

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

AMCO INSURANCE COMPANY,

Plaintiff,

vs.

Civil Action 2:06-CV-472
Judge Frost
Magistrate Judge King

LAUREN-SPENCER, INC., et al.,

Defendants.

OPINION AND ORDER

Plaintiff AMCO Insurance Company ("AMCO") initiated this declaratory judgment action seeking a determination of its obligations under a policy issued to Lauren-Spencer, Inc. ("Lauren-Spencer"). This matter is now before the Court on Lauren-Spencer's motion to amend its counterclaim for insurer bad faith. *Motion to Amend*, Doc. No. 38.

BACKGROUND

Lauren-Spencer obtained general liability insurance coverage from AMCO. Lauren-Spencer and certain of its employees were sued in this Court for copyright infringement. *George Harris v. OTC, Inc., et al.*, C-2-04-884 (S.D. Ohio) ("*Harris*"). Lauren-Spencer tendered *Harris* to AMCO, demanding defense and indemnification for any damages awarded in *Harris*. AMCO provided a defense under a reservation of rights.

AMCO thereafter initiated this declaratory judgment action, taking the position that its policy excluded coverage for the claims asserted in *Harris*; AMCO also asserted that it had no duty to either defend or to indemnify the Lauren-Spencer defendants in *Harris*. *Complaint*, Doc. No. 1. In response, Lauren-Spencer asserted counterclaims seeking a declaration of coverage and of consequent duty to defend and to indemnify in *Harris*, breach of contract and insurer bad faith. *Answer*, Doc. No. 10. The latter claim specifically alleged that

AMCO acted in breach of its implied covenant of good faith and fair dealing as follows:

(i) failing and refusing to provide the Lauren-Spencer defendants with a defense in the *Harris* lawsuit;

(ii) failing and refusing to indemnify the Lauren-Spencer defendants for the costs of such defense;

(iii) failing and refusing to participate meaningfully in the parties' settlement negotiations;

(iv) failing and refusing to either consent or respond to *Harris'* settlement demand; and

(v) failing and refusing to indemnify the Lauren-Spencer defendants for all payments, expenditures, judgments, damages, and settlements that have been incurred in connection with the *Harris* lawsuit.

Answer and Counterclaim, p. 15, Doc. No. 10.

Thereafter, the Court found coverage under the policy as well as a duty to indemnify. *Opinion and Order*, Doc. No. 24. The parties agreed that further proceedings on the remaining insurer bad faith counterclaim should be stayed pending resolution of *Harris*. *Continued Preliminary Pretrial Order*, p.1, Doc. No. 27. The case was in fact stayed pending resolution of *Harris*. *Order*, Doc. No. 31.

Harris was dismissed with prejudice on September 8, 2008, and the stay of this action was vacated. *Order*, Doc. No. 34.

MOTION TO AMEND

Lauren-Spencer now moves to amend its insurer bad faith counterclaim to expressly include AMCO's prosecution of this declaratory judgment action. *Motion to Amend*, Doc. No. 38. Lauren-Spencer characterizes the proposed amendment as merely an attempt "to clarify the

factual predicate for its stated claim in order to avoid any confusion in that regard." *Id.*, p. 1. AMCO opposes the motion, arguing that grant of leave to amend at this juncture would work to its prejudice and "would thwart the purpose and spirit of" Rule 11 of the Federal Rules of Civil Procedure. *Memorandum contra*, p. 1, Doc. No. 41. AMCO specifically contends that the proposed amendment would assert allegations and claims not encompassed in the original insurer bad faith counterclaim.

Rule 15(a) of the Federal Rules of Civil Procedure provides "[t]he court should freely give leave [to amend] when justice so requires." F.R. Civ. P. 15(a)(2). The grant or denial of a request to amend a pleading is left to the broad discretion of the trial court. *General Elec. Co. v. Sargent & Lundy*, 916 F.2d 1119, 1130 (6th Cir. 1990). In exercising its discretion, the trial court may consider such facts as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment [and] futility of the amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

This Court agrees that the proposed new allegations do more than merely clarify the allegations contained in the original insurer bad faith counterclaim. Nevertheless, the motion for leave to amend is not untimely in light of the lengthy stay of this action; moreover, little if any discovery on the insurer bad faith counterclaim -- either as originally pled or as proposed -- has taken place. Although AMCO appears to challenge the merits and legal sufficiency of the proposed new counterclaim, plaintiff points to no authority clearly establishing that the claim sought to be pursued is, as a matter of law, legally insufficient or that the proposed amendment would be an exercise in

futility. *Cf. Neighborhood Development Corp. v. Advisory Council on Historic Pres.*, 632 F.2d 21, 22 (6th Cir. 1980) (amendment is futile if proposed amendment could not survive motion to dismiss).

Under all these circumstances, the Court concludes that grant of leave to amend the insurer bad faith counterclaim is meritorious. The *Motion to Amend*, Doc. No. 38, is therefore **GRANTED**.

The Clerk shall FILE the proposed Amended Counterclaim attached to the motion.

June 16, 2009

s/Norah McCann King
Norah M^cCann King
United States Magistrate Judge