

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KAREN MCPETERS, individually, and on)
Behalf of those individuals, persons and)
entities who are similarly situated,)
Plaintiff,)

V.)

CIVIL ACTION NO. 4:10cv1103

THE HONORABLE FREDERICK E.)
EDWARDS, BARBARA GLADDEN)
ADAMICK, DISTRICT CLERK;)
MONTGOMERY COUNTY, TEXAS, and)
REED ELSEVIER, INC., d/b/a)
LexisNexis,)
Defendants.)

**DEFENDANT REED ELSEVIER, INC.’S RESPONSE TO PLAINTIFF’S OPPOSED
MOTION FOR LEAVE TO AMEND COMPLAINT**

Defendant LexisNexis, a division of Reed Elsevier Inc.,¹ (“LexisNexis”) hereby responds to Plaintiff’s Opposed Motion for Leave to Amend Complaint (“Motion for Leave”).

I. Nature and Stage of the Proceeding

Plaintiff is a Montgomery County civil litigant who complains about the e-filing system that Montgomery County began implementing in 1997, which requires litigants in designated e-filing cases to pay for filing pleadings with the County’s District Courts and the County Courts at Law having concurrent jurisdiction with the District Courts. (See Miscellaneous Order No. 97-9155, attached as Exhibit 1 to Defendant’s, Montgomery County, Texas, Motion to Dismiss for Failure to State a Claim and Brief in Support, filed with this Court, hereinafter “Montgomery County’s Brief”). Plaintiff sues Montgomery County, Texas itself, along with the Honorable Frederick E. Edwards, District Judge, 9th District Court, Montgomery County, Texas (“Judge Edwards”); Barbara Gladden Adamick, District Court Clerk of Montgomery County, Texas (“Adamick”) (collectively with Montgomery County and Judge Edwards, the “Government

¹ Improperly pled as Reed Elsevier, Inc., d/b/a LexisNexis by Plaintiff.

Defendants”); and Reed Elsevier, Inc. (“LexisNexis”), the company that currently administers the e-filing system (collectively with Judge Edwards, Adamick and Montgomery County, the “Defendants”).

Plaintiff contends Defendants, by implementing and servicing the e-filing system, have committed fraud and violated Texas statutes, RICO, the Texas Theft Liability Act, and the rights secured by the United States and Texas Constitutions. Plaintiff filed her original complaint on April 6, 2010. Defendant Montgomery County filed its Motion to Dismiss on May 4, 2010. Plaintiff amended her complaint on May 17, 2010. Defendant Montgomery County filed its Amended Motion to Dismiss on June 1, 2010. Without first applying for leave from this Court, Plaintiff filed her Second Amended Complaint on June 6, 2010, along with Plaintiff’s Response to Montgomery County’s Amended Motion to Dismiss. Plaintiff claims in her Motion for Leave that her Second Amended Complaint and her Response to Montgomery County’s Amended Motion to Dismiss were filed as a response to the Amended Motion to Dismiss. (Motion for Leave at ¶ 7). Defendant LexisNexis filed its Motion to Dismiss on June 7, 2010. After filing the Second Amended Complaint without leave, Plaintiff now requests leave from this Court to amend her complaint a second time.

II. Issues to be Ruled Upon by the Court; Standard of Review

LexisNexis asks this Court to deny Plaintiff’s Motion for Leave. The issues before this Court are whether the Plaintiff should be granted leave to file her Second Amended Complaint, or if Plaintiff is granted leave, whether Plaintiff should be liable to Defendants for costs incurred in responding to Plaintiff’s Second Amended Complaint.

A. This Court has discretion to grant or deny Plaintiff leave to file her Second Amended Complaint.

“It is well settled that the grant of leave to amend the pleadings pursuant to Rule 15(a) is within the discretion of the trial court.” *Home Depot U.S.A., Inc. v. Nat’l Fire Ins. Co.*, Civil Action No. 3:06-cv-0073, 2007 U.S. Dist. LEXIS 66696, at *6 (N.D. Tex. Sept. 10, 2007); *See also Freeman v. Continental Gin Co.*, 381 F.2d 459, 468-69 (5th Cir. 1967) (noting that when

trial courts in the Fifth Circuit have stated a reason for denying leave to amend, such as undue prejudice or repeated failure to cure deficiencies in prior complaints, the Fifth Circuit Court of Appeals has left those decisions undisturbed).

