

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION**

INDUSTRIAL RISK INSURERS, an
unincorporated Association of member
companies, and NASH FINCH
COMPANY, a Delaware corporation,

Plaintiffs,

vs.

D.C. TAYLOR COMPANY, an Iowa
Corporation,

Defendant.

No. C06-0171

ORDER AMENDING ANSWER

This matter comes before the Court on the Motion for Leave to File Amended and Substituted Answer (docket number 27) filed by the Defendant on December 6, 2007, and the Resistance (docket number 28) filed by the Plaintiffs on December 20, 2007. Pursuant to Local Rule 7.c, the Motion will be decided without oral argument.

I. RELEVANT FACTS

On November 28, 2006, Plaintiffs Industrial Risk Insurers and Nash Finch Company filed a Complaint (docket number 1), seeking judgment against Defendant D.C. Taylor Company for damages sustained to Plaintiffs following a fire on August 13, 2004. The Complaint is in three Counts: Count I alleges negligence, Count II alleges breach of implied warranties, and Count III alleges breach of contract.

Defendant filed its Answer (docket number 7) on February 1, 2007. The Answer responds to Counts I and II of the Complaint by setting forth the allegation and Defendant's response. Inexplicably, however, the Answer makes no reference to the breach of contract allegations found in Count III. In its instant Motion, Defendant states that "[f]ailure to Answer said Count III was inadvertent and D.C. Taylor Company

intended to deny certain of those allegations and defend against the claim for breach of contract.”

Pursuant to a stipulation of the parties, the Court entered a Scheduling Order and Discovery Plan (docket number 11) on April 13, 2007. Among other things, the Order established a June 12, 2007, deadline for motions to amend pleadings. Trial is now scheduled before Chief Judge Linda R. Reade on June 16, 2008. *See* Order (docket number 14).

On September 12, 2007, Defendant filed a Motion for Summary Judgment (docket number 15). In its Order denying Defendant’s Motion for Summary Judgment, the Court noted in a footnote that Defendant did not respond to Plaintiffs’ Statement of Additional Disputed Material Facts and, therefore, the statements of material fact were deemed to be admitted. In addition, the Court noted that the allegations contained within Count III of the Complaint were deemed admitted, thereby apparently alerting Defendant for the first time that it had failed to respond to Count III.

1 D.C. Taylor failed to respond to Plaintiffs’ Statement of Additional Disputed Material Facts Precluding Summary Judgment (docket no. 18-3). Accordingly, the court deems all of the statements of material fact therein to be admitted. *See* LR 56.1.d. The court also deems the allegations within Count III to be admitted to the extent they are not expressly denied elsewhere in the Answer. *See* Fed. R. Civ. P. 8(d); *see, e.g., U.S. for Use of “Automatic” Sprinkler Corp. v. Merritt-Chapman & Scott Corp.*, 305 F.2d 121, 123 (3d Cir. 1962) (deeming allegations to be admitted for failure to completely answer a complaint).

See Order (docket number 26) at 3, fn.1.

The Court’s Order was filed on December 4, 2007. Two days later, on December 6, 2007, Defendant filed the instant Motion for Leave to File Amended and Substituted Answer. Defendant requests that the Court allow the filing of a First Amended and Substituted Answer (docket number 27-3). The proposed amended answer does not change Defendant’s responses to Counts I and II, nor does it add any additional affirmative defenses or assert any counterclaims. Rather, it adds responses to Count III of the

Complaint, as set forth in paragraphs 34 through 46. While admitting certain allegations regarding contract formation (paragraphs 35 -37), the proposed Answer denies the material allegations of Count III.

II. ANALYSIS

FEDERAL RULE OF CIVIL PROCEDURE 15(a) provides, with certain limited exceptions, that “a party may amend its pleading only with the opposing party’s written consent or the court’s leave.” FED. R. CIV. P. 15(a)(2). Plaintiffs do not consent. The Rule further provides, however, that “[t]he court should freely give leave when justice so requires.” *Id.* The United States Supreme Court has instructed that “this mandate is to be heeded.” *Foman v. Davis*, 371 U.S. 178, 182 (1962).

In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be “freely given.”

Id. However, there is no absolute right to amend. *Doe v. Cassel*, 403 F.3d 986, 990 (8th Cir. 2005).

Both parties cite *Hylton v. John Deere Company*, 802 F.2d 1011 (8th Cir. 1986). There, the Defendants filed an Answer to all four counts set forth in Plaintiffs’ Complaint. In Defendants’ Answer to Plaintiffs’ First Amended Complaint, however, Defendants inadvertently did not respond to Counts III and IV. *Id.* at 1015. The District Court found that justice required that leave be granted to Defendants to amend their Answer to respond to Counts III and IV, noting that granting leave to Defendants to amend their Answer “would result in little if any prejudice to the plaintiffs.” *Id.* The Eighth Circuit Court of Appeals affirmed.

In the instant action, Defendant cites *Hylton* for the proposition that “the Court upheld the grant of a motion for leave to amend where the defendants inadvertently--as in the present case--failed to answer two counts of a complaint.” *See Reply to Resistance* (docket number 31) at 2. For their part, Plaintiffs note that the defendants in *Hylton*

responded to all four counts in the initial complaint and, therefore, “the plaintiffs knew the defendants were disputing those allegations.” *See* Brief in Support of Resistance (docket number 28-2) at 8.

