UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CAC ATLANTIC, LLC,

Plaintiff,

v.

HARTFORD FIRE INSURANCE COMPANY,

Defendant.

HARTFORD FIRE INSURANCE COMPANY,

Third-Party Plaintiff,

v.

HARCO CONSTRUCTION LLC, HARCO CONSULTANTS CORP., and ACHS MANAGEMENT CORP.,

Third-Party Defendants.

1:16-cv-5454-GHW

OPINION AND ORDER

GREGORY H. WOODS, United States District Judge:

Defendant/Third-Party Plaintiff Hartford Fire Insurance Company seeks leave to amend its answer and third-party complaint—after the close of all discovery—to plead three additional affirmative defenses. Despite counsel's lack of diligence in seeking leave to add those defenses to the case at an earlier stage, the motion is GRANTED.

I. BACKGROUND

This insurance dispute arises out of alleged losses incurred at a construction project located at 66 Boerum Place in Brooklyn, New York. Plaintiff CAC Atlantic, LLC holds an ownership interest in the property and was issued a Builder's Risk Insurance Policy (the "Policy") by Defendant Hartford Fire Insurance Company. The Policy covers "risks of direct physical 'loss' to Covered Property from any external cause except those causes of 'loss' listed in the Exclusions." Decl. of Sanjit Shah in Supp. of Mot. for Leave to Amend (ECF No. 84), Ex. 2, § A.3.

In June 2016, Plaintiff filed a complaint in the New York State Supreme Court, seeking to recover at least $16,500,000 in proceeds under the Policy for losses sustained in relation to the construction project. Defendant timely removed the case to this Court on July 8, 2016. On July 18, 2016, Defendant filed an answer as well as a counterclaim for declaratory judgment. ECF No. 6. In its answer, Defendant pleaded two of the Policy's several exclusions as affirmative defenses: (1) an exclusion for defective, deficient, or flawed workmanship and (2) an exclusion for dishonest or criminal acts. *Id.* at ¶¶ 13-14. Shortly thereafter, on August 1, 2016, Defendant filed a third-party complaint against ACHS Management Corp., Harco Construction LLC, and Harco Consultants Corp., each of whom are listed as named insureds in the Policy. ECF No. 24. In its third-party complaint, Defendant seeks the same relief it seeks in its counterclaim against Plaintiff, namely, a judgment declaring that is not required to pay out insurance proceeds as a result of the alleged loss. *Id.* ¶¶ 22-31. Defendant pleads the same two exclusions in its third-party complaint. *Id.* ¶¶ 10-11.

On August 1, 2016, the Court entered a case management plan and scheduling order, which provided that any motion to amend the pleadings was to be filed no later than August 31, 2016, that fact discovery in this matter was to be completed by December 16, 2016, and that expert discovery was to be completed by February 17, 2017. ECF No. 25. After several extensions, the period for fact discovery closed on February 15, 2017, and the period for expert discovery closed on March 31, 2017. *See* ECF No. 67. The Court never granted—nor did any party request—an extension of the deadline to amend the pleadings.

On April 7, 2017, Defendant filed a letter requesting that the Court hold a pre-motion conference to discuss its proposed motion for summary judgment. ECF No. 76. In that letter, Defendant expressed its intention to move on the ground that the alleged loss fell within certain exclusions that had been pleaded in neither the answer nor the third-party complaint. In a response letter, Plaintiff objected to Defendant filing a motion for summary judgment on those grounds, in large part because those exclusions had not been pleaded in the answer. ECF No. 77.

During a pre-motion conference held on April 17, 2017, the Court established a briefing schedule for a motion for leave to amend the answer to plead the additional exclusions. Defendant filed its motion on May 17, 2017. ECF No. 82. Defendant seeks leave to amend both the answer and the third-party complaint to plead three additional Policy exclusions as affirmative defenses: (1) an exclusion for loss caused by delay; (2) an exclusion for loss caused by latent defect; and (3) an exclusion for loss caused by acts, errors, or omissions in planning, zoning, and development. *Id.* Plaintiff filed an opposition to the motion on June 5, 2017, ECF No. 86, and Defendant filed a reply in support of its motion on June 12, 2017, ECF No. 87.

