

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA

WINTERLAND CONCESSIONS CO., a California corporation, d/b/a/
WINTERLAND, Plaintiff, v. MBO PRODUCTIONS, INC., a New York
corporation, et al., Defendants.

No. C 98-3299 SBA

Plaintiff Winterland is represented by David C. Phillips and David M.
Given.

ORDER

I. BACKGROUND

Plaintiff Winterland Concessions Co. ("Winterland") is a California corporation with its principal place of business in San Francisco. On December 17, 1993, Winterland entered into a contract with defendant MBO Productions, Inc. ("MBO") concerning Winterland's right to manufacture and sell merchandise bearing the name and likeness of co-defendant Michael Bolton ("Bolton"), an entertainer who is also the president of MBO. A term of the contract provides that, if Bolton fails to release a "studio album" within two years after his previous "studio album," then Winterland has the right to recoup advances that it paid to MBO as part of the contract. Just prior to entering the contract, Bolton released an album entitled "The One Thing" consisting of entirely new material. Within two years, he released an album entitled "Michael Bolton's Greatest Hits," that consisted of twelve previously released songs and five new songs. Winterland claims that this album does not constitute a "studio album" because it does not consist of all new material.¹ Winterland now claims it is entitled to recoup its advances. On April 20, 1998, Winterland filed a complaint against defendants for breach of contract and for an open book account.

Plaintiff now seeks leave of Court to file a First Amended Complaint. The proposed First Amended Complaint modifies the original complaint as follows:

1. It omits all references to Doe defendants and replaces the phrase "cause of action" with "claim," to comply with federal practice.
2. It substitutes plaintiff's former business name "Winterland Productions" with its new name "Winterland."
3. It alleges two additional grounds for breach of the contract that is

already at issue. The two additional grounds are set forth in separate claims, the second and third claim, because the two new breaches involve a different measure of damages than the breach alleged in the original complaint. The second claim alleges that defendants breached the "performance minimum" provision of the contract, requiring that Mr. Bolton perform before 1.8 million "paid attendees" between June 15, 1994 and December 15, 1995. Claim three alleges that defendants breached the provision precluding a gap of 90 days or more between Mr. Bolton's tour performances.

4. The claim from the original complaint based on an open book account has been revised to reflect a modified amount, based on information obtained through discovery.

Defendants oppose plaintiff's motion for leave to amend.

II. STANDARD OP REVIEW

Rule 15 provides that leave to amend a pleading should be "freely given when justice so requires." Fed. R. Civ. P. 15(a). The decision to grant or deny a request for leave to amend rests within the discretion of the trial court. *International Ass'n of Machinists of Aerospace Workers v. Republic Airlines*, 761 F.2d 1386, 1390 (9th Cir. 1985). In exercising its discretion, however, this circuit requires that district courts grant leave to amend with "extreme liberality." *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990).

The party opposing a motion for leave to amend bears the burden of demonstrating that a "substantial reason exists to deny leave to amend." *Shipner v. Eastern Air Lines*, 868 F.2d 401, 407 (11th Cir. 1989). In assessing whether leave to amend is proper, the Court should consider whether the proposed amendment "would cause the opposing party undue prejudice, is sought in bad faith, constitutes an exercise in futility or creates undue delay." *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989). Of these factors, prejudice to the opposing party is the most important. See *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990) (affirming denial of motion to amend pleading based on undue prejudice and delay grounds) (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-31 (1971)).

III. DISCUSSION

I. Winterland Does Not Seek to bend the Pretrial Preparation Order

On January 19, 1999, the Court filed its standard Order for Pretrial

Preparation (the "Order"). Defendants argue that plaintiff's amendment will require that the Order be modified and that, therefore, the more stringent standard of "good cause" review applies to plaintiff's motion to amend.

