions are certainly not "clearly erroneous" or "contrary to law." As [*10] discussed above, the screening of Buckenberger's case has been delayed by his persistent requests for extensions and by his excessive court filings.

Buckenberger next challenges the magistrate judge's November 8, 2006 order, claiming that the magistrate judge improperly denied his request for copies of documents (which previously, as noted above, he argued was not a request for documents, but was a status request regarding his extension-of-time motion). But more than ten days have passed since Buckenberger was served a copy of that order, and thus his objection is untimely. *See Fed. R. Civ. P. 72(a)*.

Buckenberger also challenges the magistrate judge's decision to refuse consolidation of the *Reed* case with the *Strain* case. But the magistrate judge issued the order on November 8, 2006, and consequently, because more than ten days have elapsed, Buckenberger's objection is similarly untimely. [13] *See Fed. R. Civ. P. 72(a)*. Moreover, the Court notes that the issue is now moot. Judge Lance Africk dismissed the *Strain* case on October 19, 2006.

> 13 A magistrate judge's order denying a motion to consolidate is a nondispositive matter, see *Wright v. City of Peoria, No. 05-1063, 2006 U.S. Dist. LEXIS 2157, 2006 WL 90067, at *3 (C.D.*

Ill. Jan. 13, 2006) (unpublished), and thus objections to this order must be filed within the ten-day window established by *Rule 72(a)*.

[*11] Finally, Buckenberger claims that the "magistrate forced [the] plaintiff to use [a] 2nd *[§] 1983* application unnecessarily to re-raise [his] probable cause claim [and] improperly dismissed 5670 [*i.e.,* the *Strain* case]." The "force" to which Buckenberger refers to is unclear and unsupported in the record. The magistrate judge never issued an order in the *Reed* case that required Buckenberger to file an additional *§ 1983* petition.

For the foregoing reasons, the petitioner's motion is DENIED. [14]

14 As for Buckenberger's claim that the magistrate judge improperly dismissed the *Strain* action, Judge Africk adopted the Report and Recommendation of the magistrate judge and dismissed that case with prejudice in October 2006. Thus, Buckenberger's remedy is now with the court of appeals, if he filed a timely notice of appeal.

New Orleans, Louisiana, April 17, 2007.

MARTIN L. C. FELDMAN

UNITED STATES DISTRICT JUDGE

LEXSEE

Positive
As of: May 18, 2009

SHIRLEY FULFORD, et al. versus TRANSPORT SERVICE CO., et al.

CIVIL ACTION NO. 03-2472 c/w 03-2636, SECTION "C" (4)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

2004 U.S. Dist. LEXIS 5855

April 6, 2004, Decided
April 6, 2004, Filed; April 6, 2004, Entered

SUBSEQUENT HISTORY: Class certification denied by Fulford v. Transp. Serv. Co., 2004 U.S. Dist. LEXIS 9955 (E.D. La., May 27, 2004)

PRIOR HISTORY: Fulford v. Transp. Serv. Co., 2004 U.S. Dist. LEXIS 3048 (E.D. La., Feb. 18, 2004)

DISPOSITION: Magistrate's ruling affirmed. Plaintiff's motions to appeal magistrate's orders denied. Defendant's motion to dismiss appeal by plaintiff, denied.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff class representatives filed separate motions to appeal the magistrate judge's order denying the class's motion to amend the complaint to add a party as a defendant in the class's action against the company, arising from a chemical spill.

OVERVIEW: The representatives filed separate class action arising from a chemical spill. The actions were consolidated and the matter was removed to the federal court based on diversity. The representatives sought to amend their complaints to add the driver of the truck as another defendant. The magistrate judge denied their request and the representatives appealed. The court held that because the driver was acting in the course and scope of his employment with the company, the company would be liable if the driver were found liable. Accordingly, the driver's participation in the action was unnecessary. Given the lack of necessity to join the driver as a defendant, and the dilatory nature of the representatives' motion to amend, the representatives' apparent motive was to defeat diversity. Thus, the representatives were not entitled to amend their complaint.

OUTCOME: The court affirmed the judgment of the magistrate judge and denied plaintiffs' motions.

CORE TERMS: amend, class action, class certification, joinder, non-diverse, join, putative, nondispositive, scheduling, dilatory, pretrial, defeat, diversity jurisdiction, occurrence, normally, deadline, removal, abused, asking, tank truck, tractor-trailer, spill

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview
Civil Procedure > Class Actions > Certification
Civil Procedure > Pretrial Matters > Conferences > Scheduling Conferences
[HN1]Where a scheduling order has not been entered, the dictates of Fed. R. Civ. P. 16(b), requiring a showing of good cause to amend the pleadings beyond the deadline proscribed in the scheduling order, normally do not apply. They are superseded by the Fed. R. Civ. P. 23 mandate that a motion for class certification be filed promptly. However, the mandate of U.S. Dist. Ct. E.D. La. R. 16.1E(a) and the Civil Justice Expense and Delay Reduction Plan, which proscribes that amendments to pleadings are due no later than 30 days after the prelimi-

nary conference, does provide a guideline for the reasonableness of a delay.

Civil Procedure > Judicial Officers > Magistrates > Pretrial Orders
Civil Procedure > Pretrial Matters > General Overview
Governments > Courts > Judges
[HN2]Under Fed. R. Civ. P. 72(a), a party may serve and file objections to a magistrate judge's orders regarding nondispositive pretrial matters if the objection is filed within 10 days after service of the order. Federal law affords a magistrate judge broad discretion in the resolution of nondispositive pretrial disputes. Fed. R. Civ. P. 72(a); 28 U.S.C.S. § 636(b)(1)(A). Thus, a district court reverses a magistrate judge's ruling on nondispositive pretrial matters only where the court finds such a ruling to be clearly erroneous or contrary to law. Fed. R. Civ. P. 72(a); 28 U.S.C.S. § 636(b)(1)(A). A motion to review is appropriate when a magistrate judge has obviously misapprehended a party's position, the facts, or the applicable law, or when the party produces new evidence that could not have been obtained through the exercise of due diligence. A party is not entitled to raise new theories or arguments in its objections that the party did not present before a magistrate judge.

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > Leave of Court
[HN3]The Federal Rules of Civil Procedure provide that leave to amend a pleading shall be given freely when justice so requires. Fed. R. Civ. P. 15(a).

Civil Procedure > Jurisdiction > General Overview
Civil Procedure > Removal > Postremoval Remands > Jurisdictional Defects
Civil Procedure > Class Actions > Judicial Discretion
[HN4]When a party seeks to join a non-diverse party to the suit after a removal based solely on diversity jurisdiction, 28 U.S.C.S. § 1447(e) allows a court, in its discretion, either to deny joinder or permit joinder and remand the action to state court. 28 U.S.C.S. § 1447(e). The court should, in its determination to permit or disallow joinder, consider whether the purpose of the amendment is to defeat federal jurisdiction, whether plaintiff has been dilatory in asking for amendment, whether plaintiff will be significantly injured if amendment is not allowed, and any other factors bearing on the equities.

COUNSEL: [*1] For SHIRLEY FULFORD (03-CV-2472), DONALD DE ROGERS, IRMA O THOMAS, plaintiffs: Vernon Palmer Thomas, Vernon P. Thomas, Attorney at Law, New Orleans, LA. Judith A. Defraites, Judith A. Defraites, Attorney at Law, New Orleans, LA.

For TRANSPORT SERVICES COMPANY, defendant (03-CV-2472): J. Warren Gardner, Jr., Gregory Scott LaCour, Christovich & Kearney, LLP, New Orleans, LA.

For PROTECTIVE INSURANCE COMPANY, defendant (03-CV-2472): John Emerson Galloway, Kimberly G. Anderson, Galloway, Johnson, Tompkins, Burr & Smith, New Orleans, LA.

For YOLANDA M ABRAM (03-CV-2636), JACQUELINE GORDON, wife of, BOBBY GORDON, and on behalf of those similarly situated, plaintiffs: Frank G. DeSalvo, Frank G. DeSalvo, A, Professional Law Corp., New Orleans, LA. Michael F. Somoza, Beevers & Beevers, LLP, Gretna, LA. Matthew Hollis Kittok, Law Office of Matthew H. Kittok, LLC, Metairie, LA.

For TRANSPORT SERVICE COMPANY, defendant (03-CV-2636): J. Warren Gardner, Jr., Gregory Scott LaCour, Christovich & Kearney, LLP, New Orleans, LA.

JUDGES: HELEN G. BERRIGAN, UNITED STATES DISTRICT JUDGE.

