STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 17 CVS 9998
W & W PARTNERS, INC., CHASE PROPERTIES, INC. Plaintiffs, v. FERRELL LAND COMPANY, LLC, FERRELL INVESTMENTS LIMITED PARTNERSHIP, DAVID S. FERRELL, and LUANNE FERRELL ADAMS, Defendants.	**ORDER ON PLAINTIFFS' MOTION FOR LEAVE TO AMEND THE SECOND AMENDED COMPLAINT**

THIS MATTER is before the Court on Plaintiffs' Motion for Leave to Amend the Second Amended Complaint. ("Motion", ECF No. 91.) Plaintiffs seek, at this late date in the progress of this matter, to renew two claims the Court previously dismissed from this lawsuit: a claim for unfair and deceptive trade practices ("UDTPA") against Ferrell Land Company, LLC and Ferrell Investment Limited Partnership, which the Court dismissed with prejudice; and a corporate veil piercing theory against David Ferrell and Luanne Ferrell Adams, which was dismissed without prejudice.

THE COURT, having considered the Motion, the briefs and materials filed in support of and in opposition to the Motion, and other appropriate matters of record, CONCLUDES, in its discretion, that the Motion should be DENIED, for the reasons set forth below.

I. FACTUAL AND PROCEDURAL BACKGROUND

1. The factual allegations in this case are set out fully in the Court's Order and Opinion on Defendants' Motion to Dismiss, ("Dismissal Order", ECF No. 65) and will not be repeated, here. For general context, this case arises from a dispute over an agreement to develop, market, and sell certain parcels of land in Wake County to be known as "the Carpenter Village Planned Unit Development".

2. Plaintiffs filed the original complaint on August 18, 2017, and subsequently filed a first amended complaint on September 29, 2017. (ECF Nos. 3, 9.) On October 27, 2017, Plaintiffs moved for leave to file the Second Amended Complaint, with the consent of Defendants, to correct "technical inaccuracies in certain allegations made in the Amended Complaint." (Mot. To Amend, ECF No. 10, at ¶ 7.) The Court granted the Motion to Amend, and Plaintiffs filed the Second Amended Complaint on October 27, 2017. ("SAC", ECF No. 13.)

3. The SAC alleged the following claims: breaches of contract; specific performance; piercing the corporate veil; UDTPA; constructive trust; and breach of listing agreement. The parties submitted a case management report on December 8, 2017. ("CMR", ECF No. 17.) In the CMR, the parties agreed: to file any amended pleadings or add additional parties "no later than January 31, 2018[,]" and to complete discovery by August 31, 2018. (ECF No. 17, at p. 4.) The Court accepted these deadlines in its Case Management Order entered on December 21, 2017. ("CMO", ECF No. 19.)

4. Defendants moved to dismiss all Plaintiffs' claims except for a claim based on alleged breach of listing agreement ("Motion to Dismiss"). (Defs.' MTD, ECF No. 23.) The Motion to Dismiss was fully briefed and argued by counsel at a hearing. (Defs.' Br. Supp. MTD, ECF No. 24; Pls.' Br. Op. Defs.' MTD, ECF No. 30; Defs.' Reply, ECF No. 52; Notice of Hearing, ECF No. 55.)

5. During the briefing period for the Motion to Dismiss, and after the CMO deadline for amending the pleadings had elapsed, Plaintiffs moved to modify the CMO to extend the deadline to amend the pleadings or add parties by ten days to allow Plaintiffs to determine whether they needed to further amend the SAC based on information learned on January 2, 2018 ("Motion to Amend CMO"). (ECF No. 42.) The Court denied the Motion to Amend CMO for failure to show good cause. (Order on Mot. to Amend CMO, ECF No. 46.)

6. On May 22, 2018, the Court granted, in part, and denied, in part, the Motion to Dismiss. (Op. and Or. On MTD, ECF No. 65.) The Court dismissed with prejudice Plaintiffs' UDTPA claim, but dismissed Plaintiffs' claim for piercing the corporate veil without prejudice.

7. Following the Order on the Motion to Dismiss, the Court granted the parties' consent motion to extend the discovery period by sixty days. (Order on Consent Mot. to Amend CMO, ECF No. 68.) The Court noted in that Order that no further extensions of the CMO deadlines would be granted "absent a showing of extraordinary circumstances." (*Id.*) Nonetheless, the Court extended the discovery deadlines in the CMO twice more, (ECF Nos. 75, 78), eventually extending the

discovery period through January 30, 2019. The final discovery deadline was over fifteen months after the SAC was filed, over thirteen months following entry of the CMO, and over eight months from entry of the Court's Order on the Motion to Dismiss.[1]

8. Plaintiffs and Defendants filed motions for summary judgment on March 1, 2019. (Pls.' Mot. for SJ, ECF No. 88; Defs.' Mot. for SJ, ECF No. 86.) Those motions are currently pending before the Court. Plaintiffs also filed the instant Motion on March 1, 2019. (ECF No. 91.)

9. Plaintiffs filed a supporting brief and exhibit with the Motion. (Br. Supp. Mot. to Amend SAC, ECF No. 93; Ex. A to Mot. to Amend SAC, ECF No. 92.) Defendants filed a Response in Opposition to Plaintiffs' Motion (ECF No. 102), and numerous exhibits in support of their opposition, (ECF Nos. 102.1–102.16), and Plaintiffs filed a Reply. (ECF No. 105.) Pursuant to rule 7.4 of the General Rules of Practice and Procedure for the North Carolina Business Court ("BCR"), the Court decides this motion without a hearing.

