

**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

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BARBARA J. WINTERBURN
CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY, OHIO

GILBERT E. ROARK, ET AL. :
 :
 Plaintiffs, : **CASE NO. 2015 CVH 00459**
 :
 vs. : **Judge McBride**
 :
 SUSAN K. FASIRICH, : **DECISION/ENTRY**
 :
 Defendant.

Arnold Law Firm, LLC, James S. Arnold and Brien K. Miller, counsel for the plaintiffs Gilbert E. Roark and Brenda M. Trimble, 8833 Chapel Square Drive, Suite C, Cincinnati, Ohio 45249

Rebold Larkin Murray, LLC, Kyle D. Murray, 5716-A Signal Hill Court, Milford, Ohio 45150, and Marcin & Marcin, Melissa A. Marcin, 100 Techne Center Drive, Suite 107, Milford, Ohio 45150, counsel for the defendant Susan K. Fastrich,

This cause is before the court for consideration of a motion to amend the complaint filed by the plaintiffs Gilbert E. Roark and Brenda M. Trimble on June 28, 2016. The court heard oral arguments on this matter on August 12, 2016, after which time the court took the motion under advisement.

Upon consideration of the motion, the written and oral arguments of counsel, the evidence presented for the court's consideration, and the applicable law, the court renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

The parties are neighbors who share a boundary line in Batavia, Ohio.¹ The plaintiffs allege that the defendant cut down trees on their property, that the defendant's dogs have gone onto the plaintiffs' property, leading to a criminal complaint, that the defendant constructed and removed a driveway pad on the plaintiffs' property, and that the defendant installed waste-water pipes that diverted the water flow onto the plaintiffs' property.²

On September 5, 2014, the defendant filed a petition for a civil stalking protection order ("CPO") against Mr. Roark.³ In the petition, the defendant claimed that Mr. Roark (1) repeatedly stood at their shared property line to observe the defendant in the nude in her yard, (2) told the defendant "Dont [sic] be shy I'm just watching Don't be shy!" while watching her at their property line, (3) threatened the defendant with guns, (4) made other sexual remarks to the defendant, and (5) threatened to shoot the defendant's dogs.⁴ The petition for a civil stalking protection order was ultimately dismissed.⁵

On April 7, 2015, the plaintiffs Gilbert E. Roark and Brenda M. Trimble filed a complaint for injunctive relief and money damages against the defendant Susan K. Fastrich. The plaintiffs have asserted seven causes of action, one of which is a cause of action for defamation relating to the defendant's statements in her petition for a civil stalking protection order.

¹ Aff. of G. Roark, ¶ 4.

² Pls. Compl. at ¶¶ 4-5, 7.

³ Pls. Sealed Ex. A to Resp. to Mot. to Dismiss.

⁴ Pls. Sealed Ex. A to Resp. to Mot. to Dismiss.

⁵ Aff. of G. Roark, ¶ 7.

On June 8, 2015, the defendant filed a motion to dismiss pursuant to Civ.R. 12(b)(6) as to on Count 4 – Defamation for failure to state a claim upon which relief can be granted. The court later converted the defendant’s motion to dismiss into a motion for summary judgment. On June 7, 2016, the court granted the defendant’s motion for summary judgment on the defamation claim, finding that absolute immunity applied to the defendant’s statements in her petition for a civil stalking protection order.

On June 28, 2016, the plaintiffs filed a motion to amend their complaint under Civ.R. 15. The plaintiffs have stated that they want to amend their complaint to include a new claim for defamation based upon the defendant’s April 12, 2016 deposition testimony. They posit that the testimony reveals that the defendant made defamatory statements about Mr. Roark to third parties that were similar to the statements the court found to be privileged in the defendant’s petition for a civil stalking protection order.

The plaintiffs attached an amended complaint to their motion, which includes the following new cause of action for defamation:

“22. Fastrich published materially untrue, unprivileged statements to third parties, outside of the before mentioned CPO, which the court has found to enjoy absolute privilege.

23. Fastrich’s actions were made were made [*sic*] with self-purpose, made maliciously and with insult, including but not limited with the purpose to embarrass, harass, annoy, and damage Plaintiff Gilbert E. Roark’s reputation, and standing in an effort to harm Plaintiff, Gilbert E. Roark or to gain an advantage in the matters involving her dogs and complaints about the before mentioned trees being cut.

