

Plaintiff commenced this action with the filing of a complaint on December 18, 2013. In its complaint, Plaintiff asserted claims for breach of contract, violation of Maine's Prompt Payment Act, unjust enrichment, quantum meruit, and promissory estoppel. As part of its response to the complaint, Defendant filed a counterclaim through which it alleged claims of breach of contract, unjust enrichment, negligent misrepresentation, and breach of warranties. On Plaintiff's motion, the Court subsequently dismissed Defendant's negligent misrepresentation claim. (Order Affirming Recommended Decision, ECF No. 33.)

Defendant maintains that through discovery, it has learned of facts that support its contention that Plaintiff made material misrepresentations during the negotiations that preceded the execution of the original contract. In essence, Defendant contends that evidence generated in discovery demonstrates that Plaintiff fraudulently represented that it would limit its profit margin to a certain level in an effort to perform the work within the proposed budget.

On February 24, 2014, the Court entered a Scheduling Order (ECF No. 8), which designated May 12, 2014, as the date by which the parties must amend the pleadings. The Court later extended the deadline to June 2, 2014 (ECF No. 15). Defendant filed its motion to amend on October 31, 2014. The formal discovery period has expired, and the case is currently scheduled for trial in March 2015.

DISCUSSION

Rule 15(a)(1) of the Federal Rules of Civil Procedure permits a litigant to amend a pleading "once as a matter of course," subject to certain time constraints. In the case of an answer, freedom to amend without leave of court is permitted within 21 days of the date on which the answer was filed. Fed. R. Civ. P. 15(a)(1)(A). Thereafter, leave of court is required, though leave should be

granted “freely . . . when justice so requires.” Fed. R. Civ. P. 15(a)(2); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962).

The standard is elevated, however, when the motion seeking leave to amend is filed after the deadline for amendment of the pleadings found in the Court’s scheduling order. A motion to amend that is filed beyond the scheduling order deadline requires an amendment of the scheduling order. To obtain an amendment of the scheduling order, a party must demonstrate “good cause.” *Johnson v. Spencer Press of Maine, Inc.*, 211 F.R.D. 27, 30 (D. Me. 2002); *El-Hajj v. Fortis Benefits Ins. Co.*, 156 F. Supp. 2d 27, 34 (D. Me. 2001); Fed. R. Civ. P. 16(b)(4). A court’s decision on good cause “focuses on the diligence (or lack thereof) of the moving party more than it does on any prejudice to the party-opponent.” *Steir v. Girl Scouts of the USA*, 383 F.3d 7, 12 (1st Cir. 2004). “Particularly disfavored are motions to amend whose timing prejudices the opposing party by ‘requiring a re-opening of discovery with additional costs, a significant postponement of the trial, and a likely major alteration in trial tactics and strategy.’” *Id.* (quoting *Acosta-Mestre v. Hilton Int’l of P.R., Inc.*, 156 F.3d 49, 52 (1st Cir. 1998)). It falls to the court’s discretion whether to grant a late motion to amend, and that discretion should be exercised on the basis of the particular facts and circumstances of the case. *Id.*

Preliminarily, the parties disagree as to whether Defendant was in a position to assert the fraud claim earlier in the proceeding. Defendant maintains that it became aware of the basis for its fraud claim upon review of documents produced by Plaintiff during discovery. Although Defendant received Plaintiff’s document production on July 7, Defendant argues that given some technical difficulties in the production, and given the volume of documents (more than 84,000 files), the timing of its motion is reasonable.

Whether Defendant could have or should have located sooner the relevant documents is not controlling in this case. The record reflects that counsel for both parties have worked diligently to conduct the necessary discovery in this matter. Nevertheless, the timing of the motion as it relates to the discovery deadline, the motion deadline and trial is pertinent.

Defendant asserts that the amendment would not generate the need for significant additional discovery and, therefore, would not delay trial. Plaintiff contends that rather extensive discovery would be necessary. While the parties' negotiations have been the subject of some discovery, the amendment would necessarily result in more discovery. For instance, Plaintiff would be entitled to explore through discovery not only the factual bases of Defendant's assertion that Plaintiff's representation regarding its profit margin was false, but also to discover whether the representation influenced Defendant's decision to enter into the contract (i.e., the reliance issue). The reliance issue has the potential for substantial discovery. Plaintiff could reasonably be expected to investigate in some detail the other potential contractors with whom Defendant could have contracted, the likely costs of those contracts, and the extent to which the economics of the contract impacted or favored Defendant.²

In addition, while the proposed amendment might not be futile,³ Defendant's need for the amendment appears to be marginal. First, it does not appear that the additional claim would materially alter the relief to which Defendant would be entitled if it prevailed on its counterclaim. Furthermore, Defendant has raised Plaintiff's alleged misrepresentation in defense of Plaintiff's

² The economics of the contract for Defendant would likely be discoverable as part of Plaintiff's expected challenge to Defendant's contention that Defendant would not have entered into the contract with Plaintiff but for Plaintiff's misrepresentation. In other words, whether the contract was economically favorable to Defendant is an issue that would be relevant to whether Plaintiff would have entered into the agreement regardless of Plaintiff's representation regarding its profit margin.

³ Even if a party demonstrates good cause to file a late motion to amend, the Court can deny the motion if the Court determines that the proposed amendment of the pleading in question would be futile. *Chiang v. Skeirik*, 582 F.3d 238, 244 (1st Cir. 2009).

claims. To the extent, therefore, that Defendant believes that the misrepresentation provides grounds for voiding the parties' agreement, or for preventing Plaintiff from any further recovery under the agreement, Defendant can pursue the argument as part of its defense to Plaintiff's claims.⁴

In sum, the proposed amendment would result in significant additional discovery, and a delay in the trial. Particularly given that Defendant has asserted other claims from which it can obtain the same or similar relief, and given that Defendant can argue fraud in its defense to Plaintiff's claim without generating the need for further discovery (e.g., no need for discovery on the reliance element of an affirmative claim for fraud), judicial economy militates in favor of denying Defendant's motion.

CONCLUSION

Based on the foregoing analysis, Defendant's Motion to Amend Counterclaim (ECF No. 41) is denied.

CERTIFICATE

Any objections to this Order shall be filed in accordance with Fed. R. Civ. P. 72.

So Ordered.

/s/ John C. Nivison
U.S. Magistrate Judge

Dated this 23rd day of December, 2014.

SCHMID PIPELINE CONSTRUCTION INC v.
SUMMIT NATURAL GAS OF MAINE INC
Assigned to: JUDGE GEORGE Z. SINGAL
Referred to: MAGISTRATE JUDGE JOHN C.
NIVISON
Cause: 28:1332 Diversity-Breach of Contract

Date Filed: 12/18/2013
Jury Demand: None
Nature of Suit: 190 Contract: Other
Jurisdiction: Diversity

⁴ This observation is not intended to be and should not be construed to be a determination that evidence of the misrepresentation is admissible at trial. Admissibility will be determined by the trial court. The point of the observation is that Defendant does not have to assert a counterclaim for fraud in order to argue the effect of the alleged misrepresentation on the parties' obligations under the contract.

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