When a proposed amendment to a complaint would require the Court to modify its pretrial scheduling order, the liberal standards of Rule 15 do not apply. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). Rather, the court must look to Federal Rule of Civil Procedure 16(b), which requires a showing of "good cause" before a motion to amend a scheduling order may be granted. *Janicki Locrcrina Co. v. Mateex*, 42 F.3d 561, 566 (9th Cir. 1994) ("We have held that Federal Rule of Civil Procedure 16 is to be taken seriously and that attempts to amend complaints, which would require an amendment of the scheduling order, must be based on good cause.")

An evaluation of good cause differs from the inquiry into the propriety of an amendment under Rule 15(a). *Johnson*, 975 F.2d at 609. "Unlike Rule 15(a)'s liberal amendment policy which focusses on the bad faith of the party seeking to interpose an amendment and the prejudice to the opposing party, Rule 16(b)'s 'good cause' standard primarily considers the diligence of party seeking the amendment." *Id.* If the moving party delayed unnecessarily or was otherwise not diligent, good cause does not exist.

Defendants argue that the "good cause" standard applies to Winterland's motion to amend because the motion will require that the Order be modified. Although the Order does not set a cut-off date for amended pleadings, defendants nonetheless argue that the motion for leave to amend effectively seeks to amend the Order because it will require that the other deadlines --- for discovery completion, identification of experts, and dispositive motions --- be amended.

Each of the cases cited by defendants in support of their argument involves a pretrial order containing a specific cut-off date for amendments. In each of those cases, the plaintiff sought to amend his complaint after the expiration of the cut-off date. See *Janicki*, 42 F.3d at 566 (affirming the denial of leave to amend where pretrial scheduling order contained July 17, 1992 deadline for joining additional parties and plaintiff did not decide until July 7, 1993 that he wanted to amend to add new parties); *Johnson*, 975 F.2d at 606-608 (affirming the denial of leave to amend where scheduling order established October 17, 1989 cut-off for joining additional parties but plaintiff did not move to amend until sometime on or after February 15, 1990); *Eckert Cold Storage v. Behl*, 943 F. Supp. 1230, 1233 (E.D. Cal. 1996) (denying leave to amend where plaintiff did not seek leave to amend to add new cause of action until nearly one year after

expiration of the amendment deadline). In contrast, the Order in the instant case did not establish a specific deadline by which plaintiff is required to amend its complaint.² (McMennamin Aff., Ex. 8.) Defendants cite no authority supporting their theory that Rule 16(e) nonetheless applies in this case despite the absence of a specific cut-off date for amendments.

Defendants rely on the assertion that the proposed amended complaint "effectively" amends the Order because it will require the modification of other cut-off dates established therein. Even assuming, arguendo, that this is a cognizable theory, it is not clear that plaintiff's proposed amendment will have such an effect. The discovery and expert designation cut-off is June 1, 1999. The additional discovery burden necessitated by the proposed amendment is not likely to be significant and, therefore, these dates are unlikely to require alteration. Furthermore, the dispositive motion cut-off is September 14, 1999, almost six-months away, and is unlikely to require postponement to accommodate the proposed amendment.

For the foregoing reasons, Rule 16(e) does not govern plaintiff's motion to amend. Therefore, this motion must be analyzed under the liberal standard of Rule 15.

II. Rule 15

In assessing whether leave to amend is proper, the Court should consider whether the proposed amendment "would cause the opposing party undue prejudice, is sought in bad faith, constitutes an exercise in futility or creates undue delay." *Ascon- Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989).

