

STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

MOUNT GROUP, LLC, MOUNT CLEMENS
INVESTMENT GROUP, LLC and
YASSER T. HAMMOUD, M.D.,
Plaintiffs,

vs.

Case No. 18-256-CB

MOSTAFA M. AFR, and
A & A MANAGEMENT SERVICE, LLC,
TURFAH FAMILY HOLDINGS,
HUSAIN SALEH, and
ZEINAB AFR, jointly and severally,
Defendants.

OPINION AND ORDER

Plaintiffs filed a motion for leave to file an amended complaint under MCR 2.118.

I. Background

Defendant Mostafa M. Afr acted as Yasser Hammoud and Hammoud Family, LLC's accountant and advisor. Plaintiffs filed their Complaint on January 18, 2018, alleging various financial improprieties. Specifically, Plaintiffs alleged: Count I, temporary restraining order/injunctive relief; Count II, conversion; Count III, fraud and misrepresentation; Count IV, constructive trust; Count V, breach of contract; and Count VI, intentional or negligent misrepresentation by Mostafa M. Afr.

Plaintiffs now seek to amend their Complaint and add a party. Along with their April 24, 2019 motion to amend, Plaintiffs filed a proposed Amended Complaint that would allege: Count I, breach of common law and statutory fiduciary duty by Mostafa Afr; Count II, claim for accounting; Count III, accounting malpractice as to Mostafa Afr and A&A Management; Count IV, fraud and negligent misrepresentation as to Mostafa

Afr; Count V, breach of contracts as to Mostafa Afr, Zeinab Afr and Turfah Family Holdings; and Count VI, unjust enrichment as to Mostafa Afr, A&A Management and Turfah Family Holdings. Plaintiffs' Exhibit A. The Court heard oral argument on the motion on May 6, 2019 and took the matter under advisement.

II. Arguments

According to Plaintiffs, discovery revealed additional facts and evidence not known when they filed their previous pleadings. Plaintiffs argue that there has been no material delay regarding the request for leave to amend. While Plaintiffs no longer wish to pursue claims against Sheldon Stone, they do seek to add Husain Saleh as an additional defendant. Plaintiffs maintain that the granting of their motion would promote judicial economy.

In Response, Defendants argue that the Court should deny Plaintiffs' motion to amend for undue delay and prejudice because Plaintiffs waited until after the close of discovery and case evaluations. Alternatively, Defendants argue that the Court should deny the motion to amend with respect to count IV (fraud), on the basis of futility and issue a revised scheduling order.

III. Law and Analysis

Except where an amendment is permitted as a matter of course under MCR 2.118(A)(1), "a party may amend a pleading only by leave of the court or by written consent of the adverse party." MCR 2.118(A)(2). Leave shall be freely given when justice so requires. *Id.*

"A motion to amend ordinarily should be granted, and should be denied only for the following particularized reasons: [1] undue delay, [2] bad faith or dilatory motive on

the part of the movant, [3] repeated failure to cure deficiencies by amendments previously allowed, [4] undue prejudice to the opposing party by virtue of allowance of the amendment, [and 5] futility.” *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997) quotation marks and citation omitted.

“Although delay is a factor to be considered in granting a motion to amend pleadings, delay alone does not warrant denial of a motion to amend.” *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 321; 503 NW2d 758 (1993) (citations omitted). Rather, delay may constitute a valid basis for denying leave to amend “where the delay was in bad faith or causes actual prejudice to the opponent.” *Id.* “The prejudice justifying the denial of a motion to amend is not prejudice arising from the amendment’s effect on the result of trial or loss of a meritorious claim or defense, but is, rather, prejudice preventing a party from having a fair trial.” *Executone Bus Sys Corp v IPC Communications, Inc*, 177 Mich App 660, 673; 442 NW2d 755 (1989).

Here, Defendants have not shown that any delay was in bad faith. Further, Defendants have not shown that amending the complaint would prevent them from having a fair trial. Upon proper showing, any prejudice arising from the schedule order can be addressed by amendment to the scheduling order. Plaintiffs have alleged alternative or additional legal theories concerning the same or similar underlying facts; therefore, granting leave to amend would promote judicial economy.

However, the Court is convinced that Count IV of the Amended Complaint would be futile. Count IV is entitled fraud and misrepresentation and relates to the sale of real property. The proposed count alleges that Defendant Mostafa Afr made a false statement to a purchaser that he was the only member of Mount Clemens Investment

Group, LLC. Plaintiffs do not allege false statements made to them—to the contrary, Plaintiffs allege that they were not aware of the sale. The buyer to whom Mostafa Afr allegedly made the false statements is not a party to this case.

More fully, the Proposed Amended Complaint states, in pertinent part, “At no point in time did Mostafa disclose to the other members/owners of MCIG and or Mt. Group that the O’Reilly would be sold or that an agreement of sale was entered into.” Plaintiffs’ Exhibit 1 at ¶39. The proposed Complaint further alleges that Mostafa did not obtain the authority or approval of the other members. *Id.* at ¶41. In addition, “Defendant Mostafa made false and material misrepresentations in writing that Mostafa was the sole member of MCIG in the consent resolution he provided in the sale of the O’Reilly Property.” *Id.* ¶110. “As a result of this intentionally false statement, the O’Reilly property was sold without authority of the other members of MCIG . . .” *Id.* 112.

It is axiomatic that:

To establish a prima facie case of fraud, a plaintiff must prove that (1) the defendant made a material representation, (2) the representation was false, (3) the defendant knew that it was false when it was made, or made it recklessly, without any knowledge of its truth and as a positive assertion, (4) the defendant made the representation with the intention that the plaintiff would act on it, (5) the plaintiff acted in reliance on it, and (6) the plaintiff suffered injury because of that reliance.

Zaremba Equip, Inc v Harco Nat’l Ins Co, 280 Mich App 16, 38–39; 761 NW2d 151 (2008). To “sustain a fraud claim, the party claiming fraud must *reasonably* rely on the material misrepresentation. *Id.* citation omitted. Here, Plaintiffs cannot establish reliance if the alleged fraudulent statements were made to a non-party. Accordingly, it would be futile to permit Plaintiffs to amend their Complaint to add Count IV. Therefore,

the Court will grant Plaintiffs' motion for leave to amend except as to proposed Count IV.

IV. Conclusion

For the reasons set forth above, Plaintiffs' motion is GRANTED except as to proposed Count IV.¹ Plaintiffs must file their amended complaint within 7 days for the date of this Opinion and Order. Pursuant to MCR 2.602(A)(3), this *Opinion and Order* neither resolves the last pending claim nor closes this case.

IT IS SO ORDERED.

Date: MAY 21 2019

Kathryn A. Viviano
Hon. Kathryn A. Viviano, Circuit Court Judge

