IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DESIGN BASICS, LLC,	:	
Plaintiff	:	**No. 1:17-cv-00031**
	:	
v.	:	**(Judge Kane)**
	:	
MTF ASSOCIATES, INC., et al.,	:	
Defendants	:	

MEMORANDUM

Before the Court are Defendants Haubert Construction, LLC d/b/a Fogarty Homes, Fogarty Homes, Inc., and Randall E. Haubert's (the "Haubert Defendants") motion for leave to file an amended answer and affirmative defenses (Doc. No. 37), and Defendants MTF Associates, Inc., Fogarty Homes, Inc., JF Development Corporation, John Fogarty Custom Built Homes, Inc. d/b/a Distinctive Homes by Fogarty, and John T. Fogarty's (the "Fogarty Defendants") motion for leave to file an amended answer and affirmative defenses (Doc. No. 41).[1] For the reasons provided herein, the Court will deny both motions.

I. BACKGROUND

The instant dispute arises out of the alleged copyright infringement of residential home designs and architectural plans. (Doc. No. 37 ¶ 1.) Plaintiff Design Basics, LLC ("Plaintiff"), is a Nebraska limited liability company engaged in the business of creating, publishing, and licensing architectural plans and designs. (Doc. No. 1 ¶ 3.) Plaintiff owns a large number of copyright-protected architectural works. (Id. ¶ 12). Defendants are entities that Plaintiff alleges infringed a portion of Plaintiff's copyright-protected architectural works. (Id. ¶ 23).

[1] The Court refers to the Haubert Defendants and the Fogarty Defendants as "Defendants."

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On January 5, 2017, Plaintiff filed a complaint in this Court, asserting four counts of non-willful copyright infringement under 17 U.S.C. §106, four counts of willful copyright infringement under 17 U.S.C. §106, and one count alleging a violation of the Digital Millennium Copyright Act under 17 U.S.C. §1202. (Doc. No. 1 ¶¶ 36-58). On February 17, 2017, the Fogarty Defendants filed an answer and asserted a crossclaim against the Haubert Defendants seeking contribution and indemnification. (Doc. No. 10 ¶ 92.) The Haubert Defendants filed an answer as to Plaintiff's complaint (Doc. No. 1), and the Fogarty Defendants' crossclaim (Doc. No. 10), on February 17, 2017 (Doc. No. 12). In their answer, the Haubert Defendants also asserted a crossclaim against the Fogarty Defendants seeking contribution and indemnification. (Doc. No. 12 ¶ 28.) On March 3, 2017, the Fogarty Defendants filed an answer to the crossclaim asserted by the Haubert Defendants. (Doc. No. 14.)

On April 18, 2018, during the course of the parties' discovery, several of Plaintiff's principals were deposed. (Doc. No. 37 ¶ 5.) During these depositions, information related to the Plaintiff's enforcement of its copyrights through litigation was elicited. (Id. ¶ 8.) Additionally, Paul Foresman, Plaintiff's vice president and director of business development ("Mr. Foresman"), testified that Plaintiff had previously paid a finder's fee to its employees if it secured a monetary settlement from copyright infringement the employee had identified. (Id. ¶ 9.) Carl Cuozzo, one of Plaintiff's senior designers, indicated that Plaintiff ceased paying its employees finder's fees in September of 2017. (Id. ¶ 16.) This change in policy occurred shortly after the issuance of an opinion by the Seventh Circuit in a case to which Plaintiff was a party.[2] (Id.) The parties completed fact discovery on September 4, 2018. (Doc. No. 47.)

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[2] Design Basics LLC v. Lexington Homes, Inc., 858 F.3d 1093 (7th Cir. 2017).

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On October 11, 2018, the Haubert Defendants filed a motion for leave to file an amended answer and affirmative defenses (Doc. No. 37), accompanied by a motion to compel discovery of Plaintiff's accounting of gross settlement revenues from copyright infringement claims filed from 2009 to the present (Doc. No. 39). On October 18, 2018, the Fogarty Defendants filed a motion for leave to file an amended answer and affirmative defenses. (Doc. No. 41.) Both Defendants seek to amend their answers to assert the affirmative defense of copyright misuse. (Doc. Nos. 37, 41.) Plaintiff filed an unopposed motion to stay the briefing schedule on October 19, 2018 (Doc. No. 42), as to the Haubert Defendants' motion to compel (Doc. No. 39). Plaintiff filed a brief in opposition (Doc. No. 47), to the Haubert Defendants' motion (Doc. No. 37), on October 25, 2018. Plaintiff filed a second brief in opposition (Doc. No. 50), to the Fogarty Defendants' motion (Doc. No. 41), on November 9, 2018.[3] Defendants did not file reply briefs, and the period in which to do so has elapsed. As a result, Defendants' motions are ripe for disposition.

