By the order of the court, Judge David A Wiseman

E-FILED
CNMI SUPERIOR COURT
E-filed: Jan 12 2011 2:24PM
Clerk Review: N/A
Filing ID: 35325826
Case Number: 09-0300-CV
N/A

FOR PUBLICATION

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

THOMAS ALDAN DUENAS and YALI ZHANG DUENAS, **Plaintiffs,** **vs.** **ASC ARCH STRUCTURE COMPANY and RICARDO RISPACIO REYES,** **Defendants.**	**Civil Action No. 09-0300** **Civil Action No. 09-0372** **ORDER GRANTING LEAVE TO AMEND COMPLAINT**
GE CHEN AND LINGYING ZHI, **Plaintiffs,** **vs.** **ASC ARCH STRUCTURE COMPANY and RICARDO RISPACIO REYES,** **Defendants.**	

I. INTRODUCTION

THIS MATTER came on for hearing January 6, 2011 at 1:30 p.m. for Plaintiffs' Motion for Leave to Amend the Complaint pursuant to NMI. R. Civ. P. 15(a) and 4 CMC §7502(e). Counsel Jack Torres appeared on behalf of Plaintiffs, Thomas Aldan Duenas, Yali Zhang Duenas, Ge Chen, and Lingying Zhi (hereinafter "Plaintiffs"). Counsel Thomas Clifford appeared on behalf of Defendant, ASC Arch Structure

Company dba ASC Construction (hereinafter "Defendant ASC"). Plaintiffs wish to amend their complaint arguing that because Defendant, Ricardo Rispacio Reyes (hereinafter "Defendant Reyes") cannot be served, Plaintiffs should be allowed to amend their complaint to include Defendant Reyes' employer EZ Call and Dongbu Insurance Company. For the reasons stated below, Plaintiffs' Motion for Leave to Amend is hereby **GRANTED**.

II. SYNOPSIS

This case arose out of a car accident that occurred on December 16, 2007 between Plaintiffs and Defendant Reyes. Defendant Reyes was working for EZ Call at the time of the accident, and had rented a truck from its owner Defendant ASC, insured by Dongbu Insurance Company, when the accident occurred.

On July 20, 2009, Plaintiffs Thomas Aldan Duenas and Yali Zhang Duenas filed a Complaint against ASC Arch Structure and Defendant Reyes. Approximately 2 months later, on September 21, 2009, Plaintiffs Lingying Zhi and Ge Chen filed their Complaint against ASC Arch Structure and Defendant Reyes. The cases were consolidated on May 11, 2010 because the claims arose out of the same transaction or occurrence. On November 30, 2010, Plaintiffs filed a Motion for Leave to Amend the Complaint to add new parties. On December 14, 2010, Defendant ASC filed its Memorandum in Opposition to Plaintiffs' Motion to Amend the Complaint (hereinafter "Opposition"). On January 3, 2011, Plaintiffs filed their Reply to Defendant's Opposition to Motion to Amend the Complaint (hereinafter "Reply").

In Plaintiffs' Motion, they argue that this Court should allow them to amend the complaint since Plaintiffs attempted to serve Defendant Reyes, however have been unable to do so. Plaintiffs further state that they were informed that Defendant Reyes no longer resides in the CNMI. Consequently, Plaintiffs wish to add Placido Manalo (Defendant's Employer) who owns and operates EZ Call Heavy Equipment and Dongbu Insurance Company.

Plaintiffs argue that leave should be granted since: (1) a direct action against an insurance

company is authorized by law where the insured cannot be served pursuant to 4 CMC § 7502(e)[1]; and (2) Placido Manalo and EZ Call Heavy Equipment are proper parties to be added since EZ Call was Defendant Reyes' employer at the time of the accident and therefore, is liable under a respondeat superior theory.

Alternatively, Defendant ASC argues that adding the three new parties to the suit would be futile because: (1) the SOL has run so the new parties cannot be added; (2) there has been undue delay in bringing the motion and Defendant ASC would be prejudiced as a result; and (3) the statutory exception allowing an insurer to be named where the insured cannot be served does not apply to this case.[2]

III. DISCUSSION

Plaintiffs ground their motion for leave to amend the complaint under NMI R. Civ. P. Rule 15(a), which provides the following:

> (a) AMENDMENTS. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. NMI. R. Civ. P. 15(a).

