IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

WILLIAM H. DURHAM, M.D. **PLAINTIFF**

v. **CIVIL ACTION NO.: 2:20-cv-112-KS-MTP**

ANKURA CONSULTING GROUP, LLC **DEFENDANT**

ORDER

THIS MATTER is before the Court on Plaintiff's Motion for Leave to Amend Complaint [124], Plaintiff's Supplement to Motion for Leave to Amend Complaint [151], and following a hearing with the parties. Having considered the submissions of the parties and the applicable law, the Court finds that Plaintiff's Motion for Leave to Amend Complaint [124], as Supplemented [151], should be granted.

Plaintiff is a medical doctor and "NIOSH[1] certified B-Reader" who reviewed chest x-rays of workers who had been exposed to asbestos to help attorneys determine whether sufficient radiographic evidence existed to submit claims to asbestos trusts for compensation. *See* [12] at 2-3. According to Plaintiff, Defendant is a consulting firm hired by the asbestos trusts to conduct an audit of Plaintiff and his B-Readings. *Id*. at 3. Plaintiff claims that Defendant conducted a "bad faith sham audit" which resulted in Plaintiff being disqualified from reviewing chest x-rays that could be submitted to the asbestos trusts. *Id*. at 4. Plaintiff claims to be damaged in the amount of approximately $14 million.[2] *Id*. at 23.

[1] NIOSH stands for the National Institute for Occupational Safety and Health and is a research agency focused on studying worker health and safety within the U.S. Centers for Disease Control and Prevention, in the U.S. Department of Health and Human Services. *See* https://www.cdc.gov/niosh/about/default.html (last visited Apr. 4, 2022).

[2] Plaintiff's damages expert identified the present value of Plaintiff's lost earnings as $11,438,786. *See* [151] at 4.

On June 22, 2020, Plaintiff filed his Complaint [1] alleging negligence and gross negligence against Defendant. After Defendant moved to dismiss his Complaint, Plaintiff filed an Amended Complaint [12]. In the Amended Complaint [12], Plaintiff added a claim of "tortious interference with contract." *See* [12] at 12. The contracts with which Defendant allegedly interfered were those between Plaintiff and the various attorneys or firms representing the asbestos claimants.

On February 25, 2021, the Court entered a Case Management Order [31], setting the deadline to file motions to amend pleadings as March 29, 2021. Eleven months later, on February 2, 2022, less than one month prior to the expiration of the already-extended discovery deadline, Plaintiff filed the instant Motion for Leave to Amend Complaint [124]. In the Motion, Plaintiff seeks leave to amend his complaint to add a claim of "tortious interference with business relations."

Upon receiving the Motion [124], the Court was unclear what claims Plaintiff was attempting to add with the amendment and whether additional discovery would be required to prove or to defend against this new claim. For example, the proposed amended complaint included a claim for negligence and/or gross negligence which had already been dismissed by the District Judge. *See* [124-1] at 20; Order [26]. On March 4, 2022, the Court conducted a discovery and status conference with the parties. *See* Minute Entry 3/04/2022. During the conference, the Court addressed its concerns regarding the proposed second amended complaint and directed that any supplement to the Motion be filed by March 11, 2022. *See* Text Only Order 03/04/2022.

On March 8, 2022, Plaintiff filed his Supplement to Motion for Leave to Amend Complaint [151], including a revised proposed second amended complaint and clarifying the scope of the proposed amendment. Defendant filed its Response [154] and accompanying

Memorandum [155]. On March 22, 2022, Plaintiff filed his Reply [156]. On April 1, 2022, the Court held a hearing with the parties to address additional questions it had related to the amendment. This matter is now ripe for review.

Federal Rule of Civil Procedure 16(b) governs amendments to pleadings after a scheduling order deadline has expired. *S&W Enterprises v. SouthTrust Bank of Alabama, NA*, 315 F.3d 533, 536 (5th Cir. 2003). Once a scheduling order has been entered, "it may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b). "Only upon the movant's demonstration of good cause to modify the scheduling order will the more liberal standard of Rule 15(a) apply to the district court's decision to grant or deny leave." *S&W Enterprises*, 315 F.3d at 536. In determining whether good cause exists, courts should consider four factors: "(1) the explanation for the failure to timely move for leave to amend; (2) the importance of the amendment; (3) potential prejudice in allowing the amendment; and (4) the availability of a continuance to cure such prejudice." *Id*. (citations and brackets omitted).

