

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II
CIVIL ACTION NO. 13-CI-1060

NORTON HEALTHCARE, INC.

PLAINTIFF

v.

UNIVERSITY OF LOUISVILLE

DEFENDANT

PLAINTIFF'S RENEWED MOTION FOR LEAVE TO AMEND COMPLAINT

Plaintiff, Norton Healthcare, Inc. ("Norton"), respectfully renews its motion pursuant to CR 15.01 for an Order granting it leave to amend its Complaint. Leave should be liberally granted in accordance with Kentucky policy. Norton's proposed amendment is not futile, would not prejudice U of L, and will not result in any injustice.

Specifically, Norton seeks leave to amend its Complaint to add a claim for breach of contract (and the implied covenant of good faith and fair dealing) arising out of U of L's breach of the parties' settlement agreement, which was reached on January 17, 2014 following months of settlement negotiations while this case was stayed. Norton originally sought leave to amend on February 6, 2014, but the Court stayed the case and "held in abeyance" that motion pending the outcome of the parties' mediation. Norton has filed a motion to lift the stay, and seeks leave to amend its Complaint in the manner previously proposed and to assert certain additional allegations based on recent events.

As set forth in the attached First Amended Complaint, the parties reached a settlement agreement on January 17, 2014 and confirmed it in writing on January 20, 2014. However, on January 21, U of L repudiated the settlement agreement, demanding that Norton agree to an "addendum" containing numerous additional terms that were not part of the settlement

agreement, precisely because the parties had concluded that they could not reach agreement on them. U of L then further repudiated the settlement agreement on January 24, claiming that the parties were “awfully close” to a settlement and that an agreement was “imminent,” but denying that an agreement was reached, and again on January 29, by filing its Answer and Counterclaims. Because U of L disputes that a settlement agreement was reached, an evidentiary hearing and discovery will be required. For that reason, Norton has sought to raise its claim by amended complaint, rather than by a motion to enforce.

In addition to asserting a claim for breach of the settlement agreement, Norton seeks leave to update and clarify certain allegations and requests for relief related to Norton’s original claim for declaratory judgment, including allegations related to U of L’s affiliation agreement with KentuckyOne and Norton’s financial support to U of L, and to include certain allegations based on recent events. As demonstrated below, the Court should grant Norton’s motion in accordance with Kentucky’s policy of “liberality” in granting amendments to pleadings.

Procedural Background

Norton was forced to file its Complaint on September 6, 2013, in response to U of L’s threat to seek to evict Norton from Kosair Children’s Hospital, the primary pediatric hospital in the Commonwealth. U of L’s threats, which U of L does not have standing to make, created a cloud of uncertainty and threatened to disrupt the medical care for thousands of children in Kentucky as well as Norton’s orderly administration of the hospital. Norton sought a declaration that U of L has no legal right to carry out its threats.

On September 25, the parties entered into a Tolling Agreement to stay all aspects of the litigation while they engaged in settlement discussions. The parties amended and restated the Tolling Agreement three times, extending the stay through January 15, 2014. During that time, the parties engaged in numerous settlement discussions, including a four-day retreat in

Covington, Kentucky, attended by both parties' senior executives, transactional counsel, and litigation counsel.

On January 17, 2014, the parties reached an oral settlement agreement, which was confirmed in writing by both parties on January 20. (Ex. A, Proposed First Amended Complaint at ¶¶ 25-36.) The parties also amended and restated the Tolling Agreement again, to allow time to seek the Commonwealth's approval of the parties' proposed amendment to the land lease, as agreed in the settlement agreement. However, on January 21, U of L reneged on the settlement agreement, demanding that Norton agree to an "addendum" containing numerous terms that were not part of the settlement agreement. (*Id.* ¶ 33.) On January 24, U of L claimed that the parties were "awfully close" to a settlement and that an agreement was "imminent," but asserted that no settlement was reached and terminated the Tolling Agreement. (*Id.* ¶ 35.) On January 29, in further repudiation of the settlement agreement, U of L filed its Answer and Counterclaims.

