

TO BE PUBLISHED  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
WESTERN DIVISION

VIRGIL VAN STELTON, et al.,

Plaintiffs,

vs.

JERRY VAN STELTON, et al.,

Defendants.

No. C11-4045-MWB

***ORDER DENYING MOTION  
FOR LEAVE TO FILE FOURTH  
AMENDED COMPLAINT***

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Plaintiffs have filed a motion (Doc. No. 113) for leave to file a fourth amended complaint. The defendants have filed resistances (Doc Nos. 122, 123, 124 and 126). Having reviewed the parties' filings, I conclude that oral argument is not necessary. *See* Local Rule 7(c). For the reasons explained below, the motion will be denied.

***BACKGROUND***

Judge Bennett's order (Doc. No. 105) regarding the defendants' motions to dismiss contains a detailed recitation of the relevant factual and procedural background. Here, I will provide background information only to the extent relevant for consideration of the pending motion.

Plaintiffs filed this case on May 11, 2011. Their original complaint (Doc. No. 1) was filed *pro se* and included the following counts: (a) a claim by all plaintiffs for relief under 42 U.S.C. § 1983, (b) claims by plaintiff Virgil Van Stelton for false arrest, malicious prosecution and loss of consortium, (c) claims by Virgil Van Stelton and Alvin Van Stelton for intentional infliction of emotional distress, slander and "Interference with Right to Petition for Redress of Grievances." Plaintiffs sought, and obtained, an extension of their deadline for serving the summons and complaint. They then filed an

amended complaint (Doc. No. 6) on January 6, 2012. The amended complaint was similar to the original but added plaintiff Carol Van Stelton as a claimant with regard to the claims for intentional infliction of emotional distress, loss of consortium and slander (renamed to “Slander and Libel”). The named defendants filed answers (Doc. Nos. 8, 9 and 14) and the parties then submitted a proposed scheduling order and discovery plan, which was approved and entered (Doc. No. 19) on March 12, 2012. Trial was scheduled to begin June 3, 2013 (Doc. No. 20).

In response to a motion by plaintiffs (Doc. No. 25) to extend deadlines, a scheduling conference was scheduled for July 30, 2012. Before the conference, two attorneys filed appearances (Doc. Nos. 27, 28) for plaintiffs. Based on statements of counsel during that conference, I entered a new scheduling order and discovery plan (Doc. No. 32) that, among other things, established October 1, 2012, as the deadline for adding parties and amending pleadings. Because of the new scheduling order, trial was rescheduled for September 23, 2013 (Doc. No. 33).

Plaintiffs, now acting through counsel, filed a motion (Doc. No. 41) for leave to file a second amended complaint on October 1, 2012. I granted that motion on November 9, 2012. The second amended complaint significantly expanded on the factual allegations contained in the prior complaints and added a new party (the City of Sibley, Iowa). The new complaint contained the following causes of action, with each count having a unique combination of plaintiffs and defendants:

1. Deprivation of certain constitutional rights in violation of 42 U.S.C. § 1983
2. Violations of the Racketeer Influenced and Corrupt Organizations (RICO) Act
3. False arrest
4. Malicious prosecution
5. Slander and libel
6. Tortious interference with prospective economic advantage
7. Declaratory judgment and injunctive relief

Doc. No. 41-1. The second amended complaint alleged a conspiracy in which defendant Hansen, as the Osceola County Attorney, and defendant Weber, as the Osceola County Sheriff, abuse their powers and official positions to reward friends and punish adversaries. Plaintiffs allege that defendant DeKoter, an attorney in private practice, is part of the favored group and, therefore, is able to employ the alleged conspiracy to benefit himself and his clients. According to the plaintiffs, DeKoter's clients include, or have included, defendants Jerry Van Stelton and Eugene Van Stelton, as well as a trust established by the father of the Van Stelton brothers.

Plaintiffs further contend that DeKoter has used his relationship with the alleged Hansen-Weber conspiracy to cause actions that benefit the trust, and the Van Stelton defendants, while causing harm to the Van Stelton plaintiffs. For example, plaintiffs allege that DeKoter "encouraged the [Van Stelton defendants] to provoke incidents and make false reports" to Weber that led to plaintiff Virgil Van Stelton's arrest on May 11, 2009. Plaintiffs contend that Virgil Van Stelton was charged with trespass and assault causing bodily injury but that all charges were later dismissed.