If the moving party establishes good cause to modify the scheduling order, the court decides whether to grant leave to file the amended pleading under Rule 15(a). Rule 15(a)(2) dictates that courts should "freely give leave [to amend] when justice so requires." This language "'evinces a bias in favor of granting leave to amend.'" *Smith v. EMC Corp.*, 393 F.3d 590, 595 (5th Cir. 2004) (quoting *Lyn-Lea Travel Corp. v. Am. Airlines*, 283 F.3d 282, 286 (5th Cir. 2002)). The Supreme Court delineates five factors for a court to consider when deciding whether leave to amend a complaint should be granted: (1) undue delay, (2) bad faith or dilatory motive, (3) repeated failure to cure deficiencies by previous amendments, (4) undue prejudice to the opposing party, and (5) futility of the amendment. *Rozenzweig v. Azurix Corp.*, 332 F.3d 854,

864 (5th Cir. 2003) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). Weighing the factors, the Court finds good cause to modify the scheduling order.

Plaintiff's explanation for failing to timely move for leave to amend is not particularly compelling. The facts underlying Plaintiff's claim appear to have been known to him since before this matter was filed. Whether Plaintiff had "contracts," "business relationships," or both with the attorneys whom he worked was certainly within his knowledge. And, however one might characterize the relationships between Plaintiff and the attorneys involved, Plaintiff knew the facts which gave rise to or defined those relationships. This factor weighs against the Plaintiff as Plaintiff provides no satisfactory reason for re-casting his cause of action far beyond the amendment deadline.

Concerning the importance of the amendment, Plaintiff claims that not allowing him to amend his complaint to include a claim of tortious interference with business relations could create a "grave risk that juror confusion, could cause him to lose…." *See* [156] at 3. It appears here that Plaintiff's concern over jury "confusion" misses the mark. What Plaintiff really fears is that the jury might find that Plaintiff did not have contracts with the attorneys and, as such, Defendant could not have interfered with any such contracts. He wishes to expand the claim somewhat to include "business relationships" to account for that possibility. The proposed amendment, though late, is clearly important to Plaintiff's case.

While it does not appear that Defendant necessarily disputes the importance of the proposed amendment for Plaintiff, Defendant argues that the Plaintiff has not demonstrated sufficient importance and that he has already been permitted to amend his complaint once previously. However, the Court finds that this factor weighs in favor of Plaintiff.

Regarding prejudice, Defendant argues that it will be substantially prejudiced since the depositions of nine law firms, Plaintiff, and Plaintiff's expert have already been completed. Defendant also claims that the new proposed second amended complaint "substantively alters both [Plaintiff's] cause of action and damages theory" and suggests that an additional 1,390 hours of work would be required to defend against this new claim. [155] at 2. Plaintiff concedes that re-deposing the lawyers may be necessary, but suggests that significantly less time would be needed. [156] at 4, 9. Plaintiff also suggests that the facts as plead in his first amended complaint support the newly-added claim of tortious interference with business relations, and that much of the information required to defend against the new claim was already addressed by Defendant during the previous depositions or other discovery.

In order to better appreciate the possible prejudice this late amendment might cause Defendant, the Court reviewed the substantive case law in Mississippi related to the differences between these two claims. The Court also reviewed portions of the transcripts of the depositions that have already been completed to get some sense of the scope of the depositions already taken and what additional discovery might reasonably be required to defend against the new claim.

The elements of tortious interference with a contract are: "(1) intentional and willful acts, (2) calculated to cause damage to the plaintiff in his lawful business, (3) done with the unlawful purpose of causing damage and loss, without right or justifiable cause on the part of the defendant (which constitutes malice), and (4) resulting in actual damage or loss." *Precision Spine, Inc. v. Zavation, LLC*, No. 3:15CV681-LG-RHW, 2016 WL 866965, at *3 (S.D. Miss. Mar. 2, 2016). The claim also requires the existence of a "shared enforceable agreement with another party that would have been performed if not for the alleged interference by the defendant." *Id*.

Mississippi Law requires that "in order to pursue a cause of action for tortious interference with a contract, it is accepted that the wrongdoer is a 'stranger' to the contract which was interfered with—an outsider." *Gulf Coast Hospice LLC v. LHC Grp. Inc.*, 273 So.3d 721, 745 (Miss. 2019). Additionally, "the complaining party must show that the defendant had knowledge of the contract in question." *Collins v. Collins*, 625 So. 2d 786, 791 (Miss. 1993).

The elements of tortious interference with business relations, sometimes referred to as interference with prospective advantage, are identical. *Id*. at 5; *see also Acad. Health Ctr., Inc. v. Hyperion Found., Inc.*, No. 2:10CV123-KS-MTP, 2012 WL 529976, at *10 (S.D. Miss. Feb. 17, 2012). However, the Supreme Court of Mississippi has distinguished between the two business torts by prohibiting a claim of tortious interference of a contract to be made against a party to the contract and requiring Plaintiffs making claims of tortious interference with business relations to provide hard proof of financial loss. *See Cenac v. Murry*, 609 So. 2d 1257 (Miss. 1992); *see also* Johnny C. Parker, *Mississippi Law of Damages* § 35:20 (3d ed. 2021). Besides these differences, the two torts are substantially similar.

