IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

MARK HORTON, Plaintiff, v. MIDWEST GERIATRIC MANAGEMENT, LLC, Defendant.	)	Case No. 14:17-CV-2324-JCH

PLAINTIFF'S REPLY TO DEFENDANT MIDWEST GERIATRIC MANAGEMENT, LLC'S COMBINED OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT AND MOTION TO MODIFY SCHEDULING ORDER

Defendant, Midwest Geriatric Management, LLC ("MGM"), has filed a combined opposition to Plaintiff's Motion for Leave to File Second Amended Complaint (Doc. 57) and Plaintiff's Motion to Modify Case Management Order (Doc. 58). For the following reasons, MGM's arguments should be rejected and both motions by the Plaintiff should be granted.

MGM argues that Plaintiff should not be permitted to file an amended Complaint adding additional counts against MGM and adding two additional parties because more than four (4) years have passed since Plaintiff filed this action on August 28, 2017. In so arguing, Defendant leaves out critical facts. Defendant leaves out the fact that shortly after this case was filed, Defendant filed a motion to dismiss which was granted by the District Court. No discovery had been conducted by the parties during the short time in which this case was pending before the District Court before a Notice of Appeal was timely filed. This case remained on appeal until the Eighth Circuit issued its Mandate on July 27, 2020, remanding the case for proceedings in light of the U.S. Supreme Court's decision in *Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731

(2020). Therefore, for three (3) of the four (4) years during which this case was pending, *no* discovery could be conducted by the parties due to the pending appeal.

Following remand, the parties promptly initiated written discovery. Due to the volume of documents produced, several requests for extension of time to complete written discovery were requested by both parties. Over ten thousand pages of documents were eventually produced by the parties.

Unfortunately, this case was remanded in the midst of the worst global pandemic in over a century. Due to the large number of deposition exhibits involved, counsel for both parties consulted and agreed that virtual depositions would be problematic, and that attempts should be made to conduct live depositions when it became reasonably safe to do so. Several attempts were made to schedule the depositions of both the Plaintiff and the two key witnesses for the Defendant, Faye and Judah Bienstock, but these were repeatedly delayed. Indeed, Defendant's attorneys did not take Plaintiff's deposition until October 14, 2021. Faye Bienstock's deposition was taken shortly thereafter on October 27, 2021. Due to a last-minute request by Defense counsel for an additional delay, Judah Bienstock's deposition was not taken until November 9, 2021. Plaintiff's counsel promptly filed the pending motions ten days later, on November 19, 2021. Defendant's argument that Plaintiff has delayed in bringing these motions is simply not credible or accurate given the actual facts and circumstances that occurred in this case.

Defendant next argues that Plaintiff has known of its claims against Jobplex and HireRight since his job offer was withdrawn in 2016. In support of this argument, Defendant points to two pieces of evidence which were completely unknown to Plaintiff until this year. Defendant first points to an e-mail that was produced pursuant to subpoena by JobPlex in February of 2021, indicating that at one point in time Jobplex notified building security that Mr.

Horton may "show up here uninvited." (Doc. 59-1). Defense counsel is well aware that Plaintiff had no prior knowledge of this e-mail or its content. Indeed, during Plaintiff's deposition taken on October 14, 2021, Defense counsel asked the following:

Q: . . . [A]re you ever aware if Jobplex notified building security to keep an eye out for you?

A: No.

Q: Did you ever go to the building uninvited?

A: No.

(Exhibit 1; Plaintiff's Deposition at pages 293-294).

Defendant similarly misleads the Court by pointing to another set of e-mails that were not produced until they were recently obtained from Jobplex via subpoena which consist of e-mails between Jobplex and Faye and Judah Bienstock in which Jobplex referred to Plaintiff as being "insane" and stating how surprised Jobplex was that they were not being sued. (Doc. 59-2). Plaintiff was not a recipient of any of these e-mails. Contrary to Defendant's assertions, Plaintiff had no knowledge of these e-mail communications between the Bienstocks and Jobplex prior their recent production in 2021.