OPINION BY: HELEN G. BERRIGAN

OPINION

Before the Court is Plaintiff's Motion to Appeal the Magistrate Judge's Order [*2] Denying Plaintiffs', Shirley Fulford, et al. (hereinafter referred to as "Fulford Plaintiffs"), Motion to Amend the Complaint to Add Dan Davis as a Defendant (Rec. Doc. 38) and Plaintiffs' Motion to Appeal the Magistrate Judge's Order Denying Plaintiffs', Yolanda M. Abram, et al. (hereinafter referred to as "Abram Plaintiffs"), Motion to Amend the Complaint to Add Dan Davis as a Defendant (Rec. Doc. 53).

Also, before the Court is Defendant's, Transport Services Company, Motion to Dismiss the Appeal by Plaintiffs, Yolanda M. Abram, et al., Regarding Magistrate Judge Roby's Denial of Plaintiffs' Motion for Leave to Add Dan Davis as a Non-Diverse Defendant. (Rec. Doc. 56).

After a thorough review of the law, the record, the Motions, and the memoranda filed in support thereof and in opposition thereto, Plaintiff's Motion to Appeal the Magistrate Judge's Order Denying Plaintiffs', Shirley Fulford, et al., Motion to Amend the Complaint to Add Dan Davis as a Defendant (Rec. Doc. 38) and Plaintiffs' Motion to Appeal the Magistrate Judge's Order Denying Plaintiffs', Yolanda M. Abram, et al., Motion to Amend

the Complaint to Add Dan Davis as a Defendant (Rec. Doc. 53) are both hereby **DENIED.**

[*3] Because the Court denied the Plaintiffs' Motions on their merits, Defendant's, Transport Services Company, Motion to Dismiss the Appeal by Plaintiffs, Yolanda M. Abram, et al., Regarding Magistrate Judge Roby's Denial of Plaintiffs' Motion for Leave to Add Dan Davis as a Non-Diverse Defendant is **DENIED.**

I. BACKGROUND AND PROCEDURAL HISTORY

This putative class action involves a chemical spill from a tractor-trailer tank truck. The Fulford Plaintiffs allege that they suffered damages as a result of the spill and seek to represent a class of plaintiffs against those they claim are responsible for causing the damage. They brought suit in the Civil District Court for the Parish of Orleans, State of Louisiana, on August 7, 2003. Defendants timely removed the suit on August 29, 2003. (Rec. Doc. 1).

On September 30, 2003, the Fulford Plaintiffs' putative class action was consolidated with the Abram Plaintiffs' putative class action, which alleges the same theory of recovery. (Rec. Doc. 7).

A preliminary conference to pick a trial date as well as all other applicable dates was scheduled for October 23, 2004. (Rec. Doc. 8). However, due to the nature of the case as a [*4] putative class action, the preliminary conference was cancelled. (Rec. Doc. 13). [1]

> 1 The Court notes that a preliminary conference to facilitate the entry of a scheduling order is not normally applicable in the context of class action litigation before a motion for class certification is ruled upon only to make one observation.
>
> [HN1]Because a scheduling order has not been entered, the dictates of Rule 16(b) of the Federal Rules of Civil Procedure, requiring a showing of good cause to amend the pleadings beyond the deadline proscribed in the scheduling order, normally do not apply. They are superseded by the Rule 23 mandate that a Motion for Class Certification be filed promptly. However, the mandate of Local Rule 16.1E(a) and the Civil Justice Expense and Delay Reduction Plan, which proscribes that amendments to pleadings are due no later than thirty days after the preliminary conference, does provide a guideline for the reasonableness of a delay.

On October 23, 2003, the [*5] Court ordered Plaintiffs to file a Motion for Class Certification by November 25, 2003, to be set for hearing on December 10, 2003. *Id.* At that time, the Court also ordered that the parties confer with the Magistrate Judge to discuss a case management order. *Id.* After conferring with the Magistrate Judge, who conducted a status conference with the parties present, the Court ordered that the deadline for filing the Motion for Class Certification be extended to April 13, 2004, to be set for hearing on April 28, 2004. (Rec. Doc. 15). [2]

> 2 In a Case Management Order dated November 12, 2003, the Magistrate Judge ordered that the Motion for Class Certification should be filed by January 9, 2004. (Rec. Doc. 16). She also ordered that the memorandum in support of the Motion for Class Certification was to be filed by February 12, 2004. *Id.* Defendants' memorandum in opposition to class certification was ordered to be filed by March 26, 2004. *Id.* Any reply memorandum was ordered to be filed by April 13, 2004. *Id.* To the extent that the Magistrate Judge's Case Management Order (Rec. Doc. 16) conflicts with this Court's order (Rec. Doc. 15), this Court's order governs.

[*6] On December 2, 2003, Plaintiffs, Shirley Fulford, et al., filed a Motion for Leave to Supplement and Amend Original Class Action Petition for Damages. (Rec. Doc. 19). This Motion sought to add two new parties to the complaint: Dan Davis and Protective Insurance Company. *Id.* On December 11, 2003, Plaintiffs filed a Motion to Remand, which was denied as premature after the Magistrate Judge's ruling on the Motions to Amend. (Rec. Doc. 21). On January 6, 2004, Plaintiffs, Yolanda Abram, et al., filed a Motion for Leave to Supplement and Amend Original Class Action Petition for Damages. (Rec. Doc. 26). This Motion virtually mirrored the Fulford Plaintiffs' Motion. *Id.* Oral argument was heard on both Motions for Leave to Supplement and Amend Original Class Action Petition for Damages on January 7, 2004.

On January 14, 2004, the Magistrate Judge denied the Motions in part and granted the Motions in part. (Rec. Doc. 31). The Magistrate Judge denied the Motions insofar as they sought to join Dan Davis, the truck driver of the tractor-trailer tank truck, who is a non-diverse party. *Id.* The Magistrate Judge allowed the joinder of Protective Insurance Company, as Defendants did not [*7] object to such joinder. *Id.*

In deciding the Motions, the Magistrate Judge noted that Defendants conceded that, because Dan Davis was acting in the course and scope of his employment with Defendants, Defendants would be liable if Dan Davis were found liable. *Id.* As such, Dan Davis' participation in this lawsuit as a party was unnecessary. *Id.* Given the lack of necessity to join Davis as a defendant, the dilatory nature of Plaintiffs' Motions to Amend, and Plain-

tiffs' apparent motive to defeat diversity, the Magistrate Judge denied Plaintiffs' Motions. (Rec. Doc. 31).

It is from this ruling that Plaintiffs appeal. The Fulford Plaintiffs filed an appeal on January 26, 2004. (Rec. Doc. 38). The Abram Plaintiffs filed an appeal on February 25, 2004. (Rec. Doc. 53). On March 1, 2004, Defendants filed a Motion to dismiss the Abram Plaintiffs appeal as untimely. (Rec. Doc. 56).

II. STANDARD OF REVIEW

[HN2]Under Rule 72(a) of the Federal Rules of Civil Procedure, a party may serve and file objections to a magistrate judge's orders regarding nondispositive pretrial matters if the objection is filed within ten (10) days after service [*8] of the order. Federal law affords a magistrate judge broad discretion in the resolution of nondispositive pretrial disputes. *See* Fed. R. Civ. P. 72(a); 28 U.S.C. § 636(b)(1)(A); *Comeau v. Rupp*, 142 F.R.D. 683, 684 (D. Kan. 1992). Thus, a district court reverses a magistrate judge's ruling on nondispositive pretrial matters only where the court finds such a ruling to be "clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a); 28 U.S.C. § 636(b)(1)(A). *See also In re Combustion, Inc.*, 161 F.R.D. 54, 55 (W.D. La. 1995). A motion to review is appropriate when a magistrate judge has obviously misapprehended a party's position, the facts, or the applicable law, or when the party produces new evidence that could not have been obtained through the exercise of due diligence. *Schrag v. Dinges*, 144 F.R.D. 121, 123 (D. Kan. 1992). A party is not entitled to raise new theories or arguments in its objections that the party did not present before a magistrate judge. *See Cupit v. Whitley*, 28 F.3d 532, 535 (5th Cir. 1994), [*9] *cert. denied*, 513 U.S. 1163, 115 S. Ct. 1128, 130 L. Ed. 2d 1091 (1995). Therefore, Plaintiffs must overcome a high hurdle for this Court to grant the instant motion.