Absent consent of the adverse party, a party may amend its pleading only with “the court’s leave.” FED. R. CIV. P. 15(a)(2). However, “[t]he court should freely give leave when justice so requires.” *Id.* Thus, the FEDERAL RULES OF CIVIL PROCEDURE liberally permit amendments to pleadings. *Dennis v. Dillard Dept. Stores, Inc.*, 207 F.3d 523, 525 (8th Cir. 2000).

The right to amend is not, however, without limitation.

[T]here is no absolute right to amend and a court may deny the motion based upon a finding of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies in previous amendments, undue prejudice to the non-moving party, or futility.

Baptist Health v. Smith, 477 F.3d 540, 544 (8th Cir. 2007) (citing *Doe v. Cassel*, 403 F.3d 986 (8th Cir. 2005)).

There is no evidence in the instant action that allowing Defendant to respond to Count III of the Complaint will result in undue delay. The discovery deadline has not passed and there is no indication that an amended answer would cause a delay in the trial, now scheduled on June 16, 2008. Plaintiffs do not claim that Defendant is acting in bad faith, with a dilatory motive, or has repeatedly failed to cure deficiencies in previous amendments. Furthermore, there is no evidence that an amendment to Defendant’s Answer, permitting it to respond to Count III, will result in undue prejudice to the Plaintiffs.

Plaintiffs argue, however, that Defendant’s proposed amendment would be futile, since “[t]his Court has previously deemed all of the allegations in Plaintiffs’ Complaint not met with a responsive pleading to be admitted.” *See* Brief in Support of Resistance (docket number 28-2) at 10. “Futility is a valid basis for denying leave to amend.” *U.S. ex rel. Lee v. Fairview Health System*, 413 F.3d 748, 749 (8th Cir. 2005). When a court denies leave to amend on the ground of futility, it means that the court reached a legal conclusion

that the amendment could not withstand a motion for judgment on the pleadings. *In re Senior Cottages of America, LLC*, 482 F.3d 997, 1001 (8th Cir. 2007).

Plaintiffs essentially argue that the allegations contained in Count III of their Complaint have been established, as a matter of law, due to Defendant's failure to respond to Count III in its Answer. In support of their argument, Plaintiffs cite a footnote in the Court's ruling on Defendant's Motion for Summary Judgment. When the Court was considering the Motion for Summary Judgment, it deemed admitted the allegations in Count III, due to Defendant's failure to respond, citing FEDERAL RULE OF CIVIL PROCEDURE 8(d).¹ Defendant argues that Plaintiffs "overstate[] the Court's footnote in its summary judgment ruling." *See* Reply to Resistance (docket number 31) at 1.

Defendant concedes that in considering the Motion for Summary Judgment, the Court was "indisputably [] correct" in concluding, pursuant to Rule 8(d), that the allegations set forth in Count III were deemed admitted. Defendant argues, however, that it does not necessarily follow that the allegations remain admitted as a matter of law for the balance of the case. That is, Defendant argues that application of Rule 8(d) in considering the Motion for Summary Judgment does not preclude the Court from subsequently granting leave to amend pursuant to Rule 15(a).

The Court can find no authority in the Rules or the common law which preclude the granting of a motion for leave to amend, following the application of Rule 8(d). In the context of considering Defendant's Motion for Summary Judgment, the Court properly deemed admitted those allegations to which Defendant failed to respond. The Court concludes, however, that it retains discretion to consider a subsequent motion for leave to amend, allowing Defendant to respond to those allegations. There is a preference in the law that disputes be decided on their merits. *Quality Refrigerated Services, Inc. v. City of Spencer*, 908 F. Supp. 1471, 1488 (N.D. Iowa 1995).

¹Due to a restyling and renumbering of the FEDERAL RULES OF CIVIL PROCEDURE, the provisions previously found in Rule 8(d) are now found in Rule 8(b)(6).

As set forth above, the Court finds no evidence that granting the amendment will result in undue delay, or that Defendant is guilty of bad faith or dilatory motive, that it has failed to cure deficiencies by amendments previously allowed, or that undue prejudice will result to Plaintiffs by allowing the amendment. Furthermore, if the Court's application of Rule 8(d) in considering the Motion for Summary Judgment does not prevent the Court from later exercising its discretion to allow an amendment pursuant to Rule 15(a), then Plaintiffs' futility argument also fails. The Court concludes that the administration of justice requires Defendant be given an opportunity to amend its Answer and correct its inadvertent failure to respond to Count III of the Complaint. Therefore, the Motion for Leave to Amend will be granted.

ORDER

IT IS THEREFORE ORDERED that the Motion for Leave to File Amended and Substituted Answer (docket number 27) filed by the Defendant is hereby **GRANTED**. The Clerk of Court shall detach and separately docket the First Amended and Substituted Answer of D.C. Taylor Company (docket number 27-3).

DATED this 4th day of January, 2008.

JON STUART SCOLES
United States Magistrate Judge
NORTHERN DISTRICT OF IOWA