More importantly, Plaintiff had no knowledge of the impact that any of these false, inaccurate and disparaging statements had on the decision of Faye and Judah Bienstock to withdraw their offer to Plaintiff until their depositions were taken on October 27, 2021, and November 9, 2021. Until these specific statements were produced and their impact on the decision to withdraw the accepted job offer were disclosed by Faye and Judah Bienstock in their recent depositions, Plaintiff had no knowledge sufficient to bring his claims against Jobplex and HireRight.

Moreover, Defendant wholly fails to address other allegations of fact asserted against MGM, Jobplex and HireRight set out in its proposed Second Amended Complaint. For example, in his proposed Second Amended Complaint, Plaintiff alleges that Jobplex and HireRight failed to disclose that they had erroneously sought verification of Plaintiff's education from "Cathedral Catholic High School" when they knew, or should have known, that Plaintiff had *never* represented that he had attended "Cathedral Catholic High School" or obtained a degree from that institution. [Doc. 57 at ¶¶ 30-35, 101, 106, 111, 115, 125 and 137). There is no dispute that these facts were not known to Plaintiff previously, and were only recently discovered. Indeed, Faye Bienstock testified that she herself was completely unaware that HireRight and Jobplex had sought verification of Plaintiff's education from "Cathedral Catholic High School," but nonetheless relied on their false representations that they had, in fact, conducted a verification of Plaintiff's education. (Ex. 2, Deposition of Faye Bienstock at pp. 212-215, 338-339).

Defendant's reliance on *Ellingsworth v. Vermeer Mfg. Co.,* 949 F.3d 1097 (8th Cir. 2020), is misplaced. Contrary to the circumstances presented herein, the plaintiff in *Ellingsworth* wholly failed to produce any newly discovered facts or other significant changed circumstances justifying the amendment of the plaintiff's pleadings. 949 F.3d at 1100. ("Good cause may be shown by pointing to a change in the law, newly discovered facts, or another significant changed circumstance that requires amendment of a party's pleading."). Here, Plaintiff has pointed to newly discovered facts which were only recently elicited during depositions.

Defendant's reliance on *Moses.com Securities, Inc. v. Comprehensive Software Systems, Inc.*, 406 F.3d 1052 (8th Circ. 2005), is equally misplaced. In that case, the plaintiff sought to file a third amended complaint after having two previous complaints dismissed. Noting that the plaintiff had already been given two prior opportunities to cure the known defects in its

pleadings, the appellate court held that the district court was justified in denying a third attempt. Such facts are not present in this case. Although this Court granted Defendant's motion to dismiss Plaintiff's initial Complaint, that dismissal was reversed based on the Supreme Court's decision in *Bostock*, and the case was remanded for further proceedings. Plaintiff was then granted leave to voluntarily amended his Complaint to plead his cause of action for sex discrimination consistent with the Supreme Court's decision in *Bostock*. No motion attacking the First Amended Complaint was ever filed by Defendant. Unlike *Moses.com*, this is not a case where plaintiff has been afforded multiple opportunities to plead a cause of action but failed to do so. Indeed, the court in *Moses.com* made clear that in most cases delay alone is insufficient justification for denying leave to amend, and that leave should be freely given when justice so requires. 406 F.3d at 1065; *See also* Fed.R.Civ.P. 15(a).

