

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

T-Peg, Inc. and Timberpeg East, Inc.)
)
 Plaintiffs,)
)
 v.)
)
 Stanley J. Isbitski and Vermont Timber Works, Inc.)
)
 Defendants.)

No. C-03-462-M

MOTION TO AMEND

NOW COME the plaintiffs, T-Peg, Inc. and Timberpeg East, Inc. (“Timberpeg”), by and through their attorneys, Devine, Millimet & Branch, Professional Association, and respectfully move to amend the Complaint, pursuant to Rule 15 of the Federal Rules of Civil Procedure, and Local Rule 15.1 of this Court. In support of this motion, Timberpeg states as follows:

1. This action raises, principally, a claim of copyright infringement against the defendant Vermont Timberworks, Inc. (“VTW”), arising out of Timberpeg’s allegation that VTW unlawfully copied its copyrighted architectural plans in the drawing and erection of a timberframe. The facts relevant to Timberpeg’s claims against VTW are set forth in detail in the Complaint as well as Timberpeg’s memorandum of law in support of its objection to VTW’s motion for summary judgment and in support of Timberpeg’s motion for partial summary judgment.

2. Timberpeg, thus far, has asserted copyright claims against VTW. In pre-litigation correspondence to VTW, however, Timberpeg raised the possibility of asserting individual liability. See Letter dated November 20, 2003 from Stephen Woods, Esquire to Ned Whittington, Esquire, attached hereto as Exhibit A. At the time Timberpeg filed the Complaint, it lacked facts that would allow it to assert individual liability under the copyright act in good faith.

3. Through, primarily, the deposition of Douglas Friant, a principal of VTW and its sole draftsman, Timberpeg has obtained specific information that now supports a claim for individual liability. Specifically, Timberpeg has learned that Mr. Friant is one of two owners of VTW, a small company with less than 10 employees, that Mr. Friant claims to be the sole draftsman involved in the preparation of VTW's drawings, which, Timberpeg alleges, constitute an infringement of its copyrighted plans, and that Mr. Friant oversaw the erection of the timberframe.

4. Having discovered a basis to assert individual liability against Mr. Friant, Timberpeg now moves to amend its Complaint to add a series of specific, factual allegations which derive directly from Mr. Friant's deposition, and one additional count, for copyright infringement against Mr. Friant. As set forth below, the proposed amendment even though it comes after the pleading amendment deadline in the Scheduling Order, neither is the product of undue delay nor a cause of prejudice to VTW, nor a futile proposed amendment. Accordingly, Timberpeg now seeks leave to amend.

Argument

5. Rule 15 of the Federal Rules of Civil Procedure provides that, after a responsive pleading is served, a party may amend only by leave of court, and such leave

shall be freely given when justice so requires. Leave to amend, generally, depends upon whether (1) undue delay has occurred, and (2) whether the party opposing the motion will suffer prejudice. See Acosta-Mestre v. Hilton International of Puerto Rico, Inc., 156 F.3d 49, 51 (1st Cir. 1998). Delay alone, however, will not prevent an amendment in the absence of showing any prejudice, bad faith or futility by the party opposing the motion. See Acosta – Mestre, 156 F.3d at 52 (amendment denied when sought over a year after prior amendment and would require continuance of trials. Edwards v. City of Goldsboro, 178 F.3d 231 (4th Cir. 1999) (“Delay alone is an insufficient reason to deny leave to amend . . .”). LR 15.1, moreover, requires parties seeking to amend to identify any new factual allegations, claims or parties, and to explain why those allegations, claims or parties were not included in the initial pleading.

6. With respect to LR 15.1, Timberpeg has identified the new allegations above. In addition, Timberpeg attaches hereto, as Exhibit B, a version of the Complaint with the proposed amendments highlighted for this Court’s review. Timberpeg did not include the allegations in the initial Complaint because it did not obtain the discovery necessary to make the factual allegations it seeks to make through the amendment until after Mr. Friant’s deposition, which occurred on August 10, and did not receive the transcript until thereafter. Timberpeg has already been accused of Rule 11 conduct in this litigation, and does not desire to incur additional accusations of that nature. See Defendant’s Motion To Dismiss at 6 (alleging that Timberpeg’s Complaint was so unfounded as to potentially violate Rule 11). In light of the defendant VTW’s concerns,