24. As a result of Fastrich’s publication, Plaintiff, Gilbert E. Roark, has incurred direct and indirect damages, consequential and incidental damages, including but not limited to injury to his reputation and exposed him to public hatred, contempt, ridicule, shame, humiliation, and disgrace and continues to suffer damages, including attorney fees in

defending the statements, in an amount in excess of \$50,000.”

The defendant filed a brief in opposition to the plaintiffs' motion on July 27, 2016. The defendant maintains that the plaintiffs have not presented adequate support for a new defamation claim and that any such claim would be barred by the statute of limitations.

The plaintiffs filed a reply brief on August 9, 2016 and submitted the defendant's deposition testimony. In the testimony, the defendant testifies that she told her parents about the "issues" involving this lawsuit and that she may have told her friends "that I have a pervert for a neighbor probably."⁶

On August 12, 2016 the court held a hearing on the motion to amend, after which time it took the issues raised by the motion under advisement.

STANDARD OF REVIEW

When the set time limit for amending a complaint has passed, the plaintiffs may amend their complaint only with the defendant's written consent or the court's leave.⁷

Civ.R. 15(A), in pertinent part, provides:

"A party may amend its pleading once as a matter of course within twenty-eight days after serving it or, if the pleading is one to which a responsive pleading is required within twenty-eight days after service of a responsive pleading or twenty-eight days after service of a motion under Civ.R. 12(B), (E), or (F), whichever is earlier. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court shall freely give leave when justice so requires."

⁶ S. Fastrich Dep., 97:7-22.

⁷ Civ.R. 15(A). See *Edmonson v. Steelman*, 87 Ohio App.3d 455, 457, 622 N.E.2d 661 (12th Dist. 1992), quoting *Wilmington Steel Products, Inc. v. Cleveland Electric Illuminating Company*, 60 Ohio St.3d 120, 121-122, 573 N.E.2d 622 (1991).

It is within the trial court's sound discretion to grant or deny a motion for leave to amend a pleading.⁸ "The language of Civ.R. 15(A) favors a liberal amendment policy * *

* * "9

"While Civ.R. 15(A) allows for liberal amendment, the trial court does not abuse its discretion if it denies a motion to amend pleadings if there is a showing of bad faith, undue delay, or undue prejudice to the opposing party."¹⁰ Furthermore, when "considering a plaintiff's request to amend its complaint, 'a trial court's primary consideration is whether there is actual prejudice to the defendants because of the delay."¹¹

Although delay is a "legitimate factor for the trial court to consider" on deciding a motion to amend, "[o]rdinarily delay, standing alone, should not prevent a trial court from allowing a plaintiff to amend his or her complaint * * *."¹² Moreover, "Ohio courts have

⁸ *Deutsche Bank Natl. Trust Co. v. Carter*, 12th Dist. Warren Nos. CA2014-01-001, CA2014-01-010, 2014-Ohio-5193, ¶ 28, citing *Scovanner v. Ohio Valley Voices*, 12th Dist. Clermont No. CA2012-02-017, 2012-Ohio-3629, ¶ 28. See *State ex rel. N. Ohio Chapter of Associated Builders & Contrs., Inc. v. Barberton City School Dist. Bd. of Edn.*, 188 Ohio App.3d 395, 2010-Ohio-1826, 935 N.E.2d 861, ¶ 28 (9th Dist.), citing *Hoover v. Sumlin*, 12 Ohio St.3d 1, 6, 465 N.E.2d 377 (1984) (holding same).

⁹ *Wilmington Steel Products, Inc.*, 60 Ohio St.3d at 121-122. See *State ex rel. N. Ohio Chapter of Associated Builders & Contrs., Inc.*, 2010-Ohio-1826 at ¶ 28, quoting *Hoover*, 12 Ohio St.3d at 6 ("The language of Civ.R. 15(A) favors a liberal amendment policy and a motion for leave to amend should be granted absent a finding of bad faith, undue delay or undue prejudice to the opposing party.").

¹⁰ *Deutsche Bank Natl. Trust Co.*, 2014-Ohio-5193, ¶ 29, quoting *Scovanner*, 2012-Ohio-3629 at ¶ 28. See *State ex rel. N. Ohio Chapter of Associated Builders & Contrs., Inc.*, 2010-Ohio-1826 at ¶ 28, quoting *Hoover*, 12 Ohio St.3d at 6 ("* * *[A] motion for leave to amend should be granted absent a finding of bad faith, undue delay or undue prejudice to the opposing party.").

