

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

T-PEG, INC and)	
TIMBERPEG EAST, INC.,)	
Plaintiffs,)	
)	
vs.)	No. 03-CV-462-M
)	
VERMONT TIMBER WORKS, INC.,)	
Defendant.)	

DEFENDANT'S OBJECTION TO MOTION TO AMEND
(AND TO ADD A NEW PARTY)

Defendant, Vermont Timber Works, Inc. ("VTW"), objects to plaintiffs' motion to amend, which also would add a new party.

Plaintiffs pretend that this is a routine motion to amend under Rule 15, which should be routinely granted unless there is prejudice to defendant. But that is not the case. Plaintiffs omit mentioning that (1) their motion is made some three months after the deadline for amendments and two months after the deadline for joinder of additional parties, (2) the motion is governed by Rule 16, not just Rule 15, (3) plaintiffs mislead the court in claiming they have just "discovered" the so-called basis to sue the third party, (4) defendant would be prejudiced by the delay involved in connection with the amendment, and (5) plaintiffs' real reason for the amendment to attempt to avoid the termination of a case which they have not prepared and which is wholly unfounded.

The Standard

Under the scheduling order (which was precisely the order requested by plaintiffs), the deadline to amend and the deadline to join new parties was July 1, 2004. This motion to amend

was made September 27, 2004. Thus, the correct standard is not just the FRCP 15 standard, but also the FRCP 16 standard, which provides

A schedule shall not be modified except upon a showing of good cause and by leave of the district judge

As emphasized by Wright & Miller, “[t]his would require the party seeking relief to show that the deadlines cannot reasonably be met despite the diligence of the party needing the extension.”

Wright & Miller, Federal Practice & Procedure §1522.1. See also, Johnson v. Mammoth Recreations, 975 F. 2d 604, 609 (9th Cir. 1992) (“unlike Rule 15(a) liberal amendment policy . . . Rule 16(b)s ‘good cause’ standard primarily considers the diligence of the party seeking the amendment; Tschantz v. McCann, 160 F.R.D. 568, 571 (C.D. Ind. 1995) (motion denied even though no prejudice suffered because “good cause” not shown).

Moreover, since plaintiff’s motion impacts both Rule 16 and Rule 15, it must additionally meet the no-prejudice-to-defendant test of Rule 15.

In denying a motion to amend filed two months after the deadline, this Court has stated:

Neither the motion for leave to amend, which was filed more than two months after the Fed.R.Civ.P. 16(b)(1) deadline for amending the pleadings and well after defendant had fully briefed its arguments in support of dismissal of the first amended complaint, nor the reply to defendant's objection makes any effort whatsoever to establish that "good cause" exists for modifying the agreed-upon Rule 16(b) deadline for amending the pleadings. See Hernandez-Loring v. Universidad Metropolitana, 233 F.3d 49, 51 (1st Cir.2000) (applying the good cause standard); cf. Riofrio Anda v. Ralston Purina, Co., 959 F.2d 1149, 1154-55 (1st Cir.1992) (noting that "undue delay" and "undue prejudice to the opposing party" provide bases for denying a motion to amend and observing that allowance of an amendment two months after the deadline established by the Rule 16(b) scheduling order "would have nullified the purpose of rule 16(b)(1)").

Gwyn v. Loon Mountain Corp., 2002 NH 100 (emphasis added).

The Motion To Amend/Motion To Join Is Not Timely

As unambiguously set forth in the Court's Scheduling Order (Ex. 1 & 2, attached), the deadline for amendment was July 1, 2004, and the deadline for joinder of additional parties was August 2, 2004. These were plaintiffs' own proposals, adopted by the Court.

The Amendment Is Not Justified By A "Recent Discovery"

Plaintiffs assert that they have "discovered a basis" to proceed against the third party, Friant (MTA ¶4), and suggest that this is new information that "now supports a claim for individual liability." (MTA ¶4) Nothing could be further from the truth.

The so-called "new" information, "discovered" at Friant's deposition, is that "Friant claims to be the sole draftsman involved in the preparation of VTW's drawings," and that "Friant oversaw the erection of the timberframe." MTA ¶3. The reality is that defendant disclosed these very facts in responding to plaintiffs first interrogatories, Nos. 8 & 9, on March 29, 2004, as follows:

No. 8. Identify all VTW's employees, agents, principals, partners, shareholders, or officers who participated in any design work for Isbitski, and identify their involvement or role.

ANSWER: Doug Friant, Vice President, draftsman.

No. 9. Identify all VTW employees, agents, principals, partners, shareholders, or officers who were involved in the construction of the VTW's timber frame at the Isbitski site in Salisbury, New Hampshire, and identify their involvement or role.

ANSWER: Dan Kelleher –Layout - Erection, Doug Friant – Design - Erection, Richard Labrecque – Fabrication - Erection, Tom Cutler – Fabrication - Erection, Jennis Brochu- Fabrication-Erection, Walter Clark –Fabrication-Erection.

Ex. 3 (emphasis added).

These responses could not be more clear. Either plaintiffs chose not to read and act on information which was clearly given to them, or hope that the deficiency will be overlooked and excused. Either way, if they needed to know who the draftsman was in order to sue him, they knew that in March and have not “discovered” it now. They have not met their burden.