II. LEGAL STANDARD

Under the Federal Rules of Civil Procedure, a party may amend a pleading once as a matter of right within 21 days of serving it or, "if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." Fed. R. Civ. P. 15(a)(1). After that point, absent written consent from the opposing party, leave to amend must be obtained from the district court. Fed. R. Civ. P. 15(a)(2). Rule 15(a)(2) provides that courts "should freely give leave when justice so requires." "Reasons for a proper denial of leave to amend include undue delay, bad faith, futility of amendment, and perhaps most important, the resulting prejudice to the opposing party." *AEP Energy Servs. Gas Holding Co. v. Bank of Am., N.A.*, 626 F.3d 699, 725 (2d Cir. 2010) (citation omitted); *see also id.* ("The rule in this Circuit has been to allow a party to amend its pleadings in the absence of a showing by the nonmovant of prejudice or bad faith.").

As the parties correctly recognize, however, "where the court has already entered a scheduling order in the case, a party requesting leave to amend must satisfy the 'good cause' standard set forth in Rule 16(b)." *Cummins, Inc. v. New York Life Ins.*, No. 10-cv-9252 (TPG), 2012 WL 3870308, at *3 (S.D.N.Y. Sept. 6, 2012); *see In re Wireless Telephone Servs. Antitrust Litig.*, No. 02-cv-2637 (DLC), 2004 WL 2244502, at *5 (S.D.N.Y. Oct. 6, 2004) ("Rule 16(b) governs the instant

motion for leave to amend."); *see also Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 340 (2d Cir. 2000) ("Several circuits have ruled that the Rule 16(b) 'good cause' standard, rather than the more liberal standard of Rule 15(a), governs a motion to amend filed after the deadline a district court has set for amending the pleadings. . . . We now join these courts in holding that despite the lenient standard of Rule 15(a), a district court does not abuse its discretion in denying leave to amend the pleadings after the deadline set in the scheduling order where the moving party has failed to establish good cause."). The purpose of Rule 16(b) is "to offer a measure of certainty in pretrial proceedings, ensuring that at some point both the parties and the pleadings will be fixed." *Id.* at 339-40.

In determining whether good cause exists, "the primary consideration is whether the moving party can demonstrate diligence." *Kassner v. 2nd Ave. Delicatessen Inc.*, 496 F.2d 229, 244 (2d Cir. 2007). But diligence is not the only consideration. "The district court, in the exercise of its discretion under Rule 16(b), also may consider other relevant factors including, in particular, whether allowing the amendment of the pleading at this stage of the litigation will prejudice [the opposing party]." *Id.*

III. DISCUSSION

As explained below, the Court finds that counsel for Defendant has failed to show that it acted diligently in seeking leave to make its desired amendment. Nevertheless, because the Court cannot discern significant prejudice to Plaintiff and Third-Party Defendants from allowing the amendment, and because the Court is hesitant to saddle Defendant itself with its counsel's failure by precluding Defendant from pursuing the three exclusions that it included in the Policy, the Court concludes that good cause exists here to modify the scheduling order.

A. Diligence

Defense counsel argues that they could not possibly have moved for leave to amend to add the latent defect exclusion by the August 31, 2016 deadline established in the Court's scheduling

order, because they could not have known that the exclusion was potentially applicable until Plaintiff's Rule 30(b)(6) witness submitted an errata sheet materially changing his testimony in December 2016. Def.'s Mem. in Supp. of Mot. to Amend (ECF No. 83) ("Def.'s Mem."), at 16. Fair enough.[1] But counsel provides no satisfactory explanation for its decision to wait until April 2017—four months later and *after* the close of all discovery—to seek leave to amend. Under those circumstances, the Court cannot conclude that defense counsel exercised the diligence required for a finding of good cause. *See, e.g.*, *O'Connell v. Hyatt Hotels of Puerto Rico*, 357 F.3d 152, 155 (1st Cir. 2004) (denying motion for leave to amend where movant waited five months after the scheduling order deadline to act).

