

FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

2023 AUG -6 PM 4:25
CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

CHARLESTON AREA MEDICAL CENTER, INC.,
Plaintiff,

vs.

Civil Action No.: 22-C-359
Presiding: Judge Nines
Resolution: Judge Akers

WEST VIRGINIA UNITED HEALTH SYSTEM,
INC., d/b/a WEST VIRGINIA UNIVERSITY
HEALTH SYSTEM, and WVU HEALTH SYSTEM;
THOMAS HEALTH SYSTEM, INC. d/b/a
THOMAS HEALTH; HERBERT J. THOMAS
MEMORIAL HOSPITAL;
CHARLESTON HOSPITAL, INC. d/b/a SAINT
FRANCIS HOSPITAL; THS PHYSICIAN
PARTNERS, INC.; PULMONARY ASSOCIATES
OF CHARLESTON PLLC, d/b/a CRITICAL
CARE, PLLC, TRAKE, LLC; PHILLIP COX, D.O.,
an individual; KEVIN EGGLESTON, M.D., an
individual; ROBBY KEITH, M.D., an individual;
JAMES D. PERRY, III, D.O., an individual;
TAMEJIRO "TOM" TAKUBO, D.O., an individual;
RYAN WADDELL, D.O., an individual; and W.
ALEX WADE, M.D., an individual,
Defendants.

ORDER GRANTING PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

Pending is the motion of Plaintiff Charleston Area Medical Center, Inc. ("CAMC") for Leave to Amend Complaint, filed on or about July 21, 2023.

Plaintiff CAMC filed its original Complaint on May 3, 2022, by way of filing its Motion for Leave to File Complaint and Various Exhibits thereto Under Seal. The Court notes leave was granted to file the Complaint on July 13, 2022. CAMC's original Complaint asserts ten causes of action against three groups of Defendants. First, the PAC Defendants consists of Defendant Pulmonary Associates of Charleston PLLC ("PAC"), Defendant Phillip Cox, D.O., Defendant Kevin Eggleston, M.D., Defendant Robby Keith, M.D., Defendant James D. Perry, III, D.O., Defendant Tamejiro "Tom" Takubo, D.O., Defendant Ryan Waddell, D.O., Defendant W. Alex

SCANNED

Wade, M.D., (collectively referred to as the “PAC Physicians”), and Defendant Trake, LLC (“Trake”). *See* Pl’s Mot., p. 2. Second, the Thomas Defendants consist of Defendant Thomas Health System, Inc., d/b/a Thomas Health (“Thomas Health”), Defendant Herbert J. Thomas Memorial Hospital Association d/b/a Thomas Memorial Hospital (“Thomas Hospital”), Defendant Charleston Hospital, Inc. d/b/a Saint Francis Hospital (“St. Francis”), and Defendant THS Physician Partners, Inc. (“THSPP”). *Id.* Finally “WVU Health” consists of Defendant West Virginia United Health System, Inc., d/b/a West Virginia University Health System and Defendant WVU Health System. *Id.*

Plaintiff proffers the claims in the original Complaint seek to recover damages resulting from the alleged conduct of Defendants’ in preventing CAMC’s acquisition of substantially all of PAC’s assets and the lease of Trake’s building located in Kanawha County, West Virginia. *Id.* at 2-3. Specifically, Counts I through V assert breach of contract claims against the PAC Defendants arising from an alleged bad faith termination of the Asset Purchase Agreement (“APA”) in February 2022, as well as alleged failure to honor other contractual obligations allegedly owed to CAMC under a February 2021 Letter of Intent (“LOI”) and other agreements. *Id.* at 3. Further, in Count X, CAMC asserts breach of contract and declaratory judgment claims against Trake arising out of alleged breaches of a Lease Agreement of the subject building. *Id.* In Counts VI and VII of the original Complaint, CAMC alleged causes of action for tortious interference against WVU Health and the Thomas Defendants arising out of alleged interference with CAMC’s contractual relationships with the PAC Defendants. *Id.* In Count VIII and Count IX, CAMC alleged claims for civil conspiracy and aiding and abetting against each Defendant. *Id.*

The Court notes on a prior day, the Thomas Defendants asserted a Counterclaim against CAMC, and on July 20, 2022, the Thomas Defendants filed an Amended Counterclaim against CAMC. *Id.* Shortly thereafter, PAC and Trake filed motions to dismiss Plaintiff’s Complaint.