The second amended complaint also included sweeping allegations concerning the "Unified Law," which is described as the mechanism through which Osceola County funds governmental operations. Plaintiffs allege that the defendants are involved in a conspiracy to provide a disproportionate level of funding to the City of Sibley and that this alleged scheme benefits certain of the individual defendants. Plaintiffs contend that they associate with a citizen's organization that opposes the alleged scheme and that this association provides additional motivation for the defendants to take illegal actions against them.

When I permitted plaintiffs to file the second amended complaint, I also granted their motion (Doc. No. 40) to extend pretrial deadlines. I vacated the existing scheduling order, continued the September 23, 2013, trial date, and ordered the parties

to submit a proposed new scheduling order and discovery plan. I reviewed, approved and filed the new scheduling order (Doc. No. 56) on November 26, 2012. That order included a deadline of February 1, 2013, for amending pleadings and adding parties. It also included a deadline of September 1, 2013, for the completion of discovery. Based on the new schedule, Judge Bennett rescheduled trial for February 10, 2014.

Some defendants filed answers (Doc. Nos. 57 and 58) to the second amended complaint. Others filed motions (Doc. Nos. 59 and 60) to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). In response to arguments raised in the motions to dismiss, plaintiffs filed a motion (Doc. No. 64) for leave to file a third amended complaint. The proposed third amended complaint sought to cure certain deficiencies described in the motions to dismiss. It also added a claim under Iowa's Ongoing Criminal Conduct statute (OCC). Although the motion for leave to file the third amended complaint was resisted, I granted it on January 3, 2013, and directed the defendants with pending motions to dismiss to file supplemental briefing to address how, if at all, the revised allegations impacted their arguments.

On July 17, 2013, Judge Bennett entered his ruling (Doc. No. 105) on the defendants' motions to dismiss. He dismissed the City of Sibley as a defendant. As for the other defendants, he dismissed some claims while finding that others were sufficiently plead. The dismissed claims included:

1. the RICO and OCC claims;
2. a First Amendment right to petition claim;
3. certain defamation claims; and
4. a fraud claim.

Four weeks after the ruling was filed, plaintiffs filed their present motion for leave to file a fourth amended complaint. Their proposed new complaint would, among other things:

1. reinstate the OCC claim;
2. reinstate the City of Sibley as a defendant;
3. add a claim of unjust enrichment;
4. replace a claim of tortious interference with prospective business advantage with two separate claims (tortious interference with inheritance rights and tortious interference with trust distribution);
5. dismiss one defendant (Gary Christians); and
6. add two new defendants (the Osceola County Public Safety Commission and the Osceola County Economic Development Commission).

*See* Doc. No. 113-3. In their motion, plaintiffs claim they have only recently discovered new information that supports the re-stated claims. They also state that their prior effort (in the third amended complaint) to plead the RICO and OCC claims together was “overly ambitious.” They characterize their proposed new complaint as being a “final, comprehensive and far more coherent” document.

### ***ANALYSIS***

Leave to amend a pleading “shall be freely given when justice so requires.” Fed. R. Civ. P. 15(a). There is, however, no absolute right to amend a pleading. *See, e.g., Hammer v. Osage Beach*, 318 F.3d 832, 844 (8th Cir. 2003); *Becker v. Univ. of Nebraska*, 191 F.3d 904, 908 (8th Cir. 1999); *Williams v. Little Rock Mun. Water Works*, 21 F.3d 218, 224 (8th Cir. 1994). Indeed, balanced against the liberal amendment policy of Rule 15(a) is the court's interest in enforcing its scheduling orders. Here, after granting multiple requests to extend previous deadlines, the court established February 1, 2013, as the deadline to amend pleadings and add parties. Scheduling orders may be modified only for “good cause.” Fed. R. Civ. P. 16(b)(4); *see also* Local Rule 16(f) (“The deadlines established by the Rule 16(b) and 26(f) scheduling order and discovery plan will be extended only upon written motion and a showing of good cause.”).