As noted above, the Court also reviewed portions of the transcripts of the depositions that have already been conducted of the nine attorneys whose "verbal contracts" and/or "business relations" are at issue in this matter. It appears to the Court that much of the information required to define the extent or existence of the verbal contracts or business relationships has already been explored. However, as Defendant expressed at the April 1 hearing, the Court recognizes that some additional deposition testimony may be desired to determine, among other things, the confines of the relationship between the parties. Additionally, while the elements of the two torts are essentially the same, the proof involved and perhaps the defense strategy employed might differ somewhat.

The Court is convinced the Defendant would suffer some prejudice were the amendment permitted, though it is not convinced that the prejudice is as extreme as Defendant suggests. This factor weighs in favor of Defendant.

The analysis does not end there. The Court finds that much of the prejudice to Defendant can be cured by extending case deadlines and allowing Defendant to re-depose the nine attorneys, for a limited time period, and to conduct other reasonable discovery concerning the newly-described claim. During the hearing, Plaintiff's counsel stated that no additional discovery would be required on his part. Likewise, as Plaintiff confirmed at the hearing, Plaintiff does not intend to change his "damage theory" as Defendant feared or to amend or change his expert's report. Defendant indicated that it desires an opportunity to designate another expert as to damages, which the Court will allow as outlined below.

Unfortunately, the key witnesses in this matter are located in several different states and scheduling and completing the depositions the first time was a significant undertaking. Additionally, many of the deponents are outside of the Court's subpoena power, and the depositions have been taken for trial purposes. The Court finds that the Defendant should be provided an opportunity to conduct additional discovery and re-depose certain witnesses. However, the depositions of those deposed shall be limited in time as much of the background information has already been obtained.

Defendant shall have 1.5 hours of additional time to re-depose each of the nine attorney witnesses and the Plaintiff. Defendant may also re-depose Plaintiff's expert for no more than one hour should it desire to do so. As this discovery was necessitated by Plaintiff's late motion, the

Court finds that Plaintiff shall be responsible for the court reporter fees and production costs[3] associated with retaking the depositions as well as all reasonable travel costs incurred for one attorney to travel to the depositions. Plaintiff shall also pay the cost of any transcript of the new depositions. Plaintiff is by all accounts financially able to do so without sufficient hardship. The Court declines to award attorney's fees or assess further costs at this time.

There is nothing in the record to indicate that the Motions [124] [151] are brought in bad faith, and while Defendant may experience some prejudice by the amendment, this prejudice can be cured with a continuance and the other measures addressed herein. Plaintiff has amended his complaint once before, but it does not appear on its face that the second amendment would be plainly futile.

Having considered the appropriate factors, the Court concludes that Plaintiff has satisfied the good cause standard under Rule 16(b). Additionally, Plaintiff has met the standard for leave to amend under Rule 15. The interests of justice, therefore, dictate that the amendment be permitted. *See Cliffs Plantation Timber Farm, LLC v. United States*, No. CIVA 505CV197-DCB-JMR, 2007 WL 4287463, at *2 (S.D. Miss. Dec. 3, 2007) (granting motion to amend complaint to add additional claim over one year after the deadline for amendment of pleadings had expired and only four months before trial)*; see also Mailing & Shipping Sys., Inc. v. Neopost USA, Inc.*, 292 F.R.D. 369, 374 (W.D. Tex. 2013) (allowing motion to amend to add new claims following deposition over six months after motions to amend pleadings deadline had passed).

IT IS, THEREFORE, ORDERED that:

[3] That is, the same costs and expenses as were incurred with the original deposition. For example, if the original deposition was videoed, then the costs to do so again must be paid by Plaintiff.

1. The Motion for Leave to Amend Complaint [124] as Supplemented [151] is GRANTED.

2. Plaintiff shall file his second amended complaint in the form attached to the Supplemental Motion [151] on or before April 8, 2022.

3. The Defendant has until June 8, 2022, to schedule and complete the additional depositions as outlined above and other limited additional discovery reasonably necessary to defend the amended claim.

4. The Defendant's expert designation deadline is extended to June 23, 2022.

5. The motions deadline (other than discovery motions and motions *in limine*) is extended to July 14, 2022.

6. The pretrial conference is reset for November 17, 2022, before Senior District Judge Keith Starrett.

7. The jury trial is reset for a two-week term beginning December 5, 2022, before Senior District Judge Keith Starrett. Any conflict with the trial date must be submitted in writing to the District Judge on or before April 20, 2022.

8. All other provisions and deadlines contained in the Case Management Order [31] remain in place.

SO ORDERED this the 6th day of April, 2022.

s/Michael T. Parker
UNITED STATES MAGISTRATE JUDGE