¹¹ *Bachtel v. Jackson*, 10th Dist. Franklin No. 08AP-714, 2009-Ohio-1554, ¶ 26, quoting *Darby v. A-Best Products Co.*, 102 Ohio St.3d 410, 2004-Ohio-3720, 811 N.E.2d 1117, ¶ 20.

¹² (Citation omitted.) *Carriker v. American Postal Workers Union*, 2d Dist. Montgomery No. 13900, 1993 WL 385807, *6 (Sept. 30, 1993).

noted that 'a[n] attempt to amend a complaint following the filing of a motion for summary judgment has been found to raise the spectre of prejudice.'"¹³

Additionally, a court acts within its discretion to deny a motion to amend a pleading "[w]here a plaintiff fails to make a *prima facie* showing of support for new matters sought to be pleaded."¹⁴ In making such a showing, the plaintiff must "marshal support for the new matters sought to be pleaded," and the amendment cannot be "simply a delaying tactic or one which would cause prejudice to the defendant."¹⁵ Thus, the factors that the court considers in determining whether to grant a motion to amend a complaint include the following factors: "whether the movant makes a *prima facie* showing of support for the new matters sought to be pleaded, the timeliness of the motion, and whether the proposed amendment would prejudice the opposing party."¹⁶

LEGAL ANALYSIS

Because it is beyond 28 days from the day the plaintiffs served their complaint, the plaintiffs may only amend their complaint under Civ.R. 15(A) with the leave of the court or with the defendant's written consent. Whether the plaintiffs should be permitted leave to amend their complaint to include a new cause of action for defamation is a

¹³ *Frankel*, 2015-Ohio-1571 at ¶ 18, quoting *Pintargo v. Sagamore Hills Twp.*, 9th Dist. Summit No. 25697, 2012-Ohio-2284, ¶ 22.

¹⁴ *Wilmington Steel Products, Inc.*, 60 Ohio St.3d at the syllabus. See *Edmonson*, 87 Ohio App.3d at 458, citing *Wilmington Steel Products, Inc.*, 60 Ohio St.3d at 122 ("Where the movant fails to present operative facts in support of the new allegations, a court does not abuse its discretion in denying a motion to amend.").

¹⁵ *Edmonson*, 87 Ohio App.3d at 458, citing *Wilmington Steel Products, Inc.*, 60 Ohio St.3d at 122.

¹⁶ *Frankel v. Toledo Pub. Schools*, 6th Dist. Lucas No. L-14-1027, 2015-Ohio-1571, ¶ 16, citing *Wilmington Steel Products, Inc.*, 60 Ohio St.3d 120.

close decision. A plaintiff must satisfy the following elements in order succeed on a defamation claim: "(1) a false statement of fact that was made about the plaintiff, (2) the statement was defamatory, (3) the statement was published, (4) the plaintiff suffered injury as a proximate result of the publication, and (5) the defendant acted with the requisite degree of fault in publishing the statement."¹⁷

The fact that the plaintiffs have submitted evidentiary materials that buttress their new claim for defamation weighs in favor of allowing such amendment. The plaintiffs maintain that the defendant's April 12, 2016 deposition revealed new statements that she made to third parties, outside of her petition for a civil stalking protection order, which may be defamatory. Namely, the defendants highlight the following testimony, which the court has included below, in relevant part:

"Q: Did you tell people that you thought he [Mr. Roark] was watching you mow your lawn in the nude?

A: I'm sure I told some of my friends. I don't know. I don't – I can't recall who I told, who I didn't tell."¹⁸

* * *

After questions exploring the defendant's claim that Mr. Roark "stops and sits there and gawks" when the defendant "is out there naked" in her yard,¹⁹ the following testimony occurred:

"Q: And there were – you told your parents and friends and your neighbors about that issue, about him?

A: I have no idea who I told.

¹⁷ *Gallagher v. Stonegate Mtge. Corp.*, 8th Dist. Cuyahoga No. 99684, 2013-Ohio-5747, ¶ 17, citing *A. Chem. Soc. v. Leadscope, Inc.*, 133 Ohio St.3d 366, 390, 2012-Ohio-4193, 978 N.E.2d 832.

¹⁸ S. Fastrich Dep., 95:12-16.