B. If this Court grants Plaintiff leave to file her Second Amended Complaint, this Court has the discretion to hold Plaintiff liable for the costs incurred by Defendants in responding.

Although Rule 15(a) does not expressly permit sanctions, Courts may impose costs as a condition of granting leave to amend to compensate the other parties for increased costs imposed by the amendments. *See, e.g., General Signal Corp. v. MCI Telecomm's Corp.*, 66 F.3d 1500, 1513-14 (9th Cir. 1995); *See also Allied Industrial Workers v. General Electric Co.*, 471 F.2d 751, 756 (6th Cir. 1973) (imposing costs when granting leave to amend would cause prejudice to the opposing party).

III. Summary of the Argument

Plaintiff is entitled to amend her complaint once as a matter of law under Rule 15(a)(1). Plaintiff used this opportunity when she filed her First Amended Complaint. Plaintiff must have leave from this Court, or consent by the other parties to file any further amended complaints. FED. R. CIV. P. 15(a)(2). Although leave to amend should be freely granted in most circumstances, it is “by no means automatic.” *Home Depot U.S.A., Inc.*, 2007 U.S. Dist. LEXIS 66696, at *6.² As set forth below, courts routinely deny leave to amend when a plaintiff seeks to use amended complaints to avoid dismissal under Rule 12(b)(6), when a plaintiff’s amended complaint would be futile because she cannot state a claim for which relief can be granted, or when granting plaintiff’s motion would result in undue prejudice to other parties. Based on these factors, this Court should deny Plaintiff’s Motion for Leave. Alternatively, if this Court grants Plaintiff’s Motion for Leave, Defendants should be awarded the costs associated with reviewing and responding to Plaintiff’s Second Amended Complaint.

² *See, e.g., Gentilello v. Rege*, Civil Action No. 3:07-cv-1564, 2008 U.S. Dist. LEXIS 50745 at *17 (N.D. Tex. June 30, 2008) (denying motion for leave to amend when no additional facts could be pled without changing the underlying theory of the case).

A. This Court should deny Plaintiff leave to file her Second Amended Complaint.

1. Plaintiff's Motion for Leave to Amend is a pre-textual attempt to avoid dismissal under Rule 12(b)(6) and should be denied.

Plaintiff is entitled to amend her complaint once as a matter of law under Rule 15(a)(1). Without consent by the other parties, Plaintiff must have leave from this Court to file any further amended complaints. FED. R. CIV. P. 15(a)(2). Plaintiff ignored the requirements of Rule 15 and filed her Second Amended Complaint before requesting leave or permission from the other parties. According to Plaintiff, however, her untimely motion for leave to amend her complaint is pursuant to Rule 15(a)(3). (*See* Plaintiff's Motion for Leave at ¶¶ 5, 8). Rule 15(a)(3) states:

Time to Respond. Unless the court orders otherwise, any required responses to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

FED. R. CIV. P. 15(a)(3).

Rule 15(a)(3) merely sets forth the time parties have to respond to amended pleadings. *Id.* It does not create any rights to amend. *Id.* Plaintiff, however, apparently desires to sneak her Second Amended Complaint into the record without leave from this Court by characterizing it as a response to Montgomery County's Amended Motion to Dismiss, i.e. an amended pleading under Rule 15(a)(3). The following language from Plaintiff's Motion for Leave exposes her intent to use her Second Amended Complaint as a response to Montgomery County's Amended Motion to Dismiss to circumvent the leave requirements of Rule 15(a)(2):

On June 6, 2010, Plaintiff McPeters filed both her Second Amended Complaint (Doc. 19) and Response to Motion to Dismiss (Doc. 20). **Both documents were filed as her response to the Amended Motion to Dismiss.**

If the court finds that FRCP 15(a)(3) did not permit Plaintiff McPeters' [sic] to file her Second Amended Complaint, then Plaintiff McPeters requests leave to file her Second Amended Complaint. The amendment to the complaint is appropriate.

