

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 12/8/15

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----X

FREDERICK M. CARGIAN, :
 :
 Plaintiff, :
 :
 -against- :
 :
 BREITLING, USA, INC., :
 :
 Defendant. :
 -----X

15 Civ. 1084 (GBD) (HBP)
ORDER

PITMAN, United States Magistrate Judge:

I write to resolve several issues addressed in correspondence from plaintiff's counsel dated November 4 and 9, 2015 and correspondence from defendant's counsel dated November 6, 2015.

Settlement Conference

The correspondence discloses that counsel had settlement discussions earlier this fall, but that no formal settlement agreement was ever executed. I do not understand plaintiff to be claiming that an enforceable settlement was ever reached. Indeed, the last email in an email chain submitted by plaintiff concerning the parties' settlement talks expressly indicates that no settlement number had been "locked in" (Email from Janice Goodman, Esq. to Zev Singer, Esq., dated Oct. 12, 2015, 3:45

p.m., annexed to the letter from Janice Goodman, Esq. to the Hon. George B. Daniels, dated November 9, 2015 (Docket Item 27)).

Without agreement on a number, there cannot be an enforceable agreement.

I am willing to convene a settlement conference if both sides wish to participate. Counsel are directed to confer and determine if both wish to participate in a settlement conference at this time. If so, they are directed to call my Deputy, Mr. Bruce Hampton ((212) 805-6112), with three dates on which both sides are available. I ordinarily convene settlement conferences at either 10:00 a.m. or 2:00 p.m.

Motion to
Amend the Complaint

Plaintiff has also seeks to amend the complaint to add Breitling SA ("SA"), the parent of Breitling, USA, Inc. ("Breitling US"), as a defendant on the theory that SA and Breitling US constitute a single employer. See generally Arculeo v. On-Site Sales & Marketing, LLC, 425 F.3d 193, 198 (2d Cir. 2005). That application is denied as untimely.

Judge Daniels' Scheduling Order set the deadline for motions to amend at August 7, 2015. "Where a scheduling order has been entered, the lenient standard under Rule 15(a), which

provides leave to amend 'shall be freely given,' must be balanced against the requirement under Rule 16(b) that the Court's scheduling order 'shall not be modified except upon a showing of good cause.'" Grochowski v. Phoenix Constr., 318 F.3d 80, 86 (2d Cir. 2003), citing Parker v. Columbia Pictures Indus., 204 F.3d 326, 340 (2d Cir. 2000); see also Kassner v. 2nd Ave. Delicatessen Inc., 496 F.3d 229, 243 (2d Cir. 2007) ("Rule 16(b) also may limit the ability of a party to amend a pleading if the deadline specified in the scheduling order for amendment of the pleadings has passed.").

To satisfy the good cause standard "the party must show that, despite its having exercised diligence, the applicable deadline could not have been reasonably met." Sokol Holdings, Inc. v. BMD Munai, Inc., No. 05-CV-3749, 2009 WL 2524611, at *7 (S.D.N.Y. Aug. 14, 2009) (citing Rent-A-Center Inc. v. 47 Mamaroneck Ave. Corp., 215 F.R.D. 100, 104 (S.D.N.Y. 2003)). However, the good cause standard is not satisfied when the proposed amendment rests on information "that the party knew, or should have known, in advance of the deadline." Id. (collecting cases).

Enzymotec Ltd. v. NBTY, Inc., 754 F. Supp. 2d 527, 536 (E.D.N.Y. 2010). "The district court, in the exercise of its discretion under Rule 16(b), also may consider other relevant factors including, in particular, whether allowing the amendment of the pleading at this stage of the litigation will prejudice defendants." Kassner v. 2nd Ave. Delicatessen Inc., supra, 496 F.3d

at 244; see Gorman v. Covidien Sales, LLC, 13 Civ. 6486 (KPF), 2014 WL 7404071 at *2 (S.D.N.Y. Dec. 31, 2014) (Failla, D.J.).

The complaint alleges that plaintiff worked for defendant from 1990 through 2013, had risen to the position of Northeast Regional Sales Representative and enjoyed a salary of over \$200,000 per year. Given plaintiff's long tenure with defendant and the position he occupied, he clearly had extensive knowledge of the relationship between Breitling USA and its parent, SA, even before this action was commenced. Indeed in his letter brief in support of his application, he cites a number of facts concerning the relationship between Breitling US and SA that he learned in the course of his employment relationship or were matters of public record prior to the August 7, 2015 deadline for motions to amend. Plaintiff admits that, as a result of his employment, he knew that SA exercised financial control over Breitling US, that representatives of SA worked on Breitling US's budget development and that all salaries and bonuses of Breitling US's employees had to be approved by SA (Letter from Janice Goodman, Esq. to the Hon. George B. Daniels, dated November 4, 2015 (Docket Item 25) ("Nov. 4 Letter") at 5). In addition, all of the following facts concerning the relationship between Breitling US and SA were known to plaintiff as a result of his

employment, long before the commencement of this action and long before the August 7, 2015 deadline for motions to amend.

- SA established all sales promotions, marketing plans and sales strategies utilized by Breitling US.
- SA established the system used to train Breitling US sales representatives.
- Any training practices developed by Breitling US had to be approved by SA before being put into use.
- Once a year all sales representatives traveled to SA's office in Switzerland to be trained regarding new products and sales strategies that they were required to follow.
- SA specifically established certain tools and procedures that Breitling US sales representatives were required to use.

(Nov. 4 Letter at 5). In addition, the fact that Breitling US is a wholly owned subsidiary of SA was disclosed Breitling's US's Rule 7.1 Statement, filed in this action on April 3, 2015 (Docket Item 11). In short, there does not appear to be any reason why plaintiff could not have asserted his single-employer theory prior to the August 7, 2015 deadline.

Finally, I also note that denying the motion to amend will not prejudice plaintiff. The Answer admits that Breitling US employed plaintiff so there is no doubt that the plaintiff has identified the proper corporate entity as the defendant. In addition, there is no hint in the record that Breitling SA would

have any difficulty in satisfying a judgment in this matter if plaintiff prevails.

Accordingly, for all the foregoing reasons, plaintiff's application to amend the complaint to add SA as a defendant is denied as untimely.

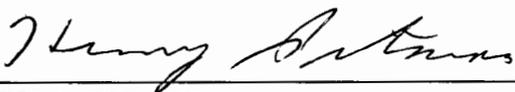
Scheduling

The schedule for the completion of pretrial proceedings is amended as follows:

1. The deadline for the completion of discovery is extended to January 31, 2016.
2. Dispositive motions shall be served and filed no later than February 29, 2016.
3. Opposition papers to any dispositive motions shall be served and filed no later than March 28, 2016.
4. Reply papers in further support of any dispositive motion shall be served and filed no later than April 11, 2016.

Dated: New York, New York
December 8, 2015

SO ORDERED


HENRY PITMAN
United States Magistrate Judge

Copies transmitted to:

Janice Goodman, Esq.
61 Jane Street
New York, New York 10014

Zev Singer, Esq.
Fox Rothschild LLP
Suite 1500
100 Park Avenue
New York, New York 10017