III. LAW AND ANALYSIS

The principal issue before the Court is whether the Magistrate Judge abused her discretion in denying the Plaintiffs' leave to amend. [HN3]The Federal Rules of Civil Procedure provide that leave to amend a pleading "shall be given freely when justice so requires." FED. R. CIV. PROC. 15(a). [3]

> 3 Plaintiffs are permitted to join Davis as a defendant as long as "there is asserted against [the defendants] jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any questions of law or fact common to all defendants will arise in the action." FED. R. CIV. PROC. 20(a). Neither party contends that Plaintiffs potential claims against Davis may not be joined under Rule 20. In this case, joinder is permissible under Rule 20.

[*10] [HN4]However, when a party seeks to join a non-diverse party to the suit after a removal based solely on diversity jurisdiction, 28 U.S.C. § 1447(e) allows a Court, in its discretion, either to deny joinder or permit joinder and remand the action to State court. 28 U.S.C. § 1447(e). The Court should, in its determination to permit or disallow joinder, consider "whether the purpose of the amendment is to defeat federal jurisdiction, whether plaintiff has been dilatory in asking for amendment, whether plaintiff will be significantly injured if amendment is not allowed, and any other factors bearing on the equities." *Hensgens v. Deere & Co.*, 833 F.2d 1179, 1182 (5th Cir. 1987); *see also Doleac v. Michalson*, 264 F.3d 470, 474 (5th Cir. 2001) and *Cobb v. Delta Exports, Inc.*, 186 F.3d 675, 677 (5th Cir. 1999).

In this case, after considering the evidence, the Magistrate Judge found that the purpose of the amendment was to defeat diversity jurisdiction because Plaintiffs never named a fictitious party in their original State court petition for damages to serve as surrogate for Davis until his identity [*11] was revealed. She also found that Plaintiffs were dilatory in asking for amendment because, although Davis lived less than two hundred feet from the scene of the accident, Plaintiffs waited over three months after removal and over a year after the accident to seek amendment. Last, after Defendants stipulated that they would be liable for any liability imposed upon Davis through the theory of respondeat superior, the Magistrate Judge found that Plaintiffs would suffer no hardship if the amendment were not allowed.

The Magistrate Judge's ruling is supported by the evidence in the record, to which she applied the proper law. Nothing in the Magistrate Judge's Order or the record suggests that the Magistrate Judge's decision was clearly erroneous or that she abused her discretion.

IV. CONCLUSION

After reviewing the Magistrate Judge's Order, the Court finds that the Magistrate Judge's ruling was not clearly erroneous. As such, the Magistrate's Judge's ruling is hereby **AFFIRMED.**

Plaintiff's Motion to Appeal the Magistrate Judge's Order Denying Plaintiffs', Shirley Fulford, et al., Motion to Amend the Complaint to Add Dan Davis as a Defendant (Rec. Doc. 38) and Plaintiffs' [*12] Motion to Appeal the Magistrate Judge's Order Denying Plaintiffs', Yolanda M. Abram, et al., Motion to Amend the Complaint to Add Dan Davis as a Defendant (Rec. Doc. 53) are both hereby **DENIED.**

Defendant's, Transport Services Company, Motion to Dismiss the Appeal by Plaintiffs, Yolanda M. Abram, et al., Regarding Magistrate Judge Roby's Denial of Plaintiffs' Motion for Leave to Add Dan Davis as a Non-Diverse Defendant is likewise **DENIED.**

New Orleans, Louisiana, this 6th day of April, 2004.

HELEN G. BERRIGAN

UNITED STATES DISTRICT JUDGE

United States District Court,
E.D. Louisiana.
Stephanie HARRELL
v.
FIDELITY SECURITY LIFE INSURANCE COMPANY.
Civil Action No 07-1439.

Jan. 16, 2008.

Shawn Thomas Deggins, Deggins & Associates, LLC, New Orleans, LA, for Stephanie Harrell.

Lauren A. Welch, Retha Elizabeth Karnes, McCranie, Sistrunk, Anzelmo, Hardy, Maxwell & McDaniel, Metairie, LA, for Fidelity Security Life Insurance Company.

ORDER AND REASONS

CARL BARBIER, District Judge.

***1** Before the Court is Defendant's Motion for Summary Judgment (Rec.Doc.13). For the reasons below, the Motion is **GRANTED.**

Background:

Procedural Background

This lawsuit is the result of a denial of a claim for disability benefits under a group accidental disability insurance policy issued by Defendant, Fidelity Security Life Insurance Company. The parties agree that the policy at issue is not an employer-sponsored plan providing primary disability coverage to eligible employees. The Plaintiff enrolled in this plan through the Nurse Services Organization (NSO) which offered limited accidental disability income protection to its members. NSO is the policyholder, and Plaintiff paid the premiums for coverage under the plan. Plaintiff's claim for benefits was originally denied on October 16, 2002.

Plaintiff filed suit in Civil District Court in Orleans Parish alleging several causes of action, related to fraud, misrepresentation, bad faith, and arbitrary and capricious behavior in the handling of the claim. Defendant claims that Plaintiff is not asking for payment of the insurance claim, but instead is only asking for damages related to economic losses, mental anguish, future pain and suffering, emotional and physical distress, and humiliation.

Defendant timely removed this action on the basis of diversity of citizenship. Plaintiff's petition avers that the amount in controversy does exceed $50,000. Plaintiff is alleging bad faith and penalties under the Louisiana Insurance Code. Defendant claimed that from the face of the petition, it appeared that the amount in controversy exceeds $75,000. In the alternative, the Defendant removed on the basis of federal question, asserting that the policy in question is governed by ERISA, a federal statute. The Plaintiff has not contested this court's jurisdiction, and it does appear that under either theory of federal jurisdiction, this court does retain jurisdiction over the claim.

Factual Background

Both parties agree that in April 2001, Plaintiff purchased accident disability insurance from Fidelity through the NSO. Defendant asserts that on July 24, 2002, Plaintiff filed a claim with the NSO asserting that she had been unable to work since June 25, 2002 when she injured her leg by hitting it against her son's bed. NSO forwarded the claim to Fidelity who received it on September 5, 2002.

Plaintiff seems to dispute some of these events, but these disputes are not relevant at this time. Plaintiff says the claim was submitted on August 22, 2002 but does not cite any document to substantiate such a date.[FN1] Regardless of the correct date, Fidelity claims that after a review of the medical records submitted with her claim, it determined that the cause of Plaintiff's injury was a "sickness or disease" which is specifically excluded by the policy in question. The parties agree that the Plaintiff was informed of this decision on October 9, 2002.

FN1. It is worth noting that the claims file submitted with Defendant's Motion is over 2000 pages long and constitutes 5 volumes. Plaintiff's date would appear to come from the affidavit of the Plaintiff herself, which was attached to the Plaintiff's memorandum in opposition. (Rec. Doc. 15-3, at 16, para. 4).

Subsequently Plaintiff filed an appeal of Fidelity's decision on October 16, 2002. Fidelity denied the appeal on October 28, 2002. Plaintiff's characterizations of the events of the next five years are substantially different from Defendant's characterizations. Plaintiff claims that "subsequent to losing her appeal, [Plaintiff] made several attempts to reach an amicable resolution with the defendants so that she could receive her benefits."(Rec. Doc. 15-3 at 3-4). Defendant notes that while Plaintiff did not specifically request a second appeal, Fidelity interpreted subsequent communications from Plaintiff as such a request and sent the claim to an outside source for a determination and analysis of the claim. This independent medical review affirmed Fidelity's decision to deny benefits. Fidelity informed Plaintiff of its decision on November 26, 2002.

***2** Plaintiff contacted Fidelity in September 2004 requesting a third review of her claim. Fidelity informed Plaintiff that the claim was considered closed since it had been two years since her last correspondence and furthermore, the medical evidence indicated that her claim should be denied. Fidelity's letter to Plaintiff was sent on September 30, 2004. Plaintiff requested another appellate review on December 7, 2004 after Plaintiff filed a complaint against Fidelity with the Louisiana Department of Insurance (DOI). Defendant conducted a fourth review of the claim, this time with the assistance of and under the supervision of the DOI. Fidelity learned new information about the claim during this review, none of which is relevant to the instant motion. On August 9, 2005, Fidelity informed the Plaintiff that her appeal would again be denied.

On November 19, 2006, Plaintiff requested a fifth appeal of her claim, and submitted evidence of the claim. Fidelity notes that much of the information submitted was duplicative and that some of it was irrelevant. However, Fidelity considered the new submissions, and informed Plaintiff that her appeal would be denied again on November 30, 2006. Plaintiff filed suit on February 16, 2007.