A. Undue Delay

One factor analyzed under Rule 15 is undue delay. In this case, the complaint was filed on April 20, 1998. Winterland made its intention to amend known to defendants in February 1999 by letter. (McMennamin Aff., 1 14.) After defendants refused to stipulate to allow the amendment, plaintiff filed the instant motion to amend on March 2, 1999. Therefore, the delay was approximately 11 months.³

"Relevant to evaluating the delay issue is whether the moving party knew or should have known the facts and theories raised in the original pleadings." See *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1388 (9th Cir. 1990). Defendants contend that plaintiff was aware of the facts upon which it bases its proposed second claim almost two years ago. (Opp'n at 9-10.) According to defendants, plaintiff's initial disclosures reveal that plaintiff had calculated the alleged total number of paid attendees at Mr. Bolton's

concerts for the relevant contractual time-period no later than May 21 or 22, 1997. (Id.) As to the proposed third claim, defendants contend that, because Winterland accompanied Mr. Bolton on all of his concert tours, it was aware at all times of the length of the gaps between concerts. (Opp'n at 10.)

Plaintiff does not respond to defendants contention that Winterland has been cognizant for several years of the facts upon which the new claims are based. Therefore, this factor weighs against Winterland.

Winterland, however, correctly points out that A[d]elay alone does not provide sufficient grounds for denying leave to amend: "Where there is lack of prejudice to the opposing party and the amended complaint is obviously not frivolous, or made as a dilatory maneuver in bad faith, it is an abuse of discretion to deny such a motion." Hurn, 648 F.2d at 1254 (quoting *Howey v. United States*, 481 F.2d 1187, 1190-91 (9th Cir. 1973)). Therefore, the Court must analyze the remaining factors to determine whether Winterland's amendment is permissible.

B. Prejudice

Defendants maintain that they will be prejudiced if Winterland is permitted to amend its complaint because they will be required to engage in duplicative discovery. (Opp'n at 18.) According to defendants, Winterland has already deposed four defense witnesses, and initial disclosures have already been exchanged. Defendants argue that they prepared the above discovery on the assumption that Winterland's claims were limited to the breach alleged in the original complaint. Defendants argue that, to the extent their witnesses must be deposed again, and to the extent they must supplement document disclosures, they will be prejudiced because of the additional cost and expense involved.

Winterland refutes that defendants will suffer prejudice if it is permitted to amend its complaint. First, Winterland represents that it will not need to retake any depositions if its amendment is allowed. (Reply at 6.) Winterland also represents that its initial disclosures contain all documents relevant to the proposed amended claims. (Id.) Further, defendants have not yet taken any depositions so they will not be required to retake any depositions. Therefore, the only conceivable prejudice that defendants might suffer is that they may be required to supplement their initial disclosures. However, this is not so significant as to constitute undue prejudice. See *United States v. Continental Illinois Nat'l Bank and Trust Co. of Chicago*, 889 F.2d 1248, 1255 (2d. Cir. 1989) ("[T]he adverse party's burden of undertaking discovery, standing alone, does not suffice to warrant a denial of a motion to amend a pleading."); see also *Genentech, Inc. v. Abbott Laboratories*, 127 F.R.D. 529, 531 (N.D. Cal 1989) (Patel,

J.) (necessity of additional discovery and likely postponement of trial date do not constitute undue prejudice).

C. Futility

Winterland's proposed amended complaint alleges that defendants have breached the tour merchandising license agreement entered into between the parties on December 17, 1993. (Pl.'s Mot., Attachment 4.) Defendants argue that the proposed amended complaint is futile because the tour merchandising license agreement does not constitute the entire agreement between the parties. Rather, defendants allege that on December 17, 1993, Winterland and defendants entered into two agreements: the above referenced tour merchandising license agreement and another agreement called the retail merchandising agreement.⁴ (Opp'n at 6.) There were also allegedly two accompanying licenses with these agreements. (Id.) Defendants argue that these four documents were all executed together, refer to one another, and were intended by the parties to be read together as one agreement. (Id.) Defendants argue that the proposed amended complaint is deficient for failing to (1) allege the existence of the entire agreement and (2) for failing to allege compliance with the entire agreement. See generally, Wright & Miller, Federal Practice and Procedure: Civil 2d Section 1235 (explaining that a properly pled complaint for breach of contract must allege the existence of a valid and binding contract and must plead that the plaintiff has complied with the terms of and performed his obligations under the contract); see also *Zaro Licensing, Inc. v. Cinmar, Inc.*, 779 F.Supp. 276, 286 (S.D.N.Y. 1991) (plaintiff asserting breach of contract must plead that he has complied with the contract and performed his obligations under the contract). Furthermore, defendants argue that Winterland has failed to perform its obligations under the retail merchandising agreement in that Winterland has failed to adequately market Bolton-related merchandise.