Also on January 29, U of L filed a Motion for Order of Mediation, to which Norton responded on February 3. U of L also filed an Amended Answer and Affirmative Defenses. On February 6, 2014, Norton filed a Motion for Leave to Amend Complaint.

On February 12, 2014, the Court ordered this case to mediation and stayed the case in its entirety pending the outcome of the mediation. (Ex. B, 2/14/14 Order at 2.) The Court also "held in abeyance" Norton's Motion for Leave to Amend Complaint. (*Id.* at 1.)

To date, the parties have not taken any discovery, with the exception of the written discovery the parties served before execution of the first Tolling Agreement. As provided in the Court's February 14, 2104 Order, the parties' responses to that discovery are due twenty-one (21) days after the mediator submitted his final report to the Court. (*Id.* at 2.)

Argument

Kentucky Rule of Civil Procedure 15.01 provides that leave to amend “shall be freely given when justice requires.” CR 15.01. Although the Court retains discretion, “liberality in granting leave to amend is desirable[.]” *Bradford v. Billington*, 299 S.W.2d 601, 603 (Ky. 1957). Among other factors, the Court may consider whether the amendment would cause prejudice to another party, result in injustice, or be futile. *Kenney v. Hanger Prosthetics & Orthotics, Inc.*, 269 S.W.3d 866, 869 (Ky. App. 2007).

The amendments Norton seeks to make will not prejudice U of L or result in any injustice. Norton could not have brought its claim for breach of the settlement agreement prior to February (when Norton filed its original Motion for Leave To Amend Complaint, which was “held in abeyance”), because the claim did not exist. Further, because the case was stayed for settlement discussions and later a mediation, the case is still at the pleading stage and the parties have not taken any discovery. On the other hand, if the amendment is not permitted, Norton will be severely prejudiced as it would be unable to enforce the parties’ settlement agreement. The remainder of Norton’s proposed amendment seeks merely to update and clarify allegations related to Norton’s original claim.

Additionally, Norton’s amendments are not futile. Under settled Kentucky law, oral settlement agreements are enforceable. *Frear v. P.T.A. Indus., Inc.*, 103 S.W.3d 99, 105-06 (Ky. 2003) (affirming lower court’s interpretation of oral settlement agreement which was subsequently memorialized in writing); *Barr v. Gilmour*, 265 S.W. 6 (Ky. 1924) (affirming jury finding that parties reached binding oral settlement agreement as evidenced by subsequent writing and testimony); *Schenkel & Schultz, Inc. v. Midwest Cons. Co.*, 2007 WL 2284809, at *3 (Ky. App. Aug. 10, 2007) (holding that evidentiary hearing was necessary to determine whether parties formed an oral agreement and, if so, which terms were included because subsequent

email was ambiguous as to the alleged agreement's terms); *Marshall v. Wise*, 2006 WL 3378477, at *1-2 (Ky. App. Nov. 22, 2006) (affirming enforcement of oral settlement agreement).

Here, the essential elements of a settlement agreement were reached, and it should be enforced. U of L has disputed that a settlement was reached, but that does not render Norton's claim futile. It just means that a trial will be necessary. For these reasons, Norton respectfully requests that the Court grant its motion for leave to file the attached First Amended Complaint.

NOTICE

Please take notice that the undersigned counsel for Plaintiff, Norton Healthcare, Inc. ("Norton"), will make the motion and tender the attached Order in the courtroom of the above Court on June 23, 2014, at 9:00 a.m.

Respectfully submitted,



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CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing Renewed Motion for Leave was delivered via email and U.S. mail on this the 16th day of June, 2014 to:

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ORDER GRANTING LEAVE TO AMEND

UNIVERSITY OF LOUISVILLE

DEFENDANT

* * * * *

Plaintiff, Norton Healthcare, Inc., having renewed its motion pursuant to CR 15.01 for an Order granting it leave to amend its Complaint,

IT IS SO ORDERED that Norton's motion is GRANTED. Norton's First Amended Complaint is deemed filed as of June __, 2014.

Entered: _____

Judge, Franklin Circuit Court

Tendered by:

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