Discussion

Choice of Law

Fidelity first and foremost claims, that this action is in federal court pursuant to the Court's diversity jurisdiction provided in 28 U.S.C. § 1332. Fidelity maintains that Plaintiff's actions are state law claims that, in accordance with the *Erie* doctrine should be decided using state substantive law. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938).

In the alternative, Fidelity suggests that this Court has jurisdiction under 28 U.S.C. § 1331 in that there exists a question of federal law, specifically that the plan in question is an ERISA qualified plan under 29 U.S.C. § 1101. Defendant now asserts that the policy in question is not an ERISA qualified plan, and therefore this Court does not have "federal question" jurisdiction under that statute. Defendant argues that the Court retains jurisdiction on diversity grounds.

ERISA

Plaintiff states that the action is really one for a breach of fiduciary duty under ERISA, and therefore Federal law must apply. Inexplicably, Plaintiff asserts that because this is an action for breach of fiduciary duty under ERISA, this Court must use Louisiana law in determining the applicable prescriptive period. Plaintiff therefore argues that LA. CIV.CODE ANN. art. 3499 applies, and this Court should apply a 10 year prescriptive period. Even if Plaintiff is correct that her claim really falls under the jurisdiction of ERISA, Plaintiff is mistaken as to the applicable prescriptive period. ERISA specifically provides for a statute of limitations for actions related to a breach of fiduciary duty under ERISA. 29 U.S.C. § 1113. That section provides that:

"No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the **earlier** of

***3** (1) six years after (A) the date of the last action

which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or

(2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;

except that in the case of fraud or concealment, such action may be commenced not later than six years after the discovery of such breach or violation."

Because the statute refers to the earlier of two time periods, it can be assumed that the three year limitation is the one that would apply in this case. There is no evidence in the record which would indicate that the Plaintiff knew of or is alleging a breach of fiduciary duty prior to her alleged accident, and therefore the three year period in subsection (2) is the only one that can apply.[FN2]

> FN2. For the six year limitation period in (1) to apply Plaintiff would have to allege that sometime *before* the Plaintiff received actual notice of the alleged breach, some sort of breach or violation occurred.

The Plaintiff is alleging fraud, and the statute provides a special limitation for actions that arise alleging fraud or concealment of six years. The Plaintiff, in that case may have a right to explore under ERISA the extent to which fraud or concealment caused Plaintiff's injuries, since that cause of action likely has not yet expired.

However, Plaintiff can only assert an ERISA claim if the Plaintiff is entitled to make such a claim. Upon a review of court decisions relating to ERISA, it must be concluded that Plaintiff has no right of action for her claims under the ERISA statutes.

Plaintiff claims that her action falls under § 1132 of ERISA. It is presumed that Plaintiff is referring to 29 U.S.C § 1132(a)(2) which provides that a person is empowered to bring a civil action "for appropriate relief under section 1109" of title 29. 29 U.S.C. § 1109 refers to a general fiduciary duty of plan administrators. However, the Supreme Court has held that recovery for a breach of fiduciary duty inures to the benefit of the plan and not to the individual participant. *Mass. Mut. Life Ins. Co. v. Russell,* 473 U.S. 134, 144 (1985); *Musmeci v. Schwegmann Giant Super Mkts.,* 159 F.Supp.2d 329, 355 (E.D.La.2001). As this Court noted in *Musmeci,* while Plaintiff has "standing to sue the fiduciary for the losses caused by the breach, [she] can do so only in a representative capacity on behalf of the plan." *Musmeci,* 159 F.Supp.2d at 355. Further, the *Russel* Court specifically held that there is no cause of action for extra-contractual damages caused by untimely or improper processing of benefit claims under section 1109. *Russell,* 473 U.S. at 148.

Plaintiff may also possibly state a claim under § 1132(a)(3) which provides that a participant may assert a cause of action "to obtain other appropriate equitable relief" to redress violations or enforce provisions of ERISA. The Supreme Court has not specifically addressed whether extra-contractual damages are available under that section.[FN3]The Fifth Circuit has held that there is also no cause of action for extra-contractual damages under § 1132(a)(3). *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc.,* 793 F.2d 1456, 1464 (5th Cir.1986); [FN4] *Corcoran v. United Health Care Inc.,* No. 90-4303, 1991 WL 353841 (E.D.La. Apr. 3, 1991). Accordingly, it does not appear that the Plaintiff would have a remedy for her extra-contractual damages claims under ERISA. Accordingly, even though it is conceivably possible that a claim by the Plaintiff would not be prescribed under ERISA rules, Plaintiff does not have a cause of action under ERISA for most, if not all, of her claims.[FN5]

> FN3. The Supreme Court came close to doing so in *Mertens v. Hewitt Assocs,* 508 U.S. 248 (1993). In *Mertens,* the Supreme Court held that ERISA "eliminated ... the common law's joint and several liability, for all direct and consequential damages suffered by the plan, on the part of person who had no real power to control what the plan did."*Id.* at 262-63.This holding is premised on the Court's assumption that equitable relief does not include monetary damages which are legal in nature. While similar to the holding that this Court issues today, the issue is not exactly the same, and therefore this Court will base its ruling on the *Sommers* case *infra.*

FN4. While it is true that the *Sommers* case has been criticized by other courts, it has not been overruled by the Fifth Circuit. *See e.g. Cox v. Eichler,* 765 F.Supp. 601 (N.D.Cal.1990); *Cal. Digital Defined Benefits Pension Fund v. Union Bank,* 705 F.Supp. 489, 491 (C.D.Cal.1989); *see also Cunningham v. Dun & Bradstreet Plan Servs.,* 889 F.Supp. 932 (N.D.Miss.1995)(noting its disagreement with but nonetheless following Fifth Circuit precedent).*But see In re Enron Corp. Sec. Derivative & ERISA Litig.,* 284 F.Supp.2d 511, 612 (S.D.Tex.2003)(holding that a claim for equitable relief under § 1102(a)(3) cannot include a claim for compensatory or punitive damages).

FN5. The only situation in which Plaintiff's claims would remain viable are if the Plaintiff is suing for payment on the contract itself (which Defendant denies is happening) and claims that she was not paid because of fraud or concealment. In that case, she would have six years from the date that the fraud or concealment was discovered. However, Plaintiff has not pled in her complaint that she is seeking payment on the contract itself. As discussed *supra,* Plaintiff's extra-contractual claims, under ERISA must fail.

State Law Claims

***4** The Defendant still avers that Plaintiff's claims are state-law claims because the policy in question is not an ERISA qualified plan .[FN6]A federal court sitting in diversity is required to apply the substantive law of the state in which it sits and federal procedural law. *Erie,* 304 U.S. at 78. Federal law provides that state prescriptive periods are substantive provisions for the purposes of *Erie. Vincent v. A.C. & S., Inc.,* 833 F.2d 553, 555 (5th Cir.1987).

FN6. If the policy were an ERISA qualified plan and ERISA applied, Plaintiff's extra-contractual claims would be preempted by the federal law. *See Bank of La. v. Aetna U.S. Health Care,* 468 F.3d 237, 242-43 (5th Cir.2006)(holding that a claim that would require inquiry into how benefit claims were processed and paid is an area of exclusive federal jurisdiction.); *see also, Hollis v. Provident Life & Accident Ins. Co.,* 259 F.3d 410, 414 (5th Cir.2001); *Hubbard v. Blue Cross & Blue Shield Ass'n,* 42 F.3d 942, 946 (5th Cir.1995). Because the Court must view the facts in the light most favorable to the non-movant, the Court will view the claims as arising under state law and not ERISA. *E.g., Joplin v. Bias,* 631 F.2d 1235, 1237 (5th Cir.1980).

The parties seem to agree that Louisiana law controls in this case, given that the insurance policy in question was delivered to an insured in Louisiana and the premiums were paid in Louisiana. Therefore the question becomes what are the applicable prescriptive periods for Plaintiff's claims?

Actions Ex Delictu vs. Action Ex Contractu: Which Prescriptive Period Applies

Plaintiffs and Defendants disagree as to whether the cause of action in this case is one that sounds in contract or tort. Defendant claims that since the Plaintiff is not seeking payment on the contract but rather damages for fraud and misrepresentation, the action is most like one in tort, subject to a one year prescriptive period. LA. CIV.CODE ANN. art. 3492. Plaintiff, however, claims that the action should be viewed as an action for breach of contract which has a ten year prescriptive period. LA. CIV.CODE ANN. art. 3499.

