

STATE OF MAINE

SUPERIOR COURT

Cumberland, ss.

RUSSELL CHRETIEN

Plaintiff

v.

Docket No. PORSC-CV-17-265

BERMAN & SIMMONS and WILLIAM ROBITZEK

Defendants

STATE OF MAINE
Cumberland ss Clerk's Office
SEP 04 2010 10:30AM
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**ORDER ON PLAINTIFF'S MOTION
FOR LEAVE TO FILE SECOND AMENDED COMPLAINT**

Plaintiff Russell Chretien has brought an action for legal malpractice against Defendants Berman & Simmons, P.A. and William Robitzek, Esq. Plaintiff has filed a Motion for Leave to File Second Amended Complaint. Defendants have filed an opposition and Plaintiff has filed a reply memorandum.

Shortly after filing their opposition, Defendants filed a Motion for Summary Judgment that, as of this writing, is not fully briefed. For reasons set forth below, the court has elected to take up the Plaintiff's Motion separately rather than defer consideration until Defendants' Motion is ready for decision.

Plaintiff's Motion seeks to add to the theories of liability already set forth in his first Amended Complaint claims for fraudulent concealment, intentional misrepresentation and punitive damages, and also seeks to add factual allegations intended to support the existing and new claims.

Defendants' opposition to the Motion asserts two major objections—that the Plaintiff's Motion is untimely and that the Motion is futile because Plaintiff cannot prevail on any of the proposed additional claims.

The starting point for the analysis is Rule 15(a) of the Maine Rules of Civil Procedure, which calls for leave to amend to be “freely given when justice so requires.” *See Diversified Foods, Inc. v. First National Bank*, 605 A.2d 609, 616 (Me. 1992). “This mandate means that ‘if the moving party is not acting in bad faith or for delay, the motion will be granted in the absence of undue prejudice.’ ” *Id.*, quoting 1 Field, McKusick & Wroth, § 15.4 (1970).

The factors that go into determining whether leave to amend should be granted include:

- The timing of the motion for leave: A motion made within the period set in the scheduling order for the case is presumptively timely. A motion made beyond that deadline is not necessarily untimely, but other factors may result in leave being denied.
- The reasons for any delay in the timing of the motion: If the moving party legitimately could not have made the motion earlier, the timing of the motion, in and of itself, will not weigh against granting leave to amend. However, “undue delay removes any presumption in favor of allowing amendment.” *Diversified Foods, Inc.*, 605 A.2d at 616 (internal quotes omitted).

- Bad faith: An improper purpose or motive on the part of the moving party weighs substantially against granting leave to amend.
- Undue prejudice: A request for leave to amend that will cause undue prejudice to an opposing party, meaning harm or detriment beyond the mere potential for liability on the proposed new claims or allegations, may be denied on that ground. *See Holden v. Weinschenk*, 1998 ME 185, ¶6, 715 A.2d 915 (leave to amend properly denied when request made after entry of summary judgment against the moving party); *Drinkwater v. Patten Realty Corp.*, 563 A.2d 772, 778 (Me. 1989) (denial upheld of motion for leave to amend made three years after commencement of case and five days before trial).
- Futility: When the proposed amendment would be futile, i.e. the moving party could not prevail on the proposed additional claims, leave to amend may be denied on that ground alone. *See Glynn v. City of South Portland*, 640 A.2d 1065, 1067 (Me. 1994) (“[W]hen . . . a proposed amended complaint would be subject to a motion to dismiss, the court is well within its discretion in denying leave to amend.”)

Defendants object to Plaintiff’s Motion on the ground that it is untimely and that what they say is Plaintiff’s undue delay will cause them undue prejudice. Defendants also object on the ground that the proposed amendment would be futile, not because it fails to state a claim for purposes of a motion to dismiss, but because

Defendants would be entitled to summary judgment on the new claims, just as they contend they are on the current claims.

In an unrecorded conference call with counsel this morning, the court advised that it is not inclined to decide the Motion based on either side's contention that the other side has either failed diligently to pursue discovery or failed diligently to respond to discovery. The court understands each side's perspective on the other's performance but does not deem either side's perspective either so compelling or so without merit that either side should be faulted or that discovery issues should be the basis for deciding Plaintiff's Motion for Leave to Amend.

Likewise, because the proposed new claims are plainly cognizable for purposes of withstanding a motion to dismiss, the Plaintiff's Motion cannot be deemed futile.

Accordingly, the focus will be on the factors of the timeliness of the Motion in relation to the inception and schedule for the case; undue prejudice to Defendants, and bad faith. Although the Motion was filed after the scheduling order deadline for amendment of the pleadings and thus cannot be deemed presumptively timely, it was filed before the close of discovery and it does not appear to allege any entirely new cause of action. Instead, it essentially alleges new theories of liability on the same cause of action set forth originally and new claims for relief in the form of money damages.

There has been no showing of bad faith on either side's part and any prejudice to the Defendants is limited, given the nature of the proposed new claims. Moreover, any prejudice to Defendants can be alleviated.

Finally, the benefit to the parties and the court of addressing Plaintiff's Motion outside the context of summary judgment is that the Defendants' pending Motion for Summary Judgment, with any amendment or supplementation allowed by this Order, can be addressed by the parties and decided by the court without any uncertainty about which claims are at issue.

Accordingly, it is hereby ORDERED AS FOLLOWS:

1. Plaintiff's Motion for Leave to File Second Amended Complaint is hereby granted. The copy of the proposed Second Amended Complaint attached to Plaintiff's Motion as Exhibit 2 shall be docketed separately.

2. Defendants' deadline for answering or otherwise pleading in response to the Second Amended Complaint is hereby extended. If the court denies Defendants' Motion for Summary Judgment in whole or part, either in that Motion's present form or as revised, Defendants shall answer or otherwise plead in response to the Second Amended Complaint 20 days after the court's ruling on Defendants' Motion is docketed.

3. Defendants may file an amended Motion for Summary Judgment and memorandum, or may supplement their present Motion, by no later than September 14, 2018. If Defendants elect to rely on their pending Motion without revision or supplementation, they shall so notify the Clerk in writing by September 14, 2018.

4. Plaintiff's deadline for filing an opposition to Defendants' Motion is hereby extended to 21 days after Defendants have either filed an amendment or supplement

to their Motion, or filed a letter with the Clerk advising that they will rely on their present filings.

5. Defendants' reply deadline is 14 days after the filing of Plaintiff's opposition.

6. The Clerk will schedule Defendants' Motion for oral argument on an available date in November 2018.

7. If claims remain pending after the court's ruling on Defendants' Motion, a conference of counsel will be convened to discuss the schedule for remaining phases of the case.

Pursuant to M.R. Civ. P. 79(a), the Clerk is hereby directed to incorporate this Order by reference in the docket.

Dated August 31, 2018

A handwritten signature in cursive script, appearing to read "A. M. Horton", is written above a horizontal line.

A. M. Horton, Justice

Russell Chretien vs. Berman & Simmons PA, et al., PORSC-CV-17-265

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