

Not Intended for Print Publication

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

NKR, INC., ETC.,)	
)	
Plaintiff,)	Case No. 1:04CV00104
)	
v.)	OPINION AND ORDER
)	
THE FORESTLAND GROUP, LLC, ET AL.,)	By: James P. Jones
)	Chief United States District Judge
)	
Defendants.)	

H. Ritchey Hollenbaugh, Carlile Patchen & Murphy LLP, Columbus, Ohio, for Plaintiff; Linda D. Frith, Frith Anderson & Peake, P.C., Roanoke, Virginia, for Defendant The Forestland Group, LLC; Steven R. Minor, Elliott Lawson & Minor PC, Bristol, Virginia, for Defendant Oak Crest Investments, LLC; Wade W. Massie, Penn, Stuart & Eskridge, Abingdon, Virginia, for Defendant Karl K. Kindig.

In this civil case, the defendants have moved to exclude any testimony by the plaintiff's damages expert, on the ground that its disclosure was not timely. In response, the plaintiff has moved to amend the complaint to add additional parties and for a continuance or dismissal without prejudice. I will deny all of the motions.

I

This action was filed in the United States District Court for the Southern District of Ohio on November 21, 2003, by plaintiff NKR, Inc., doing business as

Ohio Valley Lumber (“NKR”). NKR alleged that previously it had entered into a joint venture with defendant The Forestland Group, LLC (“Forestland”) to purchase certain business property located near Pound, Virginia, in this judicial district. It alleged that the property was composed of natural gas rights, timber, a sawmill, and a chipmill, and that the agreement provided that NKR and Forestland, together with a third party, Alpha Natural Resources, would submit a joint bid for the combined property, and if the bid were successful, NKR would receive the sawmill and chipmill as part of the agreement.

NKR claimed that in reliance on this agreement, it provided a financial analysis of the mill operations to the other parties in preparation for the bidding. According to NKR, the joint bid was made by Alpha Natural Resources and accepted by the owner, but NKR thereafter learned that it had been “cut-out [sic] of the joint venture and excluded from the deal.” (Compl. ¶ 29.) NKR claimed that defendant Oak Crest Investments, LLC replaced it and purchased the mill operations. NKR alleged that defendant Karl K. Kindig was the attorney for Forestland and was a principal in Oak Crest Investments, LLC, and “was closely involved in wrongfully taking a business opportunity from the joint venture and from its partner, [NKR], for the sole benefit of his company, Oak Crest.” (*Id.* ¶ 35.)

NKR alleged causes of action based on breach of contract, breach of fiduciary duty, tortious interference with a business relationship, unjust enrichment, and civil conspiracy. It sought a declaratory judgment and compensatory and punitive damages.

After proceedings in the Ohio court, the case was transferred to this venue on August 9, 2004. On October 12, 2004, a Scheduling Order was entered by this court, setting a trial date to begin on August 29, 2005, with a discovery cut-off date of June 1, 2005. The Scheduling Order also required the plaintiff to disclose expert testimony as required by Federal Rule of Civil Procedure 26(a)(2) by March 15, 2005.

The plaintiff's expert disclosure was not timely made, and on March 30, 2005, defendant Kindig filed a Motion to Exclude Experts for Plaintiff. Similar motions were thereafter filed by defendants Forestland and Oak Crest Investments, LLC. A hearing was held on the motions to exclude on April 28, 2005. The following day, the plaintiff filed with the court an expert witness report by Rebekah A. Smith, an accountant and business consultant, who opined that the plaintiff suffered compensatory damages as a result of its loss of the business in the amount of \$5,815,000, determined by calculating the value of the property to be purchased, less the anticipated purchase price to be paid by the plaintiff.

The day before the hearing on the motions to exclude, the plaintiff filed a Motion for Leave to File Amended Complaint and a Motion for Continuance of this Court's Scheduling Order, or in the Alternative, a Motion for Voluntary Dismissal. The defendants were given additional time to brief these new motions and the plaintiff was given an opportunity to reply. All of the motions, including the motions to exclude expert testimony filed by the defendants, were taken under advisement pending such briefing. The additional briefs have been filed and the motions are now ripe for decision.

II

It is appropriate to consider first the plaintiff's motions, although they were filed following the defendants' motions to exclude.

The motion seeking leave to amend the complaint and the motion for a continuance have a common basis. The plaintiff now believes that it named the wrong entity as the purchaser of the mill operations. In its proposed Amended Complaint, therefore, it drops Oak Crest Investments, LLC and in its place adds an entity named Mountain Forest Products, LLC, because, it alleges

Through discovery, [NKR] has now learned that Oak Crest Investments, LLC, changed their [sic] name to Mountain Forest

Products, LLC, and it was Mountain Forest who was the ultimate purchaser of the Mill Operations.

(Am. Compl. ¶ 38.)