Courts have held that the "key in differentiating a breach of contract from a tort for prescriptive purposes is the source of the duty breached." *Underwriters Ins. Co. v. Offshore Marine Contractors,* 442 F.Supp.2d 325, 333 (E.D.La.2006). Contract damages "flow from the breach of a special obligation contractually assumed by the obligor."*Id. (citing Davis v. Le Blanc,* 149 So.2d 252, 254 (La.App. 3 Cir.1969)). Damages in tort, however, "flow from the violation of a general duty owed to all persons."*Id. (citing Davis,* 149 So.2d at 254).

There is a further wrinkle, however in Louisiana prescription law when it comes to insurance contracts. LA.REV.STAT. ANN. § 22:213(A) provides provisions that must be in every health and accident insurance policy in Louisiana. One such provision that

must be provided is that "No action at law or in equity shall be brought to recover on this policy prior to the expiration of sixty days after proofs of loss have been filed in accordance with the requirements of this policy. No such action shall be brought after the expiration of one year after the time proofs of loss are required to be filed."*Id.* § 213(A)(11). The statute also provides that insurance companies are permitted to include provisions that differ from the ones set out in the statute as long as they are more favorable to the insured. *Id.* § 213(A). Plaintiff's insurance policy contained the following clause:

"No action at law or in equity shall be brought to recover on the Policy: (a) before the end of 60 days after written proof of loss has been furnished as provided herein, and (b) after 3 years from the time written proof of loss is required to be furnished."

***5** Due to the provision in the insurance contract stating that suit or actions at law must be filed within three years, and the Louisiana statute authorizing the shorter prescriptive period, an action on the contract must be filed within three years of the date that the proof of loss would be due. The policy states that a proof of loss must be filed within 90 days of the date of loss. Plaintiff was allegedly injured on June 15, 2002, and stopped working on June 26, 2002. According to Defendants, the date of loss would have been June 26, 2002, after which she had 90 days to submit her proof of loss. Plaintiff then would have three years after the 90 days had run in which to file a lawsuit. Therefore, she would have had to file a lawsuit by September 26, 2005, [FN7] for claims that arise under payment of the contract. As discussed *supra* it is possible that *all* of Plaintiff's claims that are contractual and extra-contractual in nature would prescribe on that date.

> FN7. The Court notes that this time period falls shortly after Hurricane Katrina made landfall, an event that severely disrupted and disabled the judicial system in Southeast Louisiana. Accordingly, the Louisiana legislature passed statutes which tolled all actions whose prescriptive period ended during the last half of 2005 and in some cases during the first half of 2006. LA.REV.STAT. ANN. §§ 9:5822 to 5824. By application of these statutes, Plaintiff's claim would have been tolled until June 1, 2006, at the absolute latest, and would have prescribed on that date. Plaintiff did not file suit until February, 2007.

Plaintiff disputes this reading, and instead asserts that her claim is one for breach of fiduciary duty, as well as one for fraud and misrepresentation. Plaintiff therefore claims that the actions she complains of are personal actions, subject to a liberative prescriptive period of ten years under article 3499. Plaintiff is correct that Louisiana law recognizes a fiduciary duty owed by insurers to their insured. *See Spiers v. Liberty Mut. Fire Ins. Co.*, No. 06-4493, 2006 WL 4764430 (E.D.La. Nov. 21, 2006). However such duty appears to be limited to a duty to discharge policy obligations, defend the insured against covered claims, and to consider the insured's interests in settlement. *Id; see also, Theriot v. Midland Risk Ins. Co.*, 694 So.2d 184, 193 (La.1997)("While this court has never defined the precise basis of the duties owed by an insurer to its insured, we have held that they are fiduciary in nature,"), *Pareti v. Sentry Indem. Co.*, 536 So.2d 417, 423 (La.1988)("[An] insurance company is held to a high fiduciary duty to discharge its policy obligations to its insured in good faith."). [FN8] Futher, "the causes of action and penalties allowed exclusively for breach of fiduciary duty by an insurer are codified" in LA.REV.STAT. ANN. § 22:1220. *Spiers*, 2006 WL 4764430, at *3. Therefore Plaintiff can only state an action for an insurance company's breach if it falls within the specific provisions as codified in section 1220. [FN9]

> FN8. This appears to be in contradistinction to the fiduciary duty owed to insureds by insurance *agents. See Graves v. State Farm Mut. Auto Ins. Co.*, 821 So.2d 769, 772 (La.App. 3 Cir.2002)(holding that the fiduciary duty owed by an agent is limited to the procurement of insurance only); *Smith v. Millers Mut. Ins. Co.*, 419 So.2d 59, 64 (La.App. 2 Cir.1982)(same).

> FN9. § 1220(B) provides the list of specific actions that can be brought against an insurance company for breach of fiduciary duty. The claims are (1) Misrepresenting pertinent facts or insurance policy provisions relating to any coverages at issue; (2) failing to pay a settlement within thirty days after an agreement is reduced to writing; (3) denying cov-

> erage or attempting to settle a claim on the basis of an application with the insurer knows was altered without notice to, or knowledge or consent of, the insured; (4) misleading a claimant as to the applicable prescriptive period; (5) failing to pay the amount of any claim due any person insured by the contract within sixty days after receipt of satisfactory proof of loss from the claimant when such failure is arbitrary, capricious, or without probable cause; (6) failing to pay claims pursuant to R.S. 22:658.2 when such failure is arbitrary, capricious, or without probable cause.

Courts have held that a violation of LA.REV.STAT. ANN. § 1220 are delictual in nature and therefore subject to the one year prescriptive period. *See Marketfare Annunciation, LLC v. United Fire & Cas. Co.*, No. 06-7232, 2007 WL 837202 (E.D.La. Mar. 15, 2007)("The Court has no reason to dispute that a violation of the Insurance Code sounds in tort."); *Brown v. Protective Life Ins. Co.*, 353 F.Supp.2d 739, 743 (E.D.La.2004)("Section 22:1220 is subject to a one year liberative prescription."); *Yates v. Sw. Life Ins. Co.*, No. 97-3204, 1998 WL 61033 (E.D.La. Feb. 12, 1998)("Actions against insurers under La. R.S. 22:1220 have been found delictual in nature and therefore governed by a one-year prescriptive period."). Accordingly, the actions that Plaintiff could seek against Defendant must be founded in section 1220, and those actions have a one year prescriptive period.[FN10]

> FN10. Although Plaintiff did not cite a single case which involved the ten year prescriptive period, the Court was able to find one which may be applicable. In *Cantrelle Fence & Supply Co. v. Allstate Ins. Co.*, 550 So.2d 1306, 1307-08 (La.App. 1 Cir.1989), the appellate court determined because the Supreme Court of Louisiana has determined that a claim for penalties and attorney fees under section 22:658 is a separate ground or theory of recovery from uninsured motorist coverage, the prescriptive period set in section 9:5629 for uninsured motorist coverage is not applicable. Finding nothing else in the law which establishes a prescriptive period for an action for penalties and attorney's fees, the court concluded that the ten year prescriptive period under article 3499 would apply. *Id.* at 1308.
>
> However *Cantrelle* is not applicable to the case at bar. There are two main factual differences between the case in *Cantrelle* and the instant case. The first is that the instant case involves an insurance contract for accidental disability insurance and not the uninsured motorist insurance in question in *Cantrelle.See Gordon v. State Farm Fire & Cas. Co.*, 895 F.2d 1036, 1039 (5th Cir.1990)(noting that a factual difference existed when it considered a fire insurance contract as opposed to uninsured motorist insurance). Second, as in Gordon, in the case at bar, the plaintiff failed to file her claim within the time period provided in the insurance policy itself. As in *Gordon*"there neither has been nor will be a judicial determination of [Plaintiff's] loss."The Fifth Circuit noted in *Gordon* that "judicial recovery under the policy is time-barred, and, further was time-barred at the time the plaintiffs originally filed her action. The Fifth Circuit held in Gordon that because the insurance contract included the words, "no action shall be brought", the words "no action" included an action for penalties and fees. The same is true in the case at bar, where the insurance policy prohibits "any action" for recovery. There is no reason to think that this case should be any different than *Gordon. See also Hampton v. Audubon Ins. Co.*, 948 So.2d 332, 333-34 (La.App. 2 Cir.2007)(holding the same as and agreeing with the conclusion in *Gordon*).

***6** Even if the one year prescriptive period does not apply, the holdings in *Gordon* and *Hampton* each indicate that Plaintiff cannot claim penalties and attorney's fees under section 1220 (the only section available to the Plaintiff) when the Plaintiff cannot state a claim under the contract itself. In this case, the Court has already determined that prescription had run for claims that Plaintiff made on the contract.