Timberpeg waited until the allegations upon which it now bases its proposed amendment were confirmed through deposition.¹

7. The proposed amendment cannot be characterized as the product of undue delay. The Scheduling Order set a pleading amendment deadline of July 1, 2004, and a deadline for the Joinder of new parties of August 1. Trial is not scheduled to occur until March, 2005. While this motion admittedly comes after those deadlines, this is not the kind of delay which other courts have found to be “undue” and meriting denial of motions to amend. See, e.g., Jin v. Metropolitan Life Ins. Co., 295 F.3d 335 (sd Cir. 2002) (denying amendment proposed four years after filing of Complaint, three years after close of discovery and three months after summary judgment ruling).

8. Even if this Court viewed Timberpeg’s proposed amendment as unduly delayed, VTW can claim neither prejudice, nor bad faith on Timberpeg’s part. See Edwards, 178 F.3d at 242 (delay and prejudice or bad faith required to defeat motion to amend). With respect to bad faith, Timberpeg waited until it obtained deposition testimony that directly supported its proposed amended claim before seeking to amend and allege against Mr. Friant personally. Timberpeg exercised good faith in waiting to amend.

9. With respect to prejudice, the proposed amendment will not create any unfair disadvantage to VTW. First, the proposed amendment is identical to the copyright infringement claim already lodged against VTW. As Mr. Friant is the sole draftsman of the allegedly infringing drawings, he is the principal witness relevant to the copyright claim against VTW. He is also an owner of VTW. This is a case in which his conduct on

¹ Counsel for Timberpeg also took a vacation in late August, the first day of which VTW filed a motion for summary judgment, to which Timberpeg has recently responded.

behalf of VTW may also subject him to personal liability. This is not a case in which the proposed amendment will require new discovery.

10. Second, VTW can claim no surprise. Timberpeg put VTW on notice prior to the litigation of potential individual or personal liability. See Woods Letter, Exhibit A. VTW has had every reason to expect, should the facts emerge to support it, that Timberpeg would seek personal liability. VTW, moreover, has always possessed the facts Timberpeg could only learn through discovery, inasmuch as Mr. Friant is a principal of VTW.

11. Third, the amendment will create no unfair disadvantage to VTW. If VTW defeats the copyright claim against it, then it will defeat the copyright claim against Mr. Friant – the two are, effectively, one in the same, as Mr. Friant is the only person at VTW who engaged in any of the conduct of which Timberpeg complains. Thus, the amendment, for example, does not disadvantage VTW's pending motion for summary judgment, as disposition of the copyright claim in VTW's favor will necessary dispose of the claim against Mr. Friant in his favor.

12 The only prejudice VTW could assert arises out of having to defend the new claim. It is well established, however, that the inclusion of a claim based on facts already known or available to both sides does not prejudice the non-moving party. See Popp Telcom, Inc. v. American Sharecom, 210 F.3d 928, 943 (8th Cir. 2000).

13. Finally, the proposed new claim is not futile. Copyright law allows for personal or individual liability on the part of the infringer, even if acting in the scope of his or her employment, if the individual has the ability to supervise the infringing activity

and has a financial interest in that activity, or who personally participates in that activity.

See Pinkham v. Sara Lee Corp., 983 F.2d 824, 834 (8th Cir. 1992).

14. Based on Mr. Friant's deposition testimony, he is half owner of VTW, and, therefore, has a direct financial stake in the company and its business and profits. He also claims to be the sole draftsman. He both supervised and participated in the infringing activity. Mr. Friant, if the allegations are proven true (and they have to be admitted, as they derive from Mr. Friant's deposition testimony), will be personally liable if VTW is liable for copyright infringement.

15. A copy of the proposed amended Complaint is attached hereto as Exhibit C.

16. Counsel for VTW has been contacted and does not assent to the relief requested herein.

17. Due to the extensive argument and authority cited herein, no accompanying memorandum of law is necessary. See L.R. 7.2.

WHEREFORE, Timberpeg respectfully requests that this Court:

- A. Grant leave to amend the Complaint; and
- B. Grant such further relief as this Court deems just, equitable and proper.