Exhibit B

Analysis
As of: Dec 03, 2010

Bank of Oklahoma, N.A., Plaintiff, vs. Tharaldson Motels II, Inc., a North Dakota corporation, Defendant. Tharaldson Motels II, Inc., a North Dakota corporation; Gary D. Tharaldson, a resident of the state of Nevada; and Club Vista Financial Services, LLC, a Nevada limited liability company, Third-Party Plaintiffs and/or Counterclaimants, vs. Bank of Oklahoma, N.A.; Scott Financial Corporation, a North Dakota corporation; Bradley J. Scott, a resident of North Dakota; Gemstone Development West, Inc., a Nevada corporation; Asphalt Products Corporation, a Nevada corporation d/b/a APCO Construction; Doe Individuals 1-100; Roe Business Entities 1-100; and Maslon Edelman Borman & Brand, LLP, a Minnesota limited liability partnership, Third-Party Defendants and/or Counterdefendants.

Case No. 1:09-cv-030

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA, SOUTHWESTERN DIVISION

2010 U.S. Dist. LEXIS 68603

July 8, 2010, Decided
July 8, 2010, Filed

SUBSEQUENT HISTORY: Motion denied by Bank of Okla., N.A. v. Tharaldson Motels II, Inc., 2010 U.S. Dist. LEXIS 113567 (D.N.D., Oct. 15, 2010)

PRIOR HISTORY: Bank of Okla., N.A. v. Tharaldson Motels II, Inc., 671 F. Supp. 2d 1058, 2009 U.S. Dist. LEXIS 110600 (D.N.D., 2009)

CORE TERMS: guaranty, counterclaim, misjoined, drop, claims asserted, breach of fiduciary duty, oral argument, financial services, moot, sever, venue, aiding and abetting, fraudulent, breach of contract, judicial economy, gratuitous, dropping, negligent misrepresentation, negligent omission, misrepresentation, convenient, developer, litigated, multitude, omissions

COUNSEL: [*1] For Bank of Oklahoma, N.A., Plaintiff: Benjamin E. Thomas, LEAD ATTORNEY, WOLD JOHNSON, FARGO, ND; John D. Clayman, Piper W. Turner, PRO HAC VICE, Frederic Dorwart, Tulsa, OK.

For Tharaldson Motels II, Inc., a North Dakota corporation, Defendant: Monte Lane Rogneby, LEAD ATTORNEY, VOGEL LAW FIRM, BISMARCK, ND; Christine R. Taradash, Jennifer M. Dubay, John T. Moshier, Martin A. Aronson, PRO HAC VICE, Morrill & Aronson, PLC, Phoenix, AZ.

For Gary D. Tharaldson, a resident of the state of Nevada, Club Vista Financial Services, LLC, a Nevada limited liability company, 3rd Party Plaintiff, Counter Claimant: Monte Lane Rogneby, LEAD ATTORNEY, VOGEL LAW FIRM, BISMARCK, ND; Christine R. Taradash, John T. Moshier, Martin A. Aronson, PRO HAC VICE, Morrill & Aronson, PLC, Phoenix, AZ.

For Scott Financial Corporation, a North Dakota corporation, 3rd Party Defendant, Counter Defendant: Mark R. Hanson, LEAD ATTORNEY, Kristi L. Haugen, NILLES LAW FIRM, FARGO, ND; Jon R. Jones, Matthew S. Carter, PRO HAC VICE, Kemp Jones & Coulthard,LLP, Las Veags, NV.

For Bradley J Scott, a resident of North Dakota, 3rd Party Defendant, Counter Defendant: Mark R. Hanson, NILLES LAW FIRM, FARGO, ND; Matthew S. Carter, [*2] PRO HAC VICE, Kemp Jones & Coulthard,LLP, Las Veags, NV.

For Asphalt Products Corporation, a Nevada Corporation doing business as APCO Construction, 3rd Party Defendant, Counter Defendant: Jonathan P. Sanstead, PEARCE & DURICK, BISMARCK, ND; Wade B. Gochnour, PRO HAC VICE, Howard & Howard Attorneys PLLC, Las Vegas, NV.

For Maslon Edelman Borman & Brand, LLP, a Minnesota limited liability partnership, 3rd Party Defendant, Counter Defendant: Christopher R. Morris, Kevin P. Hickey, BASSFORD REMELE, MINNEAPOLIS, MN; David A. Turner, Lewis A. Remele, PRO HAC VICE, BASSFORD REMELE, MINNEAPOLIS, MN.

For Tharaldson Motels II, Inc., a North Dakota corporation, 3rd Party Plaintiff, Counter Claimant: Monte Lane Rogneby, LEAD ATTORNEY, VOGEL LAW FIRM, BISMARCK, ND; Jennifer M. Dubay, PRO HAC VICE, Christine R. Taradash, John T. Moshier, Martin A. Aronson, Morrill & Aronson, PLC, Phoenix, AZ.

For Bank of Oklahoma, N.A., Counter Defendant: Benjamin E. Thomas, LEAD ATTORNEY, WOLD JOHNSON, FARGO, ND; John D. Clayman, Piper W. Turner, Frederic Dorwart, Tulsa, OK.

JUDGES: Daniel L. Hovland, District Judge, United States District Judge.

OPINION BY: Daniel L. Hovland

OPINION

ORDER

Before the Court are five motions: (1) Bank of Oklahoma, [*3] N.A.'s Motion to "Drop Misjoined Parties" filed on January 11, 2010; (2) Bank of Oklahoma, N.A.'s "Motion to Dismiss Gary D. Tharaldson's and Club Vista Financial Services, Inc.'s Third Party Complaint" filed on January 11, 2010; (3) Scott Financial Corporation and Bradley J. Scott's "Motion to Dismiss Third-Party Complaint" filed on January 15, 2010; (4) APCO Construction's "Motion to Dismiss Complaint" filed on February 2, 2010; and (5) Maslon Edelman Borman & Brand, LLP's "Motion to Dismiss or Sever and Transfer Claims" filed on March 8, 2010. See Docket Nos. 49, 50, 52, 71, and 96. For the reasons set forth below, the Court grants Bank of Oklahoma, N.A.'s motion to drop misjoined parties and finds the other motions moot.

I. BACKGROUND

The plaintiff, the Bank of Oklahoma, N.A. (Bank of Oklahoma), is a financial services company engaged in commercial lending activities for the development of commercial, retail, and residential real estate development and construction. The defendant, Tharaldson Motels II, Inc. (Tharaldson Motels II), is a developer and operator of select service and extended service hotels across the country. Bank of Oklahoma and Tharaldson Motels II are involved in [*4] a complex real estate development project in Las Vegas, Nevada known as "Manhattan West." See Docket No. 1.

Manhattan West's developer was Gemstone Development West, LLC (Gemstone), a Nevada limited liability company. The general contractor for the construction of the Manhattan West project was Asphalt Products Corporation, d/b/a APCO Construction (APCO), a Nevada corporation. Scott Financial Corporation (Scott Financial) is a North Dakota corporation, and Bradley J. Scott is the president of Scott Financial. Club Vista Financial Services, LLC (Club Vista) is a Nevada limited liability company. Gary D. Tharaldson indirectly owns one hundred percent of the member interests in Club Vista and a minority interest in Tharaldson Motels II.

Scott Financial agreed to loan up to $ 110 million to Gemstone for the development of the Manhattan West project. Scott Financial obtained funding for the loan through a banking syndicate that included 29 financial institutions. Bank of Oklahoma was one of the institutions and had agreed to fund $ 24 million on the project. Tharaldson Motels II executed a guaranty for the benefit of Bank of Oklahoma in January 2008. A provision in the guaranty provides:

> 10. [*5] This Guaranty shall be construed according to and will be enforced under the substantive and procedural . . . laws of the State of North Dakota. Guarantor [Tharaldson Motels II] hereby consents to the exclusive personal and venue jurisdiction of the state and federal courts located in Burleigh County, North Dakota in connection with any controversy related in any way to this Guaranty, and waives any argument that venue in such forums is not convenient.

See Docket No. 1-1.

On January 13, 2009, Club Vista, Tharaldson Motels II, and Gary Tharaldson filed a state court action in Clark County, Nevada against Scott Financial, Bradley Scott, Bank of Oklahoma, Gemstone, APCO, Doe Individuals 1-100, and Roe Business Entities 1-100, alleging in part fraud, breach of fiduciary duty, and breach of contract.

See Docket Nos. 11 and 12. On June 12, 2009, Bank of Oklahoma filed a complaint in federal district court in North Dakota alleging that the $ 110 million loan is in default and Tharaldson Motels II has refused to honor its contractual commitments under the terms of the guaranty. See Docket No. 1. Tharaldson Motels II filed a motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure [*6] or, in the alternative, stay pending the outcome of the litigation in Nevada state court. See Docket No. 8. The Court heard oral argument on November 18, 2009. See Docket No. 38. On November 25, 2009, the Court issued an "Order Denying Defendant's Motion to Dismiss and Motion to Stay Proceedings." See Docket No. 39.

On December 9, 2009, Tharaldson Motels II filed an "Answer to Bank of Oklahoma's Complaint and Counterclaim and/or Third-Party Complaint" that added all of the parties that were pending in the Nevada state court action. See Docket No. 40. On January 21, 2010, Tharaldson Motels II filed an amended counterclaim and/or third-party complaint that added Maslon Edelman Borman & Brand, LLP (Maslon), a Minnesota law firm, as a third-party defendant. [1] See Docket No. 57. In its amended counterclaim and/or third-party complaint, Tharaldson Motels II, Club Vista, and Gary Tharaldson assert the following eighteen claims: (1) fraudulent misrepresentation as against Bradley Scott, Scott Financial, Bank of Oklahoma, and APCO; (2) fraudulent concealment/fraudulent omissions as against Bradley Scott, Scott Financial, and Bank of Oklahoma; (3) constructive fraud as against Bradley Scott, [*7] Scott Financial, and Bank of Oklahoma; (4) negligent misrepresentation/negligent omission as against Bradley Scott, Scott Financial, and Bank of Oklahoma; (5) securities fraud as against Bradley Scott, Scott Financial, and Bank of Oklahoma; (6) defamation as against Scott Financial and Bank of Oklahoma; (7) breach of fiduciary duty as against Bradley Scott, Scott Financial, and Bank of Oklahoma; (8) aiding and abetting breach of fiduciary duty as against Bank of Oklahoma; (9) acting in concert/civil conspiracy as against Bradley Scott, Scott Financial, Bank of Oklahoma, APCO, and Gemstone; (10) breach of contract as against Bradley Scott, Scott Financial, and Bank of Oklahoma; (11) breach of covenant of good faith and fair dealing as against Bradley Scott, Scott Financial, and Bank of Oklahoma; (12) negligence as against Bradley Scott, Scott Financial, and Bank of Oklahoma; (13) declaratory judgment as against Bradley Scott, Scott Financial, Bank of Oklahoma, APCO, and Gemstone; (14) professional malpractice/negligence as against Maslon; (15) negligent misrepresentation/negligent omission as against Maslon; (16) breach of fiduciary duty as against Maslon; (17) aiding and abetting breach [*8] of fiduciary duty as against Maslon; and (18) aiding and abetting misrepresentations and omissions as against Maslon.

1 On January 21, 2010, Club Vista, Tharaldson Motels II, and Gary Tharaldson filed a complaint against Maslon Edelman Borman & Brand, LLP in Nevada as well. See Docket No. 77-1. The Nevada complaint contains the same claims against Maslon as the amended counterclaim and/or third-party complaint before this Court.