---

[1] 4 CMC § 7502(e) Liability Policy: Direct Action

On any policy of liability insurance the injured person or his or her heirs or representatives shall have a right of direct action against the insurer within the terms and limits of the policy, whether or not the policy of insurance sued upon was written or delivered in the Commonwealth, and whether or not the policy contains a provision forbidding the direct action; provided, that the cause of action arose in the Commonwealth and it has been determined that the insured cannot be personally served the summons and complaint and if by affidavit or otherwise the court is satisfied that with reasonable diligence, the defendant cannot be served. The action may be brought against the insurer alone, or against both the insured and insurer only if it has been determined that the insured cannot be personally served the summons and complaint and if by affidavit or otherwise the court is satisfied that with reasonable diligence, the defendant cannot be served, and that a cause of action arises against the party upon whom service is made, or he is a necessary and proper party to the action, the court may order that the insurer may be named in a direct action lawsuit.

[2] Pursuant to 4 CMC § 7502(e), if an insured cannot be personally served, after performing reasonable diligence, an action may be brought against an insurer alone, or against both the insured and the insurer. Here, Plaintiffs attempted to locate Defendant Reyes and were unable to do so even after they hired a process server. As such, 4 CMC § 7502(e) would apply allowing Plaintiffs to sue Dongbu Insurance. However, the fact that Plaintiffs are allowed to bring an action against Dongbu Insurance does not mean that Dongbu Insurance is *per se* liable under the policy. This issue will be decided at trial.

The Commonwealth Rules of Civil Procedure are patterned after the Federal Rules therefore, interpretations of the federal rules are instructive. *Ada v. K. Sadhwani's, Inc*., 3 N. M. I. 303,11 n.3 (1992). The U.S. Supreme Court has interpreted the counterpart of the Federal Rules of Civil Procedure to create a burden upon the party opposing an amendment to the complaint to demonstrate why the amendment should not be permitted, thus creating a strong presumption in favor of granting leave to amend. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Therefore, absent a showing of 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, or futility of the amendment, the leave sought should, as the rules require, be freely given. *Govendo v. Marianas Pub. Land Corp*., 2 N.M.I. 482 (1992); *see also Commonwealth v. Superior Court*, 2008 MP 11 ¶ 14; *see generally Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003).

In *Zenith Radio v. Hazeltine Research*, the Court discusses what may constitute prejudice to the extent that leave to amend should not be permitted. 401 U.S. 321 (1971). The Court stated that the decision to grant leave to amend is within the discretion of the trial court, however, "in deciding whether to permit such an amendment, the trial court was required to take into account any prejudice that Zenith would have suffered as a result. . . ." The Court concluded that the prejudice to Zenith would have been substantial because permitting leave to amend would have denied Zenith the opportunity to prove its recoverable damages and would have essentially required a reopening of the record and a retrial of the issue of damages. *Id*. at 329. In stark contrast to the case at hand, there would be no such reopening of the record nor a retrial on any issues.

Certainly, circumstances which do not reach this extreme level of prejudice may suffice in

overcoming a motion for leave to amend a complaint, nonetheless, this case is illustrative of the type of undue prejudice which would support a court denying a party the opportunity to amend their complaint.

In *Commonwealth v. Superior Court,* 2008 MP 11, the Court upheld the trial court's decision permitting the real party in interest, JG Sablan Rock Quarry, Inc., leave to amend its answer. In determining whether or not permitting JG Sablan to amend its answer constituted prejudice, the court relied on *Loyola Fed. Sav., v. Fickling*, 783 F.Supp.620; and *Freeman v. Continental Gin Co.*, 381 F.2d 459 (5th Cir. 1967).

In *Loyola*, the plaintiff waited more than a year after the close of discovery and more than nine months after filing a motion for summary judgment before they sought leave to amend their complaint. This, the *Loyola* Court held, constituted prejudice and undue delay. This case is distinguishable because Plaintiffs filed their Amended Complaint two months *prior* to the close of discovery as opposed to a year and a half after the close of discovery.

In *Freeman*, the court discussed what constituted prejudice or undue delay sufficient to overcome the presumption that leave to amend should be freely granted. 381 F.2d 459 (5th Cir. 1967). The *Freeman* Court denied the party's request for leave to amend because the party sought leave to amend nine months after summary judgment was granted and eighteen months after the filing of the original answer. In finding that prejudice existed, the court in *Freeman* stated, "[l]iberality in amendment is important to assure a party a fair opportunity to present his claims and defenses, but equal attention should be given to the proposition that there must be an end finally to a particular litigation."