¹⁹ S. Fastrich Dep., 97:1-3.

Q: At least your parents?

A. I tell them everything.

Q: What about your friends? Did you tell your friends about those issues?

A: I have no idea. If my friends were back there and he probably rode by, I'm sure I might have said something. I don't recall.

Q: Said something about what?

A: That I have a pervert for a neighbor probably. I don't recall. You're asking me the same question over and over, which now I feel like you're hounding me. * * *

The fact that the defendant's statements to third parties were discovered recently suggests that the plaintiffs should be granted leave to amend their complaint. These statements were not known to the plaintiffs at the time they filed their complaint, nor were they known to the plaintiffs during the set time limit for amending a complaint without leave.²⁰

Also weighing in favor of granting leave is the timeline for discovery and the trial. Under the court's July 11, 2016 case management order, the deadline for the completion of all discovery, except depositions of experts, is January 15, 2017. Furthermore, the trial is still months away and is set for March 6, 2017.²¹ It is not the

²⁰ Cf. *Lanham v. Franklin Tp.*, 12th Dist. Clermont No. CA2003-07-057, 2004-Ohio-2071, ¶ 12 (finding that the trial court did not abuse its discretion in denying motion to amend complaint to add a breach of contract claim where the motion was made two years after the litigation commenced and the appellants alleged "no new facts to support their claim, thus demonstrating that this additional claim could have been made at the commencement of the litigation * * *").

²¹ Cf. *State ex rel. N. Ohio Chapter of Associated Builders & Contrs., Inc.*, 2010-Ohio-1826 at ¶ 31 (finding a motion to amend untimely where it was filed less than a month from the trial date and while dispositive motions were pending); *Bachtel*, 2009-Ohio-1554 at ¶ 27 (finding that the court did not abuse its discretion in denying a motion to amend where the appellant filed the motion over two years after filing the complaint, only two months prior to the trial date, and there was no *prima facie* showing of support for the claims the appellant sought to add).

case that the plaintiffs filed their motion to amend in the eleventh hour before trial. Given the timeline for discovery and the trial, allowing the new defamation claim is unlikely to delay the proceedings further.

On the other hand, the procedural posture of this case suggests that the court should not grant leave to amend. This court has already issued a summary judgment decision. Allowing a new claim after dispositive motions will "raise the spectre of prejudice."²² Allowing the plaintiffs to amend the pleadings would require the court to permit the defendant to file another summary judgment motion. Given that the defendant has argued that the proposed defamation claim is barred by the statute of limitations and cannot satisfy all of the elements for defamation, the defendant may be inclined to file another summary judgment motion as to this new claim. Filing a new motion for summary judgment would require the defendant to expend additional time and resources that could have been avoided had she only needed to file one summary judgment motion.

In balancing these considerations, most, but not all, of the factors that courts consider when determining whether to grant the plaintiff leave to amend the complaint suggest that the plaintiffs should be permitted leave. Moreover, the liberal amendment policy in favor of granting motions for leave tips the scales in favor of the plaintiffs.

Accordingly, the court shall grant the plaintiffs leave for a period of ten days from the date of filing of this decision to amend their complaint to add their proposed cause of action for defamation.

As discussed in the hearing on this matter and in the court's case management order, the court will allow the defendant to file a summary judgment motion with respect

²² *Frankel*, 2015-Ohio-1571 at ¶ 18, quoting *Pintargo*, 2012-Ohio-2284 at ¶ 22.

to that claim. Any summary judgment motion with respect to this new claim shall be filed within thirty days of the date of filing of the amended complaint. Any evidence which is to be considered in favor of the motion must be filed at or before the time of filing of the motion.


The plaintiffs are admonished that the court is very unlikely to allow them to amend their pleadings any further. From this point forward, the parties need to concentrate on preparing this case for trial rather than filing additional claims.

CONCLUSION

For the foregoing reasons, the court finds the plaintiffs' motion for leave to amend their complaint well-taken and hereby grants for the filing of the amended complaint to add the new cause of action for defamation as set forth herein for a period of ten days from the date of filing of the within decision. Leave shall be granted to the defendant to file a motion for summary judgment with respect to this new claim for a period of thirty days after the date of filing of the amended complaint. Any evidence to be submitted by the movant must be served and filed at or before the time of filing of the motion for summary judgment.

IT IS SO ORDERED.

DATED: 8-26-16



Judge Jerry R. McBride