Plaintiff asserts that the three year prescriptive period provided in the contract cannot apply because parties

cannot contract a limitation for fraud. Plaintiff cites no law for this proposition. The Court notes that in the majority of the cases it has reviewed, courts have determined that an action for fraud is subject to a one year liberative prescription. *See e.g.* Bell v. Demax Mgmt, Inc., 824 So.2d 490 (La.App. 4 Cir.2002).[FN11] Plaintiff is correct that fraud is a reason to vitiate a contract. LA. CIV.CODE ANN. art.1955. Fraud in the consent of a contract may make that contract absolutely null. As such an action for fraud that would vitiate consent to the contract would never prescribe. *See*LA. CIV.CODE ANN. art. 2032 ("Action for annulment of an absolutely null contract does not prescribe"). However, Plaintiff is not claiming that any fraud vitiates consent, and specifically avers that the Plaintiff does not contest the validity of the contract. This Court cannot find any case or law which prevents Defendant and Plaintiff from making a contract in the way that they did. Accordingly, this Court must conclude that Plaintiff's claims are subject to a one year prescriptive period under article 3492.[FN12]

> FN11. There was at least one case reviewed in which an alleged fraud that vitiated consent was held to have a 10 year liberative prescription. *See* Fuller v. Barattini, 574 So.2d 412 (La.App. 5 Cir.1991). However, in the case at bar, Plaintiff is not claiming that the fraud complained of vitiated consent, and explicitly states that the Plaintiff does not contest the validity of the contract.

> FN12. As noted above, it is possible that Plaintiff's claims are all subject to the three year prescriptive period in the contract, but in that case, all such claims would have prescribed on June 1, 2006 at the absolute latest. Because the doctrine of *contra non valentem* applies to actions subject to the one year prescription in article 3492, the date from which prescription began to run is possibly later than the three year date noted in the contract. Therefore, since this Court must make all assumptions in favor of the Plaintiff, it will assume that the one year prescriptive period applies. *See supra* note 9 and accompanying text.

Article 3492 and the Doctrine of Contra Non Valentem

Article 3492 provides that delictual actions are subject to a one year prescription. Such prescription begins to run from the date that injury is sustained. However, under the doctrine of contra non valentem, prescription does not begin to run "when the cause of action is not known or reasonably knowable by plaintiff, even though his ignorance was not induced by the defendant." *Eldredge v. Martin Marietta Corp.*, 207 F.3d 737, 743 (5th Cir.2000)*(citing Landreneau v. Furge,* 589 So.2d 658, 662 (La.App. 3 Cir.1992)). The doctrine is extended only "up to the time that the plaintiff has actual or constructive knowledge of the tortious act."*Id. (citing* Bergeron v. Pan Am. Ass. Co., 731 So.2d 1037, 1042 (La.App. 4 Cir.1999)). Louisiana courts have defined the time in question to be "the time at which the plaintiff has information sufficient to excite attention and prompt further inquiry."*Id. (citing* Nat'l Council on Compensation Ins. v. Quixx Temp. Servs. Inc ., 665 So.2d 120, 124 (La.App. 4 Cir.1995)).

Plaintiff claims that "due to the ongoing correspondence [Plaintiff] did not know or did not have a reason to know as to her cause of action."(Rec. Doc. 15-3 at 7). Plaintiff cites no law which indicates that continued negotiations with the Plaintiff would interrupt prescription. Regardless, Plaintiff indicated in October 2002, that she believed that the doctors had falsified information, and that Defendant was relying on false information. Yet she did not file suit. Even more telling is that after Defendant's denial of Plaintiff's claim in November, 2002, Plaintiff did not contact Defendant again until September 2004, nearly two years after her last contact with Defendant. During this time, Plaintiff could have been pursuing her claim, and obtaining information, but instead was not diligent in her pursuit. Even more so, in September 2004, she stated that "This has caused me hardship, suffering and pain, due to the insurance not getting the correct information."Therefore by September 2004, it appears that Plaintiff certainly had enough information to "excite attention" and prompt further inquiry. She claimed at this time to have hired two attorneys. Yet Plaintiff did not attempt to preserve her rights under the contract.

*7 Therefore, it appears to this Court that Plaintiff's cause of action would have prescribed by September 2005. As stated above, due to Hurricane Katrina, the prescriptive date could have been extended to June 1, 2006. The cause of action would have prescribed on

that date. As already noted, Plaintiff did not file suit until February, 2007.

Accordingly,

IT IS ORDERED that Defendant's Motion for Summary Judgment (Rec.Doc.13) is **GRANTED.**

E.D.La.,2008.
Harrell v. Fidelity Sec. Life Ins. Co.
Slip Copy, 2008 WL 170269 (E.D.La.)

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HOnly the Westlaw citation is currently available.

United States District Court,
E.D. Louisiana.
MARKETFARE ANNUNCIATION, LLC, et al.
v.
UNITED FIRE & CASUALTY COMPANY, et al.
Civil Action No. 06-7232.

March 15, 2007.

Philip Anthony Franco, Gregory Fortier Rouchell, Leslie A. Lanusse, Adams and Reese LLP, New Orleans, LA, for Marketfare Annunciation, LLC, et. al.

Stephen R. Barry, Daphne P. WendellR. Verret, McNutt, Barry & Piccione APL, William Everard Wright, Jr., Georgia Kobos Thomas, Karen Patricia Holland, Deutsch, Kerrigan & Stiles LLP, New Orleans, LA, for United Fire and Casualty Company, et. al.

ORDER AND REASONS

CARL J. BARBIER, United States District Judge.

***1** Before the Court is Defendants' Motion to Dismiss. (Doc. 24.) The motion is opposed. (Doc. 27.) For the following reasons, the Court finds that the motion should be GRANTED.

BACKGROUND

The Court has already ruled that the claims against the in-state defendants, Lafayette Insurance Company and the local adjustors, were improperly joined because plaintiffs are unable to establish a cause of action against them. (Doc. 22.) The adjustor defendants Michael Sherwood, Jerry Provencher, and Candy Ray, have been voluntarily dismissed by the plaintiffs. (Doc. 29.) Lafayette Insurance Company, Gerald Jay Daussin, Kevin Vanderbrook, and VECO Consulting, L.L.C., now seek to be dismissed pursuant to this Court's order. Plaintiffs' opposition seeks a re-evaluation of the Court's order.

DISCUSSION

The Court has reviewed again the possibility of a cause of action under Louisiana law for conspiracy to refuse or delay insurance payments in violation of either an insurance contract or the Louisiana Insurance Code by someone other than the insurer. There is nothing to indicate that such a cause of action exists. To allow an allegation that the adjustor conspired with the insurer to avoid paying the claim would be contrary to the statutory and caselaw limitations on suits against adjustors. Plaintiffs do not cite any case on point, and their argument, though an impressive attempt at cobbling, presents no more than a "mere theoretical possibility of recovery under local law." *Smallwood v. Illinois Cent. R.R. Co.*, 385 F.3d 568, 573 n. 9 (5th Cir.2004). This is insufficient to destroy a defendant's right to remove when federal jurisdiction exists. *Id.*

Plaintiffs argue that a violation of La. R.S. §§ 22:658 or 22:1220 sounds in tort and refer the Court to cases applying the one-year delictual prescriptive period and cases recognizing that violation of a statute establishes negligence *per se.*The Court has no reason to dispute that a violation of the Insurance Code sounds in tort. However, the tort is committed by the insurer. Plaintiffs have one year to bring the claim against the insurer if it breaches its statutory duty. Violating La. R.S. §§ 22:658 or 22:1220 may establish negligence *per se,* but that does not give rise to a tort remedy unless a duty exists. Again, the Insurance Code places a duty upon insurers alone. As this Court pointed out in its last statement of reasons, an adjustor is an agent for the insurer and does not generally owe a duty to the insured. (Doc. 22 at 10.) To establish a cause of action against an adjustor, the plaintiff must allege a *separate* underlying offense, i.e., a separate duty and breach. *Id.*

Plaintiffs argue that this case is distinguishable from the cases that reject the imposition of a duty on insurance adjustors because in this case plaintiffs allege intentional acts rather than negligence. The statutory provisions already cover bad faith claims adjusting by the insurer. To allege that the insurance company's agents intentionally conspired with the insurance

company adds nothing. As this Court has already noted, the cause of action in a conspiracy claim is for the tortious acts, not for the conspiracy itself. (Doc. 22 at 9.) Plaintiffs fail to allege a tort that is the object of the conspiracy that is *separate* from the violation of the insurer's duties under the contract and the Insurance Code.