(Plaintiff's Motion for Leave at ¶¶ 7-8) (Emphasis added).

Plaintiff's admission proves further her intent to manipulate the Federal Rules of Civil Procedure to her benefit and Defendants' detriment.

Leave to amend should be denied when a plaintiff repeatedly fails to cure deficiencies from previous complaints. *Home Depot U.S.A., Inc.*, 2007 U.S. Dist. LEXIS 66696 at *7. Specifically, leave to amend is properly denied when the "amended claims are not the result of new information discovered in investigation...or disclosure of facts previously hidden by nonmovants." *In Re Northwest Airlines Corp.*, Case No. 96-cv-74711, 2005 U.S. Dist. LEXIS 44684 at *28 (E.D. Mich. Aug. 9, 2005). When facts included in the amended complaint were known to the plaintiff when the original complaint was filed, a trial court may properly deny leave to amend. *In Re Southmark Corp.*, 88 F.3d 311, 316 (5th Cir. 1995) (citing *Layfield v. Bill Heard Chevrolet Co.*, 607 F.2d 1097, 1098 (5th Cir. 1979), *cert denied*, 446 U.S. 939 (1980)).

Here, Plaintiff seeks to cure the deficiencies of her two prior complaints identified by Montgomery County in its Motion to Dismiss by filing a 60-page Second Amended Complaint with 50 pages of Exhibits. The Second Amended Complaint is virtually identical to the two prior complaints.³ To the extent Plaintiff's Second Amended Complaint differs, it is a response brief in disguise. For example, Plaintiff attempts to clarify her blatantly confusing RICO claims by outlining the elements of RICO and attempting to apply her version of the facts to the elements. (See Second Amended Complaint at ¶¶ 103-106, *cf.* First Amended Complaint at ¶¶ 102-103). This time, instead of merely alleging facts and leaving Defendants and this Court to determine which facts apply to which elements in RICO, Plaintiff creates sub-headings entitled "Association in Fact" (i.e. Enterprise) and "Pattern of Racketeering" to separately address the elements.⁴ (See Second Amended Complaint at ¶¶ 104-106). Plaintiff does not reveal newly discovered facts, however, but merely re-packages the same arguments from the two prior

³ Most of Plaintiff's changes in her Second Amended Complaint are minor or stylistic. (¶¶ 123, 176, 270, 302). Plaintiff also modified the allegations under the statutory claims against Barbara Adamick, which are inapplicable to LexisNexis and do not raise newly discovered factual issues. (¶¶ 264-266).

⁴ Memorandum in Support of Defendant Reed Elsevier, Inc.'s Motion to Dismiss at 20-21.

complaints. In fact, Plaintiff concedes her improper strategy to use her Second Amended Complaint as a veiled response to Defendant Montgomery County's Motion to Dismiss when she stated in her request for leave:

The amendment to the complaint is appropriate, because Montgomery County added additional extrinsic material to its Amended Motion to Dismiss, and raised other objections to Plaintiff McPeters First Amended Complaint.

Plaintiff had every opportunity to address the deficiencies in the original complaint in her 57-page First Amended Complaint. Plaintiff admittedly and improperly now seeks to use her Second Amended Complaint to avoid dismissal under Rule 12(b)(1) and 12(b)(6), which warrants this Court denying Plaintiff's request for leave to amend. *See, In Re Northwest Airlines Corp.*, 2005 U.S. Dist. LEXIS 44684 at *28.

