

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

HEARTS WITH HAITI, INC., and)
MICHAEL GEILENFELD,)
)
Plaintiffs)
)
v.)
)
PAUL KENDRICK,)
)
Defendant)

No. 2:13-cv-39-JAW

MEMORANDUM DECISION ON MOTION FOR LEAVE TO AMEND COMPLAINT¹

The plaintiffs move for leave to amend their complaint by supplementing it with additional facts and counts. Plaintiffs’ Motion to Amend Complaint to Add Supplemental Pleadings for Events Occurring in 2013 and 2014 (“Motion”) (ECF No. 129). This action was initiated on February 6, 2013, alleging, *inter alia*, defamation and tortious interference. Verified Complaint and Demand for Jury Trial. ECF No. 1. The deadline for filing amendments to the pleadings was June 24, 2013. ECF No. 21. Discovery closed on February 28, 2014. ECF No. 95. This motion was filed on February 16, 2014. ECF No. 129. I deny the motion.

I. Discussion

The proposed “Supplemental Complaint” (ECF No. 129-1) would add 44 paragraphs (allowing for duplicative numbering) to the complaint, repeats counts alleging defamation, false light, and tortious interference that are present in the operative complaint, and adds a new count

¹ A motion for leave to amend is not dispositive. *Hofland v. LaHaye*, No. CV-09-172-B-W, 2010 WL 231737, at *2 (D. Me. Jan. 14, 2010) (citing *Pagano v. Frank*, 983 F.2d 343, 346 (1st Cir. 1993)); *Trustees of Nat’l Retirement Fund v. Wildwood Corp.*, No. 11-cv-06287 (NSR) (LMS), 2014 WL 1918080, at *1 (S.D.N.Y. May 12, 2014).

entitled “Common Law Principal-Agent Liability for the Tortious Conduct of Sibert, Louima, and Tupper.” The factual allegations in the proposed supplemental complaint all appear to concern actions by the defendant that allegedly occurred in 2013 and 2014.

The plaintiffs assert that their supplemental claims deal only with events that have occurred since the initial complaint was filed, and that their addition “is necessary to contain the entire controversy between the parties to this one civil action” and that “[t]here will be no delay to the May 2014 trial date, and no trial inconvenience.” *Id.* at 2.² They argue that the defendant “can hardly be heard to complain by committing new torts last month and last week[] that he will be prejudiced in undergoing trial of those claims.” *Id.*

The plaintiffs invoke Federal Rule of Civil Procedure 15(d). *Id.* at 2-3. That rule provides:

On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

Fed. R. Civ. P. 15(d). “[L]eave to supplement the pleadings is addressed to the discretion of the court and should be freely granted when doing so will promote the economic and speedy disposition of the entire controversy between the parties, will not cause undue delay or trial inconvenience, and will not prejudice the rights of any of the other parties to the action.” *Winslow v. Commissioner, Maine Dep’t of Human Servs.*, 139 F.R.D. 15, 17 (D. Me. 1991).

The plaintiff asserts that allowing the proposed supplement will not delay trial, which at the time this motion was filed was set for jury selection on May 5, 2014, with trial to follow during that month, and will not cause any “trial inconvenience.” Motion at 2. I cannot agree. While

² On April 16, 2014, pursuant to Local Rule 56(h), the defendant filed a notice of intent to file a motion for summary judgment in this matter. ECF No. 180. That motion was filed on May 9, 2014, and is presently being briefed.

Counts VI through VIII of the proposed supplemental complaint may reasonably be described as updating claims asserted in the original complaint, *compare* Verified Complaint and Demand for Jury Trial (“Complaint”) (ECF No. 1) at 17-20 *with* Supplemental Complaint at 12-14, the proposed Count IX is an entirely new claim. If that claim were allowed, fairness alone would require that the defendant be allowed discovery on the newly-alleged theory of recovery pursuant to principal-agent liability for the conduct of three individuals newly named as agents of the defendant. That conclusion in turn would inevitably result in the delay of trial, or, indeed, delay in resolution of the defendant’s newly-filed motion for summary judgment. The mere fact that the new counts are based on events that occurred after the initial complaint was filed is not enough, standing alone, to require leave to amend a complaint in this manner.

