

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OWEN HARTY	:	CIVIL ACTION
	:	NO. 17-493
v.	:	
	:	
KIMCO KML TRUST	:	
	:	
O'NEILL, J.		July 27, 2017

MEMORANDUM

On February 2, 2017, plaintiff Owen Harty filed a complaint against defendant Kimco KML Trust seeking injunctive and other relief and attorney's fees and costs pursuant to the Americans with Disabilities Act (ADA), 42 U.S.C. § 12181, et seq. Dkt. No. 1. In his complaint, plaintiff, who "is paralyzed from the waist down and is bound to ambulate in a wheelchair," alleged violations of the ADA at "Center Square Plaza, 1301 W. Skippack Pike, Blue Bell, PA 19422." Dkt. No. 1 at ECF p. 1 at ¶¶ 1-2. He asserts that he

has visited the property which forms the basis of this lawsuit and plans to return to the property to avail himself of the goods and services offered to the public at the property, and to determine whether the property has been made ADA compliant. Plaintiff has encountered architectural barriers at the subject property which discriminate against him on the basis of his disability and have endangered his safety. These barriers also prevent Plaintiff from returning to the property to enjoy the goods and services available to the public. Plaintiff is also a tester for the purpose of asserting his civil rights and monitoring, ensuring, and determining whether places of public accommodation are in compliance with the ADA.

Dkt. No. 1 at ECF p. 2, ¶ 5; see also Dkt. No. 9-1 at ECF p. 2, ¶ 5 (same). Plaintiff alleges that "it would be a futile gesture to attempt to visit" the subject property "if he wishes to do so free of discrimination." Dkt. No. 1 at ECF p. 2, ¶ 6; see also Dkt. No. 9-1 at ECF p. 2-3, ¶ 6.

Also on February 2, 2017, the Clerk of Court provided plaintiff with a summons for Kimco. See unnumbered docket entry after Dkt. No. 1. Under Rule 4(m) of the Federal Rules of

Civil Procedure, plaintiff was required to effect service of the summons and the complaint on Kimco within 90 days of filing the complaint, i.e. by May 3, 2017. See Fed. R. Civ. P. 4(m). However, plaintiff did not serve Kimco with the summons and complaint until May 8, 2017. See Dkt. No. 3. Thus, on May 15, 2017, Kimco filed a motion seeking to dismiss this action without prejudice, raising plaintiff's failure to timely serve Kimco with a copy of the Summons or Complaint within the 90-day time period required by that Rule 4(m) of the Federal Rules of Civil Procedure. Dkt. No. 2. Thereafter, on May 18, 2017, plaintiff filed an affidavit of service with the Court reflecting the May 8 date of service. Dkt. No. 3.

Rule 4(m) "require[s] a court to extend time if good cause is shown" Petrucelli v. Bohringer and Ratzinger, 46 F.3d 1298, 1305 (3d Cir. 1995); see Fed. R. Civ. P. 4(m) ("if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period"). However, plaintiff filed nothing with his affidavit of service that would have explained why he had good cause for his failure to timely serve Kimco with the complaint. The Court considered the affidavit of service alone to be insufficient to constitute a timely response to Kimco's motion to dismiss under Rule 7.1(c) of the Local Rules of Civil Procedure (i.e., a response filed on or before May 29, 2017). See E.D. Pa. Local R. Civ. P. 7.1(c) ("Unless the Court directs otherwise, any party opposing [a] motion shall serve a brief in opposition together with such answer or other response that may be appropriate within fourteen (14) days after service of the motion and supporting brief."). Thus, on May 30, 2017, the Court ordered plaintiff to show cause why this action should not be dismissed for lack of timely service. Dkt. No. 4.

Then, on June 9, 2017, rather than specifically respond to the Order to Show Cause,

plaintiff filed an untimely¹ response and affidavit in opposition to Kimco's motion to dismiss. Dkt. No. 5 and Dkt. No. 6. In the response, plaintiff argued, inter alia, that he could

demonstrate good cause for the slight delay in filing [sic] his complaint because: (1) his attorneys contacted Defendant's attorneys well before the expiration of the 90-day time period; (2) provided them with notice of the action; and (3) attempted to offer Defendant an opportunity, in good faith to try to resolve this matter without unnecessary litigation as it has been able to do in other, similar cases in Pennsylvania with Defendant's counsel.

Dkt. No. 5 at ECF p. 1-2.

Thereafter, and before the Court had an opportunity to consider plaintiff's June 9 filing, plaintiff filed an amended complaint on June 19, 2017. Dkt. No. 7. Plaintiff's purported amended complaint, which added Route 73 Associates to the caption, and identified Route 73 Associates as a "Pennsylvania Limited Partnership," *id.* at ECF p. 1, did not appear to be compliant with the requirements of Rule 15 of the Federal Rules of Civil Procedure, as it was filed more than 21 days after Kimco filed its motion to dismiss² and was filed without leave of court or proof of Kimco's written consent.³ Accordingly, the Court ordered the Clerk of Court to strike the "Amended Complaint" docketed at docket Number 7 and granted plaintiff leave to file

¹ Plaintiff insists that he "timely filed his response in opposition to Defendant's motion . . ." Dkt. No. 9 at ECF p. 1, ¶ 3. However, fourteen days from May 15, 2017 would be May 29, 2017, not June 9, 2017.

² Rule 15(a)(1) of the Federal Rules of Civil Procedure provides, in relevant part, that

[a] party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) 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).