Bank of Oklahoma requests that the Court drop all of the parties, except Bank of Oklahoma and Tharaldson Motels II, as misjoined parties under Rule 21 of the Federal Rules of Civil Procedure or, in the alternative, sever the claims. Scott Financial and Bradley Scott contend the third-party claims against them should be dropped pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure due to a lack of subject matter jurisdiction. APCO contends the third-party claims asserted against it should be dismissed pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(3) of the Federal Rules of Civil Procedure due to a lack of subject matter and personal jurisdiction and improper venue. Maslon contends the third-party claims asserted against it should be dismissed pursuant [*9] to Rules 12(b)(2) and 12(b)(3) of the Federal Rules of Civil Procedure or, in the alternative, the claims asserted against it should be severed pursuant to Rule 14(a)(4) of the Federal Rules of Civil Procedure and transferred to the United States District Court for the District of Minnesota under 28 U.S.C. § 1404(a).

II. STANDARD OF REVIEW

Rule 21 of the Federal Rules of Civil Procedure states: "Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party." Misjoinder "occurs when there is no common question of law or fact or when . . . the events that give rise to the plaintiff's claims against defendants do not stem from the same transaction." DirecTV, Inc. v. Leto, 467 F.3d 842, 844 (3d Cir. 2006); see Strandlund v. Hawley, 532 F.3d 741, 745 (8th Cir. 2008) (adopting the Third and Seventh Circuits' interpretations of Rule 21). The Third and Seventh Circuits interpreted Rule 21 "to permit dismissals of parties only if they do not cause 'gratuitous harm to the parties' for the 'discretion delegated to the trial judge to dismiss under Rule 21 [*10] is restricted to what is just.'" Strandlund, 532 F.3d at 745 (internal citations omitted). Rule 21 has the purposes of both Rule 19 and Rule 20: (1) "to insure the presence of an 'essential core' of parties and issues, to avoid a multiplicity of suits" and (2) to permit "the Court to add parties but to avoid unduly complicating the proceeding." Stark v. Indep. Sch.

Dist. No. 640, 163 F.R.D. 557, 564 (D. Minn. 1995) (citing 7 Charles A. Wright et al., Federal Practice and Procedure §§ 1602, 1652, 1681 (1986)). It is also appropriate, under Rule 21, for the Court to consider judicial economy and efficiency in reaching its conclusion. Stark, 163 F.R.D. at 564.

III. LEGAL DISCUSSION

At the hearing on November 18, 2009, Tharaldson Motels II asserted that the action before this Court and the action in Nevada state court are the same and that this action should be dismissed or stayed pending the outcome in Nevada. At the hearing, Tharaldson Motels II argued:

> And we submit that because of the complexity of this case, that this court in North Dakota is not as convenient as Nevada. Nevada is the one jurisdiction that has jurisdiction over all of the parties and can also decide the lien priority [*11] issues. It's doubtful that all of those claims could be resolved here in North Dakota given the location of the parties and that the project is located there. . . .

See Docket No. 42, p. 16. Tharaldson Motels II contends that litigating one guaranty here and all other matters in Nevada would create piecemeal litigation. However, the Court ruled otherwise in its November 25, 2009 order. See Docket No. 39. The Court held that the guaranty between the Bank of Oklahoma and Tharaldson Motels II would be litigated in this court. The Court's clear intention was that it would handle that relatively minor legal issue among the many complex factual and legal issues present in the Nevada state court action. It appears that Tharaldson Motels II was unhappy with the Court's decision and subsequently filed a counterclaim and/or third-party complaint in this Court that brings in all of the parties and the multitude of issues currently pending in the Nevada state court action.

Only the Bank of Oklahoma and Tharaldson Motels II are parties to the guaranty. Dismissing all of the parties added by the amended counterclaim and/or third-party complaint does not cause gratuitous harm to Tharaldson Motels II [*12] or any of the subsequently added parties. Tharaldson Motels II is able to assert counterclaims and affirmative defenses against Bank of Oklahoma. There is no indication that dropping the misjoined parties will adversely affect Tharaldson Motels II, Club Vista, or Gary Tharaldson's claims. See Strandlund, 532 F.3d at 746 (finding that the district court abused its discretion by dropping the appellants because the statute of limitations on many of their claims appeared to have run at the time of the district court's Rule 21 order). On the other hand, allowing the misjoined parties to remain part of this North Dakota action would result in an unreasonable duplication of litigation and expense since the same issues are pending before the Nevada state court. Counsel for Tharaldson Motels II admitted that "Nevada is the one jurisdiction that has jurisdiction over all of the parties and can also decide the lien priority issues." See Docket No. 42, p. 16.

Taking into consideration judicial economy and efficiency, the Court finds, in its discretion, that it is appropriate and just to drop all but the original parties to this action, the Bank of Oklahoma and Tharaldson Motels II. The claims asserted [*13] by Gary Tharaldson and Club Vista will be dismissed without prejudice. The claims against Scott Financial, Bradley Scott, Gemstone, APCO, Doe Individuals 1-100, Roe Business Entities 1-100, and Maslon will also be dismissed without prejudice.

IV. CONCLUSION

Tharaldson Motels II wants all of the multitude of disputes litigated together even though the Court has previously ruled otherwise. The Court finds that Gary Tharaldson, Club Vista, Scott Financial, Bradley Scott, Gemstone, APCO, Doe Individuals, Roe Business Entities, and Maslon are misjoined parties to this action. Accordingly, the Court **GRANTS** the Bank of Oklahoma's motion to drop misjoined parties (Docket No. 49), **DISMISSES WITHOUT PREJUDICE** the claims asserted by Gary D. Tharaldson and Club Vista Financial Services, LLC, and **DISMISSES WITHOUT PREJUDICE** the claims against Scott Financial Corporation, Bradley J. Scott, Gemstone Development West, Inc., Asphalt Products Corporation, d/b/a APCO Construction, Doe Individuals 1-100, Roe Business Entities 1-100, and Maslon Edelman Borman & Brand, LLP. Therefore, the Court:

> (1) **FINDS AS MOOT** the Bank of Oklahoma's "Motion to Dismiss Gary D. Tharaldson's and Club Vista Financial Services, [*14] Inc.'s Third Party Complaint" (Docket No. 50);
>
> (2) **FINDS AS MOOT** Scott Financial and Bradley Scott's "Motion to Dismiss Third-Party Complaint" (Docket No. 52);
>
> (3) **DENIES** Scott Financial and Bradley Scott's motion for oral argument (Docket No. 56);

(4) **FINDS AS MOOT** APCO's motion to dismiss (Docket No. 71);

(5) **DENIES** APCO's motion for oral argument (Docket No. 74);

(6) **FINDS AS MOOT** Maslon Edelman Borman & Brand, LLP's "Motion to Dismiss or Sever and Transfer Claims" (Docket No. 96);

(7) **DENIES** Maslon Edelman Borman & Brand, LLP's motion for oral argument (Docket No. 97); and

(8) **DENIES** the Bank of Oklahoma's motion for oral argument (Docket No. 100).

IT IS SO ORDERED.

Dated this 8th day of July, 2010.

/s/ Daniel L. Hovland

Daniel L. Hovland, District Judge

United States District Court

LEXSEE

DUTTON PARTNERS LLC, Plaintiff-Appellee, v CMS ENERGY CORPORATION, Defendant-Appellant.

No. 292094

COURT OF APPEALS OF MICHIGAN

2010 Mich. App. LEXIS 2150

November 16, 2010, Decided

NOTICE: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

SUBSEQUENT HISTORY: [*1]
Approved For Publication November 16, 2010.

PRIOR HISTORY: Oakland Circuit Court. LC No. 2008-091210-NO.

CORE TERMS: energy, pipeline, subsidiary, alter ego, entity, corporate veil, renewed, misuse, repair, amend, corporate form, board of directors, wrongdoing, binding, inspection, ownership, corporate structure, corporate entity, evidence of fraud, instrumentality, transferred, piercing, genuine, pierce, annual report, question of fact, theory of liability, registered, accounting, universal

JUDGES: Before: GLEICHER, P.J., and ZAHRA and K. F. KELLY, JJ.

OPINION

PER CURIAM.

CMS Energy Corporation, defendant, appeals by leave granted the trial court's opinion and order denying its motion for summary disposition. [1] We reverse and remand.

1 *Dutton Partners LLC v CMS Energy Corp*, unpublished order of the Court of Appeals, issued August 24, 2009 (Docket No. 292094).

I. BASIC FACTS & PROCEDURE

Plaintiff owns a 177-acre development, known as "Stonegate Ravines," located in Orion Township, Michigan. An easement across the property contains an underground pipeline, which is used for the transportation and distribution of natural gas. On May 1, 2005, part of the pipeline ruptured and allegedly exploded, or at least caused natural gas to be released into the atmosphere. At the time, plaintiff was still working on the development of Stonegate Ravines and, as a result of the pipe's rupture, plaintiff had to temporarily cease its construction on the project.

On April 30, 2008, plaintiff filed a two-count complaint alleging that defendant was negligent and that its conduct, which allegedly caused the pipe to explode, had [*2] created a nuisance and trespass on plaintiff's property. Plaintiff's complaint was filed one day before the statute of limitations expired. See MCL 600.5805(10) (setting the limitations period for ordinary negligence actions at three years). In its answer to the complaint, defendant asserted that plaintiff had sued the wrong party.

A. DEFENDANT'S CORPORATE STRUCTURE

Defendant is a corporation organized under Michigan's laws and is a utility holding company. Defendant does not have any daily operations and has no employees; instead, it derives income from the holdings of its subsidiaries in the form of dividends received on securities. Its subsidiaries are involved in various sectors of the power and energy industries. A majority of defendant's income derives from only one of its subsidiaries, Consumers Energy Company (Consumers).

Consumers owns, operates, and maintains the pipeline involved in the underlying incident. However, defendant and Consumers are separate Michigan corporations, allegedly each with its own officers and board of directors. And, although defendant owns 100 percent of Consumers, defendant does not own or operate any of Consumers' gas pipelines or related infrastructure. [*3]

Consumers controls its own day-to-day operations, while defendant only concerns itself with regard to major policy issues affecting Consumers. Further, the two companies allegedly keep separate books and records, their financial results are reported separately, and each entities' board of directors has their own meetings and separate minutes are kept.

Other attributes of the two corporations, however, are not so distinct. Consumers and defendant share the same physical address; Consumers' universal resource locator (URL), or its website domain, is registered to defendant; the two share the same in-house counsel; all of Consumers' and defendant's filings with the Securities and Exchange Commission (SEC) are filed jointly; the two entities share the same code of conduct, ethics manual, and set of governing principles; and, defendant includes all of Consumers' assets, including its pipelines, on its balance sheets and depreciates such assets for its accounting purposes.

B. MOTION FOR SUMMARY DISPOSITION

On September 24, 2008, defendant moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff had sued the incorrect party. In its brief in support, defendant argued that [*4] it is a utility holding company separate from Consumers. Defendant relied on the affidavits of Catherine Reynolds and David Montague, who testified that defendant's corporate structure is separate from Consumers' structure and to Consumers' role in pre- and post-investigation of the ruptured pipeline, respectively.

