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S.C. SUPREME COURT

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
ORANGEBURG DIVISION

Sentry Select Insurance Company,	)	Civil Action No.: 5:15-cv-04984-JMC
	)	
Plaintiff,	)	<b>ORDER AND OPINION</b>
v.	)	
	)	
Maybank Law Firm, LLC and Roy P.	)	
Maybank,	)	
	)	
Defendant.	)	
	)	

This matter is before the court on Sentry Select Insurance Company's ("Plaintiff") Motion to Amend Complaint. (ECF No. 23.) Based upon the record before the court, Plaintiff's Motion to Amend Complaint (ECF No. 23) is **GRANTED**.

Plaintiff filed its initial Complaint on December 17, 2015, asserting claims based in legal malpractice, both directly and via assignment, against Maybank Law Firm, LLC and Roy P. Maybank (collectively "Defendants"). (ECF No. 1.) On January 25, 2016, Defendants moved to dismiss Plaintiff's Complaint on the grounds that Plaintiff, as a third-party non-client, lacks standing to sue Defendants for legal malpractice. (ECF No. 6.) On April 20, 2016, this court held a hearing on Defendant's motion. (ECF No. 16.) Upon consideration of the parties' arguments and authorities, on June 21, 2016, this court certified two questions to the Supreme Court of South Carolina: (1) "[w]hether an insurer may maintain a direct malpractice action against counsel hired to represent its insured where the insurance company has a duty to defend?" and (2) "[w]hether a legal malpractice claim may be assigned to a third-party who is responsible for payment of legal fees and any judgments incurred as a result of the litigation in which the alleged malpractice arose?" (ECF No. 17.) This court also denied Defendants' Motion to Dismiss (ECF No. 6), with leave to re-file after adjudication of the certified questions. (ECF No. 17.)

On December 12, 2016, Plaintiff filed its Motion to Amend Complaint. (ECF No. 23.) Plaintiff seeks to amend its Complaint to add a Sixth Cause of Action for equitable subrogation as a theory for relief in this attorney malpractice lawsuit, where Plaintiff is arguably not the direct client of the defendant lawyer and/or law firm. (*Id.* at 1.) Plaintiff contends that it “asserted that a court can recognize a cause of action identified as equitable subrogation as a theory for relief to be granted in an attorney malpractice lawsuit, where the plaintiff is arguably not the direct client of the defendant lawyer and/or law firm;” that this cause of action has been recognized in many jurisdictions but not in South Carolina; that “South Carolina law allowing equitable subrogation in other circumstances[] requires that the cause of action be pled,;” that “[m]any cases discussing equitable subrogation[] have held that equitable subrogation only applies where no other remedy is available to a particular plaintiff,” and that the reason Plaintiff did not initially plead this cause of action is “because [it] had no determination as to whether or not the other theories of relief sought by [] Plaintiff would be recognized in South Carolina.” (*Id.* at 1–2.)

In their memorandum in opposition to Plaintiff’s motion to amend its Complaint (ECF No. 24), filed on December 28, 2016, Defendants argue that the certified questions do not include consideration of the “viability of a claim for legal malpractice by a non-client third party against an attorney under an equitable subrogation theory;” that if Plaintiff’s Motion to Amend Complaint is granted, Defendants would have to file another motion to dismiss within fourteen days “without direction from the Supreme Court as to whether Plaintiff’s proposed amended complaint asserts claims that are recognized under South Carolina Law;” and that the motion to amend “may be futile” due to the uncertainty of the claim’s existence under South Carolina law. (*Id.* at 1, 2, 3.)

