

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Civil Action No.: 2020-CP-40-2226

Fogle Electric Company, Inc.

Plaintiff,

vs.

Kevin Bass,

Defendant.

ORDER

RECEIVED

Feb 17 2023

SC Court of Appeals

This matter is before the Court for consideration of Defendant Kevin Bass' Motion to Amend the Answer to assert Counterclaims and a Third-Party Complaint. A hearing was held on October 19, 2022, at which Plaintiff was represented by Jordan M. Crapps, Esquire and Defendant was represented by Page M. Kalish, Esquire. For the reasons set forth below and after due consideration of the Parties' respective briefing and the arguments presented at the hearing of this matter, Defendant's Motion is DENIED.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of Defendant Kevin Bass's employment with Plaintiff Fogle Electric and his conduct following the termination of that relationship. Bass's employment ended January, 2020. Fogle Electric initiated this action by filing its Complaint on May 5, 2020. On July 17, 2020, Defendant Kevin Bass Answered the Complaint and asserted Counterclaims for Malicious Prosecution and Breach of Fiduciary Duty. At the same time, Kevin Bass also filed and served a Third-Party Complaint against Carl Fogle for Defamation. Plaintiff and Carl Fogle moved to dismiss the Counterclaims and Third-Party Complaint. This Court agreed and

dismissed the Counterclaims and Third-Party Complaint without prejudice on January 4, 2021.

In doing so, the Court found:

it appears that the causes of action were drafted simply by copying and pasting the elements of each cause of action into a document and then, in most paragraphs, adding the parties' names. In other words, the causes of action contain little more than legal conclusions and do not apprise Carl or Fogle Electric of specifically what they're alleged to have done. Therefore, both the counterclaims and third-party must be dismissed.

(Order dated January 4, 2021, p. 3-4.).

Following the dismissal of Defendant's counterclaims and third-party complaint, Defendant did not seek to reassert or restate those claims. Rather, Defendant rested on his Answer and Affirmative Defenses and the case proceeded to limited discovery that consisted of written discovery and the deposition of the Defendant. One year later and within the applicable Statutes of Limitations, on January 5, 2022, Kevin Bass filed the instant motion to again assert substantially the same Counterclaims and Third-Party Complaint with revised facts pled. During the ten months that the Motion to Amend was pending for a hearing, counsel for the parties agreed to hold off on the depositions of Plaintiff and its employees and mediation until after the hearing on the Motion to Amend. In addition, two Joint Motions for Continuance were filed and granted during the pendency of the Motion to Amend.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At this stage in the proceeding, Defendant may only amend his pleading by leave of court or by written consent of the adverse party. Rule 15, SCRCP. "Leave shall be freely given when justice so requires and does not prejudice any other party." *Id.* "In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the

opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be ‘freely given.’” *Patton v. Miller*, 420 S.C. 471, 490, 804 S.E.2d 252, 262 (2017). “It is well established that a motion to amend is addressed to the sound discretion of the trial judge, and that the party opposing the motion has the burden of establishing prejudice.” *Duncan v. CRS Serrine Engineers, Inc.*, 337 S.C. 537, 542, 524 S.E.2d 115, 118 (Ct. App. 1999). “A trial court has discretion to deny a motion to amend if the party opposing the amendment can show a valid reason for denying the motion.” *Skydive Myrtle Beach, Inc. v. Horry Cty.*, 426 S.C. 175, 182, 826 S.E.2d 585, 588 (2019).

This Court finds Plaintiff would be prejudiced by the amendment proposed. “The focal inquiry in allowing amendment of pleadings is whether doing so will prejudice the opposing party.” *Pool v. Pool*, 329 S.C. 324, 328, 494 S.E.2d 820, 822 (1998). “Prejudice occurs when the amendment states a new claim or defense which would require the opposing party to introduce additional or different evidence to prevail in the amended action.” *Ball v. Canadian Am. Exp. Co.*, 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994).

This case was initiated in May, 2020, and will likely be assigned to a trial docket soon. Judicial economy requires a case of this age to be moved towards trial, not reset at the pleading stage with additional claims and parties. Compounding this issue, Defendant waited an entire year after Judge Newman dismissed the previous iteration of his counterclaims and third-party complaint prior to filing this Motion seeking to assert substantially similar claims again. “[A] motion to amend should be made as soon as the necessity for altering the pleading becomes apparent. A party who delays in seeking an amendment is acting contrary to the spirit of the rule.” *Deasy v. Hill*, 833 F.2d 38, 41 (4th Cir. 1987)(quoting, 6 Wright & Miller, Federal Practice

and Procedure § 1488 (1971)). Defendant's Motion is not timely and his delay in asserting the counterclaims and third-party complaint will prejudice Plaintiff.

Furthermore, Defendant's Counterclaims and Third-Party Complaint found in the proposed amendment are not substantially different or improved from the counterclaims and third-party complaint dismissed by Judge Newman. Having been provided an opportunity to correct the deficient pleadings and availing himself of a year's time to conduct discovery, Defendant has not noticeably cured the pleadings previously found to be deficient. Therefore, the proposed amendment would be futile. *Save Our Sound OBX, Inc. v. N. Carolina Dep't of Transportation*, 914 F.3d 213, 228 (4th Cir. 2019) ("A proposed amendment is futile when it is clearly insufficient or frivolous on its face. A proposed amendment is also futile if the claim it presents would not survive a motion to dismiss." (internal quotation and citation omitted)).

Finally, Defendant not only seeks to add counterclaims but is also seeking to assert a third-party complaint for defamation against Carl Fogle under Rule 15 of the South Carolina Rules of Civil Procedure. In addition to the reasons above, permitting Defendant's Third-Party Complaint would not be proper in this case. A defendant may only "cause a summons and complaint to be served upon a person not a party to the action *who is or may be liable to him for all or part of the plaintiff's claim against him.*" Rule 14(a) (emphasis added). "Adding a claim against a third-party defendant is proper only when the third party's liability is in some way dependent on the outcome of the main claim." *Gay v. Carolina Buggy Tours*, No. 9:06-CV-3435, 2008 WL 4031270, at *2 (D.S.C. Aug. 22, 2008) (citing 6 Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice and Procedure* § 1446 (3d ed.2002)). Defendant Bass's defamation claim against third-party Carl Fogle is in no way dependent on Fogle

Electric's claims against Bass and the claim should not be permitted – especially at this late stage.

CONCLUSION

IT IS, THEREFORE, ORDERED that Defendant's Motion to Amend filed on January 5, 2022, is hereby DENIED.

(Judge's Electronic Signature to Follow)



Richland Common Pleas

Case Caption: Fogle Electric Company Inc , plaintiff, et al vs Kevin Bass , defendant,
et al
Case Number: 2020CP4002226
Type: Order/Leave to Amend

Circuit Court Judge

s/Donald B. Hocker, Judge Code 2167