Plaintiff countered that its suit against defendant was appropriate because defendant allegedly is the alter ego of Consumers. Plaintiff supported its position that Consumers and defendant are the same entity by relying on publicly available information showing, among other things, that the two share the same corporate address and had made joint filings to the SEC. Further, contrary to Reynold's affidavit, plaintiff asserted that Consumers and defendant shared the same board of directors and corporate executives, relying on information from defendant's 2007 annual report and defendant's website. It asserted that summary disposition should be denied because a question of fact remained regarding whether defendant is the alter ego of Consumers. It also contended that that it should be allowed further discovery because defendant's liability was not limited to "ownership" of the [*5] pipeline, but included maintenance, repair, and inspection of the pipeline.

Before the trial court could rule on defendant's motion for summary disposition, plaintiff filed a motion to amend the pleadings to add Consumers as a party. Defendant countered that such leave to amend should be denied because the statute of limitations had expired on plaintiff's claims.

The trial court, Judge Fred M. Mester presiding, denied defendant's motion for summary disposition and also denied plaintiff's motion to amend the complaint. In denying plaintiff's motion to amend, the court found that Consumers did not have notice of the lawsuit within the limitations period and, thus, granting the motion to amend would be futile. With regard to defendant's motion for summary disposition, the court explained:

> [T]his Court finds that because the allegation of the Complaint [sic] are not limited to liability based on ownership of the line but also as to the maintenance, repair and inspection of the pipeline, defendant may be liable to the Plaintiff in other capacities than as the owner.

The trial court made no explicit ruling regarding plaintiff's alter ego theory.

C. RENEWED MOTION FOR SUMMARY DISPOSITION

After [*6] further discovery, defendant renewed its motion for summary disposition. In its renewed motion, defendant argued that there is no question of fact that defendant does not own and is not responsible for maintenance of the pipeline at issue. In its view, the only question left to pursue was whether defendant had any of those responsibilities; it interpreted Judge Mester's order as precluding plaintiff's alter ego theory of liability. Defendant relied on a second affidavit prepared by Montague, which indicated that defendant has no responsibilities for maintenance and repair of the pipeline.

Plaintiff responded, arguing that Judge Mester's ruling had not precluded its alter ego theory. It re-affirmed its original position that defendant was an appropriate party because it is the alter ego of Consumers. Plaintiff did not provide any evidence that defendant was responsible for the pipeline's maintenance, repair, or inspection.

In the interim, a new trial judge, Judge Lisa Gorcyca, was assigned to the case. After oral argument, the trial court issued a written opinion and order denying defendant's renewed motion for summary disposition, finding that defendant misinterpreted Judge Mester's [*7] ruling. It stated:

> [T]he undisputed evidence presents material factual questions regarding whether the two entities are alter egos of one another: (1) The CMS Energy 2007

> Annual Report identifies "gas pipelines" of Consumers Energy as an asset of CMS Energy; (2) Both companies have the same physical address and phone number; (3) In the Internet Universal Resource Locator, www.consumersengergy.com has been registered to "CMS Energy," not to Consumers Energy; (4) Both entities share the same in-house counsel; (5) Consumers Energy's letterhead describes Consumers Energy as "A CMS Energy Company;" (6) CMS enjoys the accounting benefit of depreciating the gas pipelines which are supposedly owned by its subsidiary.
>
> In sum, this Court finds that Judge Mester's previous ruling were appropriate. Defendant has not presented any basis to set aside that ruling.

Defendant now appeals this order to this Court.

II. STANDARD OF REVIEW

We review the trial court's decision on defendant's renewed motion for summary disposition de novo. [2] *Fries v Mayrick Metal Stamping, Inc*, 285 Mich App 706, 712; 777 NW2d 205 (2009). A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Woodman v Kera, LLC*, 280 Mich App 125, 134; 760 NW2d 641 (2008). [*8] We must review all the evidence in a light most favorable to the non-moving party. *Houdek v Centerville Twp*, 276 Mich App 568, 572-573; 741 NW2d 587 (2007). Summary disposition is appropriate where there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. *Woodman*, 280 Mich App at 134. A genuine issue of material fact exists where the record leaves open an issue upon which reasonable minds could differ. *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 443; 761 NW2d 846 (2008).

> 2 We note that a successor judge has the authority to enter whatever orders his or her predecessor could have entered. MCR 2.613(B).

III. ANALYSIS

Defendant argues that the trial court, Judge Gorcyca presiding, erred by finding that factual questions remained with respect to plaintiff's alter ego theory of liability. We agree with defendant. At the outset, we note that the proprietary of the trial court's ruling is questionable in the first instance. Plaintiff never pled facts supporting its alter ego theory in its complaint and never moved to amend to add such facts; thus, plaintiff's complaint likely could have been dismissed for failure to state a claim. [3] However, [*9] because the trial court treated the alter-ego theory of liability as if it had been properly pled and raised, and ultimately denied defendant's renewed motion on the basis of plaintiff's alter ego theory, we will treat the matter as if it had been properly presented and preserved.

> 3 Despite this deficiency, defendant never moved to dismiss on this basis under MCR 2.116(C)(8); rather, both of its motions were based solely on MCR 2.116(C)(10). Defendant does argue on appeal, however, that plaintiff failed to plead specific facts seeking to have the trial court disregard defendant's corporate form and suggests that plaintiff's alter ego argument is therefore waived and should have been dismissed for failure to state a claim. Defendant could have raised this basis for dismissal in its renewed motion for summary disposition, but failed to do so. Rather, it continued to defend itself against plaintiff's alter ego theory, in effect forfeiting its own waiver argument. Thus, we consider defendant's argument under MCR 2.116(C)(8) to be unpreserved and we will not dispose of this appeal on (C)(8) grounds.

Plaintiff's suit seeks to pierce the corporate veil and hold defendant liable for the acts [*10] of its subsidiary, Consumers. [4] "In order to state a claim for tort liability based on an alleged parent-subsidiary relationship, a plaintiff would have to allege: (1) the existence of a parent-subsidiary relationship, and (2) facts that justify piercing the corporate veil." *Seasword v Hilti, Inc*, 449 Mich 542, 548; 537 NW2d 221 (1995).

> 4 Plaintiff's case differs from the traditional lawsuit where a party seeks to pierce the corporate veil because plaintiff is not attempting to hold liable defendant's individual corporate executives or shareholders. See *Rymal v Baergen*, 262 Mich App 274, 293; 686 NW2d 241 (2004) ("The traditional basis for piercing the corporate veil has been to protect a corporation's creditors where there is a unity of interest of the stockholders and the corporation and where the stockholders have used the corporate structure in an attempt to avoid legal obligations.").

It is undisputed in this case that Consumers is defendant's subsidiary. Thus, the pertinent question is whether plaintiff has alleged sufficient facts to justify piercing the corporate veil. It is well settled under Michigan law that "absent some abuse of corporate form, parent and subsidiary corporations [*11] are separate

and distinct entities . . . ." *Id.* at 547. However, the courts may ignore this presumption, and the corporate veil may be pierced, if, under the circumstances, an otherwise separate corporate existence has been used to "subvert justice or cause a result that would be contrary to some other clearly overriding public policy." *Wells v Firestone Tire & Rubber Co*, 421 Mich 641, 650; 364 NW2d 670 (1985). For the corporate veil to be pierced, the plaintiff must aver facts that show (1) the corporate entity is a mere instrumentality of another entity or individual; (2) the corporate entity must have been used to commit fraud or a wrong; and, (3) as a result, the plaintiff must have suffered an unjust injury or loss. *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 715; 762 NW2d 529 (2008). "At least in the context of tort liability, relevant factors in showing that a subsidiary is a 'mere instrumentality' of its parent might be that the parent and subsidiary shared principal offices, or had interlocking boards of directors or frequent interchanges of employees, that the subsidiary is the parent's exclusive distributing arm, or the parent's revenues are entirely derived [*12] from sales by the subsidiary." *Seasword*, 449 Mich at 548 n 10.

Here, the trial court denied defendant's renewed motion for summary disposition, finding material questions of fact exist regarding "whether the two entities are alter egos of one another[,]" including:

> (1) The CMS Energy 2007 Annual Report identifies "gas pipelines" of Consumers Energy as an asset of CMS Energy; (2) Both companies have the same physical address and phone number; (3) In the Internet Universal Resource Locator, www.consumersengergy.com has been registered to "CMS Energy," not to Consumers Energy; (4) Both entities share the same in-house counsel; (5) Consumers Energy's letterhead describes Consumers Energy as "A CMS Energy Company;" (6) CMS enjoys the accounting benefit of depreciating the gas pipelines which are supposedly owned by its subsidiary.

We do not disagree with the trial court's ruling in this regard--legitimate questions exist regarding whether Consumers is a mere instrumentality of defendant's, given the conflicting evidence presented below. However, the trial court erred by denying summary disposition because plaintiff failed to demonstrate any evidence of fraud, wrongdoing, or misuse of the corporate [*13] form. And, after our review of the record, we cannot find any factual evidence showing that defendant merely used Consumers to commit fraudulent or otherwise wrongful acts. Nothing in the record demonstrates that Consumers was so controlled or manipulated by defendant in relation to Consumers' maintenance, ownership, and repair of the pipeline, that defendant was somehow abusing its corporate shield for its own purposes. Thus, given the absence of any evidence of fraud or misuse, summary disposition for defendant should have been granted.

Significantly, plaintiff does not point to any evidence of fraud, wrongdoing, or misuse in its brief on appeal. Rather, it simply argues that Michigan law does not require such a showing in order for a parent corporation to be held liable for the acts of its subsidiary. We disagree. Plaintiff has cited no binding authority for its proposition, but instead relies on lower federal court cases and Michigan cases pre-dating 1990. Neither lower federal court decisions nor Michigan cases pre-dating November 1, 1990, are binding on this Court. *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 59; 760 NW2d 811 (2008); MCR 7.215(J)(1).

Further, defendant's [*14] reliance on *CMS Energy Corp v Attorney General*, 190 Mich App 220; 475 NW2d 451 (1991), for the same proposition is unavailing. In *CMS Energy Corp*, this Court affirmed the decision of the Michigan Public Service Commission (PSC), which disregarded the separate corporate identities of Consumers and CMS Energy in a ruling that subjected certain of Consumers' proceeds received from its own assets to the PSC's regulations. *Id.* at 223-226, 231-233. Consumers had transferred the proceeds at issue to its nonregulated subsidies for purposes of insulating those funds from regulation and those subsidiaries were subsequently transferred to CMS Energy's control. *Id.* at 223-226. Although the panel cited the proposition that fraud need not be shown to consider the entities as one, it did not rely on that proposition for its conclusion that the PSC appropriately "pierce[d] the corporate veil of the nonregulated corporate entities." *Id.* at 232. Thus, the Court's statement that fraud need not be shown is dicta and is not binding on this Court. See *Auto-Owners Ins Co v Budkis*, 227 Mich App 45, 52; 575 NW2d 79 (1997). Moreover, the Court explicitly cited some misuse of the corporate form that did occur [*15] under the circumstances; specifically, the subsidiaries held by Consumers were transferred to CMS Energy for the sole purpose of merely "avoid[ing] regulation of the proceeds to be generated by those assets." *CMS Energy Corp*, 190 Mich App at 232. Thus, *CMS Energy Corp*, does not support plaintiff's position, but rather refutes it. [5]

> 5 We were unable to locate any binding Michigan case that has held that the corporate veil may be disregarded absent a showing of fraud, wrongdoing, or some misuse of the corporate form.