Similarly, defense counsel contend that they were not aware that the loss-from-delay exclusion was potentially applicable until it received from Plaintiff on February 14, 2017 a list of supplemental damages, which counsel asserts sought damages from delay for the first time. Def.'s Mem. at 21.[2] Again, counsel does not explain how failing to seek leave to amend to add the relevant exclusion until approximately two months later exhibited the kind of diligence required for a finding of good cause. The same is true with respect to the planning-and-zoning exclusion. According to defense counsel, it did not learn that this exclusion was potentially relevant to the case until a pair of January 17, 2017 depositions.[3] The Court agrees with Plaintiff that "[e]ven by Defendant's own admissions it unreasonably delayed for [three] months from when it 'determined that the planning and zoning exclusion was applicable' before seeking an amendment of its pleadings." Pl.'s Mem. at 19. That is hardly diligent.

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[1] Plaintiff disputes the proposition that Defendant had no reason to believe the latent defect exclusion was relevant to this case before that date. The court need not resolve that dispute here.

[2] As with the latent-defect exclusion, Plaintiff contests Defendant's characterization of the list of supplemental damages as the first time it became aware that Plaintiff sought delay damages. As with the latent-defect exclusion, it is also unnecessary for the Court to resolve this dispute at this time.

[3] Again, Plaintiff disputes this proposition, pointing to the fact that Defendant actually invoked the planning-and-zoning exclusion in its pre-litigation claim denial letter. Pl.'s Mem. in Opp'n to Mot. to Amend (ECF No. 86) ("Pl.'s Mem."), at 19. Again, the Court need not address that dispute.

Defense counsel argues that the suggestion that it should have sought leave to amend immediately after learning in December 2016 that Plaintiff was pursuing a design-defect theory of the case, or after purportedly first learning of the applicability of the other exclusions, "makes no sense." Reply Mem. in Supp. of Mot. to Amend (ECF No. 87) ("Def.'s Reply Mem."), at 6. According to defense counsel, had it followed that approach, "it would have made three successive motions, in December 2016 (latent defect), January 2017 (planning and zoning) and February 2017 (delay)." *Id.* Thus, counsel contends, "[t]he interests of judicial economy were best served by waiting for the April 17, 2017 Conference to raise the issue, and receive the Court's directions on how to proceed." *Id.*

While the Court appreciates defense counsel's concern for judicial economy, that argument from hindsight is not persuasive. First, the Court does not accept the proposition that a party seeking to add a new claim or defense to a pleading well after the amendment deadline established in the scheduling order should wait until the end of discovery to do so simply to avoid the as-yet-unknown potential for successive motions. Judicial economy involves a mix of considerations, including the fact that the addition of a new claim or defense—as distinct, perhaps, from the mere addition of new factual details—could alter the course of the litigation.[4] Indeed, that is why the Court's scheduling order set an early amendment deadline to begin with. It is unclear why defense counsel would arrogate to themselves alone the role of deciding in the first instance that an already untimely request should be hoarded for many more months. Even more to the point, defense

[4] Defense counsel cites *Syntel Sterling Best Shores Mauritius Ltd. v. Trizetto Grp., Inc.*, No. 15-cv-211 (LGS) (RLE), 2016 WL 5338550, at *3 (S.D.N.Y. Sept. 23, 2016), for the proposition that "[c]ourts routinely grant leave to amend when a plaintiff seeks to refine the complaint to reflect evidence obtained during discovery." Def.'s Mem. at 15-16. What counsel does not acknowledge is that the court in *Syntel Sterling* was addressing a motion to amend a pleading to add additional allegations, not new claims or defenses. *See Syntel Sterling*, 2016 WL 5338550, at *3. Indeed, the same is true of the case from which *Syntel Sterling* borrows that quotation. *See In re Pfizer Sec. Litig.*, No. 04-cv-9866 (LTS), 05-md-1688 (LTS), 2012 WL 983548, at *2 (S.D.N.Y. Mar. 22, 2012) (citing *Bridgeport Music, Inc. v. Universal Music Grp., Inc.*, 248 F.R.D 408, 417 (S.D.N.Y. 2008) (granting leave to amend when plaintiff sought to add *factual material that did not alter its substantive legal claims*) and *Kirk v. Metro. Transp. Auth.*, No. 99-cv-3787, 2001 WL 258605, at *17 (S.D.N.Y. Mar. 14, 2001) (granting leave to amend "to plead facts learned in discovery *that support previously noticed causes of action*") (emphasis added)). The cases cited in support of this proposition do not address the post-discovery addition of new claims or affirmative defenses. That is not surprising, since the addition of new claims or affirmative defenses has the potential for greater interruption to the litigation than new factual details.