The proposed Amended Complaint also seeks to add another entity, Heartwood Forestland Fund IV, L.P., and three individuals, Stephen W. Morris, Howard Parsons, and Walter B. Crickmer, who it alleges are members of Mountain Forest Products, LLC, along with Karl K. Kindig. However, the proposed Amended Complaint does not state the basis for any possible claims against Heartwood Forestland Fund IV, L.P. or the three new individuals, nor does it actually seek any relief against any of them.¹

The defendants object to filing the Amended Complaint. They point out that Oak Crest Investments, LLC is not simply an earlier name for Mountain Forest Products, LLC, but a separate entity. They contend that NKR knew or should have known that Oak Crest Investments, LLC was not the purchaser, and have supplied the court with copies of documents, including the publically recorded deed, as well as press releases and news reports, that disclosed that fact.

¹ In its motion for leave to amend, NKR does state that The Forestland Group, LLC, was “operating through a limited partnership, Heartland Forestland Fund, IV, L.P.” and that Heartland Forestland Fund, IV, L.P. “acquired part of the property in the purchase,” whatever any of that means. (Mot. for Leave to File Am. Compl. 3.) None of that information is included in the proposed Amended Complaint.

In response, NKR now concedes that the party it originally sued, Oak Crest Investments, LLC, was not the purchaser (Plt.'s Reply Mem. 2), although it believes that "some entity related and/or association [sic] with Oak Creek changed its name to Mountain Forest Products, LLC." (*Id.*)

Leave to amend a pleading "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a); *see Foman v. Davis*, 371 U.S. 178, 182 (1962). In the present case, however, I agree with the defendants that it would be unjust to allow the amendment. This case has been pending for some time; the discovery deadline is less than three weeks away and trial is set to begin August 29, 2005. Adding new parties to the case would substantially delay the final resolution of the litigation and be unfair to the defendants. The purchaser of the mill operations is not an essential party to the claims against the other defendants; indeed, it is difficult to see how the plaintiff can support its conspiracy and tortious interference claims against a purchaser when even now it is uncertain of the actual identity of that party. To start the case anew against the additional parties would prolong the litigation and result in additional expense to everyone involved. *See Deasy v. Hill*, 833 F.2d 38, 42 (4th Cir. 1987) (holding that trial court did not abuse its discretion in refusing amendment that would require additional discovery and delay imminent trial).

For similar reason, I will deny the Motion for Continuance. The plaintiff has shown no good cause to extend discovery, which likely would require a continuance of the other scheduling dates, including the trial date.

Finally, I will deny the plaintiff's alternative request that it be allowed to take a voluntary dismissal without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2), in order to permit it to further investigate and prepare its case. It is pellucid that the defendants have incurred substantial time and expense in trial preparation and that the plaintiff has an insufficient explanation for its failure to move expeditiously in the pretrial stages of this case. The defendants should not be subjected to further delay and expense, particularly where the fault for any lack of preparation lies with the plaintiff. *See Teck Gen. P'ship v. Crown Cent. Petroleum Corp.*, 28 F. Supp. 2d 989, 993 (E.D. Va. 1998) (denying motion for dismissal without prejudice where plaintiff claimed that it had inadequate time to conduct discovery against a defendant inadvertently omitted).

III

The plaintiff filed its expert disclosure late and while it attempts to justify that late filing by blaming the defendants for failing to supply adequate information needed by the expert, I find that explanation without merit. There is no clear

evidence that the defendants delayed in providing information. In addition, the expert's report shows that her opinion is not based on the information from the defendants, but on data already known to the plaintiff. While the plaintiff contends that she might have used the information it claimed was late if that information had been helpful, that does not explain why the expert's report could not have been timely filed, subject to later amendment if necessary.

Where a violation of a court-imposed scheduling deadline occurs without justification, as has happened in this case, the court has a wide range of sanctions available, including barring the expert's testimony. *See Akeva L.L.C. v. Mizuno Corp.*, 212 F.R.D. 306, 309 (M.D.N.C. 2002).

Under the circumstances of this case, I will not exclude the expert's testimony. The opinion stated by the expert is not complex and I am advised that her discovery deposition has or will shortly be taken by the defendants. In order to minimize any prejudice, however, I will extend the time for the defendants to disclose expert testimony as to the question of damages until June 15, 2005. That is an adequate sanction under the circumstances.

IV

For the reasons stated, it is **ORDERED** as follows:

1. The Motions to Exclude Experts by the defendants are DENIED;
2. The deadline for the defendants to disclose expert testimony relating to damages as required by Federal Rule of Civil Procedure 26(a)(2) is extended to and including June 15, 2005; and
3. The plaintiff's Motion for Leave to File Amended Complaint and Motion for Continuance of this Court's Scheduling Order, or in the Alternative, a Motion for Voluntary Dismissal are DENIED.

ENTER: May 11, 2005

/s/ JAMES P. JONES
Chief United States District Judge