Here, although the request for leave to amend was filed fifteen months after the October 2009 original answer and twelve months after the August 2009 answer, the facts of this case are distinguishable from *Freeman* because here, the cases were consolidated on May 11, 2010 and the Scheduling Order

allowed the parties "to amend pleadings and join parties by November 30, 2010," which is what the Plaintiffs did. *See* Scheduling Order (October 15, 2010).

Notwithstanding these facts, Defendant ASC argues *inter alia* that leave to amend Plaintiffs' complaint should not be granted because it will be unduly prejudiced by adding additional parties to defend Defendant Reyes' interests at trial. More specifically, Defendant ASC argues that had it known Plaintiffs wished to add Dongbu Insurance and EZ Call to the lawsuit, it would have changed its defense strategy from the beginning.

The Court is not persuaded by Defendant ASC's argument since many potential issues arise during litigation which can throw off an attorney's strategy. The Court does not believe that allowing Dongbu Insurance and EZ Call into the lawsuit at this time would have affected Defendant ASC's ability or desire to depose Defendant Reyes as so argued in ASC's brief and at the oral hearing. If ASC's strategy from the beginning was to blame the driver and attack his credibility, then it should have deposed Defendant Reyes when it had the chance. As illustrated by the aforementioned cases, this is not the type of prejudice which prevents a Court from granting leave to amend a complaint, especially since Defendant Reyes' failure to appear is not the result of Plaintiffs' inaction. As of now, both parties lack the benefit of interviewing or deposing Defendant Reyes since he is nowhere to be found.

As stated *supra*, the prejudice which was contemplated in *Loyola* and *Freeman* does not exist here. More appropriately applicable here is the *Freeman* Court's recognition that a party must be assured a fair opportunity to present his claims and defenses. In the present case, to date, neither party has been given this opportunity. Consequently, Defendant ASC has failed to demonstrate how any of the factors listed in the case citations above tip the scales against the presumption that leave shall be freely given to amend.

Because of the strong policy in favor of granting leave to amend pleadings absent circumstances which would make such leave inappropriate, the Court finds that it should exercise its discretion to allow Plaintiffs to amend their complaint. *See, e.g., Jackson v. Rockford Housing Authority,* 213 F.3d 389 (7th Circ. 2000) ("The general rule that amendment is allowed absent undue surprise or prejudice to the plaintiff is widely adhered to by our sister courts of appeals."); *Lowey v. Texas A&M University System,* 117 F.3d 242 (5th Cir. 1997) (Rule 15(a) creates "strong presumption" in favor of permitting amendment); *DCD Programs, Ltd. v. Leighton,* 833 F.2d 183, 186 (9th Cir. 1987), *cert. granted, judgment vac'd,* 492 U.S. 914, 109 S.Ct. 3236, L.Ed.2d 584 (1989) (weighing "bad faith, undue delay, prejudice to the opposing party, and futility of the amendment"). *Cf., United States ex rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1052 (9th Cir. 2001) (citing same factors, but noting that they do not get equal weight; futility of amendment, by itself, can be ground for denying leave to amend).

Defendant ASC next argues that EZ Call and Dongbu Insurance cannot be added as parties, since the statute of limitations has already run. The Court disagrees.

A civil action must be commenced within the period specified by the applicable statute of limitations, and "a civil action is commenced by filing a complaint with the court." NMI R. Civ. P. 3. When the statute of limitation period has run, the only vehicle through which plaintiff may amend his complaint to accurately name a defendant is Rule 15(c). *G. F. Co. v. Pan Ocean Shipping Co.,* 23 F.3d 1498, 1501 (9th Cir. 1994); *Korn v. Royal Caribbean Cruise Line, Inc.*, 724 F.2d 1397, 1399 (9th Cir. 1984).