***2** Plaintiffs also argue that the duties owed under the insurance code are independent obligations from the duties owed under the insurance contract. That argument is of no moment where the duty under either is owed to the insured by the insurer.

Finally, plaintiffs direct the Court's attention to a Louisiana state case recognizing a cause of action for conspiracy to violate the Louisiana Unfair Trade Practices and Consumer Protection Law ("UTPA").*See* Strahan v. State Dept. of Agric. and Forestry, 645 So.2d 1162 (La.App. 1st Cir.1994). However, that case is unavailing for plaintiffs because of the breadth of the statute involved. The *Strahan* court found that:

> It is not necessary to determine whether the Department was engaged in trade or commerce as defined by the UTPA because Mr. Strahan's cause of action is found in La.R.S. 51:1409(A), which provides in pertinent part:
>
> Any person who suffers any ascertainable loss of money or movable property, corporeal or incorporeal, as a result of the use or employment *by another person* of an unfair or deceptive method, act or practice declared unlawful by R.S. 51:1405, may bring an action individually but not in a representative capacity to recover actual damages.

Id. at 1165 (emphasis added).

The statute at issue in *Strahan* imposes a broadly applicable duty on every person. The duties in the Insurance Code provisions at issue in this case, however, only apply to insurers. In this case, the allegation that the insurer's agents conspired with the insurer to delay or deny payment is simply an attempt to impose a duty on insurance adjustors that Louisiana law has thus far not recognized.

Judging from the evidence plaintiffs have already adduced and presented to the Court, it is entirely possible that they can succeed in a claim for violation of La. R.S. § 22:658 or § 22:1220. Recovery in that event is against the insurer, not against its claims adjustors.

Accordingly,

IT IS ORDERED that defendants' Motion to Dismiss Lafayette Insurance Company, Gerald Jay Daussin, Kevin Vanderbrook, VECO Consulting, LLC (Doc. 24) is **GRANTED.**The claims against these defendants are **DISMISSED;**

IT IS FURTHER ORDERED that the claims against all remaining defendants in all of the consolidated cases, except for defendant United Fire & Casualty Insurance Company, are hereby **DISMISSED.**This case will proceed against United Fire & Casualty Insurance Company as the only properly joined defendant.

E.D.La.,2007.
Marketfare Annunciation, LLC v. United Fire & Cas. Co.
Not Reported in F.Supp.2d, 2007 WL 837202 (E.D.La.)

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LEXSEE

Analysis
As of: May 18, 2009

HURWITZ MINTZ FINEST FURNITURE VERSUS UNITED FIRE & CASUALTY CO.

CIVIL ACTION NO. 06-4817, SECTION "T" (3)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

2008 U.S. Dist. LEXIS 30374

March 31, 2008, Decided
March 31, 2008, Filed

SUBSEQUENT HISTORY: Motion granted by, in part, Motion denied by, in part Hurwitz Mintz Finest Furniture v. United Fire & Cas. Co., 2008 U.S. Dist. LEXIS 30375 (E.D. La., Mar. 31, 2008)

CORE TERMS: summary judgment, amend, attorneys fees, bad faith, proof of loss, post-amendment, pre-amendment, matter of law, satisfactory, insurer, applicability, retroactively, prospectively, insured's, policy provisions, probable cause, cause of action accrues, cause of action, issues presented, moving party, pre-enactment, requesting, depositions, non-moving, declaring, occurring, coverage, opposing, genuine, looked

COUNSEL: [*1] For Hurwitz Mintz Finest Furniture Store South, LLC, doing business as Hurwitz Mintz Furniture Co., Plaintiff: Martha Y. Curtis, LEAD ATTORNEY, James M. Garner, Robert Scott Hogan, Sharonda R. Williams, Sher Garner Cahill Richter Klein & Hilbert, LLC, New Orleans, LA.

For Airridge Investors, LLC, Plaintiff: Martha Y. Curtis, LEAD ATTORNEY, James M. Garner, Robert Scott Hogan, Sher Garner Cahill Richter Klein & Hilbert, LLC, New Orleans, LA.

For United Fire & Casualty Company, Defendant: Stephen R. Barry, LEAD ATTORNEY, Daphne P. McNutt, Wendell R. Verret, Barry & Piccione (New Orleans), New Orleans, LA; Ann Marie LeBlanc, Kathryn Montez Caraway, Kathryn Montez Caraway, Caraway LeBlanc, LLC, New Orleans, LA.

For Marketfare Annunciation, LLC, Movant: Philip Anthony Franco, LEAD ATTORNEY, Gregory Fortier Rouchell, Leslie A. Lanusse, Adams & Reese, LLP (New Orleans), New Orleans, LA.

JUDGES: G. THOMAS PORTEOUS, JR., UNITED STATES DISTRICT JUDGE.

OPINION BY: G. THOMAS PORTEOUS, JR.

OPINION

ORDER AND REASONS

Before the Court is Defendant's Motion for Partial Summary Judgment on all Plaintiffs' Claims for Attorney's Fee and Penalties. Rec. Doc. 113. Plaintiffs filed an Opposition. Rec. Doc. 145. Defendant's filed a reply to which Plaintiffs filed [*2] a sur-reply. Rec. Doc. 213, 263. Defendant supplemented its Memorandum. Rec. Doc. 265. Plaintiffs then filed two sur-replies. Rec. Doc. 278, 297. The Motion came for hearing with oral argument on August 8, 2007, and was taken under submission. The Court, after considering the memoranda and arguments of the parties, the record, the law, and applicable jurisprudence is fully advised in the premises and ready to rule.

Also pending before the Court is a Plaintiffs' Appeal of the Magistrate's Ruling Denying Leave to Amend. Rec. Doc. 328. That Motion came for hearing without

oral argument on March 19, 2008, and was submitted on the briefs.

The Court, having considered the arguments of the parties, the Court record, the law and applicable jurisprudence, is fully advised in the premises and ready to rule.

I. BACKGROUND

This action involves a dispute over insurance coverage applicable to Plaintiffs' two (2) furniture stores as a result of damage during Hurricanes Katrina and Rita. Plaintiffs were the named insured on Policy No. 70606595 issued by Defendant with an original policy period of June 30, 2005 through June 30, 2006. Plaintiffs allege they have not been properly paid in accordance with [*3] the policy provisions and seek, *inter alia,* penalties and attorneys fees under the appropriate statutes for Defendant's alleged bad faith in not paying the claims within the statutory time period pursuant to LSA-R.S.§ 22:658 and for breaching its duty of good faith and fair dealing pursuant to LSA-R.S. § 22:1220. Rec. Doc.1. The statutory penalty under LSA-R.S.§ 22:658 was increased from 25% to 50% effective August 15, 2006, and now provides for the assessment of attorney's fees. The amendment and its applicability are the subject of this Motion.

Defendants filed the instant Motion requesting the Court find that the pre-amendment version of LSA-R.S.§ 22:658 applies as the allegations regarding the bad faith adjustment of the claim took place prior to the amendment's effective date. Further, Defendant argues that Plaintiffs' cannot show that Defendant acted arbitrarily, capriciously or without probable cause and therefore, summary judgment should granted declaring that Defendant cannot be held liable under LSA-R.S.§ 22:658 Finally, Defendant argues that the undisputed evidence shows that it did not intentionally misrepresent coverage issues to the Plaintiffs and therefore, they are entitled [*4] to summary judgment declaring that they cannot be held liable under LSA-R.S. § 22:1220. Rec. Doc. 113.

Plaintiffs counter that the 2006 amendment applies retroactively to conduct that occurred pre-amendment and therefore, the 50% penalty and attorney's fees provision applies in this case. Even if the amendment applies prospectively only, Plaintiffs argue they are entitled to the 50% penalty and the attorney's fees because Defendant's conduct continued after the effective date of the amendment. Rec. Doc. 145. Third, Plaintiffs argue that the summary judgment on the LSA-R.S. § 22:1220 issue should be denied because the evidence is clear that Defendant repeatedly misrepresented the policy provisions. Fourth, Plaintiffs argue summary judgment should be denied because questions of fact exist regarding whether Defendant violated the statutes in connection with their adjustment of the business income claim. Rec. Doc. 145 at p. 17. Fifth, Plaintiffs suggest summary judgment be denied because the evidence shows Defendant violated both LSA-R.S. § 22:1220 and LSA-R.S.§ 22:658 in connection with the claim for rug damage at the Royal Street location. Finally, Plaintiffs submit the summary judgment [*5] should be denied because the evidence shows Defendant violated both LSA-R.S. § 22:1220 and LSA-R.S.§ 22:658 as it relates to the Airline Drive building damage claim. Rec. Doc. 145.

