

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

GLEND A SHOWS, ET AL.

PLAINTIFFS

V.

CIVIL ACTION NO. 1:07CV00709 WHB-LRA

**STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY, ET AL.**

DEFENDANTS

ORDER

THIS CAUSE is before the Court on [64] Plaintiffs' Motion to Amend the Complaint, which is opposed by State Farm Bank, State Farm Mutual, E.A. Renfroe & Company, Inc., Gene Renfroe, and Jana Renfroe [hereinafter Defendants]. Plaintiffs seek leave to amend the complaint to add Michael R. Greenhill, Deborah Greenhill, and Tom A. Brightman as plaintiffs. Plaintiffs also seek to add State Farm Bank, a federal savings association wholly-owned by Defendant State Farm Mutual, as a Defendant on claims that it "aided and abetted a civil conspiracy to conduct corrupt property inspections and procure contrived inspection reports." Additionally, Plaintiffs seek leave to amend in order to:

(1) incorporate newly discovered information that is relevant to the claims at issue;

(2) clarify the existing allegations for the benefit of the parties and the Court; and,

(3) adjust the Complaint and the named Defendants to reflect the settlement between Plaintiffs and Defendant Forensic Engineering, Inc.

The Court, having carefully considered the applicable law and the parties' briefs, hereby finds that the motion is well taken and should be **granted** for the reasons set forth hereafter.

Plaintiffs assert that since filing their original complaint, they have discovered additional facts that bolster their claims. Previously they were prevented from using the new information, but “such limitations have now been removed.” This “new information” was obtained from discovery in another case, discussed hereafter. For these reasons, Plaintiffs seek leave to amend their complaint pursuant to Rule 15(a) of the Federal Rules of Civil Procedure.

Pursuant to Rule 15(a) of the Federal Rules of Civil procedure, leave to amend shall be “freely given when justice so requires.” FED. R. CIV. P. 15. The decision to grant or deny a motion to amend is in the sound discretion of the Court. *Avatar Exploration, Inc. v. Chevron, U.S.A., Inc.*, 933 F.2d 314, 320 (5th Cir. 1991). Under Rule 15(a), leave to amend may be properly denied for various reasons, including undue delay, bad faith, and futility. Defendants contend each of these reasons exists in this case.

A. Undue Delay

The Court is not persuaded by Defendants’ arguments that there was “undue delay” on the part of Plaintiffs in filing this motion. The record clearly reflects the motion was filed prior to the Case Management Order’s deadline for filing amended pleadings.

B. Bad Faith

In addition to undue delay, State Farm Defendants argue Plaintiffs’ Motion to Amend should be denied because of the alleged unethical conduct of Plaintiffs’ counsel in *McIntosh v. State Farm Fire & Casualty Company, et.al.*, 1:06 CV1080 -LTS-RHW. *McIntosh* is one of several cases pending in the United States District Court for the

Southern District of Mississippi, Southern Division, regarding the Katrina insurance litigation. Defendants argue, and Plaintiffs do not dispute, that allegations in the amended complaint are based on information obtained in McIntosh from the hard drive of the personal laptop of Nellie Williams. (Williams is a former employee of Defendant, Forensic Analysis & Engineering Corporation.) Defendants charge that Plaintiffs obtained the hard drive using abusive and unethical discovery tactics in violation of the Federal Rules of Civil Procedure and the Rules of Professional Conduct. As such, Defendants argue the improperly obtained evidence constitutes bad faith and justifies denial of the motion to amend under FED. R. CIV. P. 15(a).

Specifically, Defendants point to the following events in McIntosh: On October 8, 2007, Defendant Forensics filed a Motion for Protective Order. Forensics requested the Court enter an order prohibiting the dissemination of data from Nellie Williams' computer, and to sanction Plaintiffs' counsel, on the grounds the computer had been obtained through a subpoena duces tecum that was never disclosed to Forensic, pursuant to FED. R. CIV. P. 45(b)(1). On October 9, 2007, United States Magistrate Judge Robert Walker issued an order prohibiting the dissemination of information obtained from Ms. Williams' hard drive, pending full briefing on the matter. On November 9, 2007, the parties notified the Court that a settlement had been reached between Forensic and Plaintiffs. Defendant Forensic then withdrew its motion for protective order and filed a joint motion with Plaintiffs requesting the Court vacate its October 9th order. A TEXT ONLY ORDER granting the motion to vacate was entered by the McIntosh Court on November 9, 2007.¹ On November 27, 2007, Plaintiffs filed the

¹Defendants have filed separate [91] & [129] Motions to Disqualify Plaintiffs' counsel for the reasons stated above, which are also currently pending before the Court.

subject motion to amend their complaint. The amended complaint references email communications obtained from Williams' computer between Defendant Forensic and State Farm employees regarding how to assess properties damaged on the Gulf Coast by Hurricane Katrina.