Because a showing of fraud, wrongdoing, or misuse is required under Michigan law in order to prevail on an alter-ego theory of liability and because plaintiff proffered no such evidence, the trial court erred by denying defendant's renewed motion for summary disposition. Plaintiff has not presented sufficient facts in support of its alter-ego theory of liability and the case cannot go forward on this basis. The matter also cannot proceed against defendant in its individual capacity. Plaintiff concedes in its brief on appeal that "ownership as well as responsibility for repair, maintenance, and inspections of [the pipeline] rests with Consumers . . . and not [defendant]." Thus, [*16] there is no genuine question of material fact that defendant was not negligent and did not otherwise trespass on plaintiff's property. On remand, the trial court shall enter an order in defendant's favor dismissing the case with prejudice.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

Elizabeth L. Gleicher

Brian K. Zahra

Kirsten Frank Kelly

LEXSEE

DARRELL GOSTON, Plaintiff, v. RICHARD POTTER, Defendant.

9:08-CV-478 (FJS/ATB)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

2010 U.S. Dist. LEXIS 121039

September 21, 2010, Decided
September 21, 2010, Filed

CORE TERMS: confinement, amend, disciplinary hearing, inmate's, good time, substitution, hearing officer, defense counsel, liberty interest, citations omitted, futile, summary judgment, disciplinary, discovery, atypical, prison, cell, proper party, leave to amend, interest protected, recommend, successor, deceased, letter-motion, assigned, proposed amendment, process violation, sua sponte, subject to dismissal, inter alia

COUNSEL: [*1] Darrell Goston, Plaintiff, Pro se, Brocton, NY.

For Defendant: C. HARRIS DAGUE, Asst. Attorney General.

JUDGES: Hon. Andrew T. Baxter, U.S. Magistrate Judge.

OPINION BY: Andrew T. Baxter

OPINION

ANDREW T. BAXTER, Magistrate Judge

ORDER and REPORT-RECOMMENDATION

Presently before the court are two letter-motions filed by plaintiff to "substitute" parties as defendants in this action. (Dkt. Nos. 45, 46). Counsel for defendant Potter has responded in opposition to the motions. (Dkt. No. 48). For the following reasons, plaintiff's motion to "substitute" will be denied. To the extent that plaintiff's second motion (Dkt. No. 46) may be read as a motion to amend, the court will recommend denial based on futility, and this court will recommend dismissing this action in its entirety.

I. Background and Procedural History

Plaintiff brought this civil rights action, challenging two disciplinary proceedings held against him. (Dkt. No. 1). This case was complicated by plaintiff filing a petition for habeas corpus raising identical claims. *See Goston v. Woods*, 9:08-CV-462 (NAM/GHL). *Goston v. Woods* was dismissed on July 17, 2008 by Chief Judge Norman A. Mordue, after a Report-Recommendation by Magistrate Judge George H. Lowe, because [*2] plaintiff never responded to Magistrate Lowe's order to state whether plaintiff lost good time as a result of the Tier III disciplinary hearing. [1] (Dkt. Nos. 5, 6 in 9:08-CV-462).

1 A petition for habeas corpus would be the appropriate method of challenging a disciplinary hearing after which plaintiff lost good time, when a decision in the inmate's favor would necessarily affect the duration of his confinement, and after the inmate exhausted his state court remedies. *Preiser v. Rodriguez*, 411 U.S. 475, 500, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973).

On August 27, 2008, defendant Potter filed his first motion for judgment on the pleadings in this case. (Dkt. No. 15). The *only* basis for defendant's motion was the lack of personal involvement in the alleged due process violation. [2] (Dkt. No. 15-1; Def.'s Mem. of Law). In an affidavit, responding to the defendant's motion, plaintiff specifically stated that defendant Potter was the hearing officer in ***both*** the Tier II and the Tier III hearings. (Dkt. No. 18 at 4). Based, in part, on this representation, Magistrate Judge Di Bianco [3] recommended that defendant Potter's motion for judgment on the pleadings be denied. (Dkt. No. 19).

2 Although plaintiff had listed defendant Potter [*3] in the caption of the complaint, he was not

mentioned anywhere in plaintiff's statement of facts. (Dkt. No. 1).

3 This case was initially assigned to Magistrate Judge Di Bianco and was assigned to me following Judge Di Bianco's retirement on January 4, 2010. (Dkt. No. 37).

Magistrate Judge Di Bianco also stated that if plaintiff lost good time as the result of these disciplinary hearings, the plaintiff would have to show that the disciplinary hearings had been reversed prior to filing a section 1983 action based on alleged due process violations during those hearings. (Dkt. No. 19 at 5, 8). In his complaint, plaintiff did not claim that he lost good time as the result of the Tier III hearing. (Dkt. No. 19 at 8). In plaintiff's response to defendant's motion for judgment on the pleadings, he alleged *for the first time in either action*, that he lost six months of good time as the result of the Tier III hearing. *Id.* at 3 (citing Dkt. No. 17). Magistrate Judge Di Bianco stated that

> [t]he court does not wish to make the mistake of recommending dismissal *sua sponte*, and then determining that plaintiff did not lose good time ***as a result of these charges***. Thus, at this time, the court will not [*4] recommend dismissal, but will merely note that if plaintiff lost good time as he says, the case will be subject to dismissal pursuant to Edwards v. Balisok, [520 U.S. 641, 117 S. Ct. 1584, 137 L. Ed. 2d 906 (1997)].

Id. at 9 (emphasis in original).

After the Report-Recommendation was filed, defense counsel filed a letter-motion requesting that his motion for judgment on the pleadings be "withdrawn." (Dkt. No. 20). Counsel stated that in view of Magistrate Judge Di Bianco's statement that, if plaintiff lost good time as a result of the Tier III hearing, the case would be subject to dismissal based on *Edwards*, defendant wished to withdraw the motion for judgment on the pleadings so that he could file a summary judgment motion. *Id.* Defense counsel was instructed to file his papers as "Objections" to the Report-Recommendation. (Text Order dated Nov. 14, 2008). Defense counsel filed his "Objections" and included as exhibits, the disciplinary records in question, showing that plaintiff lost six months of good time as a result of the Tier III hearing in question. (Dkt. No. 21).

Prior to Senior Judge Scullin's ruling on the Report-Recommendation, plaintiff moved to amend his complaint. (Dkt. No. 22). Plaintiff alleged that defendant [*5] Potter was only the hearing officer for the Tier III hearing, rather than being the hearing officer for both the Tier II and Tier III hearings, as plaintiff had stated in his response to the defendant's motion for judgment on the pleadings. (*Compare* Dkt. No. 18 at 4 *with* Dkt. No. 22). On April 27, 2009, Senior Judge Scullin issued his Memorandum Decision and Order, adopting, as modified, Magistrate Judge Di Bianco's Report-Recommendation. (Dkt. No. 23). Senior Judge Scullin denied plaintiff's motion to "stay the action," and denied defendant Potter's motion for judgment on the pleadings. (Dkt. No. 23). In that Order, Senior Judge Scullin also ordered plaintiff to advise the court whether he would waive all claims relating to good time in order that he might proceed with his claims challenging only the sanctions that affected the conditions of his confinement, [4] *i.e.* the time that he was confined in the Special Housing Unit (SHU) as a result of the Tier III hearing. [5] *Id.*

4 *See* Peralta v. Vasquez, 467 F.3d 98, 103 (2d Cir. 2006) (allowing plaintiff to proceed with a challenge to his disciplinary hearing if he waives "once and for all" all claims relating to sanctions affecting the duration [*6] of his confinement).

5 Senior Judge Scullin stated that defense counsel had submitted a great deal of documentation regarding plaintiff's disciplinary hearings, and considered the information only to the extent that it was integral to the complaint or incorporated by reference thereto. (Dkt. No. 23 at 5-6) (citing Sira v. Morton, 380 F.3d 57, 66 (2d Cir. 2004) (quotation omitted). Based on this review, Senior Judge Scullin confirmed that plaintiff lost six months of good time as the result of the Tier III hearing. *Id.*

On May 18, 2009, plaintiff filed the waiver discussed in Senior Judge Scullin's Order, allowing this civil rights action to proceed. (Dkt. No. 24). On May 19, 2009, in accordance with plaintiff's waiver, Senior Judge Scullin ordered the dismissal of "all claims set forth in the complaint relating to disciplinary sanctions imposed on Plaintiff which affect the duration of his confinement . . . ." (Dkt. No. 25 at 2).

Magistrate Judge Di Bianco granted plaintiff's motion to amend his complaint on November 12, 2009. (Dkt. No. 33). The amended complaint was filed on November 12, 2009. (Am. Compl., Dkt. No. 34). A Mandatory Pretrial Discovery and Scheduling Order was issued on [*7] December 16, 2009, setting a discovery deadline of April 14, 2010 and a dispositive motion deadline of July 13, 2010. (Dkt. No. 36). Defense counsel filed a notice of compliance with the Mandatory Pretrial Discovery Order Production of Documents. (Dkt. No. 42). A Suggestion of Death for defendant Potter was filed on July 9, 2010, and at the same time, this court granted

defense counsel's request for a stay of the dispositive motion deadline. (Dkt. Nos. 43, 44 and Text Order dtd. July 9, 2010).

II. Substitution of Parties

A. Legal Standard

Rule 25 of the Federal Rules of Civil Procedure provides that if a party dies, and the claim is not extinguished by the party's death, the court may order substitution of the proper party. Fed. R. Civ. P. 25(a)(1). A motion for substitution may be made by ***any party***, and the motion must be served on the parties as provided in Rule 5 and served upon non-parties as one would serve a summons pursuant to Rule 4. *Id.* Rule 25 further provides that unless a motion for substitution is made within 90 days after the death is "suggested upon the record by service of a statement of the fact of the death as provided [in the rule] for the service of the motion," the [*8] action will be dismissed as against the deceased party. *Id.*

The rule makes it clear that any party may make a motion for substitution, but as soon as a "suggestion of death" is filed, the motion for substitution must be made within 90 days. *Id.* The running of the 90 days commences with the "proper suggestion of death." *George v. United States*, 208 F.R.D. 29, 31 (D. Conn. 2001) (citing *Pastorello v. City of New York*, 95 Civ. 470, 2000 U.S. Dist. LEXIS 15137, 2000 WL 1538518, at *2 (S.D.N.Y. Oct. 18, 2000)). In *George v. United States*, the court cited two affirmative steps required to trigger the 90-day time limitation. *Id.* First, death must be "formally" suggested "upon the record." *Id*, (citing *Barlow v. Ground*, 39 F.3d 231, 233 (9th Cir. 1994)). Second, the "suggesting party" must serve other parties and non-party successors or representatives of the deceased with a suggestion of death in the same manner as required for service of the motion to substitute. *Id.* Although existing parties may be served pursuant to Fed. R. Civ. P. 5, non-parties must be served as if they were being served with a summons pursuant to Fed. R. Civ. P. 4. *Id.*

B. Application

In this case, defense counsel filed the suggestion of death on July [*9] 9, 2010. (Dkt. No. 43). Defense counsel served plaintiff with the suggestion of death, but it does not appear that the successors or representatives of the deceased party were served with the document. Plaintiff, therefore, has until October 7, 2010 to move for substitution of parties. On August 6, 2010, plaintiff attempted to "substitute" David Rock as a defendant "in place of Richard Potter." (Dkt. No. 45). On August 25, 2010, plaintiff requested the opportunity to further "amend" his complaint to substitute Lieutenant Sawyer and Deputy Superintendent John Doe for "the original defendant." (Dkt. No. 46).

