

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
NORTHERN DIVISION

**FILED**  
DEC 20 2017  
  
CLERK

SDIF LIMITED PARTNERSHIP 2, A  
SOUTH DAKOTA LIMITED  
PARTNERSHIP;

Plaintiff,

vs.

TENTEXKOTA, LLC, A SOUTH  
DAKOTA LIMITED LIABILITY  
COMPANY; W. KENNETH ALPHIN,  
TIMOTHY J. CONRAD, MICHAEL R.  
GUSTAFSON, GEORGE D. MITCHELL,  
DALE MORRIS, MARC W. OSWALD,  
RONALD W. WHEELER, DWIGHT P.  
WILES,

Defendants.

1:17-CV-01002-CBK

OPINION AND ORDER

Defendants filed a motion to amend their answer, counterclaim, and third party complaint to include a request for declaratory relief. Plaintiff resists the motion, contending that the proposed amendment would be futile.

Pursuant to Fed. R. Civ. P. 15(a)(2), the “court should freely give leave [to amend a pleading] when justice so requires.” “Unless there is a good reason for denial, ‘such as undue delay, bad faith, or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the non-moving party, or futility of the amendment, leave to amend should be granted.’” Becker v. Univ. of Nebraska at Omaha, 191 F.3d 904, 907–08 (8th Cir. 1999) (*quoting* Brown v. Wallace, 957 F.2d 564, 566 (8th Cir. 1992)). The motion to amend was filed within the time set for filing such motions in the scheduling order issued by the Court pursuant to the parties’ proposed dates. There is no undue delay, bad faith, or dilatory motive shown in this case. There is

also no undue prejudice to the plaintiff. The only prejudice would be legal prejudice if defendants are successful on the merits of the claim for declaratory relief.

The proposed amended claim for declaratory relief seeks a ruling on the application of SDCL 47-34A-303 to the liability of the individual defendants and third party plaintiffs for the debts of Tentexkota, LLC. Plaintiff contends that the amendment is futile, suggesting that I rule on the merits of the application of SDCL 47-34A-303 in the first instance. I decline to do so. The United States Court of Appeals for the Eighth Circuit has held that the “[l]ikelihood of success on the new claim or defenses is not a consideration for denying leave to amend unless the claim is clearly frivolous.” Becker v. Univ. of Nebraska at Omaha, 191 F.3d at 908. The new claim is not clearly frivolous.

Now, therefore,

IT IS ORDERED that the motion, Doc. 53, to amend the answer, counterclaim, and third-party complaint is granted.

DATED this 20th day of December, 2017.

BY THE COURT:



CHARLES B. KORNMANN  
United States District Judge