The longer a plaintiff delays in moving to amend its complaint, the more likely the motion to amend will be denied. *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.* (citation and internal punctuation marks omitted).³ In this case, where discovery is closed and the court has held the pre-filing conference that is required by Local Rule 56(h) when a party has indicated that it will file a motion for summary judgment, ECF No. 177, “permitting supplementation would unduly delay this litigation and prejudice [the] defendant[.]” *Rivers v. New York City Housing Auth.*, No. CV 2011-5065(KAM)(MDG), 2014 WL 1311557, at *5 (E.D.N.Y. Mar. 31, 2014); *McGrotha v. Fed Ex*

³ See also *United States v. Russell*, 241 F.2d 879, 882 (1st Cir. 1957) (supplemental pleading designed to obtain relief “along the same lines, pertaining to the same cause, and based on the same subject matter or claim for relief, as set out in the original complaint).

Ground Package Sys., Inc., No. 5:05-CV-391 (CAR), 2007 WL 640457, at *5 (M.D. Ga. Feb. 24, 2007); *Walker v. United Parcel Serv., Inc.*, 240 F.3d 1268, 1278 (10th Cir. 2001).

While these considerations apply with greater force to the newly-proposed count alleging vicarious liability, the cited case law makes clear that they apply as well to proposed additions that are truly supplemental.

The plaintiffs argue, without citation to authority, that their proposed supplemental claims “must be made part of this case under the doctrine of *res judicata*, or to avoid splitting the disputes between these parties into two or more cases.” Plaintiffs’ Reply Memorandum in Support of Motion to Supplement Pleadings (ECF No. 165) at 5. Neither argument is persuasive.

First, the original complaint alleges that the alleged tortious conduct of the defendant “continues to present,” Complaint ¶¶ 47, 56, and that the harm caused to the plaintiffs by this conduct “continue[s]” and “will in the future cause” further harm, *id.* ¶¶ 80, 88. These allegations may well allow the plaintiffs to proffer evidence at trial, should the case go to trial, of conduct and harm that occurred after the original complaint was filed. Indeed, the plaintiffs assert that they have “diligently kept Defendant apprised throughout discovery of each ongoing statement that will form both an independent and collective basis for the defamation, false light, and tortious interference claims[.]” Motion at 3. This possibility also suggests that the plaintiffs’ professed fear of “splitting” their claims against the defendant applies only to the new cause of action alleged in Count IX of their proposed supplemental complaint, which, for the reasons already discussed, would not represent a “splitting” of their claims if brought separately.

In addition, the plaintiffs’ professed concern about application of the doctrine of *res judicata* to any claims they may wish to assert against the defendant has been rejected by courts that have specifically considered such an argument. *E.g.*, *Moore v. Pak*, 402 Fed. Appx. 491, 493-

94, 2010 WL 4487063, at **1-**2 (11th Cir. 2010); *Baker Group, L.C. v. Burlington N. & Santa Fe Ry. Co.*, 228 F.3d 883, 886 (8th Cir. 2000); *Hernandez v. Asset Acceptance, LLC*, 970 F.Supp.2d 1194, 1201-02 (D. Colo. 2013); *EEOC v. Anheuser-Busch, Inc.*, No. 4:05CV1598 CDP, 2006 WL 2246426, at *2 (E.D. Mo. Aug. 4, 2006).

II. Conclusion

For the foregoing reasons, the plaintiffs' motion for leave to amend and/or supplement the complaint is **DENIED**.

NOTICE

In accordance with Federal Rule of Civil Procedure 72(a), a party may serve and file an objection to this order within fourteen (14) days after being served with a copy thereof.

Failure to file a timely objection shall constitute a waiver of the right to review by the district court and to any further appeal of this order.

Dated this 30th day of May, 2014.

/s/ John H. Rich III
John H. Rich III
U.S. Magistrate Judge

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