II. LAW AND ANALYSIS

Summary judgment should be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FRCP 56(c). The party moving for summary judgment bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. *Stults v. Conoco, Inc.*, 76 F.3d 651, 655-56 (5th Cir. 1996) *citing, Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 912-13 (5th Cir.). Summary judgment is also proper if the party opposing the motion fails to establish an essential element of his case. *See Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). In this regard, the non-moving party must do more than simply deny the allegations raised by the moving party. *See Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646, 649 (5th Cir. 1992). [*6] Rather, the non-movant must come forward with competent evidence, such as affidavits or depositions, to buttress his claims. *Id.* Hearsay evidence and unsworn documents do not qualify as competent opposing evidence. *Martin v. John W. Stone Oil Distrib., Inc.*, 819 F.2d 547, 549 (5th Cir. 1987). Finally, in evaluating the summary judgment motion, the court must read the facts in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255.

The Court begins with Defendant's arguments that it is entitled to summary judgment on the issues related to its proposed bad faith, alleged failure to timely adjust claims, its alleged misrepresentations under the policy and all other acts of arbitrariness, capriciousness or lack of probable cause alleged by Plaintiffs in violation of LSA-R.S. § 22:1220 and LSA-R.S.§ 22:658. At the same time the instant Motion was filed, Plaintiffs filed Motions for Summary Judgment requesting the Court find as a matter of law that Defendant's conduct, the same conduct at issue in this Motion, violated, as a matter of law, these same statutes. *See* Rec. Docs. 102, 105. The Court found that those Motions should be denied due the highly

fact intense inquiry [*7] of the issues presented which inquires are better left for the jury to decide after hearing and weighing all the evidence. The Court comes to the same conclusion with regard to Defendant's instant Motion. Accordingly, the Motion is denied insofar as it requests summary judgment finding that Defendant's conduct, as a matter of law, did not violate LSA-R.S. § 22:1220 and LSA-R.S.§ 22:658.

Turning now to the applicability of the 2006 Amendment, this Court has already ruled on the issues presented herein in *Marketfare Annunciation, LLC v. United Fire & Cas. Co.* 2007 U.S. Dist. LEXIS 85944, 2007 WL 4144944 (E.D.La., 2007)(Porteous, J). In *Marketfare,* this Court held that the 2006 Amendments to LSA-R.S. 22:658 do not apply retroactively. 2007 U.S. Dist. LEXIS 85944, 2007 WL 4144944 *2. Accordingly, Plaintiffs' argument that the 50% penalty and attorneys fees provision enacted in 2006 apply retroactively to acts pre-amendment is rejected.

Next, Plaintiffs argue that the statute applies prospectively to acts that occurred post-amendment. In the context of this Motion, Plaintiffs submit evidence of one alleged instance of improper action by the Defendant in April 2007, after the lawsuit was filed. *See* Rec. Doc. 263 at p. 5. [1] In *Marketfare,* this Court [*8] found that the date the cause of action **accrues** is the applicable date for determining whether the 2006 or 2005 version is applicable. 2007 U.S. Dist. LEXIS 85944, 2007 WL 4144944 *3. Similar to the plaintiffs in *Marketfare,* the Plaintiffs in this matter do not present evidence regarding the accrual of their cause of action but rather argue that when conduct begins pre-amendment and continues post-amendment, the newer version of the statute applies to the post-amendment conduct. That argument was rejected in *Marketfare* based upon this Court's prior rulings. *See Marketfare,* 2007 U.S. Dist. LEXIS 85944, 2007 WL 4144944, 5 (E.D. La. 2007) *citing, Kiefer v. State Farm Mutual Automobile Co.,* 1999 U.S. Dist. LEXIS 3220, 1999 WL 147673 (ED La. 3/11/99)(Porteous, J). In *Kiefer,* the issue was whether LSA-R.S. § 22:1220, effective on July 6, 1990, applied to an insurer's conduct which continued after the statute's effective date. In *Kiefer,* this Court found that the insured had been complaining of the bad faith conduct since 1989 (pre-enactment) and specifically rejected the argument that if the bad faith continued past the July 1990 effective date, that the statute would be applicable to conduct occurring pre-enactment. This Court agreed with Louisiana precedent that if the alleged [*9] bad faith occurred (i.e. began) after the effective date of the statute, such as when a settlement is reached and not funded within thirty (30) days, then the statute would apply prospectively to such a claim. However, because it was clear that State Farm's failure to make any tender began in 1989 and continued after the statute's enactment, the statute was not applicable to the pre-amendment facts of the case. *Kiefer,* 1999 U.S. Dist. LEXIS 3220, 1999 WL 147673 *7.

1 The Court is aware of the pending Appeal of the Magistrate's ruling denying Plaintiffs' Motion for Leave to Amend asserts additional post-amendment conduct beginning in April 2007 and ending in November 2007. Rec. Doc. 336.

In determining when the cause of action accrues, the Court looked to Judge Duval's decision in *Madere v. State Farm Fire & Casualty Company,* 2007 U.S. Dist. LEXIS 41283, 2007 WL 165553 (E.D. La. 2007) for guidance. In *Madere,* Plaintiffs argued that the 2006 amended version of the statute should apply because the insurer failed to reexamine its position post-amendment. The insurer urged that because Plaintiffs filed suit prior to August 15, 2006, the amendment was not applicable. Judge Duval found that "an insured's right to penalty under § 658 comes into existence [*10] only after the insurer fails to pay a claim within thirty (30) days of receiving satisfactory proof of loss." *Madere,* 2007 U.S. Dist. LEXIS 41283, 2007 WL 165553 (E.D. La. 2007)(citations omitted). "The critical factor in determining the applicability of the amendment to § 658 is not whether the suit was filed prior to the effective date of the amendment, ... but rather whether the thirty (30) day period within which State Farm had to pay the claim, trigger[ed] by its receipt of the "satisfactory proof of loss," expired on or after August 15, 2006." *Id.* Judge Duval denied the Motion for Summary Judgment because there was no evidence showing when, or if, plaintiffs provided State Farm with satisfactory proof of loss. Thus, Judge Duval could not determine whether the thirty (30) day period during which State Farm should have timely paid payment, elapsed prior to or after the effective date of the amendment.

Similarly, the Court cannot surmise from this record when or whether satisfactory proof of loss was submitted and therefore, the Court cannot ascertain whether the cause of action accrued prior to or after the effective date of the 2006 amendment. In fact, in the other numerous motions filed before this Court one [*11] of the highly contested issues is the adequacy and existence of "proof of loss." Accordingly, the Court **DENIES** Defendant's Summary Judgment at this time.

The Court now reviews Plaintiffs' Appeal of the Magistrate's Order denying Plaintiffs' Leave to Amend relying on this Court's *Marketfare* decision. Rec. Doc. 318. In sum, Plaintiffs argue that the Magistrate erred in not allowing Plaintiffs to amend their complaint to alleged acts violating LSA-R.S. § 22:1220 and LSA-R.S.§ 22:658 which occurred after the 2006 Amendment. Rec.

Doc. 336. Specifically, Plaintiffs seek leave to amend to add allegations of bad acts occurring in April 24, 2007, June 21, 2007, and November 5, 2007. Rec. Doc. 336. These alleged acts are all past the date this suit was filed, i.e. post-August 25, 2006. Hence, they cannot be looked at in determining whether the penalty statute is applicable. *Marketfare*, 2007 U.S. Dist. LEXIS 85944, 2007 WL 4144944, 3 (E.D.La., 2007) *citing Premium Finance Company v. Employers Reinsurance Corp.*, 761 F.Supp. 450, 452 (W.D.La.1991). Accordingly, the Court finds that the Magistrate's ruling was not clearly erroneous or contrary to law. *See* FRCP 72(a); 28 U.S.C. § 636 (b)(1)(A).

For the foregoing reasons,

IT IS [*12] **ORDERED** that Defendant's Motion for Partial Summary Judgment (Rec. Doc. 113) is **DENIED.**

IT IS FURTHER ORDERED that Plaintiffs' Appeal of the Magistrate's Order Denying Leave to Amend (Rec. Doc. 328) is **DENIED.**

New Orleans, Louisiana, this 31st day of March, 2008.

/s/ G. Thomas Porteous, Jr.

G. THOMAS PORTEOUS, JR.

UNITED STATES DISTRICT JUDGE