"A proposed amendment is futile only if no set of facts can be proven under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." *Miller v. Rykoff-Sexton*, 845 F.2d 209, 214 (9th Cir. 1988). The test is identical to the test used to determine the sufficiency of a pleading under Rule 12 (b) (6). *Id.* To plead a breach of contract, a plaintiff must allege the terms of the contract, each element of the alleged breach, the resulting damages, and plaintiff's compliance with the contract and performance of the obligations under such contract. *Zaro*, 779 F.Supp. at 286.

Winterland's proposed amended complaint alleges the existence of a contract, the elements of the defendants' alleged breach of the contract, plaintiff's damages resulting from the alleged breach, and plaintiff's compliance with and performance under the contract. Therefore, plaintiff

has satisfied the basic pleading requirements for a breach of contract claim. Defendants' argument that the agreement alleged in the complaint does not constitute the entire complaint is unavailing because, at this stage of the proceedings, the complaint must be construed in a light most favorable to the plaintiff and all properly pleaded factual allegations taken as true. See *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). The Court must therefore accept as true the complaint's representations that the tour merchandising agreement is the entire contract at issue and that Winterland has complied with the terms of the contract.

Furthermore, the tour merchandising agreement contains the following integration clause:

19. (a) The entire understanding between the parties hereto relating to the subject matter hereof is contained herein, and no warranties, representations, or undertakings are made by the parties hereto except as are expressly provided herein.

(b) This agreement cannot be modified or amended except by a written instrument executed by the parties hereto, and any prior or contemporaneous agreement of the parties hereto, whether oral or in writing, pertaining to the subject matter hereof shall be deemed merged herewith.

(Phillips Supp. Decl. Par. 11.) This clause can be reasonably interpreted to contradict defendants' argument regarding the scope of the agreement. At the very least, it shows that there truly is a dispute over the proper interpretation of the contract(s). Defendants' argument that the proposed amended complaint is futile therefore fails.

D. Bad Faith

Defendants argue that Winterland delayed amending its complaint based on a bad faith motive. Specifically, defendants speculate that, because the proposed amended claims involve lower money damages than the original claim, Winterland refrained from asserting the new claims in the original complaint in order to "test the strength of its original theory of breach before retreating to its proposed claims." (Opp'n at 22-23.) In support of this argument, defendants rely on *Dussouy v. Gulf Coast Investment Corp.*, 660 F.2d 594 (5th Cir. 1981), in which the court stated: "[W]here the movant first presents a theory difficult to establish but favorable and, only after that fails, a less favorable theory, denial of leave to amend on the grounds of bad faith may be appropriate." *Id.* at 599. However, defendant's reliance on this theory of bad faith is flawed for the simple reason that plaintiff's original contract claim has not failed. Other cases relying on this theory of bad faith, including the cases cited to by

defendants, involve plaintiffs attempting to amend their complaints only after previous claims have either been dismissed or otherwise failed. See *Beverly Hills Bancorp v. Hine*, 752 F.2d 1334, 1338 (refusing to allow bankruptcy trustee to amend pleadings to allege new theory of recovery after appellate court rejected his prior theory); *Vine v. Beneficial Finance Co.*, 374 F.2d 627, 636-37 (2d. Cir. 1967) (denying leave to amend where plaintiff waited until after dismissal of prior complaint to seek leave to amend). In the instant case, Winterland's original claim for breach of contract has not been dismissed or otherwise been defeated. Therefore, defendants fail to show bad faith by plaintiff.