2. Plaintiff's Motion for Leave to Amend should be denied because it is futile.

Courts can deny leave to amend when amending the complaint would be futile. *Home Depot U.S.A., Inc.*, 2007 U.S. Dist. LEXIS 66696, at *7; *Glick v. Koenig*, 766 F.2d 265, 268-69 (7th Cir. 1985); *Briggs v. Mississippi*, 331 F.3d 499, 508 (5th Cir. 2003). Thus, courts apply the "the same standard of legal sufficiency as applies under Rule 12(b)(6)" when reviewing proposed amended complaints. *Landavazo v. Toro Co.*, 301 F. App'x 333, 337 (5th Cir. 2008) (citing *Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 873 (5th Cir. 2000)).

The standard of legal sufficiency under Rule 12(b)(6) requires analysis of whether plaintiff has made a plain statement of the grounds of her entitlement to relief based on the factual allegations in her complaint alone. Fed R. Civ. P. 8(a); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation"); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do"). *See also Sullivan v. Leor Energy, LLC*, 600 F.3d 542, 546 (5th Cir. 2010) (following *Iqbal* and

Twombly in affirming dismissal of claims under Texas law when factual allegations failed to support legal allegations in the complaint.). If the plaintiff has alleged sufficient facts to bear out the elements of the claim, the court must then consider whether the adequately pleaded facts state a “plausible,” rather than a merely “possible,” claim. *Iqbal*, 129 S. Ct. at 1950; *Twombly*, 550 U.S. at 555. Conclusory allegations will not suffice. *Fernandez-Montes v. Allied Pilots Ass’n*, 987 F.2d 278, 284 (5th Cir. 1993). Plaintiff has failed to meet this standard.

As set forth above, the only substantive difference between Plaintiff’s First Amended Complaint and Plaintiff’s Second Amended Complaint are with respect to Plaintiff’s RICO allegations, specifically the allegations of “enterprise.” Plaintiff, however, still fails to adequately allege a RICO “enterprise.” “In order to avoid dismissal for failure to state a claim, a plaintiff must plead specific facts, not mere conclusory allegations, which establish the existence of an enterprise.” *Elliott v. Foufas*, 867 F.2d 877, 881 (5th Cir. 1989). Allegations of an association-in-fact enterprise must show that the various associates “function as a continuous unit.” *Whelan v. Winchester Prod. Co.*, 319 F.3d 225, 229 (5th Cir. 2003); *see also Rivera v. AT&T Corp.*, 141 F. Supp. 2d 719, 726 (S.D. Tex. 2001) (J. Ellison). Importantly, the “enterprise is not a pattern of racketeering activity, but must exist separate and apart from the pattern of racketeering activity in which it engages.” *Id.*; *see also Rivera*, 141 F. Supp. 2d at 726. A plaintiff must plead “not only that the enterprise is distinct from the series of predicate acts constituting racketeering activity, but also that the RICO ‘person’ who commits the predicate acts is distinct from the enterprise.” *Id.*

In her Second Amended Complaint, Plaintiff attempts to cure her failures in pleading “enterprise.” Plaintiff now specifies the enterprise as an “association-in-fact” enterprise, but continues to fail in her attempts to allege any association distinct from the predicate acts under RICO. The test is whether “the enterprise would still exist were the predicate acts removed from the equation.” *In re Mastercard Int’l Inc.*, 132 F. Supp. 2d 468, 485 (E.D. La. 2001), *aff’d* 313 F.3d 257 (5th Cir. 2002). The relationship between LexisNexis and the remaining Defendants would undoubtedly end if e-filing was discontinued. The very existence of any association by

Defendants Edwards, Adamick, Montgomery County, and LexisNexis is by virtue of e-filing. E-filing, according to Plaintiff forms the basis of the predicate acts under RICO. Thus, Plaintiff has not alleged an enterprise which exists separate from the alleged predicate acts.

Plaintiff attempts to establish enterprise by calling the e-filing relationship an “E-file Racket.” (Second Amended Complaint at ¶ 104). This characterization is purely rhetorical with no supporting factual allegations. Looking beyond the rhetoric, it is apparent that Plaintiff’s RICO allegations fail for the same reason they did in the previous complaints – Plaintiff cannot allege an enterprise distinct from the alleged predicate acts. As a result, Plaintiff should not be permitted another opportunity to amend her complaint, as any amendment would be futile.