Even assuming that plaintiff's submissions were sufficient "motions," plaintiff has understandably misunderstood the meaning of Rule 25. The meaning of a "proper party" under Rule 25 "is either a representative of the decedent's estate or the successor of the deceased." *Shapiro v. United States*, No. 07 Civ. 161, 2008 U.S. Dist. LEXIS 74252, 2008 WL 4302614, at *1 (S.D.N.Y. Sept. 17, 2008) (citations omitted). Under New York law, to qualify as a "representative" of the decedent's estate, the individual must have received letters to administer the estate of the decedent. *Id.* (citing *Graham v. Henderson*, 224 F.R.D. 59, 64 (N.D.N.Y. 2004). [*10] To qualify as a "successor," the individual is considered a proper party if the person is a distributee of the estate. *Id.* (citing *inter alia Hardy v. Kaszycki & Sons Contractors, Inc.*, 842 F. Supp. 713, 716-17 (S.D.N.Y. 1993)).

David Rock is the Superintendent of Great Meadow Correctional Facility. (Dkt. No. 46 at 1). It is unclear from the plaintiff's submission who proposed defendants Sawyer [6] and Doe are; however, it is clear that none of these defendants are representatives of defendant Potter's estate, nor are they distributees of the estate. None of the new defendants proposed by plaintiff is a "proper party" for substitution. Plaintiff has not yet requested the substitution of the proper party. Thus, to the extent that plaintiff is asking to "substitute" these parties for defendant Potter, these "motions" are denied.

6 Based upon documents provided by defense counsel in his "objections" to Judge Di Bianco's Report-Recommendation, proposed defendant Sawyer appears to be the hearing officer assigned to the Tier II hearing at issue in this case. (Dkt. No. 21-1 at 1).

III. Motion to Amend

As a *pro se* party, plaintiff may have been confused by the concept of "substitution" of parties. [*11] The court will also interpret plaintiff's submissions as motions to amend his complaint to add defendants in addition to, not in place of, defendant Potter.

A. Legal Standard

Fed. R. Civ. P. 15(a) provides that the Court should grant leave to amend "freely . . . when justice so requires." Generally, the court has discretion whether or not to grant leave to amend a pleading. *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962). When exercising its discretion, the court must examine whether there has been undue delay, bad faith, or dilatory motive on the part of the moving party. *Evans v. Syra-*

cuse City School District, 704 F.2d 44, 46 (2d Cir. 1983) (citing Foman, 371 U.S. at 182). The court must also examine whether there will be prejudice to the opposing party. *See, e.g., Ansam Associates Inc. v. Cola Petroleum, Ltd.*, 760 F.2d 442, 446 (2d Cir.1985) (permitting proposed amendment would be especially prejudicial once discovery was completed and a summary judgment motion filed). Where it appears that granting leave to amend is unlikely to be productive or the amendment is futile, it is not an abuse of discretion to deny leave to amend. *Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 131 (2d Cir. 1993) [*12] (citations omitted).

Generally, an amendment is futile if the pleading fails to state a claim or would otherwise be subject to dismissal. *Duling v. Gristede's Operating Corp.*, 265 F.R.D. 91, 103-104 (S.D.N.Y. 2010) (citing *inter alia Health Chem Corp. v. Baker*, 915 F.2d 805, 810 (2d Cir. 1990)) (failure to state a claim); *Yves Saint Laurent Parfums, S.A. v. Costco Wholesaler Corp.*, No. 07 Civ. 3214, 2010 U.S. Dist. LEXIS 62967, 2010 WL 2593671, at *2 (S.D.N.Y. June 24, 2010) (leave to amend based on futility may be granted where the proposed amendment has "no colorable merit). The analysis is similar to that employed in a motion to dismiss. *Kassner v. 2nd Avenue Delicatessen, Inc.*, 496 F.3d 229, 244 (2d Cir. 2007); *Stetz v. Reeher Enterprises, Inc.*, 70 F. Supp. 2d 119, 121 (N.D.N.Y. 1999). The court must accept the asserted facts as true and construe them in the light most favorable to the amending party. *Id.* The complaint must contain sufficient factual matter, accepted as true, to state a claim that is "plausible on its face." *Ashcroft v. Iqbal*, U.S. , 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). "[T]hreadbare recitals of the elements of a cause of action, [*13] supported by mere conclusory statements," do not suffice. *Id.* (citing *Bell Atl. Corp.*, 550 U.S. at 555). Plaintiff's factual allegations must also be sufficient to give the defendant "'fair notice of what the . . . claim is and the grounds upon which it rests.'" *Bell Atl. Corp.*, 550 U.S. at 555 (citation omitted).

When amendments raise colorable claims, especially where they are based upon disputed facts, they should be allowed, and a comprehensive legal analysis deferred to subsequent motions to dismiss or for summary judgment. *Madison Fund, Inc. v. Denison Mines Ltd.*, 90 F.R.D. 89, 91 (S.D.N.Y. 1981); *EEOC v. Sage Realty Corp.*, 87 F.R.D. 365, 371-72 (S.D.N.Y. 1980); *WIXT Television, Inc. v. Meredith Corp.*, 506 F. Supp. 1003, 1010 (N.D.N.Y. 1980).

In the case of proposed amendments where a party is to be added, the Court must also look to Rule 21 of the Federal Rules of Civil Procedure. *Bridgeport Music, Inc. v. Universal Music Group, Inc.*, 248 F.R.D. 408, 412 (S.D.N.Y. 2008) (citations omitted). Rule 21 states that the court may permit a party to be added to an action "at any time, on just terms." Fed. R. Civ. P. 21. Rule 21 is "intended to permit the bringing in of a person, who through [*14] inadvertence, mistake or for some other reason, had not been made a party and whose presence as a party is later found necessary or desirable." *United States v. Commercial Bank of North America*, 31 F.R.D. 133, 135 (S.D.N.Y. 1962) (internal quotations omitted). Addition of parties under Rule 21 is guided by the same liberal standard as a motion to amend under Rule 15. *Bridgeport Music, Inc.*, 248 F.R.D. at 412; *Fair Housing Development Fund Corp. v. Burke*, 55 F.R.D. 414, 419 (E.D.N.Y. 1972). As with Rule 15 amendments, joinder pursuant to Rule 21 may be denied as futile if the proposed pleading would not withstand a motion to dismiss. *See Cortigiano v. Oceanview Manor Home for Adults*, 227 F.R.D. 194, 201-202 (E.D.N.Y. 2005) (citations omitted) (discussion of Rule 15(a) standards, including futility, as applied to Rule 21 motion to add parties).

B. Application

Because plaintiff in this case cannot "substitute" the proposed new defendants in place of defendant Potter under Rule 25, the court will interpret plaintiff's request as a motion to amend to add new parties under Rules 15(a) and 21. [7] As a motion to amend, however, plaintiff's submission is not in the proper form. Plaintiff has not [*15] submitted a proposed amended complaint, [8] which asserts how the proposed new defendants were personally involved in the alleged constitutional violation. Personal involvement is a prerequisite to the assessment of damages in a section 1983 case. *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994); *Richardson v. Goord*, 347 F.3d 431, 435 (2d Cir. 2003).

7 *Pro se* submissions are interpreted with the utmost liberality. *Phillips v. Girdich*, 408 F.3d 124, 128 (2d Cir. 2005); *Tapia-Ortiz v. Doe*, 171 F.3d 150, 152 (2d Cir. 1999) (*per curiam*).

8 Submission of a proposed amended complaint is required by the Local Rules of the Northern District of New York. *See* Local Rules N.D.N.Y. 7.1(a)(4).

There is no allegation that Superintendent Rock was involved with plaintiff's disciplinary hearings. The same is true for the Deputy Superintendent "John Doe." The only individual who appears to have been involved in plaintiff's disciplinary hearings is Lieutenant Sawyer. The court knows this only after reviewing the documents that defense counsel filed as "objections" to Judge Di Bianco's Report-Recommendation. [9] Even if plaintiff had moved properly to add Lieutenant Sawyer, this court finds that the amendment would [*16] be futile.

9 These documents were served on plaintiff on November 28, 2008. (Dkt. No. 21-4. Certificate of Service). The court notes that exhibits attached to defendant's "objections" would constitute much of the discovery materials relevant to this case because they include copies of the documents related to the disciplinary hearings at issue in this case. Although the court does not base its decision on the "delay" factor of the standard for amendment of pleadings, it is clear that plaintiff knew as of late November or early December 2008, that Lieutenant Sawyer was the hearing officer in plaintiff's Tier II hearing. Plaintiff had stated inaccurately in his earlier submission, that defendant Potter was the hearing officer for both hearings. Based on the documents submitted by defense counsel in his objections, and after Senior Judge Scullin acted on the Report-Recommendation in late April, 2009, plaintiff could have moved to amend his complaint at that time instead of waiting until more than one year later, after the death of defendant Potter.

Plaintiff's current amended complaint alleges that, as the result of one incident on August 17, 2007, he was given two misbehavior reports and [*17] was "denied his Procedural rights to Due Process when he was subjected . . . to a [sic] Tier II and Tier III Disciplinary Hearings and sanctions that arose out of the same . . . incident." (Am. Compl. at p.6). [10] Plaintiff lists three "Causes of Action," related to this conduct. *Id.* Only two of the three are actually "Causes of Action." The first "Cause of Action" alleges a violation of due process, and the second, alleges a violation of the Eighth Amendment. *Id.* The third "Cause of Action" merely alleges that the sanction of 360 days in SHU imposed by defendant Potter amounted to an "atypical and significant" deprivation, sufficient to establish a liberty interest protected by "due process." This third paragraph does not raise a separate cause of action because the establishment of a "liberty interest" is only the first step in a due process claim. *Giano v. Selsky*, 238 F.3d 223, 225 (2d Cir. 2001).

10 Plaintiff has inserted a blank page in the middle of his Form-Complaint on which he has written his "Statement of Facts" and "Procedural History." This court will, therefore, cite to the pages of the complaint as assigned by the court's Case Management and Electronic Case Filing (CM/ECF) [*18] system.

Based on the documents submitted by defense counsel as objections to Judge Di Bianco's Report-Recommendation, it is clear that Lieutenant Sawyer was the hearing officer for plaintiff's Tier II hearing. According to plaintiff's amended complaint, the only sanctions plaintiff suffered as the result of the Tier II hearing were 30 days cell confinement and 30 days loss of various privileges. (Am. Compl. at p.5).

In order to begin a due process analysis, the court must determine whether plaintiff had a protected liberty interest in remaining free from the confinement that he challenges and then determine whether the defendant deprived plaintiff of that liberty interest without due process. *Giano v. Selsky*, 238 F.3d at 225; *Bedoya v. Coughlin*, 91 F.3d 349, 351 (2d Cir. 1996). In *Sandin v. Conner*, the Supreme Court held that although states may still create liberty interests protected by due process, [11] "these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force ..., nonetheless imposes atypical and significant hardship on the inmate [*19] in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 483-84, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995). In the context of a summary judgment motion, the *Sandin* court rejected a claim that thirty days in segregated confinement was "atypical and significant." *Id.* at 486.

11 "[T]he prevailing view is that by its regulatory scheme New York State has created a liberty interest in remaining free from disciplinary confinement, thus satisfying the first *Sandin* factor (citations omitted)." *Thompson v. LaClair*, 9:08-CV-037, 2009 U.S. Dist. LEXIS 75277, 2009 WL 2762164 at *4 (N.D.N.Y. Aug. 25, 2009).