III. Analysis

Of the four factors that can justify denial of a motion to amend, the only factor defendants have ostensibly shown is undue delay. However, undue delay alone is not a sufficient reason to deny a plaintiff leave to amend a complaint. *Hurn*, 648 F.2d at 1254. Furthermore, even in cases in which leave to amend has been denied based in part on undue delay, a more compelling mixture of factors has been present than are apparent in the instant case. See, e.g., *Texaco v. Ponsoldt*, 939 F.2d 794, 798-99 (9th Cir. 1991) (affirming trial court's denial of leave to amend where plaintiff delayed nearly two years after filing initial complaint before moving to amend, summary judgment had been granted against plaintiff eight months previously, discovery had closed, and only four-and-a-half months remained until trial); *Western Shoshone Nat'l Council v. Molini*, 951 F.2d 200, 204 (9th Cir. 1991) (affirming trial court's denial of leave to amend where two-and-a-half years had passed since the commencement of the action, addition of "major new evidentiary issue" at a late stage in the proceedings would require extensive discovery, defendant was subject to an injunction during the entire course of litigation, and the plaintiff had already amended twice); *Jackson*, 902 F.2d at 1387-88 (affirming denial of leave to amend where new claims required additional discovery to be taken and the relitigation of a portion of a prior state court action, facts and theories underlying the amended claim should have been known to plaintiffs at the time of the original complaint, and plaintiffs did not offer the amended complaint until fourteen months after first informing the court of their intention to amend); *M/V American Queen v. San Diego Marine Construction Corp.*, 708 F.2d 1483, 1491 (9th Cir. 1983) (affirming trial court's denial of leave to amend where plaintiff delayed one and one-half years before filing motion to amend, new allegations totally altered the basis of the action in that they covered different acts, employees and time periods, and a motion for summary judgment was pending at the time motion to amend was made). Moreover, prejudice is generally regarded as the most important factor, and defendants have failed to show undue prejudice. See *Jackson*, 902 F.2d at 1387 (explaining that prejudice is the most important factor).

In light of this circuit's requirement that district courts grant leave to amend with "extreme liberality," *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990), plaintiff's motion to amend is GRANTED.

IV. Objections

Plaintiff objects to paragraphs 18 and 19 in the affidavit of M. Breeze McMennamin, submitted by defendants. Plaintiff objects on the ground that these two paragraphs consist of legal arguments rather than statements of fact. Plaintiff moves to strike the paragraphs.

Civil Local Rule 7-5(b) provides that an affidavit "shall avoid conclusions and argument." It further states that an affidavit "not in compliance with this rule may be stricken in whole or in part." Civil L.R. 7-5(b).

Paragraphs 18 and 19 of Ms. McMennamin's affidavit simply reassert arguments that are set forth in defendants' opposition. These paragraphs are in violation of Civil Local Rule 7-5(b) and, therefore, plaintiff's motion to strike is GRANTED.

IV. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED THAT plaintiff's motion to amend and motion to strike are GRANTED.

HON. SAUNDRA BROWN ARMSTRONG

United States District Judge

Dated: April 2, 1999

Footnote:

1 The contract does not define "studio album." However, it defines "album" to specifically exclude "record albums consisting of re-released material."

2 Defendants argue that Winterland implicitly represented that it would not seek to amend its complaint when it stated in the Joint Case Management Statement that it did not intend to add any additional parties. (Opp 'n at 3.) However, the Court does not interpret Winterland's

representation that it did not intend to add additional parties as suggesting that it did not intend to add additional claims.

3 Defendants point out that Winterland first asserted its claim for breach of contract against defendants by letter dated May 30, 1997, suggesting that the delay in moving to amend was therefore actually two years.
(McMennamin Aff., Ex. 1.)

4 The retail merchandising agreement is not referred to in plaintiff's complaint.