“The interplay between Rule 15(a) and Rule 16(b) is settled in this circuit.” *Sherman v. Winco Fireworks, Inc.*, 532 F.3d 709, 716 (8th Cir. 2008). The liberal

amendment standard contained in Rule 15(a) applies when a motion for leave to amend is filed within the time permitted by the court's scheduling order and discovery plan. Because plaintiffs' motion for leave to file the third amended complaint was filed before the deadline for amended pleadings, I applied the Rule 15(a) standard in granting that motion. *See* Doc. No. 70 at 2.

On the other hand, "[i]f a party files for leave to amend outside of the court's scheduling order, the party must show cause to modify the schedule." *Popoalii v. Corr. Med. Servs.*, 512 F.3d 488, 497 (8th Cir. 2008); *see also In re Milk Prods. Antitrust Litig.*, 195 F.3d 430, 437-38 (8th Cir. 1999) ("If we considered only Rule 15(a) without regard to Rule 16(b), we would render scheduling orders meaningless and effectively would read Rule 16(b) and its good cause requirement out of the Federal Rules of Civil Procedure.") (quoting *Sosa v. Airprint Sys., Inc.*, 133 F.3d 1417, 1419 (11th Cir. 1998)). Plaintiffs' current motion for leave to file the fourth amended complaint, and to thereby add two new defendants, was filed more than six months after the deadline for such actions. As such, Rule 15(a) does not apply. Instead, the proposed amendment may be allowed only if plaintiffs can establish good cause for the untimely action.

In *Sherman*, the Eighth Circuit Court of Appeals explained the Rule 16(b) "good cause" standard as follows:

"The primary measure of good cause is the movant's diligence in attempting to meet the order's requirements." *Rahn v. Hawkins*, 464 F.3d 813, 822 (8th Cir. 2006); *see also* Fed.R.Civ.P. 16(b), advisory committee note (1983 Amendment) ("[T]he court may modify the schedule on a showing of good cause if it cannot reasonably be met despite the diligence of the party seeking the extension."). While the prejudice to the nonmovant resulting from modification of the scheduling order may also be a relevant factor, generally, we will not consider prejudice if the movant has not been diligent in meeting the scheduling order's deadlines. *See Bradford v. DANA Corp.*, 249 F.3d 807, 809 (8th Cir. 2001) (concluding that there was "no need to explore beyond the first criterion, [diligence,] because the record clearly demonstrate[d] that Bradford made only minimal efforts to satisfy the

[scheduling order's] requirements"). Our cases reviewing Rule 16(b) rulings focus in the first instance (and usually solely) on the diligence of the party who sought modification of the order. *See, e.g., Rahn*, 464 F.3d at 822 (affirming the district court's denial of Rahn's request for a modification of the scheduling order because the record made clear that Rahn did not act diligently to meet the order's deadlines); *Barstad v. Murray County*, 420 F.3d 880, 883 (8th Cir. 2005) (affirming the district court's denial of leave to amend the Barstads' complaint under Rule 16(b) because the Barstads had eight months to request an amendment of the scheduling order and "knew of the claims they sought to add when they filed the original complaint"); *Freeman v. Busch*, 349 F.3d 582, 589 (8th Cir. 2003) (affirming, under Rule 16(b), the district court's denial of Freeman's motion to amend her complaint because she provided no reasons why the amendment could not have been made earlier or why her motion to amend was filed so late).

*Sherman*, 532 F.3d at 716-17. Under this "good cause" standard, the Eighth Circuit held that leave to add a new defense should have been denied, as such leave was not sought until almost eighteen months after the deadline to amend pleadings had expired. *Id.* at 717-18.

This court, in applying *Sherman*, has held that good cause for an untimely amendment under Rule 16(b) "requires a showing that, despite the diligence of the movant, the belated amendment could not reasonably have been offered sooner." *Transamerica Life Ins. Co. v. Lincoln Nat'l Life Ins. Co.*, 590 F. Supp. 2d 1093, 1100 (N.D. Iowa 2008) (citing *Sherman*). Under that standard, the issue is not even close in this case. Plaintiffs offer two general explanations for their untimely motion, neither of which is remotely persuasive.

