UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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866 EAST 164TH STREET, LLC,

Plaintiff,

-against-

UNION MUTUAL FIRE INSURANCE COMPANY,

Defendant.
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16-CV-03678 (SN)

OPINION AND ORDER

SARAH NETBURN, United States Magistrate Judge:

On March 9, 2017, plaintiff moved to amend its complaint to add a second defendant, Fabricant & Fabricant, Inc. ("Fabricant"). Defendant has been given an opportunity to address the proposed amendment. For the reasons stated below, plaintiff's motion to amend is DENIED.

This case involves a first party insurance denial of an insurance claim filed by plaintiff. The property at issue was insured through a commercial insurance policy written by defendant. Plaintiff now asserts, in its motion to amend, that the policy was obtained on its behalf by Fabricant, its insurance broker. According to plaintiff, in January 2015, Fabricant agreed to advise plaintiff with respect to insurance coverage for the underlying property. See Steven Kotchek Aff. ¶ 6 (ECF No. 59). Plaintiff alleges that it informed Fabricant on two separate occasions that one-third of the property would be occupied beginning on February 15, 2015, and that the property would be fully occupied by the end of February 2015. See id. ¶¶ 7–8. In preparing the insurance application for plaintiff, however, Fabricant answered "No" in response to the question as to whether the property was vacant. See id. ¶ 10. Plaintiff now seeks to amend its complaint to bring claims sounding in breach of contract and negligence against Fabricant.

Leave to amend pleadings is generally evaluated under Rule 15(a), which provides that leave to amend "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). But once a scheduling order setting a deadline for amended pleadings is in place, it is Rule 16(b) that governs motions for leave to amend. Under Rule 16(b), a scheduling order "shall not be modified except upon a showing of good cause. . . ." Fed. R. Civ. P. 16(b). To show "good cause" within the meaning of Rule 16(b), the moving party must demonstrate that the scheduling deadline could not have been met despite its diligence. See Grochowski v. Phoenix Const., 318 F.3d 80, 86 (2d Cir. 2003) ("A finding of good cause depends on the diligence of the moving party.").

The deadline to amend pleadings in this case was August 31, 2016. Plaintiff's motion to amend the complaint to add Fabricant, its broker, was filed on March 9, 2017. Plaintiff addresses (in its reply submission rather than in its original motion) that Rule 16(b) has been satisfied: it claims that good cause for the delay arose from defendant's dilatory tactics during discovery and plaintiff could not have known of "defendant's underwriting practices" until after the relevant discovery and depositions were conducted. ECF No. 71 at 4. In other words, plaintiff maintains it did not know until after discovery that defendant's position in this litigation was that plaintiff, not Fabricant, ratified the insurance application. See id.

But the facts and circumstances surrounding Fabricant's involvement were undisputedly known to plaintiff well before the start of this action. Plaintiff now claims that it was Fabricant who answered the vacancy question at the heart of this case but does not assert (nor can it) that it failed to discover the nature and extent of Fabricant's involvement until after August 2016. Indeed, plaintiff's entire motion to amend is based on its knowledge of pre-litigation facts. In as early as January 2015, plaintiff enlisted Fabricant to help it obtain insurance coverage. In

February 2015, Fabricant then helped the plaintiff prepare the very insurance application at issue. Accordingly, plaintiff has not shown good cause to justify modifying the scheduling order.

Given that plaintiff's diligence is the primary consideration in a Rule 16(b) analysis, the Court is guided by plaintiff's failure to so act and declines to reach the issue of prejudice.[1] See Jackson v. Odenat, 9 F. Supp. 3d 342, 369–70 (S.D.N.Y. 2014) (declining to reconsider the denial of a motion to amend that was based solely on the party's lack of diligence under Rule 16(b) and rejecting the argument that the court had erred in not considering prejudice to the opposing party). Plaintiff's alternative argument that defendant would actually benefit by having another defendant added to the matter is irrelevant. Plaintiff's eleventh-hour request for leave to amend its complaint is therefore DENIED.

The Court requests the Clerk of Court to terminate the motions at ECF Nos. 58, 59 & 60.

SO ORDERED.

SARAH NETBURN
United States Magistrate Judge

DATED: April 6, 2017
New York, New York

[1] Of course, it is plain that defendant would be prejudiced because this case would likely be dismissed for lack of subject matter jurisdiction, and the parties would have to begin anew in state court. Given that discovery has concluded and defendant's motion for summary judgment is due tomorrow, this would be patently unfair to defendant.