The sanction that Lieutenant Sawyer imposed on plaintiff was 30 days confinement to his own cell, together with some loss of privileges for 30 days. A 30-day confinement, particularly confinement to one's own cell, absent additional egregious circumstances is insufficient to establish a liberty interest, protected by due process. *See Sealey v. Giltner*, 197 F.3d 578, 589-90 (2d Cir. 1999) (101 days in normal SHU conditions were not atypical and significant). The federal district courts in New York, applying *Sandin*, have been consistent in holding that terms of SHU or "keeplock" [12] of approximately 30 days, and the related loss of [*20] privileges, do not implicate a liberty interest protected by the Due Process clause, even in the absence of detailed factual development regarding the conditions of confinement. *See, e.g., Carl v. Dirie*, No. 9:09-CV-724, 2010 U.S. Dist. LEXIS 86933, 2010 WL 3338566 at *6-7 (N.D.N.Y. March 29, 2010) (granting motion to dismiss where plaintiff spent 30 days in SHU, but did not allege any additional aggravating circumstances present during the period of confinement); *Thompson v. LaClair*, No.

9:08-CV-37, 2009 U.S. Dist. LEXIS 75277, 2009 WL 2762164, at *5-6 (N.D.N.Y. Aug. 25, 2009) (finding, on the pleadings, no liberty interest in 30-day confinement with loss of privileges); *Ochoa v. DeSimone*, No. 9:06-CV-119, 2008 U.S. Dist. LEXIS 76256, 2008 WL 4517806, at *4 (N.D.N.Y. Sept. 30, 2008) (summary judgment).

12 "Keeplock" is confinement to one's own cell. *Gittens v. LeFevre*, 891 F.2d 38, 39 (2d Cir. 1989). This is would be an even less "atypical" type of confinement than being placed in a special housing unit for 30 days.

Even if the discipline imposed implicated a liberty interest, plaintiff does not allege any due process violation. Other than claiming that he was charged in two hearings for one incident, plaintiff does not cite any other alleged deficiency in the Tier II [*21] hearing. Plaintiff's attempt to amend his complaint to add Lieutenant Sawyer in order to challenge his Tier II hearing, would not withstand a motion to dismiss. [13] Thus, to the extent that plaintiff's submission can be interpreted as a motion to amend to add Lieutenant Sawyer as a separate defendant, it must be denied.

13 Plaintiff also claims a violation of the Eighth Amendment as a result of the two disciplinary hearings, however, an Eighth Amendment violation requires conditions of confinement that impose an excessive risk to the inmates health or safety. *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994). In this case, there is no indication that confinement to plaintiff's own cell for 30 days would have caused plaintiff any risk to his health or safety. Thus, no Eighth Amendment violation is stated with respect to the Tier II disposition.

IV. *Sua Sponte* Dismissal

Generally, the court would afford plaintiff the opportunity to substitute the appropriate estate representative for defendant Potter. [14] However, this court has determined that it would be futile to do so. Even if plaintiff were to properly substitute defendant Potter's estate, plaintiff does not state a claim for relief.

14 As stated [*22] above, based upon the date of the suggestion of death, plaintiff would have until October 7, 2010 within which to substitute the appropriate party.

A. Legal Standard

Plaintiff is proceeding *in forma pauperis* in this action. Under 28 U.S.C. § 1915 (e)(2)(B)(ii), the court has the authority to dismiss an action brought *in forma pauperis* by an inmate at any time if the court determines that the action is "frivolous or malicious[,] . . . fails to state a claim on which relief may be granted[,] . . . or . . . seeks monetary relief against a defendant who is immune from such relief." In this case, the basis of plaintiff's due process claim is that he should not have had two disciplinary hearings related to the same conduct.

Plaintiff received twelve months SHU confinement as a result of the Tier III hearing. (Am. Compl. at p.5). Twelve months (365 days) confinement would suffice to establish a liberty interest, requiring due process protection. *See Colon v. Howard*, 215 F.3d 227, 231 (2d Cir.2000) (finding that a prisoner's liberty interest was infringed by 305-day confinement). In *Wolff v. McDonnell*, 418 U.S. 539, 563-64, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), the Supreme Court held that due process requires advance notice [*23] of the charges against the inmate, and a written statement of reasons for the disposition. The inmate should also have the ability to call witnesses and present documentary evidence, subject to legitimate safety and correctional goals of the institution. *Id.* Finally, the inmate is entitled to a fair and impartial hearing officer, and the hearing disposition must be supported by "some" or "a modicum" of evidence. *Superintendent v. Hill*, 472 U.S. 445, 455, 105 S. Ct. 2768, 86 L. Ed. 2d 356 (1985)(some evidence standard); *McCann*, 698 F.2d at 121-22 (fair and impartial hearing officer). Plaintiff alleges no deficiencies in the Tier III hearing, relating to the rights described in *Wolff*.

Plaintiff's claim could be interpreted as a "double jeopardy" claim. The Double Jeopardy Clause is limited to proceedings that are "essentially criminal." *Breed v. Jones*, 421 U.S. 519, 528, 95 S. Ct. 1779, 44 L. Ed. 2d 346 (1975). It is well-settled that prison disciplinary hearings are not considered part of a criminal prosecution, and that they do not implicate the Double Jeopardy Clause. *See Porter v. Selsky*, 287 F. Supp. 2d 180, 190-91 (W.D.N.Y. 2003) (discussing cases); *Nimmons v. Schult*, No. 9:07-CV-927, 2008 U.S. Dist. LEXIS 95899, 2008 WL 5056744, at *3 (N.D.N.Y. Nov. 24, 2008) (citing *inter* [*24] *alia Wolff v. McDonnell*, 418 U.S. at 556 and *Breed v. Jones, supra* and discussing cases). In *Porter v. Selsky*, the court denied the inmate's motion for reconsideration of its prior ruling that prison officials could impose their own penalty for a prison disciplinary rule violation, originating from the *same conduct* for which the inmate was found guilty in a criminal prosecution, without violating the inmate's right to be free from double jeopardy. 287 F. Supp. 2d at 188-91.

B. Application

In this case, plaintiff claims *only* that he should not have had two separate hearings based on the same con-

duct. Because plaintiff complains only about prison disciplinary hearings, the Double Jeopardy Clause does not afford him any protection. Additionally, a review of plaintiff's complaint shows that, although he had two separate hearings, the charges at each hearing were different. [15] Plaintiff states that the Tier II hearing involved the following charges:

> 1. Rule 100.13 - An Inmate Shall Not Engage in Fighting.
> 2. Rule 104.11 - An Inmate Shall Not Engage in Violent Conduct.
> 3. Rule 104.13 - An Inmate Shall Not Engage in Conduct Which Disturbs the Order of the Facility.

(Am. Compl. at p.5). Plaintiff [*25] states that he was found guilty only of the first and third charges. *Id.* The Tier III hearing involved the following charges:

> 1. Rule 106.10 - Violating a Direct Order
> 2. Rule 113.10 - Weapon
> 3. Rule 115.10 - Frisk Procedures
> 4. Rule 100.11 - Attempted Staff Assault

(Am. Compl. at p.5). Plaintiff states that he was found guilty of all the violations, charged in the Tier III hearing. *Id.* A review of the charges of which plaintiff was found guilty shows that none are the same. Plaintiff admits that he was found not guilty of the Tier II violation of engaging in violent conduct, but was found guilty of the Attempted Staff Assault after the Tier III hearing. Arguably, the violent conduct charge and the fighting charge could have been similar, but plaintiff was found not guilty of one of the charges.

> 15 The court suspects that this is the case because the Tier II violations were not as serious as the Tier III violations and were handled separately for that reason.

The fact that plaintiff had two separate hearings regarding the same incident does not mean that he was charged or punished twice for the same conduct, only that he was punished for several different violations arising from one incident. [*26] [16] This does not rise to the level of a constitutional violation. In fact, plaintiff's own statement of facts shows that he was not punished twice for the same charge. [17]

> 16 Even in a criminal prosecution, multiple violations arising out of a single transaction may be charged and tried separately without violating double jeopardy. *See e.g.* United States v. Blackshear, 313 Fed. Appx. 338, 345 (2d Cir. 2008).
>
> 17 A review of defense counsel's exhibits shows that the plaintiff's sanctions from the Tier II hearing and the Tier III hearing were served concurrently; thus, there is no indication that plaintiff spent any extra time confined as a result of the two hearings. The exhibits show that the Tier II sanction was to be served from August 23, 2007 until September 16, 2007 (plaintiff only had twenty four days left of his 30-day sanction after the Tier II hearing), and the Tier III SHU time was to be served from August 23, 2007 until August 23, 2008. (Dkt. No. 21-1 at 1; Tier II sanction); (Dkt. No. 21-2 at 3; Tier III sanction).

This court finds that plaintiff's amended complaint does not state a claim for relief. The court is recommending *sua sponte* dismissal of the amended complaint in its [*27] entirety as against defendant Potter, pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). To the extent that plaintiff's motions can be read as motions to amend the amended complaint to add different defendants in addition to defendant Potter, I recommend that the motions be denied as futile.

WHEREFORE, based on the findings above, it is

ORDERED, that plaintiff's letter-motion to "substitute" David Rock as a defendant (Dkt. No. 45) is **DENIED**, and it is

RECOMMENDED, that plaintiff's letter-motion to amend his amended complaint to add Lieutenant Sawyer and a "John Doe" Deputy Superintendent (Dkt. No. 46) be **DENIED**, and it is

RECOMMENDED, that the amended complaint (Dkt. No. 34) be **DISMISSED IN ITS ENTIRETY WITH PREJUDICE** for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii).

Pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 72.1(c), the parties have fourteen (14) days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN DAYS WILL PRECLUDE APPELLATE REVIEW.** *Roldan v. Racette*, 984 F.2d 85, 89 (2d Cir. 1993) (citing *Small v. Secretary of Health and Human Services*, 892 F.2d 15 (2d Cir. 1989)); [*28] 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(e), 72.

Dated: September 21, 2010

/s/ Andrew T. Baxter

Hon. Andrew T. Baxter

U.S. Magistrate Judge

Caution
As of: Dec 03, 2010

MOMENTUM LUGGAGE & LEISURE BAGS, a partnership between ROBERT RUDKO and WILLIAM M. GREYSTONE, Plaintiff, -v- JANSPORT, INC., LUGGAGE & LEATHER GOODS MANUFACTURERS OF AMERICA, INC., and BUSINESS JOURNALS, INC., Defendants.

00 CIV. 7909 (DLC)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2001 U.S. Dist. LEXIS 415

January 23, 2001, Decided
January 25, 2001, Filed

DISPOSITION: [*1] Plaintiff's request for leave nunc pro tunc to amend complaint denied.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff sought leave to amend its trademark infringement complaint to add seven additional defendants, alleging it had the right to amendment as of right or, in the alternative, sought leave to amend nunc pro tunc. Defendant moved to strike or, in the alternative, to stay.

