STATE OF MAINE
Cumberland, ss.

BUSINESS & CONSUMER COURT
LOCATION: Portland
Docket No. BCD-CV 11-28

KAILE R. WARREN, JR., RENT-A-HUSBAND LLC, RENT-A-HUSBAND ENTERPRISES, LLC, and KW ENTERPRISES, INC.,

Plaintiffs,

v.

PRETI, FLAHERTY, BELIVEAU & PACHIOS, LLC, MARCUS, CLEGG & MISTRETTA, P.A., and ACE HARDWARE CORP.,

Defendants

ORDER ON PLAINTIFFS MOTION TO AMEND COMPLAINT

Plaintiffs Kaile R. Warren, Jr., Rent-A-Husband LLC, Rent-A-Husband Enterprises, LLC, and KW Enterprises, Inc. move to amend their complaint for a third time to add two counts against Ace Hardware Corp. (Ace): breach of fiduciary duty (Count V), and violation of the Uniform Trade Secrets Act, 14 M.R.S. §§ 1541-48 (2012), (Count VI).[1] Plaintiffs assert that the facts to support these counts have been previously pleaded in their Second Amended Complaint or generated during the course of discovery. Plaintiffs further assert that their motion is not sought in bad faith or for a dilatory reason, and that Ace will suffer

[1] Plaintiffs' First Amended Complaint was filed on April 20, 2011, as of right. *See* M.R. Civ. P. 15(a). The Court granted Plaintiffs' motion to amend on October 25, 2012, resulting in Plaintiffs' Second Amended Complaint.

no undue prejudice from the amendment. The Court held oral argument on the motion on March 20, 2012.

After a responsive pleading is served, a plaintiff may amend its complaint "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." M.R. Civ. P. 15(a); *see also Efstathiou v. Aspinquid, Inc.*, 2008 ME 145, ¶ 21, 956 A.2d 110. "Whether to allow a pleading amendment rests with the court's sound discretion." *Holden v. Weinschenk*, 1998 ME 185, ¶ 6, 715 A.2d 915 (quoting *Diversified Foods, Inc. v. First Nat'l Bank of Boston*, 605 A.2d 609, 616 (Me. 1992)). Courts should freely allow an amendment to a complaint except for bad faith, dilatory tactics, or undue delay resulting in prejudice to the opponent. *Longley v. Knapp*, 1998 ME 142, ¶ 19, 713 A.2d 939. Nevertheless, a moving party must make a timely request to amend a pleading, particularly when the deadline for amendment of pleadings has passed. *See El-Hajj v. Fortis Benefits Ins. Co.*, 156 F. Supp. 2d 27, 34 (D. Me. 2001), *quoted in Davis v. Grover*, 2002 Me. Super. LEXIS 69, at *9 (Apr. 3, 2002) (Mead, J.). Further, where "a proposed amended complaint would be subject to a motion to dismiss, the court is well within its discretion in denying leave to amend." *Glynn v. City of S. Portland*, 640 A.2d 1065, 1067 (Me. 1994).

In the present case, Plaintiffs announced their intention to seek leave to amend during an argument on a discovery issue on November 1, 2012. Plaintiffs again stated their intention to file the motion to amend at a hearing on December 17, 2012. At that time, the Court observed that the success of a motion to amend was inversely related to the closeness of the trial date. Plaintiffs filed the motion to amend on January 9, 2013.

As Ace has noted, the proposed amendment is more than a year past the deadline of January 1, 2012, for amendment of pleadings. Plaintiffs attempt to justify that delay by arguing that the facts to support each of the proposed new claims were developed during ongoing discovery.

As to their proposed breach of fiduciary duty claim, Plaintiffs assert that as facts regarding the partnership relationship between them and Ace developed during discovery, the breach of fiduciary duties attendant in such a relationship became clear, but the Court is not persuaded. Plaintiffs have consistently asserted that they had a partnership relationship with Ace.[2] Thus, if there is indeed any basis for a breach of fiduciary claim against Ace, it was known to Plaintiffs when they filed their initial complaint in March 2011.[3] *See McIntyre v. Nice*, 2001 ME 174, ¶ 10, 786 A.2d 620. In October 2011, the Court noted that the Plaintiffs' Second Amended Complaint does not sufficiently allege a fiduciary relationship, much less a breach claim. (Oct. 25, 2011, Order at 9 n.4 ("The Plaintiffs have not established sufficient facts supporting the allegation that a fiduciary relationship existed between Plaintiffs and Ace simply because there were ongoing business discussions.").) The delay in bringing the breach of fiduciary claim forward has simply not been explained or justified.

Finally, the Plaintiffs' proposed amendments are mere recitations of the elements of the cause of action and offer no further specifics about the alleged fiduciary relationship. *See America v. Sunspray Condo. Ass'n*, 2013 ME 19, ¶ 13, -- A.3d ---; *Bryan R. v. Watchtower Bible & Tract Soc'y of N.Y., Inc.*, 1999 ME 144, ¶ 21, 738 A.2d 839. The gravamen of Plaintiffs'

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[2] (*See* Compl. ¶¶ 79-80, 82-84, 92, 95-97, 163; Amend. Compl. ¶¶ 79-80, 82-84, 92, 95-97, 163, 219; 2d Amend. Compl. ¶¶ 45, 79-80, 82-84, 86, 90, 94-97, 108, 210.)