With respect to MGM's argument that Plaintiff's Second Amended Complaint is futile, it is clear that MGM does not "have standing to assert claims of futility on behalf of proposed defendants" Jobplex and HireRight. *Abraham v. Hampton Inn Corporation,* No. 18-2137-DDC, 2018 WL 2926582, at *2 (D. Kan. June 7, 2018). *See also Silva v. Ekis*, No. 15-3007-CM, 2017 WL 5465531, at *1 (D. Kan. Nov. 14, 2017) ("Because defendant lacks standing to assert a futility argument on behalf of the proposed defendants, the court cannot bar the proposed amended pleading on this basis."). Moreover, the proposed defendants, Jobplex and HireRight, have not established standing to object to Plaintiff's motion. They are not current parties to this action, nor have they moved to intervene for the purpose of opposing Plaintiff's motion. *Abraham,* 2018 WL 2926582, at *2. *See Clayton v. District of Columbia*, 999 F. Supp. 2d 178, 182 n.6 (D. D.C. 2013) (quoting Motion Practice, 9–80 (David F. Herr et al., eds., 5th Ed. Supp. 2012) ("If a motion seeks leave to amend to name additional parties, those parties are not entitled

to notice and they have no absolute right to participate in the motion hearing until they are formally added to the litigation through a granted amendment.... [T]hey have no standing under Rule 15 to object.")). As such, MGM cannot assert a futility argument with respect to Plaintiff's claims against the proposed defendants, Jobplex and HireRight.

With respect to the additional claims asserted against MGM, Plaintiff's Second Amended Complaint is not futile. Specifically, Plaintiff's additional counts are not barred by the statute of limitations because they relate back to the filing date of the original claims under Rule 15(c)(2) of the Federal Rules of Civil Procedure. An amended pleading relates back if the claim asserted "arose out of the same conduct, transaction, or occurrence" as the original claims. *United States v. Craycraft,* 167 F.3d 451, 457 (8th Cir.1999). The rationale behind Rule 15(c)(2) is that "a party who has been notified of litigation concerning a particular occurrence has been given all the notice that statutes of limitations were intended to provide." *Baldwin County Welcome Ctr. v. Brown,* 466 U.S. 147, 149–50 n. 3, 104 S.Ct. 1723, 80 L.Ed.2d 196 (1984).

Here, the original claims challenged the reasons for Defendant's revocation of Plaintiff's employment offer. Similarly, the amended complaint challenges Jobplex and HireRight's involvement in the Defendant's revocation of Plaintiff's employment offer. Therefore, the claims asserted in the amended complaint arise out of the same occurrence, Defendant's revocation of Plaintiff's employment offer, and as a result the claims relate back to the date of the original Complaint, August 28, 2017. The original Complaint was filed well within the five-year statute of limitations. As such, the claims asserted in Plaintiff's amended Complaint are not barred by the statute of limitations and Plaintiff's amended Complaint is not futile.

Moreover, the statute of limitations was tolled because Jobplex and HireRight's damage to Plaintiff's employment was not capable of ascertainment until at least February 2021. Under

Missouri's "ascertainment test," the statute of limitations for a cause of action does not begin to run until "the damage resulting therefrom is sustained and is capable of ascertainment." RSMO § 516.100. Damage is "sustained and capable of ascertainment" "when it can be discovered or made known, even though the amount of damage is unascertained." *M & D Enterps. v. Wolff*, 923 S.W.2d 389, 394 (Mo. App. S.D. 1996) (citation omitted). In other words, a claim accrues when one "has some notice of his cause of action, an awareness either that he has suffered an injury or that another person has committed a legal wrong which ultimately may result in harm to him." *Myers v. Clayco State Bank,* 687 S.W.2d 256, 263 (Mo.App.1985)(quoting *Krug v. Sterling Drug, Inc.,* 416 S.W.2d 143, 150 (Mo.1967)).

Plaintiff's additional claims include Jobplex and HireRight's involvement in Plaintiff's background check. (Doc. #53-1). More specifically, Plaintiff's additional claims are against Defendant, Jobplex, and HighRight for their negligence, fraudulent concealment, and tortious interference with obtaining true and correct information to complete Plaintiff's background check. At the time MGM revoked Plaintiff's employment offer, Plaintiff was completely unaware that Jobplex and HireRight had committed the claimed legal wrongs that were only recently discovered. More importantly, it was not until the depositions of Faye and Judah Bienstock were taken just a few weeks ago that it was discovered that the false and misleading statements and representations made by HireRight and Jobplex played a critical and even determinative role in Plaintiff's harm. In other words, Plaintiff did not know Jobplex and HireRight had caused the loss of his employment.