OVERVIEW: Plaintiff luggage manufacturer filed a complaint alleging defendants violated the Lanham Act and New York's General Business Law, infringed on plaintiff's trade dress, diluted plaintiff's trademark, and engaged in acts of unfair competition, false designation of origin, and false description or representation. Plaintiff requested and received expedited scheduling for the case. One defendant filed an answer. However before the second defendant answered, plaintiff sought leave to amend the complaint to include seven additional defendants. The first defendant moved to strike the amendment or to stay. The court found that Fed. R. Civ. P 21, rather than Fed. R. Civ. P. 15, governed the addition and elimination of parties, due to court administration issues. The addition of new defendants would delay both discovery and trial as well as the final case resolution and the delay would prejudice defendants. Moreover, plaintiff provided no answer to, inter alia, failure of service and bad faith arguments presented by the first defendant. Plaintiff's failure to respond to defendant's arguments left them as additional reasons to deny the amendment.

OUTCOME: Plaintiff's request to amend the complaint or, in the alternative, request for leave nunc pro tunc to amend the complaint was denied because it would delay discovery and trial and prejudice defendant and also because plaintiff failed to respond to, inter alia, defendant's additional failure of service and bad faith arguments.

CORE TERMS: amend, answered, customer, leave to amend, discovery, responsive pleading, expedited, reasons stated, new parties, liberality', joinder, adding, nunc pro tunc, teleconference, trademark, proposed amendments, claims asserted, matter of course, bad faith, non-answering, elimination, quotation, normally, infringement, unpersuasive, threatening, depositions, disputed, spent

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview
[HN1]See Fed. R. Civ. P. 15(a).

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > Leave of Court
[HN2]Once a responsive pleading has been served, a party may amend its pleadings only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. Fed. R. Civ. P. 15(a).

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview
[HN3]Where some but not all defendants have answered a complaint, the plaintiff may amend as of course claims asserted solely against the non-answering defendants.

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview
Civil Procedure > Parties > Joinder > Misjoinder
[HN4]Fed. R. Civ. P. 15(a) generally governs the amendment of complaints, but in the case of proposed amendments where new defendants are to be added, Fed. R. Civ. P. 21 governs.

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview
[HN5]Whether parties should be dropped from or added to an action presents problems of judicial administration over which the court, rather than the parties and their counsel, should maintain control at every stage of the action. In adding or eliminating parties, courts must consider judicial economy and their ability to manage each particular case, as well as how the amendment would affect the use of judicial resources, the impact the amendment would have on the judicial system, and the impact the amendment would have on each of the parties already named in the action.

Civil Procedure > Dismissals > Involuntary Dismissals > General Overview
Governments > Courts > Judges
[HN6]As part of its general power to administer its docket, a district court may stay or dismiss a suit that is duplicative of another federal court suit.

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > General Overview
Civil Procedure > Parties > Joinder > Misjoinder
[HN7]A party may be added to an action at any stage of the action and on such terms as are just. Fed. R. Civ. P. 21. In deciding whether to allow joinder, the court is guided by the same standard of liberality afforded to motions to amend pleadings under Fed R. Civ. P. 15.

Civil Procedure > Pleading & Practice > Pleadings > Amended Pleadings > Leave of Court
[HN8]In the context of amendment to pleadings under Fed R. Civ. P. 15, a refusal to grant leave to amend must be justified by grounds such as undue delay, bad faith, futility, or prejudice to the opposing party. Refusal to grant leave to amend without justification is inconsistent with the spirit of the Federal Rules. The decision to grant leave to amend falls within the sound discretion of the trial court.

COUNSEL: For Plaintiff: John P. Bostany, New York, NY.

For Jansport, Inc., Defendant: Thomas A. Canova, Gianni P. Servodidio, Pennie & Edmonds LLP, New York, NY.

JUDGES: DENISE COTE, United States District Judge.

OPINION BY: DENISE COTE

OPINION

OPINION AND ORDER

DENISE COTE, District Judge:

This dispute arises out of defendants' alleged infringement of plaintiff's trademark. Plaintiff seeks leave to amend the complaint to add seven additional defendants. For the reasons stated below, plaintiff's request to amend the complaint is denied.

Procedural History

This action was filed on October 17, 2000. Plaintiff alleged that defendants Jansport, Inc. ("Jansport"), and Luggage & Leather Goods Manufacturers of America, Inc. ("Luggage & Leather"), violated the Lanham Act and New York's General Business Law by infringing plaintiff's trade dress, diluting plaintiff's trademark, and engaging in acts of unfair competition, false designation of origin, and false description or representation. [1] Pursuant to the Court's Pretrial Scheduling Order of October 23, 2000, entered in response to plaintiff's request for an expedited [*2] resolution of this case, all fact discovery is to be completed by February 23, 2001. The Joint Pretrial Order must be filed by March 23, 2001, and the case has been placed on the April 2001 trial ready calendar.

1 On November 16, 2000, plaintiff voluntarily dismissed its claims against a third defendant,

Business Journals, Inc., pursuant to Rule 41(a)(1)(i), Fed. R. Civ. P.

Jansport served, and attempted to file, an answer on December 7, 2000. [2] As of December 20, 2000, the date on which the amended complaint was filed, Luggage & Leather had neither served nor filed an answer. Pursuant to the Court's December 28, 2000 Order, however, Luggage & Leather had until January 15, 2001 to answer, move, or otherwise respond to the complaint. As of the writing of this Opinion, Luggage & Leather has not responded to the complaint. Plaintiff filed an amended complaint without the Court's leave on December 20, 2000, adding seven additional defendants. Jansport opposes the amendment. Plaintiff asserts that it is free to [*3] amend as of right, but in the alternative, seeks leave *nunc pro tunc* to amend the complaint.

2 On December 7, 2000, Jansport filed and served its answer to the complaint. On December 11, 2000, Jansport filed and served its Rule 1.9 Statement. On December 12, however, without knowing that Jansport had filed and served the Rule 1.9 Statement the day before, the Court directed the Clerk's Office to return the answer to Jansport pending the filing of the Rule 1.9 Statement. The answer has since been filed *nunc pro tunc*.

DISCUSSION

Plaintiff claims that, pursuant to Rule 15(a), Fed. R. Civ. P., it was entitled to amend its complaint to add new defendants. [HN1]Under Rule 15(a), Fed. R. Civ. P., "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served." As stated above, Jansport served its answer before plaintiff filed the amended complaint. [3] [HN2]Once a responsive pleading has been "served", a party may amend its pleadings "only by leave of court [*4] or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a).

3 Under Rule 15(a), plaintiff would need leave to amend its complaint against Jansport. *See, e.g., Bruno v. Shoreline Oil Co.*, 1988 U.S. Dist. LEXIS 14733, No. 87 Civ. 9175 (PKL), 1988 WL 142476, at *2 (S.D.N.Y. Dec. 27, 1988) ("[defendant]'s answer is a 'responsive pleading' under Rule 15(a) precluding amendment as of right as to [defendant]"); *Rose v. Associated Universities*, 2000 U.S. Dist. LEXIS 14242, No. 00 Civ. 0460 (DAB), 2000 WL 1457115, *3 (S.D.N.Y. Sept. 28, 2000) ("[HN3]'where some but not all defendants have answered, plaintiff may amend as of course claims asserted solely against the non-answering defendants'") (quoting *Barksdale v. King*, 699 F.2d 744, 747 (5th Cir. 1983)). *See also* 3 James Wm. Moore et al., *Moore's Federal Practice* § 15.11, at 15-13 (3d ed. 1997) ("If some, but not all, of the defendants have answered, the plaintiff has the right to amend only the claims asserted against the non-answering parties and must obtain leave to amend the complaint as to answering parties."); William W. Schwarzer et al., *Federal Civil Procedure Before Trial* § 8:379, at 8-83 (1997) ("Common sense suggests that amendments may be made as a matter of course as to defendants who have not yet answered; but leave of court must be obtained insofar as the amendment affects defendants who have already answered.").

[*5] [HN4]

Rule 15(a) generally governs the amendment of complaints, but in the case of proposed amendments where new defendants are to be added, Rule 21 governs. *See Kaminsky v. Abrams*, 41 F.R.D. 168, 170 (S.D.N.Y. 1966) ("It has been held that the specific provisions of Rule 21 govern over the general provisions of Rule 15, and that an amendment changing parties requires leave of Court even though made at a time when under Rule 15 amendment may be made as of course."); *see also United States v. Hansel*, 999 F. Supp. 694, 697 (N.D.N.Y. 1998); *Sheldon v. PHH Corp.*, 1997 U.S. Dist. LEXIS 2217, No. 96 Civ. 1666 (LAK), 1997 WL 91280, at *3 (S.D.N.Y. Mar. 4, 1997) ("[A] broad reading of Rule 15 would permit amendments for any purpose, including changes of parties. . . . Nevertheless, the preferred method is to consider such motions under Fed. R. Civ. P. 21, which specifically allows for the addition and elimination of parties."), *aff'd on other grounds*, 135 F.3d 848 (2d Cir. 1998); *Holtzman v. Richardson*, 361 F. Supp. 544, 552 (E.D.N.Y. 1973), *rev'd on other grounds*, 484 F.2d 1307 (2d Cir.); *Gordon v. Lipoff*, 320 F. Supp. 905, 923 (D. Mo. 1970) [*6] ("Neither Rule 15(a) nor the Notes of the Advisory Committee intimate that an exception to Rule 21 was intended by the provision of Rule 15(a) which permits a party to amend without leave of court before a responsive pleading is filed."). *But cf. Washington v. New York City Board of Estimate*, 709 F.2d 792, 795 (2d Cir. 1983) (analyzing motion to add new parties under Rule 15(a) when defendant had not answered, and not addressing Rule 21).

There are sound reasons why Rule 21 should govern the addition and elimination of parties. [HN5]Whether parties should be dropped from or added to an action presents problems of judicial administration over which the court, rather than the parties and their counsel, should maintain control at every stage of the action. *See Gordon*

v. Lipoff, 320 F. Supp. at 923. In adding or eliminating parties, courts must consider judicial economy and their ability to manage each particular case, as well as how the amendment would affect the use of judicial resources, the impact the amendment would have on the judicial system, and the impact the amendment would have on each of the parties already named in the action.

These policy reasons [*7] are particularly applicable in this case because of the substantial effect this amendment of the complaint would have on the party who has already answered, as well as on the conduct of the litigation as a whole. Plaintiff requested expedited litigation, and the Court agreed to the request. Jansport has answered the complaint and both Jansport and the plaintiff -- as well as the Court -- have spent substantial resources in accommodating the expedited schedule. [4]

> 4 In any event, even if leave were not necessary, Jansport has made a motion to strike and, in the alternative, to stay. The Court would grant these motions for the reasons stated *infra*. *See generally* Curtis v. Citibank, 226 F.3d 133, 138 (2d Cir. 2000) ("[HN6]As part of its general power to administer its docket, a district court may stay or dismiss a suit that is duplicative of another federal court suit.").