[3] The stay of this case for several months, during which Ace pursued an interlocutory appeal, does not affect this analysis as the amendment of pleadings deadline had already passed at that point.

dispute with and against Ace is an arms-length business deal gone south. *See America*, 2013 ME ¶ 15, -- A.3d --- (analyzing the substance of the overall complaint). *See also Clappison v. Foley*, 148 Me. 492, 497-99, 96 A.2d 325, 327-28 (1953) (noting that where the complaint does not demonstrate evidence of a fiduciary relationship, but instead only conventional business dealings, the motion to dismiss must be granted).

With respect to the trade secret claim, Plaintiffs' assertion that it was revealed only in the course of discovery that "Ace misappropriated the Plaintiffs' 'hub-and-spoke' model for Rent-a-Husband's placement in stores for itself" (M. Amend. 3) is more plausible. Nevertheless, as Plaintiffs admit, the UTSA claim is not contemplated by the previous complaints. In fact, it is a vast departure from the theories presently asserted against Ace and would open up a completely new and different set of issues between the Plaintiffs and Ace.

> As the Law Court has explained, factors relevant to
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> > determin[ing] whether the information "derives independent economic value . . . from not being generally known [or] readily ascertainable," 10 M.R.S.[] § 1542(4)(A), include: (1) the value of the information to the plaintiff and to its competitors; (2) the amount of effort or money the plaintiff expended in developing the information; (3) the extent of measures the plaintiff took to guard the secrecy of the information; (4) the ease or difficulty with which others could properly acquire or duplicate the information; and (5) the degree to which third parties have placed the information in the public domain or rendered the information "readily ascertainable" through patent applications or unrestricted product marketing.

Spottiswoode v. Levine, 1999 ME 79, ¶ 27 n.6, 730 A.2d 166. Similarly, factors relevant to

> > determin[ing] whether the information "is the subject of efforts that are reasonable under the circumstances to maintain its secrecy," 10 M.R.S. § 1542(4)(B), include: (1) the extent to which the information is known outside the plaintiff's business; (2) the extent to which employees and others involved in the plaintiff's business know the information; (3) the nature and extent of measures the plaintiff took to guard the secrecy of the information; (4) the existence or absence of an express agreement restricting disclosure;

> and (5) the circumstances under which the information was disclosed to any employee, to the extent that the circumstances give rise to a reasonable inference that further disclosure without the plaintiff's consent is prohibited.

Id. ¶ 27 n.7.

Trial of this case was originally set for June 2013, and it is now set for January-February 2014. The court is in the process of resetting deadlines to enable discovery, expert witness activity and dispositive motion briefing to be completed sufficiently ahead of trial to enable the parties to know what claims will be going to trial. Because the Plaintiffs' proposed UTSA claim would likely entail discovery well beyond the discovery already taken in connection with the present claims against Ace, allowing the amendment would almost certainly require further delays in this two-year-old litigation.

As an aside, the UTSA claim as pleaded in the amendment is arguably facially deficient. *See Glynn*, 640 A.2d at 1067. The complaint fails to state how the hub-and-spoke model "[d]erives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use," as required by 10 M.R.S. § 1542(4)(A) (2012).

The Court is cognizant that leave to amend should be freely granted:

> The philosophy of the rules is that pleadings are not an end in themselves but only a means of bringing into focus the area of actual controversy. Leave to amend should be freely granted when justice so requires. A party should not be precluded by the technicalities of pleading from presenting his claim or defense on its merits unless the pleadings have misled the opposing party to his prejudice.

Bangor Motor Co. v. Chapman, 452 A.2d 389, 392 (Me. 1982) (quoting 1 Field, McKusick & Wroth, *Maine Civil Practice* § 15.1 (1970)). "[P]rejudice means something more than an

increased likelihood of defeat in the litigation if the amendment is granted." *Id.* (quoting 1 Field, McKusick & Wroth, *Maine Civil Practice* § 15.4 (1970)).

Undue prejudice to the opponent can occur when the newly asserted claim inserts a new issue into the case that has not been previously raised or litigated. *See id.* at 393. Similarly, the Law Court has affirmed the denial of a motion to amend to add permissive counterclaims when the request was made more than a year after the litigation between the parties began and no reasonable excuse for the delay was provided. *See Efstathiou v. The Aspinquid, Inc.*, 2008 ME 145, ¶¶ 21-22, 956 A.2d 110; *cf. Kelley v. Michaud's Ins. Agency*, 651 A.2d 345, 347 (Me. 1994) (a delay of six weeks after a party's responsive pleading is not undue delay to justify denying a motion to amend). "Although passage of time, alone, is not grounds for denying a motion to amend, 'undue delay' removes any presumption in favor of allowing amendment." *See Diversified Foods, Inc. v. First Nat'l Bank*, 605 A.2d 609, 616 (Me. 1992) (citation omitted) (concluding an intentional delay of seven months to add claims supported denial of the motion to amend).

In this case, allowing the Plaintiffs to amend again, would almost certainly cause further substantial delay, and also work undue prejudice to Ace, given the posture of the case and the lack of justification for the amendment.

Accordingly, Plaintiffs' Motion to Amend Complaint is DENIED.

Pursuant to M.R. Civ. P. 79, the clerk shall incorporate this order into the docket by reference.

Dated: March 26, 2013

A. M. Horton
Justice, Business and Consumer Court

Entered on the Docket: 3.27.13
Copies sent via Mail ___ Electronically ✓