Briefing occurred and the matter was referred to the Business Court Division. In its Response to the motions to dismiss, CAMC partially withdrew Count IV. Plaintiff proffers it did not withdraw its claim against Defendant Takubo arising from his alleged breach of a non-compete provision in his April 2021 Employment Agreement with CAMC. *Id.* at 4.

Following the adjudication of the pending motions to dismiss, the PAC Defendants moved to file an Answer and Counterclaim under seal on May 26, 2023, which request was granted on May 31, 2023. Plaintiff proffers the PAC Defendants' Counterclaim asserts four counts: Count I, a claim that CAMC allegedly breached the APA by failing to satisfy certain condition precedents; Count II, an affirmative defense of the first breach doctrine; Count III, Defendant Takubo claims that CAMC is liable for alleged fraud in connection with its termination of his April 2021 Employment Agreement; and Count IV, Defendant Takubo claims that CAMC allegedly breached his April 2021 Employment Agreement by terminating him without the correct notice. *Id.* at 5.

Subsequently, Plaintiff now seeks leave of the Court to file an Amended Complaint and amend Count IV to reflect the partial withdrawal and to assert additional claims against Defendant Takubo stemming from alleged duties owed by virtue of his employment. *Id.* at 6.

The parties have fully briefed the issues necessary. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

CONCLUSIONS OF LAW

As an initial matter, Rule 7 of the West Virginia Rules of Civil Procedure governs pleadings allowed. Rule 7(a) provides as follows:

- (a) Pleadings.** There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person

who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

W. Va. R. Civ. P. 7.

Rule 13 of the West Virginia Rules of Civil Procedure governs counterclaims and cross-claims. Rule 13 provides, in pertinent part: "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." W. Va. R. Civ. P. 13.

The Court concludes the West Virginia Rules of Civil Procedure do not allow for a Counterclaim to the Counterclaim and the Court declines to analyze Plaintiff's proposed claims as a compulsory counterclaim to an existing counterclaim. Specifically, Rule 13, which governs counterclaims, does not provide for a counterclaim to the counterclaim by the Plaintiff who was counterclaimed against. Additionally, the Court notes a Counterclaim to the Counterclaim is not listed in the permitted pleadings enumerated in Rule 7.

The Court finds that if CAMC, as Plaintiff in this civil action, wishes to assert a new claim against any Defendants, CAMC must go through the proper channels for amending its original pleading, as governed by Rule 15. The Court therefore analyzes CAMC's request to amend its Complaint to assert the above-mentioned claims under Rule 15 of the Rules of Civil Procedure. The Court finds this would be appropriate procedurally, whereas CAMC counterclaiming a Defendant(s)' counterclaim against would not.

Rule 15 of the West Virginia Rules of Civil Procedure governs amended and supplemental pleadings. Rule 15 provides that such leave shall be "freely given" by the Court. W. Va. R. Civ. P. 15(a).

Rule 15 of the West Virginia Rules of Civil Procedure provides, in pertinent part,
...a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires...

W. Va. R. Civ. P. 15.

Further, the rule of civil procedure that leave to amend a pleading “shall be freely given when justice so requires” is to be liberally construed to promote substantial justice and to secure the just, speedy, and inexpensive determination of every action. *Perdue v. S. J. Groves & Sons Co.*, 152 W. Va. 222, 161 S.E.2d 250 (1968). “The purpose of the words ‘and leave [to amend] shall be freely given when justice so requires’ in Rule 15(a) W. Va. R. Civ. P., is to secure an adjudication on the merits of the controversy as would be secured under identical factual situations in the absence of procedural impediments; therefore, motions to amend should always be granted under Rule 15 when: (1) the amendment permits the presentation of the merits of the action; (2) the adverse party is not prejudiced by the sudden assertion of the subject of the amendment; and (3) the adverse party can be given ample opportunity to meet the issue.” Syl. pt. 3, *Rosier v. Garron, Inc.*, 156 W.Va. 861, 199 S.E.2d 50 (1973). Syl. Pt. 6, *Berry v. Nationwide Mut. Fire Ins. Co.*, 181 W.Va. 168, 381 S.E.2d 367 (1989); *see also*, Franklin D. Cleckley, Robin J. Davis & Louis J. Palmer, *Litigation Handbook on West Virginia Rules of Civil Procedure* § 334 (2002); *Boggs v. Camden-Clark Mem’l Hosp. Corp.*, 216 W. Va. 656, 609 S.E.2d 917 (2004) *holding modified on other grounds by Gray v. Mena*, 218 W. Va. 564, 625 S.E.2d 326 (2005).