[HN7]Rule 21 states that a party may be added to an action "at any stage of the action and on such terms as are just." Fed. R. Civ. [*8] P. 21. In deciding whether to allow joinder, the Court is guided by "the same standard of liberality afforded to motions to amend pleadings under Rule 15." *Soler v. G & U, Inc.*, 86 F.R.D. 524, 527-28 (S.D.N.Y. 1980) (internal quotation omitted); *see Clarke v. Fonix Corp.*, 1999 U.S. Dist. LEXIS 2143, 98 Civ. 6116 (RPP), 1999 WL 105031, at *6 (S.D.N.Y. March 1, 1999) ("Although Rule 21, and not Rule 15(a) normally governs the addition of new parties to an action, the same standard of liberality applies under either Rule.") (internal quotation omitted), *aff'd*, 199 F.3d 1321 (2d Cir. 1999); *Sheldon*, 1997 WL 91280, at *3 ("While plaintiffs' motion [to add a new defendant] properly is considered under Rule 21 rather than Rule 15, nothing material turns on this distinction. Under either rule, leave of the Court is required. . . . To the extent the limited case law under Rule 21 permits a conclusion, the standard under that rule is the same as under Rule 15."); *FTD Corp. v. Banker's Trust Co.*, 954 F. Supp. 106, 109 (S.D.N.Y. 1997) ("Although Rule 21, and not Rule 15(a) normally governs the addition of new parties to an action, 'the [*9] same standard of liberality' applies under either Rule.") (quoting *Fair Hous. Dev. Fund Corp. v. Burke*, 55 F.R.D. 414, 419 (E.D.N.Y. 1972)); *Kaminsky*, 41 F.R.D. at 170.

[HN8]In the context of amendment to pleadings under Rule 15, the Supreme Court has emphasized that a refusal to grant leave to amend must be justified by grounds such as undue delay, bad faith, futility, or prejudice to the opposing party. *Foman v. Davis*, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962). Refusal to grant leave to amend "without justification is 'inconsistent with the spirit of the Federal Rules.'" *Rachman Bag Co. v. Liberty Mut. Ins. Co.*, 46 F.3d 230, 234 (2d Cir. 1995) (quoting *Foman*, 371 U.S. at 182). The decision to grant leave to amend falls within the sound discretion of the trial court. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330, 28 L. Ed. 2d 77, 91 S. Ct. 795 (1971); *Austin v. Ford Models, Inc.*, 149 F.3d 148, 155 (2d Cir. 1998).

Jansport will be prejudiced by the delay in this litigation which joinder of additional defendants will cause. This case [*10] was put on an expedited schedule at plaintiff's request. The addition of seven new defendants will delay both discovery and trial as well as the final resolution of this case. [5] Plaintiff's claim that the joinder will not cause a delay is unpersuasive.

> 5 Plaintiff's claim that the addition of new defendants will not delay discovery or trial, because it will quickly serve them with the complaint and provide them with copies of all discovery, is unpersuasive. The briefs regarding the amendment of the complaint were not fully submitted until January 10, 2001, and depositions are scheduled to start on January 24, 2001. If new defendants were added, the Court would grant them the full time to answer or move. New parties would also have a right to be heard as to the appropriate schedule for this litigation. All of this would necessarily increase the length and expense of discovery and delay the trial date.

Because of the contentious nature of this case, it has consumed an unusual amount of time and resources of the [*11] parties and the Court in what should have been a relatively straightforward trademark infringement case. Over the past few months, the parties and the Court have spent considerable time resolving disputes regarding, among other things, Jansport's two motions to compel discovery from plaintiff, Jansport's objections to plaintiff's document requests and interrogatories, the location, timing, and payment of travel expenses and fees for depositions of Jansport witnesses, plaintiff's three requests to send letters to Jansport's customers, plaintiff's request for sanctions, Jansport's Motion to Dismiss the statutory damages claim, and disputes over briefing schedules. It is in the interest of all to bring this litigation to the speedy resolution for which plaintiff has success-

fully argued in order to put some limit on the burden and cost of this litigation.

Finally, plaintiff has provided no answer to several of the arguments presented by Jansport. First, Jansport points out that the amended complaint was not even served on it. Second, Jansport contends that plaintiff's proposed amendment is evidence of plaintiff's bad faith. [6] Jansport argues that plaintiff seeks to add Jansport's customers [*12] as party defendants after agreeing in writing before Magistrate Judge Katz to a notification letter that Jansport already sent its customers. Jansport also states that the Court has twice denied plaintiff's requests to send threatening letters to Jansport's entire customer base. Jansport asserts that it has demonstrated its willingness and ability to contact specific customers and others to stop any use of the disputed name. Jansport also points out that six of the proposed new defendants have discontinued any use of the Momentum name, and the seventh proposed new defendant has never used the disputed name. Third, Jansport argues that plaintiff can obtain complete relief in the form of damages and/or an injunction without the additional defendants. Finally, Jansport points out that adding additional parties will dramatically increase the scope of this action. Plaintiff's failure to respond to these arguments leaves them as additional reasons to deny the amendment.

6 Nor has plaintiff explained why it did not inform the Court of the amended complaint during a teleconference on December 21, 2000, the day after plaintiff filed and purported to serve its amended complaint on Jansport. During the December 21, 2000 teleconference, plaintiff sought leave to send threatening letters to Jansport's customers. Because these customers included the same entities that plaintiff had filed an amended complaint against on December 20, 2000, plaintiff should have mentioned the amendment during the teleconference.

[*13] **CONCLUSION**

For the reasons stated, plaintiff's request for leave *nunc pro tunc* to amend the complaint is denied.

SO ORDERED:

Dated: New York, New York

January 23, 2001

DENISE COTE

United States District Judge

Analysis
As of: Dec 03, 2010

DAVID LEE TERMARSCH, Plaintiff, v. FABRIZIO & BROOK, P.C., JOSEPH J. FABRIZIO, ROSE MARIE BROOK, JONATHAN L. ENGMAN, JOSEPH G. FABRIZIO, MARC P. JERABEK, DIANE DERENGE, NEW CENTURY MORTGAGE, HOMEQ SERVICING CORPORATION, and DEUTSCHE BANK NATIONAL TRUST CO., Defendants.

Case No. 06-12514

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

2006 U.S. Dist. LEXIS 86117

November 15, 2006, Filed

SUBSEQUENT HISTORY: Related proceeding at Termarsch v. Argent Mortg. Co., LLC, 2008 U.S. Dist. LEXIS 31394 (M.D. Fla., Apr. 16, 2008)

PRIOR HISTORY: TerMarsch v. Fabrizio & Brook, P.C., 2006 U.S. Dist. LEXIS 78883 (E.D. Mich., Oct. 30, 2006)

CORE TERMS: amend, reconsideration, mortgage, lawsuit, leave to amend, reconsider, palpable, notice, misled, attach, infliction of emotional distress

COUNSEL: [*1] David L. TerMarsch, Plaintiff, Pro se, Lakeland, FL, US.

For Fabizio and Brook, P. C., Joseph J. Fabrizio, Rose Marie Brook, Jonathan L. Engman, Joseph G. Fabrizio, Marc P. Jerabek, Diane Derenge, Defendants: Karen A. Smyth, LEAD ATTORNEY, Lipson, Neilson, (Bloomfield Hills), Bloomfield Hills, MI.

For New Century Mortgage Corporation, Defendant: Thomas G. Costello, LEAD ATTORNEY, Lipson, Neilson, (Bloomfield Hills), Bloomfield Hills, MI.

For HomEq Servicing Corporation, Deutsche Bank National Trust Company, Defendants: Marilyn H. Mitchell, LEAD ATTORNEY, Evans & Luptak (Bloomfield Hills), Bloomfield Hills, MI.

JUDGES: PATRICK J. DUGGAN, UNITED STATES DISTRICT JUDGE.

OPINION BY: PATRICK J. DUGGAN

OPINION

ORDER DENYING PLAINTIFF'S MOTION TO RECONSIDER OR IN THE ALTERNATIVE MOTION FOR LEAVE TO AMEND COMPLAINT

At a session of said Court, held in the U.S. District Courthouse, Eastern District of Michigan, on November 15, 2006.

PRESENT: THE HONORABLE PATRICK J. DUGGAN

U.S. DISTRICT COURT JUDGE

Plaintiff David TerMarsch filed this lawsuit in State court on May 9, 2006. Defendants removed Plaintiff's complaint to this Court on June 6, 2006. This is the second lawsuit Plaintiff [*2] has filed against Defendants Fabrizio & Brook, P.C., HomEq Servicing Corporation ("HomEq"), Deutsche Bank National Trust Company ("Deutsche Bank"), and New Century Mortgage ("New Century") in relation to Plaintiff's mortgage on real property in Metamora, Michigan. In this action, Plaintiff alleges violations of the Fair Debt Collection Practices Act, intentional infliction of emotional distress,

negligent infliction of emotional distress, and "Violations of Constitutionally Protected Rights."

On August 15, 2006, HomEq and Deutsche Bank filed a motion to dismiss. The remaining Defendants, except New Century Mortgage, filed a motion to dismiss or alternatively for summary judgment on September 15, 2006. On August 17, 2006, two days after HomEq and Deutsche Bank filed their motion, the Court sent a notice to the parties reminding them of the provisions of Eastern District of Michigan Local Rule 7.1, advising that a response to a dispositive motion must be filed within 21 days after service of the motion. Plaintiff filed a response to HomEq's and Deutsche Bank's motion, but did not respond to the motion filed by the other Defendants. On October 30, 2006, the Court issued an opinion and [*3] order granting Defendants' motions and dismissing all Defendants, except New Century Mortgage, from this lawsuit.

On November 13, 2006, Plaintiff filed a motion to reconsider or in the alternative, motion for leave to amend complaint. Local Rule 7.1(g) provides:

> . . . the court will not grant motions for rehearing or reconsideration that merely present the same issues ruled upon by the court, either expressly or by reasonable implication. The movant must not only demonstrate a palpable defect by which the court and the parties have been misled but also show that correcting the defect will result in a different disposition of the case.

E.D. Mich. L.R. 7.1(g). Plaintiff's motion for reconsideration does not demonstrate any "palpable defect" by which the Court and the parties have been misled; nor does Plaintiff identify in his motion how the correction of any the defect will result in a different disposition of the case.

The essence of Plaintiff's request for relief in his motion for reconsideration is that he was unaware of the provisions of Local Rule 7.1(a)(2), to which the Court referred in its October 30 opinion and order. Rule 7.1(a)(2) simply allows a court to [*4] decide a motion without oral argument. The Court fails to see how Plaintiff's lack of knowledge of this rule in any way affected his rights, particularly when the Court advised the parties prior to issuing its decision that it would be deciding Defendants' motions without oral argument. This notice was sent to the parties on October 13, 2006, and the Court received no objections from Plaintiff to the Court proceeding in this manner.

Plaintiff's motion to amend his complaint must be denied. Eastern District of Michigan Local Rule 15.1 provides, in relevant part: "A party who moves to amend a pleading shall attach the proposed amended pleading to the motion." [1] The purpose of this rule is to alert the Court and the opposite party as to what the proposed amendment will do. That way, the opposing party can have a basis for responding to the motion to amend.

> 1 All parties, whether represented by counsel or acting *pro se,* must be aware of and must follow the Local Rules, as well as the Federal Rules of Civil Procedure. Otherwise, a *pro se* litigant could simply justify the failure to comply with the rules on the basis of his/her unawareness.

[*5] In this case, not only did Plaintiff not attach his proposed amended complaint to his motion to amend, but he did not even state in his motion what amendment(s) he seeks to make. Thus Plaintiff has provided the Court absolutely no idea of how he would amend the complaint and, therefore, the Court is unable to make a determination as to whether an amendment would "cure the defect" in the original complaint. In other words, the Court is not able to determine whether Plaintiff could amend his complaint so as to state a cause of action against the Defendants that have been dismissed.

For the reasons set forth above,

IT IS ORDERED, that Plaintiff's motion for reconsideration is **DENIED;**

IT IS FURTHER ORDERED, that Plaintiff's motion to amend the complaint is **DENIED.**

s/ PATRICK J. DUGGAN

UNITED STATES DISTRICT JUDGE