While Plaintiff was aware that Defendant used Plaintiff's incompletion of the background check as grounds for MGM's withdrawal of their offer letter for employment, Plaintiff was not required to question MGM's agents and third-party research firms in order to uncover the injury

caused by Jobplex and HireRight. *See Martin v. Crowley, Wa Wade and Milstead, Inc.,* 702 S.W.2d 57, 58 (Mo. Banc 1985)(plaintiff had no automatic, affirmative duty to double check the services provided by a professional expert to uncover surveyors injury to plaintiff). Moreover, Plaintiff was not provided sufficient reason to question Jobplex or HireRight's involvement in Plaintiff's injury. *See Id.* (property owners had no reason to question survey until discovery of error, even though defect complained of was visible). Instead, it wasn't until Jobplex's records were produced in February 2021 that Plaintiff was provided sufficient information to question Jobplex and HireRight's work. In fact, Defendant admits that Plaintiff did not receive this pertinent information until February 11, 2021 when Plaintiff received a copy of Jobplex's file. (Doc. #59, n.2). In other words, Plaintiff was unaware of Jobplex and HireRight's legal wrongs committed against him until Jobplex's records were produced in February 2021, and thus, Plaintiff's additional counts did not accrue until February 2021. Moreover, Plaintiff did not have any knowledge how the false and misleading statements contained in those documents played a role in the termination of his offer of employment until the depositions of Faye and Judah Bienstocfk were taken a few weeks ago. As a result, Plaintiff's additional counts against Jobplex and HireRight are not barred by the statute of limitations.

Next, MGM attacks counts II-VII of Plaintiff's proposed Second Amended Complaint by asserting that the claims cannot be pursued because Plaintiff was an employee at-will. However, only counts I, II and V of Plaintiff's Second Amended Complaint are asserted against MGM. The remaining counts are asserted against Jobplex and HireRight in their individual capacities. Plaintiff does not seek a remedy from MGM for his claims asserted against Jobplex and HireRight. Thus, MGM does not have standing to challenge the merits of the claims

asserted against Jobplex and HireRight. *See* 80 Fordham L. Rev. 1539 (March, 2012) (standing of the defendant is present when a plaintiff seeks a remedy from the defendant).

Further, leave to amend should not be denied based on likelihood of success on the merits *unless* the claim asserted is clearly frivolous. *Gamma-10 Plastics, Inc. v. Am. President Lines, Ltd.,* 32 F.3d 1244, 1255 (8th Cir. 1994). Defendant MGM has not shown that Plaintiff's additional claims asserted in his Second Amended Complaint are clearly frivolous. Plaintiff asserts two additional claims against MGM, a claim for negligence with respect to their duty to monitor Jobplex and HireRights efforts in completing Plaintiff's background check, and Fraudulent Concealment for failing to disclose Jobplex and HireRight's failure to competently and honestly complete Plaintiff's background check. (Doc. #57-1). Contrary to Defendant's argument, Plaintiff's claim are purely tort claims, and while the damage that resulted from MGM's careless and negligent actions resulted in Plaintiff's loss of employment, these additional claims are not wrongful termination claims subject to the employment at-will doctrine. As such, MGM's attack on the merits are not well-taken and the Court should not deny Plaintiff's motion.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court GRANT Plaintiff's Motion for Leave to File Second Amended Complaint (Doc. 57) and GRANT Plaintiff's Motion to Modify Case Management Order (Doc. 58), together with such other and further relief as the Court deems just and proper.

Respectfully Submitted,

MATHIS, MARIFIAN & RICHTER, LTD.

By */s/Mark S. Schuver*

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CERTIFICATE OF SERVICE

I hereby certify that, on December 10, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Eastern District of Missouri by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/Mark S. Schuver