Here, Plaintiffs cause of action accrued on December 16, 2007, the date the accident occurred. Under Commonwealth laws, actions for personal injury must "be commenced only within two years after

the cause of action accrues." 7 CMC § 2503(d). Therefore, the statute of limitations would have run on December 15, 2009, thereby barring Plaintiffs from filing the present lawsuit, unless of course they could satisfy the requirements under NMI R. Civ. P. 15(c). NMI R. Civ. P. Rule 15(c) provides the following:

> (c) RELATION BACK OF AMENDMENTS. An amendment of a pleading relates back to the date of the original pleading when
> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleadings, or
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party. NMI. R. Civ. P. 15(c).

Although Rule 15(c) only refers to an amendment "changing the party," the federal courts have consistently held that the rule extends to the "addition" of parties also. *Raynor Bros. v. American Cyanimid Co.*, 695 F.2d 382, 384 (9th Cir. 1982). The circumstance of a plaintiff filing an amended complaint seeking to bring in a new defendant is the "typical case" of Rule 15(c)[3]'s applicability. *Krupski v. Costa Crociere S. p. A.*, 130 S. Ct. 2485, 2493 n.3, 177 L. Ed. 2d 48, 57 (2010). Thus, Rule 15(c)(3) applies provided its three requirements are met.

Here, Plaintiffs Amended Complaint would relate back since they have satisfied the requirements as set forth under NMI. R. Civ. P. 15(c)(3). First, the amendment changes the party against whom the claim is asserted to include Defendant Reyes' employer EZ Call and ASC's insurance company, Dongbu Insurance. Secondly, the claim arose out of the same transaction or occurrence as set forth in the original

complaint to wit: the December 2007 car accident. Third, EZ Call and Dongbu Insurance have both received notice[3] of the present action and will not be prejudiced[4] by being brought in at this time especially since EZ Call knew that one of its drivers was involved in the alleged accident, and Dongbu Insurance Company has been involved in settlement negotiations since the inception of this case. Finally, EZ Call and Dongbu Insurance either knew or should have known that they could potentially be brought in as a party to this action since EZ Call could be vicariously liable for the torts committed by one of its agents and Dongbu Insurance could potentially be held liable for an accident arising under Defendant ASC's insurance policy. Therefore, since Plaintiffs have satisfied all of the requirements under NMI. R. Civ. P. 15(c)(3), the Amended Complaint will be treated as though it had been filed on the date of the original pleading.

IV. CONCLUSION

In short, Defendant ASC has failed to meet its burden of showing undue delay, bad faith or dilatory

---

[3] As the U.S. Supreme Court noted in discussing Rule 15(c), "[t]he linchpin is notice, and notice within the limitations period." *Schiavone v. Fortune*, 477 U.S. 21, 31 (1986). The limitations period under Rule 4(m) is 240 days from the date the original complaint was filed. NMI R. Civ. P. 4(m). However, the U.S. Supreme Court has rejected the suggestion that Rule 15(c) requires actual service of process. *See Krupski*, 130 S. Ct. at 2497 n.5. The rule simply requires that the prospective defendant receive sufficient "notice of the action" within the Rule 4(m) period that he will not be prejudiced in maintaining his defense on the merits. *Id.* Thus, the notice required by Rule 15(c) can be formal or informal, actual or constructive. *Craig v. United States*, 479 F.2d 35, 36 (9th Cir. 1973); *Miller v. Hassinger*, 173 Fed. Appx. 948, 955 (3rd Cir. 2006). In addition, imputing knowledge of the action from the original defendants to the prospective defendant is justified when there is "sufficient community of interest" between the two entities. *Korn*, 724 F.2d at 1401. However, such a community, or identity, of interests exists between two companies only when "the parties are so closely related in their business operations or other activities that the institution of an action against one serves to provide notice of the litigation to the other." *G.F. Co. v. Pan Ocean Shipping Co.*, 23 F.3d 1498, 1503 (9th Cir. 1994) (quoting 6A Charles Miller, et al., Federal Practice and Procedure § 1499 at 146 (2d ed. 1990).

[4] Prejudice to the prospective defendant is a main concern when determining whether the relation back doctrine applies. *Korn*, 724 F.2d at 1400; NMI R. Civ. P. 15(c)(3)(A). Timely notice assures that the party to be added has received ample opportunity to pursue and preserve the facts relevant to various avenues of defense.

motive on the part of Plaintiffs. Therefore, given the strong presumption in favor of granting leave to amend, Plaintiffs' Motion to Amend is **GRANTED.**

SO ORDERED this 12th day of January, 2011.

/ s /

David A. Wiseman, Associate Judge