First, plaintiffs devote several paragraphs of their motion to a general recitation of various recent discoveries that, allegedly, support the newly-stated claims. With one exception, discussed below, they do not explain why the information could not have been discovered earlier. Nor do they provide any details as to how the new information actually supports new allegations in the proposed amended complaint. Instead, they

simply make conclusory comments to the effect that the new information justifies the amendments.

The exception involves an Iowa Appeal Board ruling filed April 30, 2013. Clearly, plaintiffs could not have discovered or anticipated that ruling until it was actually issued. Even with regard to that ruling, however, plaintiffs do not explain the correlation between that ruling and the proposed amendment. What are material allegations in the proposed, fourth amended complaint that could not have made prior to April 30, 2013? Plaintiffs do not say. Nor do they explain why, if that ruling is so significant to their claims, they waited more than three months after the ruling was issued before seeking leave to amend.

Second, plaintiffs state that the fourth amended complaint is necessary because, in light of Judge Bennett's recent ruling, they now realize that they erred by pleading the OCC and RICO claims together. They refer to their prior pleading as "overly ambitious" and state that the OCC claim was, in fact, properly plead. However, they believe that the "insufficiently pleaded RICO claim eclipsed the sufficiency of the [OCC] claim." In other words, plaintiffs believe the third amended complaint stated a perfectly valid OCC claim and that Judge Bennett ruled otherwise simply because they confused him by pleading the RICO and OCC claims together.

This theory has no basis in the record. Judge Bennett analyzed the OCC claim separately and found that the third amended complaint failed to sufficiently allege two key elements of that claim. Doc. No. 105 at 52-54. Nothing in his analysis suggests that his decision was based on some kind of confusion or uncertainty arising from the fact that plaintiffs plead the OCC and RICO claims together. And, frankly, even if plaintiffs' theory was correct, it would not justify an untimely amendment. They are not entitled to file an untimely amended complaint, reinstating an already-dismissed claim, simply because they did a poor job of pleading that claim in the previous complaint. Indeed,

plaintiffs filed their third amended complaint in direct response to issues raised in defendants' motions to dismiss.<sup>1</sup> That complaint was the document that, supposedly, would cure and resolve all deficiencies. Now that the motions to dismiss have been ruled upon, plaintiffs are not entitled to try yet again with yet another amended complaint.

Plaintiffs have failed to show that despite their exercise of diligence, the belated amendment could not reasonably have been offered sooner. Instead, it is apparent that plaintiffs, having fought hard to resist the motions to dismiss, now seek to hit the reset button and undo the consequences of the ruling on those motions. Because they have not shown good cause to permit an untimely amendment, their motion must be denied.

The lack of good cause makes it unnecessary to address the issue of prejudice. *Sherman*, 532 F.3d at 717. Nonetheless, I do make the additional finding that substantial, unfair prejudice would result to the defendants if plaintiffs are permitted to file the fourth amended complaint. This case has been on file for nearly two-and-a-half years. Discovery is now closed. Adding new claims, reinstating a dismissed claim and adding new parties would undoubtedly cause more delays and further expense. If the amendment is allowed, discovery would have to be reopened and two new parties would have to start from scratch. Those parties would have the right to file pre-answer motions and to engage in discovery, including depositions, that the other parties have already completed. The existing parties would likewise have the right to file pre-answer motions with regard to the fourth amended complaint. And, of course, they would have the right to conduct discovery concerning the new claims. All of this would require another substantial continuance of trial and expose the defendants to significant, additional litigation expenses.

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<sup>1</sup> In their motion for leave to file the third amended complaint, plaintiffs stated that the purpose of that proposed complaint was to address concerns previously voiced by the court and deficiencies identified by the defendants. Doc. No. ¶¶ 3, 14.

Plaintiffs have had ample time to investigate their claims and have already been given many opportunities to plead them. Many of their claims have survived the defendants' motions to dismiss. The expense and delay that would result from allowing plaintiffs to add new claims and new parties at this stage of the case is not justified.

***CONCLUSION***

For the reasons explained above, plaintiffs' motion (Doc. No. 113) for leave to file a fourth amended complaint is **denied**.

**IT IS SO ORDERED.**

**DATED** this 9th day of September, 2013.



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LEONARD T. STRAND  
UNITED STATES MAGISTRATE JUDGE