Applying the standard outlined in *Rosier* and *Boggs*, this Court analyzes as follows. First, the proposed amendment to the Complaint permits the presentation of the merits of the action, because it will further the presentation of the merits of Plaintiff’s Complaint against Defendant Takubo. The Court notes the existing and proposed causes of action surround the same factual issue of alleged wrongful conduct of Defendants’ in preventing CAMC’s

acquisition of substantially all of PAC's assets and the lease of Trake's building located in Kanawha County, West Virginia, including the alleged breach of certain agreements, including an employment agreement with Dr. Takubo. Further, the Court notes the additional claims in its proposed amended complaint are directed at a single Defendant, Defendant Takubo. *See* Pl's Mot., p. 1.

Second, the amending of the Complaint as described above will not prejudice Defendants by the sudden assertion of the subject of the amendment. As noted above, the causes of actions surround the same factual background and are directed at one Defendant. Further, the Court notes while arguing the proposed amendment is dilatory and vague/insufficient, Defendants, in their Joint Response, did not proffer evidence or argument to the Court that any of them, much less Defendant Takubo specifically, would be prejudiced by such an amendment at this stage. At any rate, the Court finds the proposed amendment would not be prejudicial to Defendants, given that the facts arise from the same conduct between Defendants and Plaintiff, the early stage of litigation this civil litigation is currently in, the fact that there is no scheduling order currently in place, and the fact that no deadline for amendments has passed.

Finally, third, Defendants will have ample time to meet the issue, because they will have ample time to respond, a scheduling order is forthcoming in this matter, and much discovery will not need to be expanded upon or re-started (Plaintiff has proffered no depositions have taken place). *See* Pl's Mot., p. 8. The Court finds amending the Complaint in this manner will not limit Defendants' access to evidence or witnesses. The Court notes Defendants argued that CAMC was dilatory in seeking an amendment, but finds that argument without merit as the instant motion was brought soon after the orders disposing of the motions to dismiss and contemporaneously with CAMC's Answer to PAC's Counterclaim, and finds the Court must

allow for amendment, keeping in mind the presumption and standard that amending the Complaint is leave that shall be “freely given” under Rule 15.

The Court hereby GRANTS CAMC’s request for amendment, and concludes and orders that such amended complaint (which the Court notes was attached to the instant motion as Exhibit A) shall be filed within twenty (20) days of entry of this order. Considering the original complaint in this matter was granted leave to be filed under seal, the Court hereby GRANTS Plaintiff leave to file the Amended Complaint UNDER SEAL if it wishes to do so.

Finally, the Court addresses Defendants’ other arguments in its Joint Response as to the merits of the proposed amended complaint, and concludes that such findings by this Court would be premature at this time. The Court is granting CAMC’s request to file an amendment to its complaint to add claims against Defendant Takubo. If at the time of the filing of the amended complaint, Defendants opine that a cause of action pled in the amended complaint fails to state a claim or requires a more definite statement, they may file a motion under the proper rule at that time. The Court will then fully brief said motion and consider the arguments and rebuttal. Since the amended complaint has not been filed yet, to dismiss any claims or order a more definite statement be filed would be premature at this time. For this reason, the Court will not grant Defendants’ requested relief under this basis.


CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that CAMC’s Motion for Leave to File Amended Complaint is hereby GRANTED. The Court does hereby ORDER CAMC’s Amended Complaint to be filed within 20 days of the entry of this Order. The Court further grants Plaintiff leave to file the Amended Complaint UNDER SEAL if it wishes to do so.

The Court notes the objections and exceptions of the parties to any adverse ruling herein. The Clerk shall enter the foregoing and forward attested copies hereof to all counsel, all *pro se*

parties, and to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

ENTERED this 4th day of Aug 2023.


JUDGE SHAWN D. NINES
JUDGE OF THE WEST VIRGINIA
BUSINESS COURT DIVISION

Date: 8/4/23
Certified copies sent to:
____ counsel of record P. Combs
____ parties A. Cooke
____ other (please indicate) R. Miller
By: J. Hume
____ certified/1st class mail
____ fax
____ hand delivery
____ interdepartmental
Other directives accomplished: C. Miller, Bus. Ct.
[Signature]
Deputy Circuit Clerk