counsel has not shown why it was the diligent course of action to wait the two months between the close of fact discovery and the April 17, 2017 conference to raise the amendment issue.[5]

B. Prejudice

Although the Court has found that Defendant—through its counsel—did not demonstrate the diligence ordinarily required by Rule 16(b), the Court concludes that good cause nevertheless exists because the desired amendment would result in no significant prejudice to Plaintiff. "In determining what constitutes 'prejudice,' [courts] consider whether the assertion of a new claim would: (i) require the opponent to expend significant additional resources to conduct discovery and prepare for trial; (ii) significantly delay the resolution of the dispute; or (iii) prevent the plaintiff from bringing a timely action in another jurisdiction." *Block v. First Blood Assocs.*, 988 F.2d 344, 350 (2d Cir. 1993).

Plaintiff contends that the addition of at least some of the extra exclusions at this stage would require additional discovery, thereby resulting in "an extensive delay in these proceedings; a duplication of depositions already held; as well as a significant increase in litigation expenses." Pl.'s Mem. at 21. While extensive delay, duplication of depositions, and significantly increased expenses would amount to prejudice, Plaintiff invokes those consequences in only the broadest of terms. Plaintiff has provided no concrete description of the kind of incremental discovery it would require in light of the addition of the exclusions.

For its part, Defendant argues that "there was no need for Plaintiff to take any discovery regarding [the] exclusions," because "the applicability of these exclusions is a question of law for the Court to decide." Def.'s Reply Mem. at 6-7. As an initial matter, the Court notes that the question whether a particular claim falls within a policy exclusion is not a pure question of law that, by its very

[5] Further, to the extent that counsel seeks to rely on the "threadbare" nature of Plaintiff's complaint as a justification for its late recognition of the applicability of certain defenses, the Court observes that counsel could have moved for a more definite statement pursuant to Federal Rule of Civil Procedure 12(e) or to dismiss for failure to state a claim pursuant to Rule 12(b)(6). Counsel pursued neither type of motion.

nature, requires no facts in order to resolve. Yet it appears that Defendant intended to make that argument, judging by its citation to *MCC Non Ferrous Trading Inc. v. AGCS Marine Insurance Co.* for the proposition that "when the issue to be decided is limited to a pure question of law, such as the interpretation of unambiguous contract language, summary judgment may be appropriate even before the commencement of discovery." Def.'s Reply Mem. at 7 (quoting *MCC*, No. 14-cv-8302, 2015 WL 3651537, at *3 (S.D.N.Y. June 8, 2015)). While that proposition may be correct when the question is limited to the interpretation of the exclusion itself, the question whether an exclusion applies in a specific case—which will be a relevant question here—is a mixed question of law and fact. *Atlantic Cas. Ins. Co. v. W. Park Assocs., Inc.*, 585 F. Supp. 2d 323, 326 (E.D.N.Y. 2008) (concluding that exclusion applied by applying "the law in light of the undisputed facts"); *cf. Jalloh v. Gonzalez*, 498 F.3d 148, 151 (2d Cir. 2007) (stating that the "proper application of legal principles to the facts and circumstances of the individual case at hand" is a "mixed question[ ] of law and fact"). Indeed, the case on which Defendant relies itself held that the applicability of an exclusion could not appropriately be resolved before discovery. *See MCC*, 2015 WL 361537, at *4.