Defendants argue that allegations in the amended complaint are based on the fruits of Plaintiffs' counsel's unethical conduct and are properly excluded under Rule 15(a) as bad faith amendments. According to Defendants, this conduct is indicative of an overall pattern of unethical conduct on the part of Plaintiffs' counsel in the Katrina litigation. Plaintiffs argue that State Farm has no standing to challenge the way the information was obtained, as the evidence was acquired from a Forensic employee, not a State Farm employee. Furthermore, Plaintiffs assert that the terms of the Forensic settlement permit Plaintiffs to use the information as they see fit.

Ordinarily, as long as there is a good faith basis supporting the allegations contained in the complaint, timely amendments to the complaint shall be allowed. In this case, the claim of "bad faith" does not appear to relate to the allegations supporting Plaintiffs' claims but, instead, relates to the manner in which Plaintiffs' counsel obtained evidence to support those claims. As such, the Court finds Defendants' claim of "bad faith" raises an evidentiary/admissibility issue as opposed to a pleading issue. Under Rule 15(a), leave to amend a complaint must be freely given when justice requires. There is no requirement in that rule that the Court must first determine whether the evidence supporting a parties' claim will be admissible at trial before granting leave to amend.

The undersigned concludes that the amended complaint should not be stricken on the assertion that the allegations contained therein are based on evidence that was obtained in "bad faith". Claims of "bad faith" regarding the discovery of supporting evidence are not decided within the context of a motion to amend. Accordingly, the Court finds that leave to file the amended complaint should not be denied based on Defendant's claims of bad faith.

C. Futility

Finally, Defendants argue the motion to amend should be denied as futile. In assessing futility, the Court "applies the same standard of legal sufficiency as applies under Rule 12(b)(6)." *In re Burlington Coat Factory*, 114 F.3d 1431, 1434 (3rd Cir. 1997). Thus, in deciding whether an amendment is futile, a court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. *Id.* "Leave to file an amendment should be denied as futile if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

State Farm Defendants state that nine (9) plaintiffs in this case have signed settlement releases with State Farm. As such, Defendants argue they are precluded from proceeding because plaintiffs are "not allowed to ... retain the financial benefits of their settlement contract with [the Defendant] on the one hand, and on the other hand ... avoid the non-beneficial aspects of the settlement agreement based on the purported fraudulent conduct of [the defendant]." *Bogy v. Ford Motor Co.*, 417 F. Supp. 2d 807, 810 (S.D. Miss. 2006). Furthermore, Defendants contend, even if the

payments had been returned, these plaintiffs would be barred as a matter of law because they cannot show reasonable reliance -- a necessary element to establish a claim of common law fraud. Plaintiffs do not dispute that some plaintiffs signed settlement releases, but challenge Defendants' assertion that there was no reasonable reliance.

The legal effect of these Plaintiffs' settlements and releases on the instant lawsuit is a substantive issue of law and/or fact. At this stage of the pleadings, the undersigned cannot find that "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations," and, therefore, that the proposed amendments would indeed be futile. The Court additionally finds that this issue should not be resolved on a Rule 15(a) motion to amend but, instead, should be properly resolved through a dispositive motion before the district judge.

Likewise, the same holds true for Defendants' argument that the amended complaint fails to adequately plead the necessary enterprise and continuity elements in support of their RICO claim. Whether a RICO claim has been appropriately plead will be considered by the district judge upon dispositive motions and pleadings. Liberal amendments shall be allowed in this case.

The amended complaint is unnecessarily lengthy and contains entirely too much commentary and editorializing. Amendments are liberally allowed, and the motion shall be granted. However, Plaintiffs shall revise the amended complaint

to strictly adhere to Rules 8,² 10,³ and 11⁴ of the Federal Rules of Civil Procedure. In future pleadings before the undersigned in this case, all parties are directed to strictly comply with page limitations for memorandum.

IT IS THEREFORE HEREBY ORDERED that Plaintiffs' Motion to Amend is hereby granted, subject to the requirements set forth herein, and the Clerk of the Court is directed to accept and file the Plaintiffs' Amended Complaint upon submission by counsel within fourteen days from the filing of this Order.

SO ORDERED THIS the 10th day of March, 2008.

S/Linda R. Anderson
UNITED STATES MAGISTRATE JUDGE

²The complaint shall contain "a short and plain statement" of the claims. Each allegation must be "simple, concise, and direct."

³A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. "If doing so would promote clarity, each claim founded on a separate transaction or occurrence... must be stated in a separate count or defense."

⁴By signing [or filing, submitting, etc.] the complaint, attorneys are certifying that "it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation...."