3. Plaintiff’s Motion for Leave to Amend should be denied because it will cause undue prejudice to Defendants.

Finally, in exercising its discretion to deny leave to amend a complaint, a trial court may properly consider undue prejudice to other parties. *In re Southmark Corp.*, 88 F.3d at 314-15. The pattern of Plaintiff manipulating the Federal Rules of Civil Procedure to her benefit should be stopped before any further prejudice to Defendants occurs. If Plaintiff is permitted to use amended complaints to respond to motions to dismiss, this litigation will never move forward and Defendants will continue incurring needless costs.

B. LexisNexis should be awarded costs if Plaintiff’s Motion for Leave to Amend is granted.

Finally, Courts may impose costs as a condition of granting leave to amend to compensate the other parties for increased costs imposed by the amendments. *See, e.g., General Signal Corp. v. MCI Telecomm’s Corp.*, 66 F.3d 1500, 1513-14 (9th Cir. 1995). If this Court grants Plaintiff’s Motion for Leave to Amend, LexisNexis requests this Court assess against Plaintiff the attorneys’ fees and costs incurred by Defendants in responding to Plaintiff’s Second Amended Complaint.

IV. Conclusion

Defendants should not be forced to incur the expense of reviewing and responding to a complaint that could have been the original complaint had Plaintiff done her homework. Amended complaints are not the appropriate vehicle for curing deficiencies from prior complaints exposed by Defendants' motions to dismiss. For the foregoing reasons, LexisNexis respectfully requests that the Court deny Plaintiff's Motion for Leave, or in the alternative, hold Plaintiff responsible for fees incurred by LexisNexis in responding to Plaintiff's Second Amended Complaint.

Respectfully submitted,

By: /s/ Miranda Tolar
MIRANDA R. TOLAR
Texas Bar No. 24029843
S.D. Tex. ID No. 28896
600 Travis Street, Suite 2800
Houston, Texas 77002-3095
mtolar@lockelord.com
Telephone: (713) 226-1618
Facsimile: (713) 223-3717

ATTORNEY-IN-CHARGE FOR
DEFENDANT REED ELSEVIER, INC.

OF COUNSEL FOR DEFENDANT REED ELSEVIER, INC.
PAUL, HASTINGS, JANOFSKY & WALKER LLP
John G. Parker
Georgia Bar No. 562425
Admitted Pro Hac Vice
600 Peachtree Street, N.E. Suite 2400
Atlanta, Georgia 30308
johnparker@paulhastings.com
Telephone: (404) 815-2222
Facsimile: (404) 685-5222

J. Allen Maines
Georgia Bar No. 466575
Admitted Pro Hac Vice
600 Peachtree Street, N.E. Suite 2400
Atlanta, Georgia 30308
allenmaines@paulhastings.com
Telephone: (404) 815-2500
Facsimile: (404) 815-2401

Emily L. Shoemaker
Georgia Bar No. 558138
Pro Hac Vice Application Pending
600 Peachtree Street, N.E. Suite 2400
Atlanta, Georgia 30308
emilyshoemaker@paulhastings.com
Telephone: (404) 815-2252
Facsimile: (404) 685-5252

S. Tameka Phillips
Georgia Bar No. 245633
Admitted Pro Hac Vice
600 Peachtree Street, N.E. Suite 2400
Atlanta, Georgia 30308
tamekaphillips@paulhastings.com
Telephone: (404) 815-2330
Facsimile: (404) 685-5330

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of June, 2010, I electronically filed the foregoing Defendant Reed Elsevier, Inc.'s Response to Plaintiff's Opposed Motion for Leave to Amend Complaint with the Clerk of Court using the CM/ECF system, which automatically sends an e-mail notification of such filing to the following attorneys of record:

Robert L. Mays
mays7772@gmail.com
Sara M. Forlano
sara.florlano@mctx.org
Allison Miller
amiller@sschlaw.com

/s/ Miranda R. Tolar
Miranda R. Tolar