Plaintiff's reply to the response (ECF No. 25), filed on January 4, 2017, asserts that an Equitable Subrogation claim is included in the first certified question because it is "a direct claim asserted against a lawyer for legal malpractice by an insurance carrier who paid a claim due to the lawyer's malpractice." (*Id.* at 2.) Furthermore, Plaintiff suggests that this court can address Defendants' second argument "by granting leave to Defendants to file an answer or other pleading in response to the amendment, thirty (30) days after the Supreme Court's final ruling on the Certified Questions." (*Id.* at 3.) Finally, Plaintiff asserts that amending the Complaint would allow the Supreme Court to address the specific issue of equitable subrogation, thus preventing the second round of delay that could occur if the Court is not fully alerted to the specific issue and preventing the amendment from being futile. (*Id.*)

Rule 15(a) of the Federal Rules of Civil Procedure provides that "[t]he court should freely give leave [to amend] when justice so requires." Although Rule 15(a) mandates that leave to amend pleadings should be granted freely where justice requires, "[m]otions to amend are committed to the discretion of the trial court." *Keller v. Prince George's County*, 923 F.2d 30, 33 (4th Cir. 1991). "Leave to amend a pleading should be denied *only when* the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would be futile." *Edwards v. City of Goldsboro*, 178 F.3d 231, 242 (4th Cir. 1999) (quoting *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 509 (4th Cir. 1986)). "Delay alone is an insufficient reason to deny leave to amend," "[r]ather, the delay must be accompanied by prejudice, bad faith, or futility." *Id.*

It does not appear to this court that any of the reasons to deny leave to amend are present in this case. Having considered the arguments of the parties, the court finds that allowing the amendment will not visit any prejudice upon Defendants. The court agrees with Plaintiff's

suggestion that Defendants be given thirty (30) days after the Supreme Court's final ruling on the certified questions to file an answer or other pleading in response to the Amended Complaint. At that time, Defendants will be able to craft a response to the Amended Complaint based on the Supreme Court's decision regarding the certified questions.

Furthermore, there is no indication of bad faith on the part of Plaintiff. Plaintiff explained that it did not include the equitable subrogation theory in its original Complaint because the law is unclear as to whether such a claim exists in South Carolina. Plaintiff now wishes to amend the Complaint to prepare for the possibility that the Supreme Court recognizes such a claim when responding to the certified questions. Finally, it is not clear to this court that the amendment "would be futile," because the amendment's futility or lack thereof is dependent upon the South Carolina Supreme Court's answers to the certified questions.<sup>1</sup>

Therefore, Plaintiff's Motion to Amend Complaint (ECF No. 23) is **GRANTED**; and Plaintiff shall file an Amended Complaint within five (5) days of the entry date of this Order. Defendants are hereby granted leave to file an answer or other pleading in response to the

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<sup>1</sup> The court observes that Plaintiff's equitable subrogation theory is at least impliedly included in the first certified question regarding the ultimate issue of claim viability. Although Plaintiff would further request that this court forward its Complaint, Plaintiff's Motion to Amend, Defendants' Motion to Dismiss, and all memorandum filed in connection with amendments to and dismissal of this case, as well as a copy of this order to the Supreme Court of South Carolina "to make clear that all issues which have been briefed are properly before them and ripe for being rule upon," the court declines this invitation. (ECF No. 25 at 1, n.1, and 2.) The South Carolina Appellate Court Rules dictate the briefing schedule and record on appeal. *See* SCACR 244. "In the event a party believes that additional materials from the record before the certifying court are necessary, it shall notify the Supreme Court and the certifying court so that the certifying court can determine if the additional materials will be submitted." SCACR 244(b). This case was argued before the South Carolina Supreme Court on February 9, 2017, and therefore, the court presumes that Plaintiff's request is moot. S.C. Sup. Ct. Video Portal, <http://www.sccourts.org/SCvideo/index Archived.cfm> (last visited Sept. 25, 2017).

Amended Complaint within thirty (30) days after the decision on the certified questions is received by this court.

**IT IS SO ORDERED.**

A handwritten signature in black ink that reads "J. Michelle Childs". The signature is written in a cursive style with a large initial "J".

United States District Judge

September 25, 2017  
Columbia, South Carolina

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH CAROLINA

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