Plaintiffs Cannot Show Good Cause

Plaintiffs have not done anything at all to fulfill their diligence and good cause obligations. Not only did they (in the most charitable characterization) not read the information which was plainly given to them, if they truly did not know, they didn’t make any further attempt to obtain the information – the most basic and obvious in the case – before the deadline. They did not take any depositions before the amendment deadlines ran. They only took Friant’s deposition (the only deposition they have taken at all, on August 10) when defendant urged them to.

This is, after all, a case alleging copyright infringement. The issue of who drew defendant’s plans is as central and basic as one can imagine. Plaintiffs hardly can claim diligence on this issue in ignoring what they were told and not bothering to take Friant’s deposition until after the deadline ran.

Defendant Would Be Prejudiced By The Amendment/Joinder

The joinder of a new party and amendment of the complaint would prejudice VTW.

First, the case was filed in October 2003 and is already in the final trial preparation phase, with VTW’s summary judgment motion fully briefed, with plaintiffs’ expert disclosure deadline

past, and final trial preparations in full progress. VTW would suffer renewed expense to have all of these closed issues, and dates reopened.

Second, the joinder of a new party would further delay the case, and might add many new issues. If the Court granted the motion, plaintiffs would then have to serve the proposed new defendant, whose responsive pleading would not even be due until at least December. The new party would then have to decide whether to engage separate counsel, and would have the right to file his own motions to dismiss, counter- and cross-claims, and his own document requests and interrogatories. He might take new or different depositions, or raise issues causing plaintiffs to do so.

Third, the new party would have the right to keep information from the existing depositions out of evidence and/or to retake the several depositions already taken by VTW. It would be prejudicial for VTW to be subjected to an additional round of expense for such processes, where it has already been forced to spend the resources to fully prepare for trial (on a case which it considers frivolous).

Fourth, the new party would have the right to engage his own expert witnesses.

Fifth, VTW would be forced to participate in discovery between plaintiffs and the new party on issues on which VTW has already prevailed, such as plaintiffs' claim for their damages, which they have (apparently) withdrawn against VTW but which they wish to assert afresh against the proposed new party (discussed below).

The Amendment Would Be Futile

For all the reasons set forth in VTW's pending Motion For Summary Judgment (which it incorporates here by reference), the proposed new claim against the third party would fail as a matter of law, and the amendment would be futile.

Plaintiffs' Real Reason For The Attempted Amendment Appears To Be To Revive Issues And Procedural Which Have Lapsed Or Been Lost

Plaintiffs' real reason for their requested "amendment" and joinder of a new party appears to be to revive issues which have been lost and restart procedural deadlines which it has already missed.

By way of example, one of the hotly-contested issues since the filing of the case a year ago is the issue of plaintiffs' alleged "damages." Plaintiffs initially alleged that they had "lost gross profit on the Isbitski project . . . of \$116,007.41." Ex. 4. Subsequently, VTW uncovered proof that (1) plaintiffs had collected \$3,500 from Isbitski for their design work and claimed only an additional \$1,003.75 as unpaid, and (2) plaintiffs had threatened to sue the bank which had purchased the property in foreclosure and thereby obtained an additional \$4,000 for the use of its plans, thus generating a profit on the so-called "infringement" of approximately \$3,000. Plaintiffs withdrew their damages claim on September 29, 2004. Ex. 5.¹ Nonetheless, their proposed Amended Complaint has damages claims, both against VTW and the proposed new defendant. In case this was merely an oversight, VTW sent a clarifying letter asking plaintiffs to withdraw or amend their proposal Amendment Complaint, and they refused. Ex. 6 & 7.

¹ Despite their clear statement "my client has instructed me to inform you that it will not seek any damages arising out of its lost profits," plaintiffs have subsequently sent inconsistent correspondence, and VTW has filed a separate motion to clarify that damages are out of the case.

In addition, unlike VTW, which has taken the case seriously and incurred significant defense costs, plaintiffs have done virtually nothing to prosecute the case. They have taken only a single deposition, which they took only at VTW's urging when it appeared the witness would be unavailable for a period. They have disclosed no expert witnesses except two of their own employees, and are now past the deadline for disclosing experts. The fact is that they failed to prepare a real case – both because there is no case and because they hoped to obtain a settlement from VTW – and now that their deadlines have expired they would like an excuse to start over. This would be grossly prejudicial to VTW and would reward plaintiffs for their dilatory litigation strategy.

The motion to join a new party and to amend the complaint should be denied.

Date: October 13, 2004

VERMONT TIMBER WORKS, INC.
Defendant,

By: W. E. Whittington
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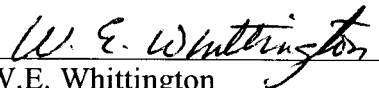
Ex. 1 – USDC of NH - Discovery Plan Fed. R. Civ.P.(26(f) – Scheduling Order	02/13/04
Ex. 2 – USDC of NH – Other Orders/Judgments – Scheduling Order	02/16/04
Ex. 3 – VTW's Responses To Plaintiffs' First Interrogatories And Request to Produce	03/05/04
Ex. 4 – Plaintiffs' Mandatory Disclosures Pursuant to Rule 26(a)	03/02/04
Ex. 5 – D. Will letter dated September 29, 2004	09/29/04
Ex. 6 – W. Whittington letter dated October 1, 2004	10/01/04
Ex. 7 – D. Will letter dated October 4, 2004	10/04/04

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2004, I served the foregoing pleading on the following counsel of record, by first class mail:

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