That said, there has been discovery in this case. Thus, the question is not whether applicability of the exclusions can be determined without any discovery, but whether applicability of these three extra exclusions can be determined fairly without *additional* discovery. Beyond broad and vague statements, Plaintiff has not explained—and the Court is unable to discern—why the additional exclusions would need to be applied to a different universe of facts than those developed through the already-extensive discovery conducted in this action. As a result, the Court cannot conclude that amendment of the answer and third-party complaint to add the three exclusions would result in significant prejudice to Plaintiff, and Defendant will be permitted to make the requested amendment.[6] *See Fresh Del Monte Produce, Inc. v. Del Monte Foods, Inc.*, 304 F.R.D. 170, 176

[6] Plaintiff has also opposed Defendant's motion on the ground that the contemplated amendments would be futile. The Court makes no finding with respect to futility here, and instead defers resolution of the merits of the added defendants to the anticipated motions for summary judgment.

(S.D.N.Y. 2014) ("[I]n appropriate circumstances, a district court has discretion to grant a motion to amend even where the moving party has not shown diligence in complying with a deadline for amendments in a Rule 16 scheduling order."); *Coale v. Metro-North R.R. Co.*, No. 08-cv-1307, 2009 WL 4881077, at *3 (D. Conn. Dec. 11, 2009) (finding good cause for amendment largely because it would cause no prejudice to the opposing party, and stating that "[s]cheduling orders are not the Code of Hammurabi").[7] Defendant is directed to file its amendments to the answer and third-party complaint, solely to add the three exclusions described in its motion, no later than seven days after the date of this order.

Balanced against any prejudice to Plaintiff from granting this request, the Court weighs the fact that both parties—Plaintiff and Defendant—agreed that these exclusions would apply to the Policy. To effectively strip the Policy of those limitations because of counsel's failure to assert them at an earlier stage would lead to an inequitable result by denying Defendant the ability to assert exclusions that the parties negotiated and expected to apply. Permitting the requested amendments avoids that inequitable and unduly harsh result. This too supports the Court's conclusion that good cause exists to permit the proposed amendments.

To ensure the amendments do not unduly prejudice Plaintiff, however, the Court will permit Plaintiff to make an application for leave to conduct additional discovery in light of the amendments no later than fourteen days after the date of this order. Any such application must be made by a letter not to exceed five pages, and must make a concrete and detailed showing of the need for additional discovery. If Plaintiff makes a timely application for additional discovery, Defendant may file a response letter not to exceed five pages within seven days after the date of service of Plaintiff's letter.

[7] The Court also notes that, under Rule 15, "the fact that the opposing party will have to undertake additional discovery standing alone, does not suffice to warrant denial of a motion to amend a pleading." *Christians of Cal., Inc. v. Clive Christian N.Y., LLP*, No. 13-cv-275, 2014 WL 3605526, at *5 (S.D.N.Y. July 18, 2014) (quoting *United States ex rel. Mar. Admin. v. Cont'l Ill. Nat'l Bank & Tr. Co. of Chi.*, 889 F.2d 1248, 1255 (2d Cir. 1989)).

IV. CONCLUSION

For the reasons described above, Defendant/Third-Party Plaintiff Hartford Fire Insurance Company' motion for leave to amend the answer and third-party complaint is GRANTED. The amendments must be filed no later than seven days after the date of this order and must be limited to the addition of (1) the exclusion for loss caused by delay; (2) the exclusion for loss caused by latent defect; and (3) the exclusion for loss caused by acts, errors, or omissions in planning, zoning, and development.

Plaintiff may, but is not required to, submit a letter requesting leave to conduct additional discovery in light of the above amendments. Any such letter must be filed no later than fourteen days after the date of this order and must not exceed five pages in length. Defendant may submit a response letter, also limited to five pages, no later than seven days after service of Plaintiff's letter, if any.

The Clerk of Court is directed to terminate the motion pending at ECF No. 82.

SO ORDERED.

Dated: July 25, 2017
New York, New York

GREGORY H. WOODS
United States District Judge