³ Rule 15(a)(2) provides that, other than for the amendment permitted as of right, "in all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2).

a motion on or before July 6, 2017 seeking leave to file an amended complaint pursuant to Rule 15(a)(2). Dkt. No. 8.

On June 30, 2017, plaintiff filed a “consent motion for leave to amend complaint & amendment of caption.” Dkt. No. 9. For the reasons that follow, the Court will grant plaintiff’s motion for leave to amend and will deny Kimco’s motion to dismiss pursuant to Rule 4(m).

I. Motion for Leave to Amend

Plaintiff seeks to amend his complaint to add Route 73 Associates as a defendant pursuant to Rule 15 of the Federal Rules of Civil Procedure. Dkt. No. 9. He asserts that Kimco has provided written consent to the amendment (although plaintiff has not attached proof of such consent).⁴ *Id.* at ECF p. 2, ¶ 9. Plaintiff’s motion explains that on June 15, 2017, counsel for Kimco advised him that Kimco “owned a portion of the subject property, but did not own the entire property” and that he was informed that “some of the architectural barriers alleged by Plaintiff are located on the portion of the subject property that is not owned by” Kimco. *Id.* at ¶ 5. As a result, plaintiff contends that with further research “he was able to determine that Route 73 Associates, a Pennsylvania Limited Partnership, owned the portion of the subject property that is not owned by Defendant Kimco.” *Id.* at ¶ 6. Plaintiff thus asks that he be granted leave to file and serve the amended complaint which names Route 73 Associates as a defendant. *Id.* at ECF p. 3.

Rule 15(a)(2) provides that “[t]he court should freely give leave [to amend a complaint] when justice so requires.” Fed. R. Civ. P. 15(a)(2); see *Foman v. Davis*, 371 U.S. 178, 182 (1962) (“[T]his mandate is to be heeded.”). Nonetheless, a district court may deny leave to amend a complaint where “it is apparent from the record that (1) the moving party has

⁴ Kimco has not filed a response to the “consent motion for leave to amend complaint & amendment of caption.”

demonstrated undue delay, bad faith or dilatory motives, (2) the amendment would be futile, or (3) the amendment would prejudice the other party.” Lake v. Arnold, 232 F.3d 360, 373 (3d Cir. 2000); see also Arthur v. Maersk, Inc., 434 F.3d 196, 204 (3d Cir. 2006) (“Leave to amend must generally be granted unless equitable considerations render it otherwise unjust.”).

The Court cannot say that allowing an amendment to add Route 73 Associates as a defendant would be futile. Plaintiff alleges that he “will continue to suffer direct and indirect injury,” Dkt. No. 9-1 at ECF p. 2, ¶ 6, as a result of the alleged architectural barriers at Center Square Plaza, raising claims that are arguably of a continuing nature because he alleges that he “plans to return to the property” Id. at ¶ 5. According to plaintiff, he has now learned that Route 73 Associates may be the owner of some of the property containing the alleged architectural barriers. Although there has been some delay in naming Route 73 Associates as a defendant, delay alone is not a sufficient ground for denial of leave to amend. Adams v. Gould Inc., 739 F.2d 858, 868 (3d Cir. 1984). “At some point, the delay will become ‘undue,’ placing an unwarranted burden on the court, or will become ‘prejudicial,’ placing an unfair burden on the opposing party.” Id. However, plaintiff’s case has not yet reached that point. Nor can the Court find that plaintiff has acted in bad faith or with a dilatory motive. Cognizant that claims should be decided on their merits rather than on technicalities, see Dole v. Arco Chem. Co., 921 F.2d 484, 486–87 (3d Cir. 1990), and guided by the Court’s obligation to “secure the just, speedy and inexpensive determination of every action and proceeding,” Fed. R. Civ. P. 1, the Court will grant plaintiff’s request for leave to amend.⁵

⁵ In granting plaintiff’s motion, the Court notes that plaintiff has a parallel obligation under Rule 1 that he has not fully satisfied because he has unnecessarily complicated the course of this matter through his failure to explicitly follow the deadlines and procedures set forth in the current version of the Federal Rules and the Court’s local rules. See Fed. R. Civ. P. 1 (dictating that the Federal Rules of Civil Procedure “should be construed, administered, and

II. Kimco's Motion to Dismiss Pursuant to Rule 4(m)

In his motion seeking to amend his complaint to add Route 73 Associates as a defendant, plaintiff notes that Kimco's motion to dismiss remains pending before the Court. Dkt. No. 9 at ECF p. 1. Kimco seeks dismissal of plaintiff's claims against it without prejudice pursuant to Rule 4(m) of the Federal Rules of Civil Procedure "due to his failure to timely serve Kimco with a copy of the Summons or Complaint" Dkt. No. 2 at ECF p. 7.

Rule 4(m) provides, in relevant part, that "[i]f a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time." Fed. R. Civ. P. 4(m) (emphasis added). The Court is also mindful that the Court of Appeals has held that "dismissal of a complaint is inappropriate when there exists a reasonable prospect that service may yet be obtained. In such instances, the district court should, at most, quash service, leaving the plaintiffs free to effect proper service." Umbenhauer v. Woog, 969 F.2d 25, 30 (3d Cir. 1992).

Under Rule 4(m), plaintiff should have effectuated service of the summons and complaint on Kimco by May 3, 2017. Plaintiff did not timely serve Kimco, but he did then serve Kimco with the complaint on May 8, 2017. See Dkt. No. 3.

Under these circumstances, it is appropriate to deny Kimco's motion

An appropriate Order follows.

employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding") (emphasis added).