II. LEGAL STANDARD

Under Rule 15(a) of the Federal Rules of Civil Procedure, "a party may amend the party's pleadings only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). While Rule 15 liberally permits leave to amend be "freely given," a district court may deny leave to amend if the movant's delay in seeking amendment is undue, motivated by bad faith, prejudicial to the opposing party, or is futile. See Foman v. Davis, 371 U.S. 178, 182 (1962). It is within the

[3] Additionally, the Haubert Defendants filed a motion for summary judgment (Doc. No. 54), and the Fogarty Defendants and Plaintiff each filed motions for partial summary judgment on November 13, 2018. (Doc. Nos. 57, 60). The Court issued an Order extending the time to file responsive briefs to February 1, 2019 to allow for the disposition of Defendants' instant motions. (Doc. No. 65.)

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sound discretion of the trial court to determine whether a party shall be granted leave to amend pleadings. See id.

Futility of amendment occurs when the amended pleading does not state a claim upon which relief can be granted. See In re Burlington Coat Factory Litig., 114 F.3d 1410, 1434 (3d Cir. 1997). If the proposed amendment "is frivolous or advances a claim or defense that is legally insufficient on its face, the court may deny leave to amend." Harrison Beverage Co. v. Dribeck Imps., Inc., 133 F.R.D. 463, 468 (D.N.J. 1990) (internal citations omitted). The Third Circuit has held that "the trial court may properly deny leave when the amendment would not withstand a motion to dismiss" under Federal Rule of Civil Procedure 12(b)(6). Massarsky v. General Motors Corp., 706 F.2d 111, 125 (3d Cir. 1983). Assertions that leave to amend an answer would be futile are also reviewed under the "motion to dismiss" standard. See, e.g., Miller v. Beneficial Mgmt. Corp., 844 F. Supp. 990, 1001 (D.N.J. 1993). Under this standard, the Court must accept as true the allegations in the proposed amended answer and construe those allegations in the light most favorable to the moving party. Id.

In the Third Circuit, "prejudice to the non-moving party is the touchstone for the denial of an amendment." Lorenz v. CSX Corp., 1 F.3d 1406, 1413-14 (3d Cir. 1993) (quoting Cornell & Co., Inc. v. Occupational Safety & Health Review Comm'n., 573 F.2d 820, 823 (3d Cir. 1978)). When considering prejudice, the hardship on the non-movant is the Court's focus. See Adams v. Gould Inc., 739 F.2d 858, 868 (3d Cir. 1984). The non-moving party must do more than claim prejudice, however, "it must show that it was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the . . . amendments been timely." Bechtel v. Robinson, 886 F.2d 644, 652 (3d Cir. 1989) (quoting Heyl & Patterson Int'l, Inc. v. F.D. Rich Housing, 663 F.2d 419, 426 (3d Cir. 1981)). In deciding whether the non-

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moving party is prejudiced by the delay in amendment, the Court considers whether allowing an amendment would result in "additional discovery, cost, and preparation to defend against new facts or new theories." Cureton v. Nat'l Collegiate Athletic Ass'n, 252 F.3d 267, 273 (3d Cir. 2001). The Third Circuit has also held that prejudice exists when there is "undue difficulty in prosecuting a lawsuit as a result of a change of tactics or theories on the part of the other party." Deakyne v. Comm'rs of Lewes, 416 F.2d 290, 300 (3d Cir. 1969).

In addition to prejudice, a movant's undue delay is also a ground for denying leave to amend, although the Third Circuit has held that the mere passage of time does not require that a motion to amend a pleading be denied. See Adams, 739 F.2d at 868. At some point, however, the movant's delay "will become 'undue,' placing an unwarranted burden on the [C]ourt, or will become 'prejudicial,' placing an unfair burden on the opposing party." Adams, 739 F.2d at 868. Delay may become undue when a movant has had previous opportunities to amend. See Lorenz v. CSX Corp., 1 F.3d 1406, 1414 (3d Cir. 1993). In weighing whether the movant has unduly delayed in filing a motion to amend a pleading, therefore, the Court's focus is on the movant's motives for not amending. See Adams, 739 F.2d at 868.

III. DISCUSSION

A. Arguments of the Parties

In their motions (Doc. Nos. 37, 41), Defendants both seek leave to file an amended answer for the identical purpose of asserting the affirmative defense of copyright misuse. In support of their motions, Defendants advance nearly the same arguments in favor of amending. (Doc. Nos. 38, 48.) Specifically, Defendants address the four grounds upon which district courts may deny leave to amend: (1) undue delay; (2) prejudice to Plaintiff; (3) bad faith or dilatory motive; and (4) futility of amendment. See Foman, 317 U.S. at 182.

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