II. LEGAL STANDARD

10. The decision as to whether or not to grant a motion to amend is addressed to the sound discretion of the trial judge. *Rabon v. Hopkins*, 208 N.C. App. 351, 353, 703 S.E.2d 181, 184 (2010). North Carolina Rule of Civil Procedure (hereinafter "Rule(s)") 15(a) governs amendment of the pleadings and provides that

[1] The BCR place a presumptive limit on the discovery period, including both fact and expert discovery, of seven months from the date of the case management order. BCR 10.4(a).

amendment by leave of court "shall be freely given when justice so requires." N.C. Gen. Stat. § 1A-1, Rule 15(a).

11. Nevertheless, a court may deny a motion to amend for any of the following reasons: (a) undue delay, (b) undue prejudice, and (c) futility of amendment. *Members Interior Constr. v. Leader Constr. Co.*, 124 N.C. App. 121, 124, 476 S.E.2d 399, 402 (1996). The burden is upon the opposing party to establish that it would be prejudiced by the amendment. *Mauney v. Morris*, 316 N.C. 67, 72, 340 S.E.2d 397, 400 (1986).

III. ANALYSIS

12. Plaintiffs argue that certain facts revealed during the course of discovery justify their Motion to amend the SAC; that there was no undue delay in filing the Motion because Plaintiffs did not begin discovery until May 23, 2018 after the Court issued its Order on the Motion to Dismiss; that many depositions were delayed until January 2019 due to "scheduling issues"; that Defendants will not be prejudiced by the Plaintiffs' allegations and claims raised in the amendment because the UDTPA claim and veil piercing claim were raised in the SAC and the subject of Plaintiff's discovery (despite the fact that Plaintiff did not seek discovery until after those two claims had been dismissed by this Court); and that the purported amendments are not futile. (ECF No. 93.)

13. With regard to the UDTPA claim, Defendants argue that the Motion should be denied because "Plaintiffs' proposed UDTPA claim is futile because it (1) has previously been dismissed with prejudice and is barred by res judicata/collateral

estoppel, and (2) is not otherwise a viable claim." (ECF No. 102, at p. 3) The Court agrees with Defendants.

> [O]nce a trial court enters its dismissal under Rule 12(b)(6), plaintiff's right to amend under Rule 15(a) is terminated. Under certain limited circumstances set forth in [Rules] 59(e) and 60(b), a plaintiff may however seek to reopen the trial court's judgment and amend the complaint concurrently under Rule 15(a). . . . To hold otherwise would enable the liberal amendment policy of Rule 15(a) to be employed in a way that is contrary to the philosophy favoring finality of judgment and the expeditious termination of litigation.

Johnson v. Bollinger, 86 N.C. App. 1, 7–8, 356 S.E.2d 378, 382 (1987) (internal citations and quotation marks omitted). "Dismissal with prejudice, unless the court has made some other provision, is subject to the usual rules of res judicata[.]" *Barnes v. McGee*, 21 N.C. App. 287, 289, 204 S.E.2d 203, 205 (1974) (internal citations omitted).

14. The Court dismissed Plaintiffs' UDTPA claim with prejudice. That dismissal is subject to the usual rules of res judicata, and terminated Plaintiffs' right under Rule 15(a) to amend the SAC with respect to the UDTPA claim. Therefore, Plaintiffs' motion to amend the SAC to reassert the UDTPA claim should be DENIED.

15. Defendants also argue that Plaintiffs' request to renew their veil piercing claim should be denied because, *inter alia*, Plaintiffs have unduly delayed in bringing their motion for leave to amend, and Defendants would be prejudiced by this late amendment. Again, the Court agrees with Defendants' contentions.

16. Plaintiffs contend that they did not unduly delay in seeking the amendments because certain allegedly new information only became known to them

through recent discovery. "The [BCR] do not discourage the parties from beginning discovery before entry of the [CMO], but the presumptive discovery period, including both fact and expert discovery, is seven months from the date of the [CMO]. . . . Each party is responsible for ensuring that it can complete discovery within the time period in the [CMO]." BCR 10.4(a). The total discovery period from the filing of the SAC was over fifteen months, and the parties had over thirteen months to conduct discovery from the Court's entry of the CMO until the final discovery deadline. Nothing prevented Plaintiffs from engaging in discovery prior to the Court's Order on the Motion to Dismiss, but even that arbitrarily shortened discovery period was over eight months. Plaintiffs' choice to begin discovery so late in the discovery period, to schedule key depositions in the thirteenth month of discovery, and to then wait an additional thirty days beyond the close of the discovery period to move for leave to amend the SAC, is undue delay.

17. Finally, if the Court were to allow Plaintiffs to reassert dismissed claims at this late stage it would be prejudicial to Defendants, who have engaged in discovery under the assumption that the claims Plaintiffs now seek to reassert had been dismissed. The discovery period has closed, and Defendants have filed a motion for summary judgment, and cannot now engage in further discovery for the purposes of defending against the reasserted claims.

18. Ultimately, for the reasons stated above, the Court concludes that Plaintiffs' Motion should be DENIED.

IV. CONCLUSION

THEREFORE, IT IS ORDERED that Plaintiffs' Motion for Leave to Amend the Second Amended Complaint is DENIED.

SO ORDERED, this the 23rd day of April, 2019.

/s/ Gregory P. McGuire
Gregory P. McGuire
Special Superior Court Judge for
Complex Business cases